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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 RYAN CHILCOTE,

12 Petitioner,

13 v.

14 UNKNOWN,

15 Respondent.
16
17

Case No.: 17cv0061 GPC (PCL)

**ORDER: (1) DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND; and (2)
NOTIFYING PETITIONER OF
OPTIONS TO CURE FAILURE TO
EXHAUST STATE COURT
REMEDIES**

18 Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas
19 corpus pursuant to 28 U.S.C. § 2254.

20 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

21 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in
22 forma pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00
23 filing fee or qualified to proceed in forma pauperis. *See* Rule 3(a), 28 U.S.C. foll. § 2254.

24 **FAILURE TO NAME A PROPER RESPONDENT**

25 Review of the Petition reveals that Petitioner has failed to name a proper
26 respondent. On federal habeas, a state prisoner must name the state officer having
27 custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir.
28

1 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction
2 when a habeas petition fails to name a proper respondent. *See id.*

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

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

19 Here, Petitioner has not named a Respondent. In order for this Court to entertain
20 the Petition filed in this action, Petitioner must name the warden in charge of the state
21 correctional facility in which Petitioner is presently confined or the Secretary of the
22 California Department of Corrections and Rehabilitation. *Brittingham v. United States*,
23 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

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

25 Petitioner is required to demonstrate exhaustion of his state judicial remedies. *See*
26 *Rose v. Lundy*, 455 U.S. 509, 522 (1982). Petitioner has not alleged exhaustion as to
27 claims two through four. (*See* Pet. at 5.)

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1 The exhaustion requirement is satisfied by providing the state courts with a “fair
2 opportunity” to rule on Petitioner’s constitutional claims. *Anderson v. Harless*, 459 U.S.
3 4, 6 (1982). In most instances, a claim is exhausted once it is presented to a state’s
4 highest court, either on direct appeal or through state collateral proceedings. *See*
5 *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002). The constitutional claim raised
6 in the federal proceedings must be the same as that raised in the state proceedings. *See*
7 *id.* Here, Petitioner’s claims two through four appear to be unexhausted.

8 **PETITIONER’S OPTIONS**

9 As discussed above, the Petition is dismissed because Petitioner has failed to
10 satisfy the filing fee requirement and has failed to name a proper Respondent. Once
11 Petitioner cures those deficiencies, in order to prevent the Petition from remaining
12 dismissed, Petitioner must choose one of the following options.

13 i) First Option: Demonstrate Exhaustion

14 If Petitioner may file further papers with this Court to demonstrate that he has in
15 fact exhausted the claims the Court has determined are likely unexhausted. If Petitioner
16 chooses this option, his papers are due **no later than March 20, 2017**. Respondent may
17 file a reply by **April 19, 2017**.

18 ii) Second Option: Voluntarily Dismiss the Petition

19 Petitioner may move to voluntarily dismiss his entire federal petition and return to
20 state court to exhaust his unexhausted claims. Petitioner may then file a new federal
21 petition containing only exhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 510, 520-21
22 (stating that a petitioner who files a mixed petition may dismiss his petition to “return[] to
23 state court to exhaust his claims”). If Petitioner chooses this second option, he must file a
24 pleading with this Court **no later than March 20, 2017**. Respondent may file a reply by
25 **April 19, 2017**.

26 Petitioner is cautioned that any new federal petition must be filed before expiration
27 of the one-year statute of limitations. Ordinarily, a petitioner has one year from when his
28 conviction became final to file his federal petition, unless he can show that statutory or

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

13 iii) Third Option: Formally Abandon Unexhausted Claim(s)

14 Petitioner may formally abandon his unexhausted claims and proceed with his
15 exhausted ones. *See Rose*, 455 U.S. at 510, 520-21 (stating that a petitioner who files a
16 mixed petition may “resubmit[] the habeas petition to present only exhausted claims”). If
17 Petitioner chooses this third option, he must file a pleading with this Court **no later than**
18 **March 20, 2017**. Respondent may file a reply by **April 19, 2017**.

19 Petitioner is cautioned that once he abandons his unexhausted claim(s), he may
20 lose the ability to ever raise it/them in federal court. *See Slack v. McDaniel*, 529 U.S.
21 473, 488 (2000) (stating that a court’s ruling on the merits of claims presented in a first
22 § 2254 petition renders any later petition successive); *see also* 28 U.S.C. § 2244 (a)-(b).

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

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

27 If Petitioner wishes to use the “stay and abeyance” procedure he should ask the
28 Court to stay his mixed petition while he returns to state court to exhaust. Under this

1 procedure he must demonstrate there are arguably meritorious claims which he wishes to
2 return to state court to exhaust, that he is diligently pursuing his state court remedies with
3 respect to those claims, and that good cause exists for his failure to timely exhaust his
4 state court remedies. *Rhines v. Webber*, 544 U.S. 269, 277-78 (2005).

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

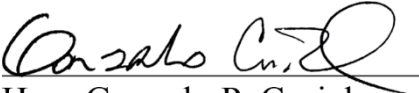
15 If Petitioner chooses this fourth option, he must file a pleading with this Court **no**
16 **later than March 20, 2017**. Respondent may file a reply by **April 19, 2017**.

17 CONCLUSION

18 Accordingly, the Court **DISMISSES** this case without prejudice and with leave to
19 amend. If Petitioner wishes to proceed with this case he must, **no later than March 20,**
20 **2017**: (1) pay the \$5.00 filing fee or submit adequate proof of his inability to pay the fee;
21 (2) file a First Amended Petition that names a proper respondent; and (3) choose one of
22 the options listed above. *The Clerk of Court is directed to mail Petitioner a blank*
23 *motion to proceed in forma pauperis form and a blank First Amended Petition form*
24 *together with a copy of this Order.*

25 **IT IS SO ORDERED.**

26 Dated: January 12, 2017

27 
28 Hon. Gonzalo P. Curiel
United States District Judge