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

VICTOR HENDERSON,

Petitioner,

v.

UNKNOWN,

Respondent.

Civil No. 10-2180 WQH (CAB)

ORDER:

(1) DENYING IN FORMA PAUPERIS APPLICATION;

(2) DISMISSING CASE WITHOUT PREJUDICE AND WITH LEAVE TO AMEND; and

(3) NOTIFYING PETITIONER OF FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES AND PROVIDING OPTIONS

Petitioner, a state prisoner proceeding pro se, has not paid the \$5.00 filing fee and has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).

REQUEST TO PROCEED IN FORMA PAUPERIS

The request to proceed in forma pauperis is denied because Petitioner has not provided the Court with sufficient information to determine Petitioner’s financial status. A request to proceed in forma pauperis made by a state prisoner must include a certificate from the warden or other appropriate officer showing the amount of money or securities Petitioner has on account

1 in the institution. Rule 3(a)(2), 28 U.S.C. foll. § 2254; Local Rule 3.2. Petitioner has failed to
2 provide the Court with the required signed Prison Certificate. (The proper Southern District in
3 forma pauperis form, which includes the required Prison Certificate, is attached for Petitioner’s
4 convenience.)

5 **FAILURE TO NAME A PROPER RESPONDENT**

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

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

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

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

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

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
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 claims that it was improper to “bring up a case that happen[ed] 10 years
21 ago;” that he is innocent of the crime; that the victim had “mental issues;” he was improperly
22 denied a expert to testify about the victim’s injuries. *See* Pet. at 6-9. In no way does Petitioner
23 claim he is “in custody in violation of the Constitution or laws or treaties of the United States.”
24 28 U.S.C. § 2254.

25 **FAILURE TO ALLEGE EXHAUSTION AS TO ALL CLAIMS**

26 Further, Petitioner has not alleged exhaustion as to claims two and three. (*See* Pet. at 8-
27 9.) Having preliminarily determined the petition contains unexhausted claims, the Court notifies
28 Petitioner of the possible dismissal of his petition.

The exhaustion requirement is satisfied by providing the state courts with a “fair
opportunity” to rule on Petitioner’s constitutional claims. *Anderson v. Harless*, 459 U.S. 4, 6

1 (1982). In most instances, a claim is exhausted once it is presented to a state’s highest court,
2 either on direct appeal or through state collateral proceedings.¹ *See Sandgathe v. Maass*, 314
3 F.3d 371, 376 (9th Cir. 2002). The constitutional claim raised in the federal proceedings must
4 be the same as that raised in the state proceedings. *See id.* Here, claim three, that the victim
5 suffered from “mental issues,” and claim four, that he should have been permitted to present
6 expert testimony at trial, appear to be unexhausted. (*See* Pet. at 8-9.)

7 **PETITIONER’S OPTIONS**

8 If Petitioner wishes to pursue this case, he must choose one of the following options.

9 **i) First Option: Demonstrate Exhaustion**

10 Petitioner may file further papers with this Court to demonstrate that he has in fact
11 exhausted the claims the Court has determined are likely unexhausted. If Petitioner chooses this
12 option, his papers are due no later than **December 15, 2010**.

13 **ii) Second Option: Voluntarily Dismiss the Petition**

14 Petitioner may move to voluntarily dismiss his entire federal petition and return to state
15 court to exhaust his unexhausted claims. Petitioner may then file a new federal petition
16 containing only exhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 510, 520-21 (stating that
17 a petitioner who files a mixed petition may dismiss his petition to “return[] to state court to
18 exhaust his claims”). If Petitioner chooses this second option, he must file a pleading with this
19 Court no later than **December 15, 2010**.

20 Petitioner is cautioned that any new federal petition must be filed before expiration of the
21 one-year statute of limitations. Ordinarily, a petitioner has one year from when his conviction
22 became final to file his federal petition, unless he can show that statutory or equitable “tolling”
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25 ¹ 28 U.S.C. § 2254 (b)(1)-(2) states:

26 (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the
27 judgment of a State court shall not be granted unless it appears that -

27 (A) the applicant has exhausted the remedies available in the courts of the State; or

28 (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that
render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure
to the applicant to exhaust the remedies available in the courts of the State.

1 applies. *Duncan v. Walker*, 533 U.S. 167, 176 (2001); 28 U.S.C. § 2244(d).² The statute of
2 limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C.
3 § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). *But see Artuz v. Bennett*,
4 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and
5 acceptance [by the appropriate court officer for placement into the record] are in compliance
6 with the applicable laws and rules governing filings.”); *Bonner v. Carey*, 425 F.3d 1145, 1149
7 (9th Cir. 2005) (holding that a state application for post-conviction relief which is ultimately
8 dismissed as untimely was neither “properly filed” nor “pending” while it was under
9 consideration by the state court, and therefore does not toll the statute of limitations), *as*
10 *amended* 439 F.3d 993. However, absent some other basis for tolling, the statute of limitations
11 continues to run while a federal habeas petition is pending. *Duncan*, 533 U.S. at 181-82.

