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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: _____

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

11	RICHARD EARL GEORGE,	
12		Petitioner,
13	v.	
14	PEOPLE OF THE STATE OF	
15	CALIFORNIA,	
16		Respondent.

Case No.: 16-2578 BEN (PCL)

ORDER: (1) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS; and (2) 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 together with a motion to proceed in forma pauperis.

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner has \$0.00 on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the above-referenced action without being required to prepay fees or costs and without being required to post security. The Clerk of the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the filing fee.

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1 **FAILURE TO NAME PROPER RESPONDENT**

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

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

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

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

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

2 Further, habeas petitioners who wish to challenge either their state court conviction
3 or the length of their confinement in state prison, must first exhaust state judicial
4 remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).
5 Ordinarily, to satisfy the exhaustion requirement, a petitioner must “‘fairly present[]’ his
6 federal claim to the highest state court with jurisdiction to consider it, or . . .
7 demonstrate[] that no state remedy remains available.” *Johnson v. Zenon*, 88 F.3d 828,
8 829 (9th Cir. 1996) (citations omitted). Moreover, to properly exhaust state court
9 remedies a petitioner must allege, in state court, how one or more of his or her federal
10 rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that an
11 evidentiary ruling at a state court trial denied him [or her] the due process of law
12 guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal
13 court, but in state court.” *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)(emphasis
14 added).

15 Nowhere on the Petition does Petitioner allege that he raised his claims in the
16 California Supreme Court. In fact, he specifically indicates he did not seek review in the
17 California Supreme Court. (*See* Pet. at 6.) If Petitioner has raised his claims in the
18 California Supreme Court he must so specify.

19 Further, the Court cautions Petitioner that under the Antiterrorism and Effective
20 Death Penalty Act of 1996 (AEDPA) a one-year period of limitation applies to a petition
21 for a writ of habeas corpus by a person in custody pursuant to the judgment of a State
22 court. The limitation period runs from the latest of:

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

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

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

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

8 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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

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

23 CONCLUSION

24 For the foregoing reasons, the Court **DISMISSES** the Petition without prejudice and
25 with leave to amend. To have this case reopened, Petitioner must, **no later than December**
26 **30, 2016**, file a First Amended Petition that cures the pleading deficiencies outlined in this

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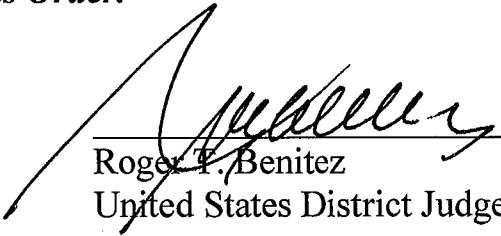
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1 Order. *The Clerk of Court is directed to mail Petitioner a blank First Amended Petition*
2 *form together with a copy of this Order.*

3 **IT IS SO ORDERED.**

4 DATED: November 15, 2016



Roger F. Benitez
United States District Judge

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