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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAIME BELTRAN,
Petitioner,
v.
ON HABEAS CORPUS,
Respondent.

No. 1:15-cv-01858-DAD-SKO HC
**FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT THE COURT
DISMISS THE PETITION FOR WRIT OF
HABEAS CORPUS FOR FAILURE TO
EXHAUST STATE REMEDIES**
(Doc. 1)

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Because Petitioner has not exhausted his state remedies, the undersigned recommends that the Court dismiss the petition.

I. Preliminary Screening

Rule 4 of the Rules Governing § 2254 Cases requires the Court to conduct a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas corpus should not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded were such leave to be granted. *Jarvis v. Nelson*,

1 440 F.2d 13, 14 (9th Cir. 1971).

2 **II. Procedural Background**

3 In January 2013, a jury in the Fresno County Superior Court convicted Petitioner of first
4 degree murder. On February 14, 2013, the state court sentenced Petitioner of a term of fifty years
5 to life. On December 1, 2015, the California Court of Appeal for the Fifth District rejected
6 Petitioner's direct appeal, finding no arguable issues. Petitioner did not appeal to the California
7 Supreme Court. On December 11, 2015, Petitioner filed a petition for writ of habeas corpus in
8 this Court.
9

10 **III. Exhaustion of State Remedies Required**

11 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
12 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
13 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
14 opportunity to correct the state's alleged constitutional deprivations. *Coleman v. Thompson*, 501
15 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Buffalo v. Sunn*, 854 F.2d 1158,
16 1163 (9th Cir. 1988).
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18 A petitioner can satisfy the exhaustion requirement by providing the highest state court
19 with a full and fair opportunity to consider each claim before presenting it to the federal court.
20 *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 276 (1971);
21 *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state
22 court was given a full and fair opportunity to hear a claim if the petitioner has presented the
23 highest state court with the claim's factual and legal basis. *Duncan*, 513 U.S. at 365; *Kenney v.*
24 *Tamayo-Reyes*, 504 U.S. 1, 8 (1992). The petitioner must also have specifically informed the
25 state court that he was raising a federal constitutional claim. *Duncan*, 513 U.S. at 365-66; *Lyons*
26 *v. Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); *Hiivala v. Wood*,
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1 195 F.3d 1098, 1106 (9th Cir. 1999); *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir. 1998).

2 When none of a petitioner's claims has been presented to the highest state court as
3 required by the exhaustion doctrine, the Court must dismiss the petition. *Raspberry v. Garcia*,
4 448 F.3d 1150, 1154 (9th Cir. 2006); *Jiminez v. Rice* 276 F.3d 478, 481 (9th Cir. 2001). The
5 authority of a court to hold a mixed petition in abeyance pending exhaustion of the unexhausted
6 claims has not been extended to petitions that contain no exhausted claims. *Raspberry*, 448 F.3d
7 at 1154.

9 In his petition, Petitioner discloses that he has not yet appealed the recent decision of the
10 California Court of Appeals to the California Supreme Court. As a result, he has not exhausted
11 state remedies as to the claims set forth in his petition. Although non-exhaustion of state court
12 remedies has been viewed as an affirmative defense, it is the petitioner's burden to prove that
13 state judicial remedies were properly exhausted. 28 U.S.C. § 2254(b)(1)(A); *Darr v. Burford*,
14 339 U.S. 200, 218-19 (1950), *overruled in part on other grounds in Fay v. Noia*, 372 U.S. 391
15 (1963); *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981). If available state court remedies
16 have not been exhausted as to all claims, a district court must dismiss a petition. *Rose v. Lundy*,
17 455 U.S. 509, 515-16 (1982).

19 **IV. Conclusion and Recommendation**

20 Because Petitioner has not exhausted state remedies, the undersigned recommends that the
21 Court dismiss the petition without prejudice.

22 These Findings and Recommendations will be submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**
24 **(30) days** after being served with these Findings and Recommendations, Petitioner may file
25 written objections with the Court. The document should be captioned "Objections to Magistrate
26 Judge's Findings and Recommendations." Petitioner is advised that failure to file objections
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1 within the specified time may constitute waiver of the right to appeal the District Court's order.
2 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d
3 1391, 1394 (9th Cir. 1991)).
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6 IT IS SO ORDERED.

7 Dated: December 30, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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