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SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 WARREN LEMONS,

Petitioner,

Civil No. 10-0807 BEN (CAB)

ORDER:

12
13 v.

**(1) GRANTING APPLICATION TO
PROCEED IN FORMA PAUPERIS,
and**

14
15 UNKNOWN,

16 Respondent.

**(2) DISMISSING PETITION
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

17
18 Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas
19 Corpus pursuant to 28 U.S.C. § 2254, together with a copy of his prison trust account statement,
20 which this Court construes as a request to proceed in forma pauperis.

21 **REQUEST TO PROCEED IN FORMA PAUPERIS**

22 Petitioner has no funds on account at the California correctional institution in which he
23 is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS**
24 Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the
25 above-referenced action as a poor person without being required to prepay fees or costs and
26 without being required to post security. The Clerk of the Court shall file the Petition for Writ
27 of Habeas Corpus without prepayment of the filing fee.

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1 **FAILURE TO NAME A PROPER RESPONDENT**

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

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

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

22 Here, Petitioner has failed to name a Respondent. In order for this Court to entertain the
23 Petition filed in this action, Petitioner must name the warden in charge of the state correctional
24 facility in which Petitioner is presently confined or the Secretary of the California Department
25 of Corrections and Rehabilitation. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.
26 1992) (per curiam).

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1 courts are to be given the opportunity to correct alleged violations of prisoners' federal rights,
2 they must surely be alerted to the fact that the prisoners are asserting claims under the United
3 States Constitution." *Id.* at 365-66 (emphasis added). For example, "[i]f a habeas petitioner
4 wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law
5 guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state
6 court." *Id.* (emphasis added).

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

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

13 (B) the date on which the impediment to filing an application
14 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;

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

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

20 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2008).

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

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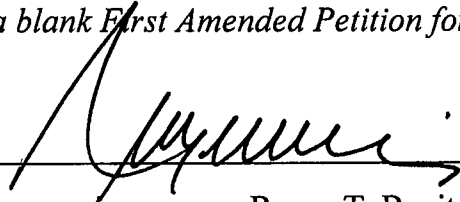
CONCLUSION

Based on the foregoing, the Court **DISMISSES** this action without prejudice because Petitioner has failed to name a proper respondent and failed to state a cognizable federal claim. To have this case reopened, Petitioner must, **no later than June 28, 2010**, file a First Amended Petition that cures the pleading deficiencies set forth above. *For Petitioner's convenience, the Clerk of Court shall attach to this Order a blank First Amended Petition form.*

IT IS SO ORDERED.

DATED: _____

4/28/2010



Roger T. Benitez
United States District Judge