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

JAMES LYNN HINES,

Petitioner,

v.

D. CARILLO, Associate Warden,

Respondent.

Civil No. 07-2325 J (BLM)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

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

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than March 7, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

FAILURE TO NAME A PROPER RESPONDENT

Further, 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

1 2(a), 28 U.S.C. foll. § 2254). “The ‘state officer having custody’ may be ‘either the warden of
2 the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state
3 penal institutions.” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note).

4 Here, Petitioner incorrectly named “D. Carillo” as Respondent. In order for this Court
5 to entertain the Petition filed in this action, Petitioner, who is confined at Arizona State Prison
6 Camp in Florence, Arizona, must name the warden *currently* in charge of the correctional facility
7 in which Petitioner is presently confined or the Secretary of the Department of Corrections.
8 Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

9 **FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES**

10 Further, habeas petitioners who wish to challenge either their state court conviction or the
11 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
12 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial
13 remedies, a California state prisoner must present the California Supreme Court with a fair
14 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28
15 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court
16 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
17 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
18 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
19 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
20 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
21 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
22 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
23 in federal court, but in state court.” Id. at 366 (emphasis added).

24 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
25 Supreme Court. In fact, he specifically indicates he has a petition still pending before the state
26 supreme court. (See Pet. at 4, 7-9.) If Petitioner has raised his claims in the California Supreme
27 Court he must so specify. “The burden of proving that a claim has been exhausted lies with the
28 petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d

1 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v.
2 Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

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

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

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

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

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

16 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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

24 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
25 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
26 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
27 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
28 habeas relief because he has not alleged exhaustion of state court remedies.

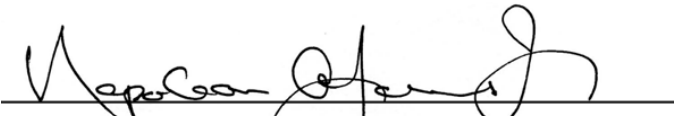
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CONCLUSION

The Petition is **DISMISSED** for failure to satisfy the filing fee requirement, failure to name a proper respondent, and failure to allege exhaustion of state judicial remedies. In order to have this case reopened, Petitioner must, **by March 7, 2008**, (1) either pay the filing fee or provide adequate proof of his inability to pay and (2) file a First Amended Petition curing the pleading deficiencies discussed above. For Petitioner's convenience, **the Clerk of Court shall attach to this Order, a blank Southern District of California In Forma Pauperis Application to Petitioner and a blank First Amended Petition form.**

IT IS SO ORDERED.

DATED: February 8, 2008


HON. NAPOLEON A. JONES, JR.
United States District Judge