12 **iii) Third Option: Formally Abandon Unexhausted Claims**

13 Petitioner may formally abandon his unexhausted claims and proceed with his exhausted
14 ones. *See Rose*, 455 U.S. at 510, 520-21 (stating that a petitioner who files a mixed petition may
15 “resubmit[] the habeas petition to present only exhausted claims”). If Petitioner chooses this
16 third option, he must file a pleading with this Court no later than **December 15, 2010**.

17 Petitioner is cautioned that once he abandons his unexhausted claims, he may lose the
18 ability to ever raise them in federal court. *See Slack v. McDaniel*, 529 U.S. 473, 488 (2000)

21 ² 28 U.S.C. § 2244 (d) provides:

22 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in
23 custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

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

26 (B) the date on which the impediment to filing an application created by State action in violation
27 of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by
28 such State action;

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

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

(2) The time during which a properly filed application for State post-conviction or other collateral review
with respect to the pertinent judgement or claim is pending shall not be counted toward any period of
limitation under this subsection.

1 (stating that a court’s ruling on the merits of claims presented in a first § 2254 petition renders
2 any later petition successive); *see also* 28 U.S.C. § 2244 (a)-(b).³

3 **iv) Fourth Option: File a Motion to Stay the Federal Proceedings**

4 Petitioner may file a motion to stay this federal proceeding while he returns to state court
5 to exhaust his unexhausted claims. There are two methods available to Petitioner, the “stay and
6 abeyance” procedure and the “withdrawal and abeyance” procedure.

7 If Petitioner wishes to use the “stay and abeyance” procedure he should ask the Court to
8 stay his mixed petition while he returns to state court to exhaust. Under this procedure he must
9 demonstrate there are arguably meritorious claims which he wishes to return to state court to
10 exhaust, that he is diligently pursuing his state court remedies with respect to those claims, and
11 that good cause exists for his failure to timely exhaust his state court remedies. *Rhines v.*
12 *Webber*, 544 U.S. 269, 277-78 (2005).

13 If Petitioner wishes to use the “withdrawal and abeyance” procedure, he must voluntarily
14 withdraw his unexhausted claim(s), ask the Court to stay the proceedings and hold the
15 fully-exhausted petition in abeyance while he returns to state court to exhaust, and then seek
16 permission to amend his petition to include the newly exhausted claim(s) after exhaustion is
17 complete. *King v. Ryan*, 564 F.3d 1133, 1141-42 (9th Cir. 2009). Although under this
18 procedure Petitioner is not required to demonstrate good cause for his failure to timely exhaust,
19 the newly exhausted claim(s) must be either timely under the statute of limitations or “relate
20 back” to the claim(s) in the fully-exhausted petition, that is, they must share a “common core of
21 operative facts” with the previously exhausted claim(s). *Id.* at 1142-43, quoting *Mayle v. Felix*,
22 545 U.S. 644. 659 (2005).

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25 ³ 28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive habeas corpus application under
§ 2254 shall be dismissed unless:

26 (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases
on collateral review by the Supreme Court, that was previously unavailable; or

27 (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise
of due diligence; and

28 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be
sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable
factfinder would have found the applicant guilty of the underlying offense.

1 If Petitioner chooses this fourth option, he must file a pleading with this Court no later
2 than **December 15, 2010**.

3 **CONCLUSION**

4 For all the foregoing reasons , the Court **DENIES** the application to proceed in forma
5 pauperis, **DISMISSES** this case without prejudice and with leave to amend and notifies
6 Petitioner that he has filed a petition that contains both exhausted and unexhausted claims. In
7 order to proceed with this case, Petitioner must, no later than **December 15, 2010**: (1) pay the
8 filing fee or provide adequate proof of his inability to pay; (2) file a First Amended Petition that
9 cures the pleading deficiencies outlined in this Order; **AND/OR** (3) choose one of the options
10 outlined above. If Petitioner fails to respond to this Order, the case will remained dismissed
11 without prejudice.⁴ *See Rose, 455 U.S. at 522. For Petitioner's convenience, the Clerk of Court*
12 *shall attach to this Order a blank in forma pauperis application and a blank First Amended*
13 *Petition form.*

14 **IT IS SO ORDERED.**

15 DATED: November 2, 2010

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17 **WILLIAM Q. HAYES**
18 United States District Judge

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⁴ Although the dismissal is “without prejudice,” Petitioner is again cautioned that any later federal petition may be barred by the statute of limitations. *See* 28 U.S.C. § 2244(d)(1)-(2); *see also* footnote two of this Order.