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

JON WINIARZ,  
  
Petitioner,  
  
v.  
  
UNKNOWN,  
  
Respondent.

Civil No. 10-1878 WQH (NLS)

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

Petitioner, a state prisoner proceeding pro se, has submitted a document which this Court construes as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and paid the \$5.00 filing 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 U.S.C. foll. § 2254). “The ‘state officer having custody’ may be ‘either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note).

Here, Petitioner has failed to name a Respondent. In order for this Court to entertain the Petition filed in this action, Petitioner must name the warden *currently* in charge of the state correctional facility in which Petitioner is presently confined or the Secretary of the California

1 Department of Corrections and Rehabilitation. *Brittingham v. United States*, 982 F.2d 378, 379  
2 (9th Cir. 1992) (per curiam).

### 3 FAILURE TO STATE A COGNIZABLE 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  
10 court shall entertain an application for a writ of habeas corpus in  
11 behalf of a person in custody pursuant to the judgment of a State  
12 court only on the ground that he is in custody in violation of the  
13 Constitution or laws or treaties of the United States.

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

20 Here, Petitioner fails to set forth any specific claims. Rather, he has submitted only a  
21 copy of a “Notice of Parole Revocation Rights and Acknowledgments” form, with handwritten  
22 notations in the margins. In no way does Petitioner claim he is “in custody in violation of the  
23 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

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

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

9 Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective  
10 Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of  
11 limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant  
12 to the judgment of a State court. The 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. § 2244(d)(1)(A)-(D).

23 The Court also notes that the statute of limitations does not run while a properly filed state  
24 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003,  
25 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000). But see Artuz v. Bennett, 531 U.S. 4,  
26 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by  
27 the appropriate court officer for placement into the record] are in compliance with the applicable  
28 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of

1 limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167,  
2 181-82 (2001).

3 **FAILURE TO USE PROPER FORM**


4 Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with  
5 the Local Rules of the United States District Court for the Southern District of California. See  
6 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be  
7 submitted upon a court-approved form and in accordance with the instructions approved by the  
8 Court. Here, Petitioner failed to submit his application for writ of habeas corpus on an approved  
9 form.

10 **CONCLUSION**

11 Accordingly, the Court **DISMISSES** the Petition without prejudice and with leave to  
12 amend due to Petitioner's failure to (1) name a proper respondent, (2) state a cognizable claim,  
13 and (3) use a proper form. To have this case reopened, Petitioner must file a First Amended  
14 Petition **no later than November 9, 2010** in conformance with this Order. *For Petitioner's*  
15 *convenience, the Clerk of Court shall attach to this Order a blank First Amended Petition form.*

16 **IT IS SO ORDERED.**

17 DATED: September 13, 2010

18   
19 **WILLIAM Q. HAYES**  
20 United States District Judge