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

KENNETH LEWIS,  
  
v.  
  
COURT,  
  
Respondent.

Civil No. 09-2502 DMS (RBB)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE AND WITH  
LEAVE TO AMEND**

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. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis. See Rule 3(a), 28 U.S.C. foll. § 2254.

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

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

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

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

### 21 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

22 Further, habeas petitioners who wish to challenge either their state court conviction or the  
23 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
24 § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy the  
25 exhaustion requirement, a petitioner must “fairly present[] his federal claim to the highest state  
26 court with jurisdiction to consider it . . . or . . . demonstrate[] that no state remedy remains  
27 available. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (citing *Picard v. Connor*, 404  
28 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Moreover, to properly

1 exhaust state court remedies a petitioner must allege, in state court, how one or more of his or  
2 her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that  
3 an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed  
4 by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state  
5 court.” See *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)(emphasis added).

6 Nowhere on the Petition does Petitioner allege that he raised his claims in the California  
7 Supreme Court. If Petitioner has raised his claims in the California Supreme Court he must so  
8 specify.

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

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

15 (B) the date on which the impediment to filing an application  
16 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;

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

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

22 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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

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

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

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

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

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

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

19 Here, Petitioner claims that “under the jurisdiction of the courts my pleas were not met  
20 in the court of law as my life sentence was given to me [and] in time I have met my sentence.”  
21 (Pet. at 3.) In addition he claims “this is an understanding of the facts of my case, of the facts  
22 of my board of prison terms denied eight times in the last 17 years.” (*Id.* at 4.) In no way does  
23 Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of the United  
24 States.” 28 U.S.C. § 2254.

25 **FAILURE TO USE PROPER FORM**

26 Moreover, a Petition for Writ of Habeas Corpus must be submitted in accordance with  
27 the Local Rules of the United States District Court for the Southern District of California. *See*  
28 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be  
submitted upon a court-approved form and in accordance with the instructions approved by the

1 Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-  
2 approved form.

3 **FAILURE TO SIGN PETITION**

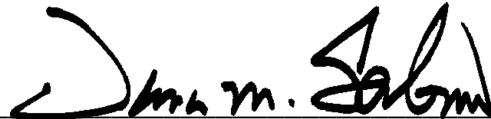
4 Finally, Rule 2(c) of the Rules Governing Section 2254 Cases provides that “[t]he petition  
5 shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the  
6 petitioner.” Rule 2(c), 28 U.S.C. foll. § 2254 (emphasis added). Here, Petitioner has failed to  
7 sign the Petition.

8 **CONCLUSION**

9 For all the foregoing reasons, the Court **DISMISSES** this case without prejudice and with  
10 leave to amend. If Petitioner wishes to proceed with this case, he must submit, **no later than**  
11 **January 16, 2010**: (1) a copy of this Order with the \$5.00 fee **OR** a motion to proceed in forma  
12 pauperis; **AND** (2) a First Amended Petition which cures the pleading deficiencies outlined in  
13 this Order. **THE CLERK OF COURT SHALL MAIL PETITIONER A BLANK MOTION**  
14 **TO PROCEED IN FORMA PAUPERIS AND A BLANK FIRST AMENDED PETITION**  
15 **FORM TOGETHER WITH A COPY OF THIS ORDER.**

16 **IT IS SO ORDERED.**

17 DATED: November 13, 2009



18 Dana M. Sabraw  
19 United States District Judge  
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