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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TIMOTHY EARL HISSONG, SR.,	1:07-CV-01383 AWI SMS HC	
Petitioner,		ORDER DISMISSING PETITION FOR WRIT
v.		OF HABEAS CORPUS AND GRANTING
		PETITIONER OPPORTUNITY TO AMEND
		PETITION
STATE OF CALIFORNIA, et al.,	[Doc. 1]	
Respondent.		

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed the instant petition for writ of habeas corpus on September 13, 2007, in the United States District Court for the Eastern District of California, Sacramento Division. On September 20, 2007, the action was transferred to the Fresno Division.

DISCUSSION

A. Procedural Grounds for Summary Dismissal

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been filed. A petition for

1 habeas corpus should not be dismissed without leave to amend unless it appears that no tenable
2 claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th
3 Cir. 1971).

4 B. Improper Respondent

5 _____ A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state
6 officer having custody of him as the respondent to the petition. Rule 2 (a) of the Rules
7 Governing § 2254 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v.
8 California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having
9 custody of an incarcerated petitioner is the warden of the prison in which the petitioner is
10 incarcerated because the warden has "day-to-day control over" the petitioner. Brittingham v.
11 United States, 982 F.2d 378, 379 (9th Cir. 1992); see, also, Stanley v. California Supreme Court,
12 21 F.3d 359, 360 (9th Cir. 1994). However, the chief officer in charge of state penal institutions
13 is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360. Where a petitioner is on
14 probation or parole, the proper respondent is his probation or parole officer and the official in
15 charge of the parole or probation agency or state correctional agency. Id.

16 In this case, petitioner names the State of California and Bill Lockyer, the California
17 Attorney General as Respondents. Although Petitioner is currently in the custody of the
18 California Department of Corrections, neither the State nor the California Attorney General can
19 be considered the person having day-to-day control over Petitioner.

20 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition
21 for lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326,
22 1326 (9th Cir. 1970); see, also, Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd
23 Cir. 1976). However, in this case, the Court will give petitioner the opportunity to cure his defect
24 by amending the petition to name a proper respondent. See, West v. Louisiana, 478 F.2d 1026,
25 1029 (5th Cir.1973), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir.1975) (en banc)
26 (allowing petitioner to amend petition to name proper respondent); Ashley v. State of
27 Washington, 394 F.2d 125 (9th Cir. 1968) (same).

28 C. Failure to State a Claim

1 The basic scope of habeas corpus is prescribed by statute. Subsection (c) of Section 2241
2 of Title 28 of the United States Code provides that habeas corpus shall not extend to a prisoner
3 unless he is “in custody in violation of the Constitution.” 28 U.S.C. § 2254(a) states:

4 The Supreme Court, a Justice thereof, a circuit judge, or a district court
5 shall entertain an application for a writ of habeas corpus in behalf of a person in
6 custody pursuant to a judgment of a State court only on the ground that he is in
7 custody in violation of the Constitution or laws or treaties of the United States.

8 (emphasis added). See also, Rule 1 of the Rules Governing Section 2254 Cases in the United
9 States District Court. The Supreme Court has held that “the essence of habeas corpus is an attack
10 by a person in custody upon the legality of that custody . . .” Preiser v. Rodriguez, 411 U.S. 475,
11 484 (1973).

12 Furthermore, in order to succeed in a petition pursuant to 28 U.S.C. § 2254, Petitioner
13 must demonstrate that the adjudication of his claim in state court

14 resulted in a decision that was contrary to, or involved an unreasonable
15 application of, clearly established Federal law, as determined by the Supreme
16 Court of the United States; or resulted in a decision that was based on an
17 unreasonable determination of the facts in light of the evidence presented in the
18 State court proceedings.

19 28 U.S.C. § 2254(d)(1),(2).

20 In addition, Petitioner must state his claim with sufficient specificity. See Hendricks v.
21 Vasquez, 908 F.2d 490, 491-92 (9th Cir. 1990); Wacht v. Cardwell, 604 F.2d 1245, 1246-47 (9th
22 Cir. 1979). Rule 2(c) of the Rules Governing Section 2254 Cases states:

23 The petition must:

- 24 (1) specify all the grounds for relief available to the petitioner;
25 (2) state the facts supporting each ground;
26 (3) state the relief requested;
27 (4) be printed, typewritten, or legibly handwritten; and
28 (5) be signed under penalty of perjury by the petitioner or by a person authorized
to sign it for the petitioner under 28 U.S.C. § 2242.

