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

WILBUR LANN PITTMAN,
Petitioner,
v.
D. PEARSON, et al.,
Respondent.

Civil No. 09-0301 L (RBB)

**ORDER GRANTING APPLICATION
TO PROCEED IN FORMA
PAUPERIS AND DISMISSING CASE
WITHOUT PREJUDICE**

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.

REQUEST TO PROCEED IN FORMA PAUPERIS

According to his prison trust account statement, Petitioner has no funds 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 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 A PROPER RESPONDENT

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

1 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to
2 name a proper respondent. *See id.*

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

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

18 Here, Petitioner has incorrectly named “D. Pearson” and “J. Harris” as Respondents. In
19 order for this Court to entertain the Petition filed in this action, Petitioner must name the warden
20 in charge of the state correctional facility in which Petitioner is presently confined or the
21 Secretary of the California Department of Corrections and Rehabilitation. *Brittingham v. United*
22 *States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

23 **FAILURE TO STATE A COGNIZABLE HABEAS CLAIM**

24 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
25 has failed to allege that his state court conviction or sentence violates the Constitution of the
26 United States. Title 28, United States Code, § 2254(a), sets forth the following scope of review
27 for federal habeas corpus claims:

28 The Supreme Court, a Justice thereof, a circuit judge, or a district
court shall entertain an application for a writ of habeas corpus in

1 behalf of a person in custody pursuant to the judgment of a State
2 court only on the ground that he is in custody in violation of the
3 Constitution or laws or treaties of the United States.

4 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.
5 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800
6 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
7 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
8 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
9 United States.” *See* 28 U.S.C. § 2254(a).

10 Here, Petitioner’s allegations are incomprehensible. He appears to claim that correctional
11 staff members have violated various provisions of the California Penal Code. (*See* Pet. at 6-9.)
12 In no way does Petitioner claim he is “in custody in violation of the Constitution or laws or
13 treaties of the United States.” 28 U.S.C. § 2254. Accordingly, the Petition must be dismissed.

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

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

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1 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
2 Supreme Court. In fact, he specifically indicates he did not seek review in the California
3 Supreme Court. (*See* Pet. at 6-8.) If Petitioner has raised his claims in the California Supreme
4 Court he must so specify. “The burden of proving that a claim has been exhausted lies with the
5 petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); *see Breard v. Pruett*, 134 F.3d
6 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v.*
7 *Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

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

12 (A) the date on which the judgment became final by the
13 conclusion 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
15 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
by such State action;

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

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

21 28 U.S.C. § 2244(d)(1)(A)-(D).

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


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

6 **CONCLUSION**

7 Based on the foregoing, Petitioner’s application to proceed in forma pauperis is
8 **GRANTED**. However, the Petition is **DISMISSED** without prejudice for failure to name a
9 proper respondent, failure to state a cognizable claim, and failure to allege exhaustion of state
10 judicial remedies. In order to have this case reopened, Petitioner must, **no later than May 1,**
11 **2009**, submit a First Amended Petition which cures the pleading deficiencies discussed in this
12 Order. *For Petitioner’s convenience, the Clerk of Court shall attach to this Order a blank First*
13 *Amended Petition form.*

14 **IT IS SO ORDERED.**

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16 DATED: March 10, 2009

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18 M. James Lorenz
19 United States District Court Judge
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