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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ADAM LEE SELLHEIM,

Petitioner,

v.

FRANK MUNOZ,

Respondent.

Civil No. 06-CV-02465 JM (LSP)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND
WITH LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (West Supp. 2006).

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to either pay the \$5.00 filing fee or move to proceed in forma pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis. *See* Rule 3(a), 28 U.S.C. foll. § 2254.

FAILURE TO NAME PROPER RESPONDENT

In addition, review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

The warden is the typical respondent. However, “the rules following section 2254 do not specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the institution in

1 which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.” *Id.*
2 (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a petitioner is in custody due
3 to the state action he is challenging, ‘[t]he named respondent shall be the state officer who has official
4 custody of the petitioner (for example, the warden of the prison).” *Id.* (quoting Rule 2, 28 U.S.C. foll.
5 § 2254 advisory committee’s note).

6 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas
7 corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The actual person
8 who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v. Washington*, 394 F.2d 125,
9 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon the custodian
10 of the state prisoner, the person who will produce “the body” if directed to do so by the Court. “Both
11 the warden of a California prison and the Director of Corrections for California have the power to
12 produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d at 895.

13 Here, Petitioner has incorrectly named “Frank Munoz,” as Respondent. In order for this Court
14 to entertain the Petition filed in this action, Petitioner must name the warden in charge of the state
15 correctional facility in which Petitioner is presently confined, Richard J. Donovan State Prison, or the
16 Director of the California Department of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379
17 (9th Cir. 1992) (per curiam).

18 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

19 Further, habeas petitioners who wish to challenge either their state court conviction or the length
20 of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);
21 *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy the exhaustion requirement,
22 a petitioner must “fairly present[] his federal claim to the highest state court with jurisdiction to consider
23 it . . . or . . . demonstrate[] that no state remedy remains available. *Johnson v. Zenon*, 88 F.3d 828, 829
24 (9th Cir. 1996) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4,
25 6 (1982)). Moreover, to properly exhaust state court remedies a petitioner must allege, in state court,
26 how one or more of his or her federal rights have been violated. The Supreme Court in *Duncan v.*
27 *Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged
28 violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are

1 asserting claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For example,
2 “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or
3 her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
4 in federal court, but in state court.” *Id.* at 366 (emphasis added). It is not clear from the petition
5 whether Petitioner has exhausted his claims in state court. (*See* Pet. at 6-13.) If Petitioner has raised
6 his claims in the California Supreme Court he must so specify.

7 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty
8 Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas
9 corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run
10 from the latest of:

11 (A) the date on which the judgment became final by the conclusion of direct
12 review or the expiration of the time for seeking such review;

13 (B) the date on which the impediment to filing an application created by State
14 action in violation of the Constitution or laws of the United States is removed, if the
15 applicant was prevented from filing by such State action;

16 (C) the date on which the constitutional right asserted was initially recognized
17 by the Supreme Court, if the right has been newly recognized by the Supreme Court and
18 made retroactively applicable to cases on collateral review; or

19 (D) the date on which the factual predicate of the claim or claims presented could
20 have been discovered through the exercise of due diligence.

21 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

22 The statute of limitations does not run while a properly filed state habeas corpus petition is
23 pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). *But see*
24 *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery
25 and acceptance [by the appropriate court officer for placement into the record] are in compliance with
26 the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the
27 statute of limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S.
28 167, 181-82 (2001).

29 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a habeas
30 petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the
31 petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254. Here, it

1 appears plain from the Petition that Petitioner is not presently entitled to federal habeas relief because
2 he has not alleged exhaustion of state court remedies.

3 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

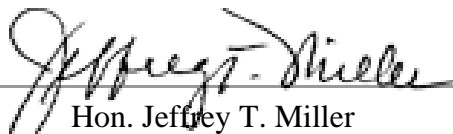
4 In addition, Petitioner has failed to state a claim under 28 U.S.C. § 2254. To present a
5 cognizable claim under 28 U.S.C. § 2254, a state prisoner must allege both that he is in custody pursuant
6 to a “judgment of a State court,” and that he is in custody in “violation of the Constitution or laws or
7 treaties of the United States.” See 28 U.S.C. § 2254(a); *Tollett v. Henderson*, 411 U.S. 258, 266 (1973).
8 Here, Petitioner states in claims one through three that his grounds for relief are “involuntary committal
9 and servitude,” “I was not sentenced to parole on 04-20-06 by Judge Hartunian in Dept. 6 of San Diego
10 Superior Court,” and “I have done over 3 years 3 months on parole, the contract says 3 yrs.” (Pet. at
11 6-11.) In claim four he states his grounds for relief as “due process violated on arresting charges,” but
12 he does not specify exactly how his due process rights have been violated. (Pet. at 12-13.) Accordingly,
13 he fails to state a cognizable federal claim under 28 U.S.C. § 2254.

14 **CONCLUSION**

15 For the foregoing reasons, the Court **DISMISSES** the Petition without prejudice and with leave
16 to amend. To have this case reopened, Petitioner must, no later than January 12, 2007: (1) pay the
17 \$5.00 filing fee or submit adequate proof of his inability to pay the fee **AND** (2) file a First Amended
18 Petition which cures the pleading deficiencies outlined in this Order. **THE CLERK OF COURT IS**
19 **DIRECTED TO MAIL PETITIONER A BLANK MOTION TO PROCEED IN FORMA**
20 **PAUPERIS AND A BLANK FIRST AMENDED PETITION FORM.**

21 **IT IS SO ORDERED.**

22 DATED: November 15, 2006

23 
24 Hon. Jeffrey T. Miller
25 United States District Judge
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