The instant petition is deficient. In Ground One, Petitioner states that he “was denied
a[n] effective lawyer.” (Petition, at 5.) He continues that “Barry Robinson never fought for me
and he got 18 yrs for me with no proof in the case against me. [I]n other words he got me
railroaded.” (Id.) In Ground Two, Petitioner states “The [D.A.] in the case tried to use CART

1 tapes that only lied. . . . in the court transcripts that I have in my possession, state that I pled
2 guilty but I did ever and that I confessed to the jury or others, but I didn't." (Id.) Petitioner's
3 claims are not stated with sufficient specificity. In addition, Petitioner does not allege a violation
4 of the Constitution or federal law, nor does he argue that he is in custody in violation of the
5 Constitution or federal law. Petitioner does not allege that the adjudication of his claims in state
6 court "resulted in a decision that was contrary to, or involved an unreasonable application of,
7 clearly established Federal law, . . . or resulted in a decision that was based on an unreasonable
8 determination of the facts. . . ." 28 U.S.C. § 2254.

9 Therefore, the petition must be dismissed; however, Petitioner will be given an
10 opportunity to file an amended petition. Petitioner is advised that failure to file a complete
11 petition raising cognizable federal claims within the time allotted will result in a recommendation
12 that the petition be dismissed and the action be terminated. Petitioner is advised that the
13 amended petition should be titled "First Amended Petition, and reference the instant case
14 number."

15 D. Failure to Exhaust State Remedies

16 A petitioner who is in state custody and wishes to collaterally challenge his conviction by
17 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).
18 The exhaustion doctrine is based on comity to the state court and gives the state court the initial
19 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
20 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct.
21 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

22 A petitioner can satisfy the exhaustion requirement by providing the highest state court
23 with a full and fair opportunity to consider each claim before presenting it to the federal court.
24 Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828,
25 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair
26 opportunity to hear a claim if the petitioner has presented the highest state court with the claim's
27 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (legal
28 basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

1 Additionally, the petitioner must have specifically told the state court that he was raising a
2 federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at 888; Keating v. Hood, 133
3 F.3d 1240, 1241 (9th Cir.1998). For example, if a petitioner wishes to claim that the trial court
4 violated his due process rights “he must say so, not only in federal court but in state court.”
5 Duncan, 513 U.S. at 366, 115 S.Ct. at 888.

6 Additionally, the petitioner must have specifically told the state court that he was raising
7 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
8 669 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th
9 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States
10 Supreme Court reiterated the rule as follows:

11 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion
12 of state remedies requires that petitioners "fairly presen[t]" federal claims to the
13 state courts in order to give the State the "opportunity to pass upon and correct
14 alleged violations of the prisoners' federal rights" (some internal quotation marks
15 omitted). If state courts are to be given the opportunity to correct alleged violations
16 of prisoners' federal rights, they must surely be alerted to the fact that the prisoners
17 are asserting claims under the United States Constitution. If a habeas petitioner
18 wishes to claim that an evidentiary ruling at a state court trial denied him the due
19 process of law guaranteed by the Fourteenth Amendment, he must say so, not only
20 in federal court, but in state court.

21 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

22 Our rule is that a state prisoner has not "fairly presented" (and thus
23 exhausted) his federal claims in state court *unless he specifically indicated to*
24 *that court that those claims were based on federal law*. See Shumway v. Payne,
25 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
26 Duncan, this court has held that the *petitioner must make the federal basis of the*
27 *claim explicit either by citing federal law or the decisions of federal courts, even*
28 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889
(9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the
underlying claim would be decided under state law on the same considerations
that would control resolution of the claim on federal grounds. Hiivala v. Wood,
195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
(9th Cir. 1996);

In Johnson, we explained that the petitioner must alert the state court to
the fact that the relevant claim is a federal one without regard to how similar the
state and federal standards for reviewing the claim may be or how obvious the
violation of federal law is.

Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

In this case, it is unclear whether Petitioner has sought relief at the state's highest court as
to the claims raised in the instant petition. In the amended Petitioner must also specify whether

1 the state court remedies have been exhausted with respect to the federal claims. If possible,
2 Petitioner should present to the Court documentary evidence that the claims were indeed
3 presented to the California Supreme Court.¹

4 ORDER

5 Accordingly, it is HEREBY ORDERED that:

- 6 1. The petition for writ of habeas corpus is DISMISSED;
- 7 2. Petitioner is granted thirty (30) days from the date of service of this order to file
8 an amended petition in compliance with this order;
- 9 3. The Clerk of Court is DIRECTED to send Petitioner a blank § 2254 petition; and
- 10 4. Failure to comply with this order will result in a recommendation that the instant
11 petition be dismissed.

12 IT IS SO ORDERED.

13 Dated: October 1, 2007

13 /s/ Sandra M. Snyder
14 UNITED STATES MAGISTRATE JUDGE

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27 ¹A copy of the California Supreme Court's denial alone is insufficient to demonstrate exhaustion. The
28 proper documentation to provide would be a copy of the Petition *filed* in the California Supreme Court that includes
the claim now presented and a file stamp showing that it was indeed filed in that Court.