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

CARL BURKE,

Petitioner,

v.

TERRI GONZALES,

Respondent.

Civil No. 10-0927 LAB (PCL)

**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. If Petitioner wishes to proceed with this case, he must submit, **no later than July 2, 2010**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the 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 “Terri Gonzales,” as Respondent. In order for this
19 Court to entertain the Petition filed in this action, Petitioner must name the warden in charge of
20 the state correctional facility in which Petitioner is presently confined or the Director of the
21 California Department of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.
22 1992) (per curiam).

23 **FAILURE TO STATE A COGNIZABLE FEDERAL 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 asks “the mercy of the courts” to reduce his sentence. (Pet. at 3.) In no
11 way does Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of
12 the United States.” 28 U.S.C. § 2254.

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

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

1 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
2 Supreme Court. If Petitioner has raised his claims in the California Supreme Court he must so
3 specify. “The burden of proving that a claim has been exhausted lies with the petitioner.”
4 *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); *see Breard v. Pruett*, 134 F.3d 615, 619
5 (4th Cir. 1998); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*,
6 23 F.3d 292, 300 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

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 Supp. 2002).

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
24 application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer
25 for 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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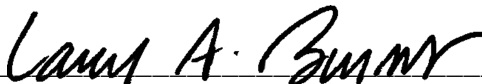
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CONCLUSION

Accordingly, the Court **DISMISSES** the Petition without prejudice due to Petitioner's failure to satisfy the filing fee requirement, failure to name a proper respondent, failure to state a cognizable federal claim and failure to allege exhaustion of state judicial remedies. To have this case reopened, Petitioner must file a First Amended Petition **no later than July 2, 2010** in conformance with this Order. *For Petitioner's convenience, the Clerk of Court shall attach to this Order a blank First Amended Petition form and a blank Southern District of California In Forma Pauperis Application.*

IT IS SO ORDERED.

DATED: 5-5-10



Larry Alan Burns
United States District Judge