

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

JIMMIE STEPHEN,

Petitioner,

v.

HERNANDEZ, et al., Warden

Respondent.

Civil No. 08-0357 LAB (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, but has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis.

FAILURE TO SATISFY FILING FEE REQUIREMENT

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 April 15, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

///

///

///

///

FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM

1
2 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
3 has failed to allege that his state court conviction or sentence violates the Constitution of the
4 United States.

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

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

12 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.
13 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800
14 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
15 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
16 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
17 United States.” *See* 28 U.S.C. § 2254(a).

18 Here, Petitioner claims that the Court erred in dismissing several of his civil rights
19 complaints, filed under 42 U.S.C. § 1983; and counting the dismissals as strikes under 28 U.S.C.
20 § 1915(g). (See Pet. at 6, 7, 9, 11.) In no way does Petitioner claim he is “in custody in violation
21 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254. Moreover,
22 Petitioner’s claims are not cognizable on habeas because they do not challenge the constitutional
23 validity or duration of Petitioner’s confinement. *See* 28 U.S.C. § 2254(a); *Preiser v. Rodriguez*,
24 411 U.S. 475, 500 (1973); *Heck v. Humphrey*, 512 U.S. 477, 480-85 (1994). “Section 2254
25 applies only to collateral attacks on state court judgments.” *McGuire v. Blubaum*, 376 F. Supp.
26 284, 285 (D. Ariz. 1974).

FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES

27 Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal
28 habeas claim and then refile the amended petition in this case. He must exhaust state judicial
remedies before bringing his claims via federal habeas. State prisoners who wish to challenge

1 their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);
2 *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a
3 California state prisoner must present the California Supreme Court with a fair opportunity to
4 rule on the merits of every issue raised in his or her federal habeas petition. *See* 28 U.S.C.
5 § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court
6 judicial remedies a petitioner must allege, in state court, how one or more of his or her federal
7 rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995)
8 reasoned: “If state courts are to be given the opportunity to correct alleged violations of
9 prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting
10 claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For example,
11 “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him
12 the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in
13 federal court, but in state court.” *Id.* (emphasis added).

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

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

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

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

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

27 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

28 ///

1 The Court also notes that the statute of limitations does not run while a properly filed state
2 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003,
3 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). *But see Artuz v. Bennett*, 531 U.S. 4,
4 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by
5 the appropriate court officer for placement into the record] are in compliance with the applicable
6 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of
7 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167,
8 181-82 (2001).

9 FAILURE TO NAME A PROPER RESPONDENT

10 Finally, review of the Petition reveals that Petitioner has failed to name a proper
11 respondent. On federal habeas, a state prisoner must name the state officer having custody of
12 him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule
13 2(a), 28 U.S.C. foll. § 2254). “The ‘state officer having custody’ may be ‘either the warden of
14 the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state
15 penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note).

16 Here, Petitioner incorrectly named “Hernandez,” “IRS,” “Rhodes,” “Lacy,” “Shear,” and
17 “The Attorney General of the State of California” as Respondents. None of these parties has
18 custody over Petitioner, who is confined at California Men’s Colony. In order for this Court to
19 entertain the Petition filed in this action, Petitioner must name the warden *currently* in charge
20 of the state correctional facility in which Petitioner is presently confined or the Director of the
21 California Department of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.
22 1992) (per curiam).

23 CONCLUSION

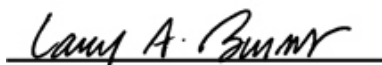
24 Based on the foregoing, the Petition is **DISMISSED** without prejudice for failure to
25 satisfy the filing fee requirement, failure to state a cognizable federal habeas corpus claim,
26 failure to allege exhaustion of state judicial remedies and failure to name a proper respondent.
27 In order to have this case reopened, Petitioner must, **no later than April 15, 2008**, (1) either

28 ///

1 pay the filing fee or provide adequate proof of his inability to pay and (2) file a First Amended
2 Petition which cures the deficiencies discussed above. *For Petitioner's convenience, the Clerk*
3 *of Court shall attach to this Order a blank application to proceed in forma pauperis and a blank*
4 *First Amended Petition form.*

5 **IT IS SO ORDERED.**

6
7 DATED: February 29, 2008

8 

9 HONORABLE LARRY ALAN BURNS
10 United States District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28