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

KENNETH LEWIS,

Petitioner,

v.
TERRI GONZALES, Warden

Respondent.

Civil 10-0804 IEG (PCL)
No.

**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.

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. 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.

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

1 name a proper respondent. See id.

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

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

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

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

23 Further, habeas petitioners who wish to challenge either their state court conviction or the
24 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
25 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial
26 remedies, a California state prisoner must present the California Supreme Court with a fair
27 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28
28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court

1 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
2 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
3 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
4 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
5 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
6 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
7 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
8 in federal court, but in state court.” Id. at 366 (emphasis added).

9 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
10 Supreme Court. If Petitioner has raised his claims in the California Supreme Court he must so
11 specify. “The burden of proving that a claim has been exhausted lies with the petitioner.”
12 Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d 615, 619
13 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v. Allenbrand,
14 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

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

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

21 (B) the date on which the impediment to filing an application
22 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;

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

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

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

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

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

13 VENUE

14 A petition for writ of habeas corpus may be filed in the United States District Court of
15 either the judicial district in which the petitioner is presently confined or the judicial district in
16 which he was convicted and sentenced. *See* 28 U.S.C. § 2241(d); *Braden v. 30th Judicial*
17 *Circuit Court*, 410 U.S. 484, 497 (1973). Petitioner is presently confined at California Men’s
18 Colony, located in San Luis Obispo County, which is within the jurisdictional boundaries of the
19 United States District Court for the Central District of California, Western Division. *See*
20 28 U.S.C. § 84(c)(2). Petitioner does not specify where his state court conviction or board of
21 parole hearing occurred. Thus, it is currently unclear whether this Court has jurisdiction in this
22 matter. Petitioner must tell the Court where he suffered the conviction which he seeks to
23 challenge in this matter.

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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, 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 “a plea bargain in the courts with as a juvenile delinquent,
19 yet trial as adult in this matter” and that he has met the “requirement of the board of prison terms
20 in this case.” (Pet. at 3-4.) In no way does Petitioner claim he is “in custody in violation of the
21 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

22 **FAILURE TO USE PROPER FORM**

23 Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with
24 the Local Rules of the United States District Court for the Southern District of California. See
25 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be
26 submitted upon a court-approved form and in accordance with the instructions approved by the
27 Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-
28 approved form.

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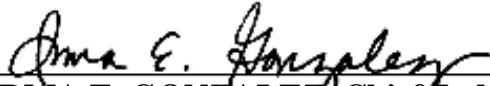
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1 CONCLUSION AND ORDER

2 In light of the above, the Court **DISMISSES** the case without prejudice for Petitioner's
3 failure to (1) satisfy the filing fee requirement, (2) name a proper respondent, (3) allege
4 exhaustion of state judicial remedies, (4) demonstrate that venue is proper in this jurisdiction (5)
5 state a cognizable federal claim, and (6) use the proper form. If Petitioner wishes to proceed
6 with this case, he must submit, **no later than June 29, 2010**, a copy of this Order with the \$5.00
7 fee or with adequate proof of his inability to pay the fee, AND a First Amended Petition which
8 cures the pleading deficiencies noted above. *The Clerk of Court is directed to send a blank*
9 *Southern District of California In Forma Pauperis Application and a First Amended Petition*
10 *form to Petitioner along with a copy of this Order.*

11 **IT IS SO ORDERED.**

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13 **DATED: April 27, 2010**

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15 **IRMA E. GONZALEZ**, Chief Judge
16 **United States District Court**