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

ARTHUR FREDERICK LUTE, III,

Petitioner,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS,

Respondent.

Civil No. 09cv2501-DMS (WMc)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a 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. 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 January 11, 2010**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee. The Court notes that Petitioner includes a request for an in forma pauperis application. (Pet. at 1.) The Clerk of Court will provide Petitioner with a blank Southern District of California In Forma Pauperis Application along with a copy of this Order.

In addition, it appears that the Petition is subject to dismissal because Petitioner has failed to name a proper Respondent, has failed to state a cognizable claim and has failed to allege

1 exhaustion of his state court remedies. Petitioner is granted leave to file a First Amended
2 Petition in an attempt to cure these pleading defects no later than January 11, 2010.

3 **FAILURE TO NAME PROPER RESPONDENT**

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

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

17 Here, Petitioner has incorrectly named “California Department of Corrections” as
18 Respondent. A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a
19 writ of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is in
20 custody. The actual person who is [the] custodian [of the petitioner] must be the respondent.”
21 Ashley v. Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a
22 writ of habeas corpus acts upon the custodian of the state prisoner, the person who will produce
23 “the body” if directed to do so by the Court. “Both the warden of a California prison and the
24 Director of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval,
25 81 F.3d at 895. In order for this Court to entertain the Petition filed in this action, Petitioner
26 must name the warden in charge of the state correctional facility in which Petitioner is presently
27 confined or the Director of the California Department of Corrections and Rehabilitation.
28 Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

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

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 his counsel was incompetent, that there was coercion between
19 the Deputy District Attorney and defense counsel, that defense counsel violated duties and rules,
20 and there were dishonest court practices. (Pet. at 6-9.) Petitioner does not claim he is “in
21 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
22 § 2254. If Petitioner contends that he received constitutionally ineffective assistance of counsel
23 in violation of the Sixth Amendment, for example, he should specifically say so.

24 Further, the Court notes that Petitioner may not be able to simply amend his Petition to
25 state a federal habeas claim and then refile the amended petition in this case. He must exhaust
26 state judicial remedies with respect to any federal claim before bringing his claims via federal
27 habeas.

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

 Habeas petitioners who wish to challenge either their state court conviction or the length
of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.

1 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial
2 remedies, a California state prisoner must present the California Supreme Court with a fair
3 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28
4 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court
5 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
6 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
7 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
8 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
9 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
10 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
11 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
12 in federal court, but in state court.” Id. at 366 (emphasis added).

13 Petitioner has specifically indicated that he did not present his claims to the California
14 Supreme Court. (See Pet. at 6-9.) If Petitioner has raised his claims in the California Supreme
15 Court he must so specify. The burden of proving that a claim has been exhausted lies with the
16 petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir.1981).

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

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

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

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

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

3 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

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

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

16 **CONCLUSION**

17 Based on the foregoing, the Court **DISMISSES** this action without prejudice because
18 Petitioner has failed to satisfy filing fee requirements, failed to allege exhaustion of state judicial
19 remedies and failed to state a cognizable federal claim. To have this case reopened, Petitioner
20 must, no later than **January 11, 2010**, pay the \$5.00 filing fee or submit adequate proof of his
21 inability to pay the fee, **and** file a First Amended Petition that cures the pleading deficiencies
22 set forth above. The Clerk of Court shall send a blank Southern District of California in forma
23 pauperis application and a blank Southern District of California amended habeas petition form
24 to Petitioner along with a copy of this Order.

25 Further, Petitioner is advised that if he has not submitted a First Amended Petition stating
26 a cognizable federal claim(s) and alleging exhaustion of his state court remedies with regard to

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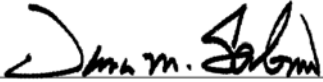
1 that claim(s) before January 11, 2010, he will have to start over by filing a completely new
2 habeas petition in this Court. See In re Turner, 101 F.3d 1323 (9th Cir. 1997).

3 **IT IS SO ORDERED.**

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5 **DATED: November 12, 2009**

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7 **HON. DANA M. SABRAW**
8 **United States District Judge**

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10 **CC: ALL PARTIES**

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