

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL JOHN DELMONICO,
Petitioner,
v.
MATTHEW RODRIQUEZ,
Respondent.

Case No. [21-cv-02009-HSG](#)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

Petitioner has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a 2018 misdemeanor conviction from Palo Alto Superior Court.¹ Dkt. No. 1. Petitioner has paid the filing fee. Dkt. No. 2.

BACKGROUND

On August 24, 2018, Petitioner was convicted in Palo Alto Superior Court of a misdemeanor of disorderly conduct (Cal. Penal Code § 647(a)). Dkt. No. 1 at 1. Petitioner was sentenced to twelve days in county jail. Dkt. No. 1 at 1. Petitioner states that he is not yet confined pending his appeal and that he is on formal probation. Dkt. No. 1 at 1.

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¹ The Clerk of the Court is directed to substitute Matthew Rodriguez, the California Attorney General, in place of the previously named respondent because Attorney General Rodriguez is Petitioner’s current custodian. *See Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir.), *as amended* (May 8, 1996) (where petitioner is on probation or parole, he may name as respondent his probation or parole officer, or the official in charge of the parole or probation agency, or the state correctional agency, or the state attorney general).

1 not merely provide a summary in narrative format. Each claim should be supported by a statement
2 of specific facts.

3 Claims cannot be incorporated by reference. Petitioner’s appellate opening brief was not
4 filed with his petition. If the appellate opening brief set forth claims of ineffective assistance of
5 counsel which Petitioner seeks to raise here, Petitioner must list these claims in his amended
6 petition, and provide supporting facts for each claim. In the alternative, Petitioner may attach a
7 copy of his appellate opening brief to his amended petition, as long as he clearly identifies which
8 claims in the appellate opening brief he wishes to raise in his federal habeas petition.

9 The Court notes that Petitioner states that he did not present some of these claims in his
10 appellate opening brief. Petitioner is cautioned that prisoners in state custody who wish to
11 challenge collaterally in federal habeas proceedings either the fact or length of their confinement
12 are first required to exhaust state judicial remedies, either on direct appeal or through collateral
13 proceedings, by presenting the highest state court available with a fair opportunity to rule on the
14 merits of each and every claim they seek to raise in federal court. *See* 28 U.S.C. § 2254(b), (c);
15 *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982). A district court may not grant the writ unless state
16 court remedies are exhausted, or there is “an absence of available state corrective process,” or such
17 process has been “rendered ineffective.” *See* 28 U.S.C. § 2254(b)(1)(A)-(B).

18 **CONCLUSION**

19 For the foregoing reasons, the Court orders as follows.

20 1. The Clerk is directed to substitute California Attorney General Matthew Rodriquez
21 as Respondent.

22 2. The petition is dismissed with leave to amend. Within twenty-eight (28) days of
23 the date of this order, Petitioner shall file an amended petition. The amended petition must
24 include the caption and civil case number used in this order (21-cv-02009 HSG) and the words
25 “AMENDED PETITION” on the first page. Because an amended petition completely replaces the
26 previous petitions, Petitioner must include in his amended petition all the claims he wishes to
27 present. Petitioner may not incorporate material from the prior petition by reference. Failure to
28 file an amended petition in accordance with this order will result in dismissal of this action for

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failure to prosecute under Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

Dated: 3/31/2021


HAYWOOD S. GILLIAM, JR.
United States District Judge