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

MARVIN GOLDSTON, JR.,

Petitioner,

v.

NEW FOLSOM STATE PRISON,

Respondent.

Civil 11-2190 LAB (CAB)
No.

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

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

REQUEST TO PROCEED IN FORMA PAUPERIS

Petitioner has not paid the \$5.00 filing fee and has filed a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). 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 in the institution. Rule 3(a)(2), 28 U.S.C. foll.

1 § 2254; Local Rule 3.2. Petitioner has failed to provide the Court with the required Prison
2 Certificate.

3 **FAILURE TO NAME PROPER RESPONDENT**

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

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

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

24 Here, Petitioner has incorrectly named “New Folsom State Prison,” as Respondent. In
25 order for this Court to entertain the Petition filed in this action, Petitioner must name the warden
26 in charge of the state correctional facility in which Petitioner is presently confined or the
27 Director of the California Department of Corrections. Brittingham v. United States, 982 F.2d
28 378, 379 (9th Cir. 1992) (per curiam).

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

2 Further, habeas petitioners who wish to challenge either their state court conviction or the
3 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
4 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial
5 remedies, a California state prisoner must present the California Supreme Court with a fair
6 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28
7 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court
8 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
9 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
10 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
11 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
12 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
13 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
14 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
15 in federal court, but in state court.” Id. at 366 (emphasis added).

16 It is unclear whether Petitioner has raised his claims in the California Supreme Court.
17 Petitioner indicates he did not seek review in the California Supreme Court. (See Pet. at 4-5.)
18 However, he has attached an order denying a petition for writ of habeas corpus from the
19 California Supreme Court. (Pet. at 3.) If Petitioner has raised his claims in the California
20 Supreme Court he must so specify. “The burden of proving that a claim has been exhausted lies
21 with the petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett,
22 134 F.3d 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997);
23 Oyler v. Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir.
24 1994).

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

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

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

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

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

10 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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

18 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
19 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
20 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
21 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
22 habeas relief because he has not alleged exhaustion of state court remedies.

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.

27 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
28 federal habeas corpus claims:

1 The Supreme Court, a Justice thereof, a circuit judge, or a district
2 court shall entertain an application for a writ of habeas corpus in
3 behalf of a person in custody pursuant to the judgment of a State
4 court only on the ground that he is in custody in violation of the
5 Constitution or laws or treaties of the United States.

6 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.
7 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800
8 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
9 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
10 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
11 United States.” See 28 U.S.C. § 2254(a).

12 Here, Petitioner claims that (1) he was released from Charter Hospital after the hospital
13 took him off his medications for 40 days and a week later he committed a violent felony; (2)
14 Randall Toreez visited him in jail and gave him social security checks which he believes were
15 fraudulently obtained; (3) he believes the medication study in which he participated was a fraud
16 perpetrated by the Food and Drug Administration. (Pet. at 6-12.) In no way does Petitioner
17 claim he is “in custody in violation of the Constitution or laws or treaties of the United States.”
18 28 U.S.C. § 2254.

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CONCLUSION AND ORDER

Accordingly, the Court **DENIES** the request to proceed in forma pauperis, and **DISMISSES** the case without prejudice for Petitioner's failure to provide adequate proof of his inability to pay the filing fee and for his failure to allege exhaustion of state judicial remedies, name a proper respondent, and state a cognizable federal claim. To have the case reopened, Petitioner must, no later than November 29, 2011, provide the Court with: (1) a copy of this Order together with the \$5.00 filing fee; or (2) a copy of this Order together with adequate proof that Petitioner cannot pay the \$5.00 filing fee AND a First Amended Petition which cures the pleading deficiencies noted above. *The Clerk of Court is directed to send Petitioner a blank Application to Proceed In Forma Pauperis, and a blank First Amended Petition.*

IT IS SO ORDERED.

DATED: September 27, 2011


HONORABLE LARRY ALAN BURNS
United States District Judge