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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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LUIS ENRIQUE VAZQUEZ-HERNANDEZ, v. STATE OF NEVADA, Respondents.	Case No. 3:14-cv-00344-MMD-VPC ORDER
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This habeas action comes before the Court for initial review.

The papers presented are subject to multiple substantial defects.

First, petitioner did not properly commence the federal action by either paying the filing fee or submitting a properly completed pauper application. Under Local Rule LSR 1-1, a petitioner must use the Court's required pauper application form to seek pauper status. Under Local Rule LSR 1-2, a petitioner must attach both a financial certificate authorized by an appropriate correctional official and a statement of his inmate trust account for the prior six (6) months. Petitioner did not use the required pauper form, and he did not include the required financial certificate.

Second, petitioner did not use the required form for a petition challenging a state court conviction. Under Local Rule LSR 3-1, a petitioner seeking to challenge a state court conviction must use the Court's required form for a petition under 28 U.S.C. § 2254. Petitioner instead used a form for a motion under 28 U.S.C. § 2255 that would be used by a person seeking to challenge a federal conviction and sentence.

1 Third, petitioner may not proceed against the only respondent named, the State
2 of Nevada. Petitioner may not bring a civil action in federal court directly against the
3 State of Nevada because of the state sovereign immunity recognized by the Eleventh
4 Amendment, regardless of the relief sought. *E.g., Pennhurst State School & Hospital v.*
5 *Halderman*, 465 U.S. 89, 101-02 (1984).¹

6 Fourth, petitioner otherwise did not name a proper respondent. Petitioner is
7 seeking to challenge a Nevada state justice court misdemeanor conviction on a fully-
8 expired sentence while currently in custody in an Arizona facility apparently for federal
9 immigration authorities. The Court is not called upon to express a definitive opinion as
10 to who the proper respondent should be in that context, as the Court need note here
11 only that petitioner clearly has not named a proper respondent. See 1976 Advisory
12 Committee Notes to Rule 2(b) of the Rules Governing Section 2254 Cases (discussing
13 the possible respondents for various possible situations).

14 Fifth, while petitioner signed the declaration on the pleading that he filed, he did
15 not sign the pleading itself. He must sign both the pleading and the accompanying
16 declaration.

17 Due to these multiple defects, the pauper application will be denied without
18 prejudice and the petition in this improperly-commenced action will be dismissed without
19 prejudice. It does not appear that a dismissal without prejudice to a new federal action
20 would materially impact adjudication of any issue in a promptly filed new action or
21 otherwise cause substantial prejudice.²

22
23 ¹To the further extent that petitioner names the United States of America as a
24 respondent, he similarly cannot proceed directly against the federal sovereign due to
25 sovereign immunity.

26 ²The papers presented and the available online state court records reflect the
27 following. Petitioner challenges his December 5, 2008, state justice court misdemeanor
28 conviction, pursuant to a guilty plea, of possession of drug paraphernalia, in violation of
N.R.S. 453.566. Petitioner was sentenced to seven days time served, such that the
sentence necessarily was fully expired from the very outset over five years ago.
Petitioner did not file an appeal from the conviction.

In 2012, petitioner filed a petition to seal records in the justice court. It appears
from the papers presented that the state courts adjudicated the petition as directed to a
(*fn. cont...*)

1 It is therefore ordered that the application (dkt. no. 1) to proceed *in forma*
2 *pauperis* is denied without prejudice and that this action shall be dismissed without
3 prejudice.

4 It is further ordered that a certificate of appealability is denied. Jurists of reason
5 would not find the dismissal of this improperly-commenced action to be either debatable
6 or incorrect, given the multiple substantial defects presented and the absence of any
7 substantial collateral prejudice to petitioner from the dismissal without prejudice.

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10 _____
11 (...fn. cont.)

12 justice court conviction based upon a September 27, 2010, guilty plea of misdemeanor
13 domestic battery. (See "Addendum C," dkt. no. 1-2, at electronic docketing page 20.)
14 The state justice court denied the petition and denied petitioner's motion for
15 reconsideration. The state district court affirmed the denial of the motion for
16 reconsideration. When petitioner sought to appeal to the Supreme Court of Nevada, that
17 court dismissed the appeal, in No. 64345 in that court, because the denial of a motion
18 for reconsideration was not appealable under state law and the state district court in any
19 event had final appellate jurisdiction over a case arising in the justice court.

20 It thus would appear from the foregoing that it is probable that: (a) there is no
21 federal habeas jurisdiction to collaterally review the December 5, 2008, misdemeanor
22 conviction because petitioner no longer was in custody under the conviction after the
23 seven-day sentence expired (*see, e.g., Maleng v. Cook*, 490 U.S. 488 (1989)); (b) the
24 one-year federal limitation period putatively expired on its face over five years ago; and
25 (c) none of the claims in the federal papers challenging the conviction on the merits
26 have been exhausted by being fairly presented through to a final decision on the merits
27 by the highest court available.

28 The Court further notes that, in his federal papers, petitioner seeks to challenge
his conviction on the basis that he was not advised of the immigration consequences of
the conviction and thus was denied effective assistance of counsel under the Sixth
Amendment. However, the decision that this argument indirectly invokes, *Padilla v.*
Kentucky, 559 U.S. 356 (2010), is not retroactively applicable to convictions that
became final prior to the March 31, 2010, date of that decision. (*See Chaidez v. United*
States, 133 S.Ct. 1103 (2013).) Moreover, the minutes from the plea colloquy reflect
that petitioner was advised of and waived his right to, *inter alia*, counsel when he
entered his plea to the misdemeanor conviction. (*See* dkt. no. 1-1, at 29.) While
petitioner maintains that the interpreter failed to advise him of the immigration
consequences, it is unlikely that a defendant can waive his right to counsel and then at
least successfully complain that he was not properly advised by the interpreter.

In all events, the dismissal of this improperly-commenced action without
prejudice will not materially impact the adjudication of any such issues in a promptly
filed new federal action. The resolution of the foregoing issues will not turn upon the
filing date of this particular action under this particular docket number.

Petitioner also refers to a pending proceeding in No. 11-73907 in the Ninth
Circuit. That proceeding appears to be an appeal from a decision of the Board of
Immigration Appeals and thus has no direct relevance to this proceeding or the
discussion herein.


Nothing herein directs petitioner to file any proceeding in any court.

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The Clerk of Court shall send petitioner two (2) copies each of a pauper application form for a prisoner and a § 2254 petition form, along with one (1) copy of the instructions for the forms and the papers that he submitted herein.

The Clerk shall enter final judgment accordingly, dismissing this action without prejudice.

DATED THIS 3rd day of July 2014.


MIRANDA M. DU
UNITED STATES DISTRICT JUDGE