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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH ADRIAN FULLER,	No. C 10-05501 EJD (PR)
Petitioner,) ORDER OF DISMISSAL WITH LEAVE TO AMEND
VS.	
RICK HILL,))
Respondent.))

Petitioner, a former prisoner, has filed a <u>pro se</u> petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his state conviction.

BACKGROUND

It appears that Petitioner pleaded no contest to receiving stolen property and received a suspended three year state prison sentence and was placed on probation for three years on the conditions, among others, that he serve 10 months in county jail and enter into a residential drug treatment program. People v. Fuller, 2012 WL 1451246 *2 (Cal. App. 1 Dist. April 7, 2012). There were several probation violations and Petitioner eventually served some time in prison. Id. at 2-5. Petitioner is no longer incarcerated.

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DISCUSSION

A. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

It shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." <u>Id.</u> § 2243.

B. <u>Legal Claims</u>

Petitioner raises nineteen claims in this petition, challenging the effectiveness of his attorneys, the probation requirements and imposition of fines among other claims. A review of some of Petitioner's appeals in state court indicate that a few of the claims may have been exhausted but it is not clear about all the claims. Petitioner states on the petition that he has attached a brief regarding exhaustion and an appendix, however, they were not included.

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b)-(c). Before he may challenge either the fact or length of his confinement in a habeas petition in this Court, Petitioner must present to the California Supreme Court any claims he wishes to raise in this court. See Rose v. Lundy, 455 U.S. 509, 522 (1982) (holding every claim raised in federal habeas petition must be exhausted). If available state remedies have not been exhausted as to all claims, the district court must dismiss the petition. See id., 455 U.S. at 510; Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988).

The petition will be dismissed with leave to amend. In the amended petition, Petitioner must demonstrate that the claims he has brought are exhausted and Petitioner should just include exhausted claims. Petitioner should include petitions to the California Supreme Court and the decision of that Court on the claims he wishes to present in federal court.

If the federal petition contains both exhausted and unexhausted claims, it is a "mixed" petition. See Rhines v. Weber, 544 U.S. 269, 277 (2005). The general rule is that a federal district court must dismiss a federal habeas petition containing any claim as to which state remedies have not been exhausted. See Rose v. Lundy, 455 U.S. 509, 522 (1982).

CONCLUSION

For the foregoing reasons,

1. The petition is DISMISSED with leave to amend. Petitioner must, within **twenty-eight (28) days** of the date this order is filed, file an amended petition challenging the lawfulness of the state conviction for which he is currently incarcerated. See 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-16 (1982). The amended petition must include the caption and civil case number used in this order, No. C 10-05501 EJD (PR), and must include the words **AMENDED PETITION** on the first page.

Failure to file a timely response in accordance with this order will result in the dismissal of this action without prejudice and without further notice to Petitioner.

The Clerk shall include two copies of the court's form petition with a copy of this order to Petitioner.

DATED:	2/4/2013	EQUI () Wash
·	EDWARD J. DAVILA	
		United States District Judge

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

KENNETH ADRIAN FULLER,	Cose Number CV 10 05501 EID (DD)
Petitioner,	Case Number CV 10-05501 EJD (PR)
VS.	CERTIFICATE OF SERVICE
RICK HILL,	
Respondent.	
I, the undersigned, hereby certify that I a District Court, Northern District of Calif	am an employee in the Office of the Clerk, U.S. fornia.
attached, by placing said copy(ies) in a p	g said envelope in the U.S. Mail, or by placing said
Kenneth Adrian Fuller 45 Pearce Street Petaluma, CA 95490	
DATED: <u>2/6/2013</u>	Richard W. Wieking, Clerk By: Elizabeth Garcia, Deputy Clerk