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

BERNARD HILL,
Petitioner,

v.

J.W. SULLIVAN, Warden, et al.,
Respondents.

Civil No. 08-0124 JM (CAB)

ORDER:

**(1) GRANTING APPLICATION
TO PROCEED IN FORMA
PAUPERIS; and

(2) DISMISSING CASE
WITHOUT PREJUDICE AND
WITH LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner has \$2.11 on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the above-referenced action as a poor person without being required to prepay fees or costs and without being required to post security. The Clerk of the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the filing fee.

FAILURE TO NAME PROPER RESPONDENT

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2 Review of the Petition reveals that Petitioner has failed to name a proper
3 respondent. On federal habeas, a state prisoner must name the state officer having
4 custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir.
5 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction
6 when a habeas petition fails to name a proper respondent. *See id.*

7 The warden is the typical respondent. However, “the rules following section 2254
8 do not specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the
9 warden of the institution in which the petitioner is incarcerated . . . or the chief officer in
10 charge of state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254
11 advisory committee’s note). If “a petitioner is in custody due to the state action he is
12 challenging, ‘[t]he named respondent shall be the state officer who has official custody
13 of the petitioner (for example, the warden of the prison).’” *Id.* (quoting Rule 2, 28 U.S.C.
14 foll. § 2254 advisory committee’s note).

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

23 Here, Petitioner has incorrectly named “J.W. Sullivan and Hon. Gerry Brown,” as
24 Respondent. In order for this Court to entertain the Petition filed in this action, Petitioner
25 must name the warden in charge of the state correctional facility in which Petitioner is
26 presently confined or the Director of the California Department of Corrections.
27 *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

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

2 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases,
3 Petitioner has failed to allege that his state court conviction or sentence violates the
4 Constitution of the United States.

5 Title 28, United States Code, § 2254(a), sets forth the following scope of review
6 for federal habeas corpus claims:

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

13 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th
14 Cir. 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v.*
15 *Shimoda*, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal
16 habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody
17 pursuant to a “judgment of a State court,” and that he is in custody in “violation of the
18 Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2254(a).

19 Here, Petitioner claims that “petitioner’s request for an instruction on the
20 entrapment defense should have been granted” (claim one) and “the trial court erred in
21 unduly restricting petitioner’s cross examination of the under cover officer” (claim two).
(*See* Pet. at 6-13.) Petitioner does not claim he is “in custody in violation of the
22 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

23 Further, the Court notes that Petitioner cannot simply restate his claims as federal
24 habeas in an amended petition and refile it in this case. He must have first exhausted his
25 state judicial remedies before bringing his claims via federal habeas. State prisoners who
26 wish to challenge their state court conviction must first exhaust state judicial remedies.
27 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust
28 state judicial remedies, a California state prisoner must present the California Supreme
Court with a fair opportunity to rule on the merits of every issue raised in his

1 or her federal habeas petition. *See* 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-
2 34. Moreover, to properly exhaust state court judicial remedies a petitioner must allege,
3 in state court, how one or more of his or her federal rights have been violated. For
4 example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state
5 court trial denied him the due process of law guaranteed by the Fourteenth Amendment,
6 he must say so, not only in federal court, but in state court.” *Id.* (emphasis added).

7 Additionally, the Court cautions Petitioner that under the Antiterrorism and
8 Effective Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year
9 period of limitation shall apply to a petition for a writ of habeas corpus by a person in
10 custody pursuant to the judgment of a State court. The limitation period shall run from
11 the latest of:

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

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

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

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

23 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

24 The Court also notes that the statute of limitations does not run while a properly
25 filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*,
26 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). *But see Artuz*
27 *v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its
28 delivery and acceptance [by the appropriate court officer for placement into the record]
are in compliance with the applicable laws and rules governing filings.”).

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1 However, absent some other basis for tolling, the statute of limitations does run while a
2 federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

3 **CONCLUSION**

4 Based on the foregoing, the Court **GRANTS** Petitioner's motion to proceed in
5 forma pauperis and **DISMISSES** this action without prejudice and with leave to amend.
6 To have this case reopened, Petitioner must, **no later than April 1, 2008**, file a First
7 Amended Petition that cures the pleading deficiencies set forth above. THE CLERK OF
8 COURT IS DIRECTED TO MAIL PETITIONER A BLANK FIRST AMENDED
9 PETITION FORM.

10 **IT IS SO ORDERED.**

11 DATED: January 30, 2008

12 
13 Hon. Jeffrey T. Miller
United States District Judge

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