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

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11 MIKE E. MITCHELL,

12 Petitioner,

13 v.

14 STATE OF CALIFORNIA,

15 Respondent.

Case No.: 17cv1204 GPC (BLM)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

16  
17 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of  
18 Habeas Corpus pursuant to 28 U.S.C. § 2254.

19 **FAILURE TO SATISFY THE FILING FEE REQUIREMENT**

20 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in  
21 forma pauperis. Because this Court cannot proceed until Petitioner has either paid the  
22 \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the  
23 case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to  
24 proceed with this case, he must submit, **no later than September 11, 2017**, a copy of this  
25 Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

26 **FAILURE TO NAME A PROPER RESPONDENT**

27 Additionally, review of the Petition reveals that Petitioner has failed to name a  
28 proper respondent. On federal habeas, a state prisoner must name the state officer having

1 custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir.  
2 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction  
3 when a habeas petition fails to name a proper respondent. See *id.*

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

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

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

#### 25 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

26 Further, habeas petitioners who wish to challenge either their state court conviction or the  
27 length of their confinement in state prison, must first exhaust state judicial remedies. 28  
28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust

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

13 Nowhere on the Petition does Petitioner allege that he raised his claims in the  
14 California Supreme Court. If Petitioner has raised his claims in the California Supreme  
15 Court he must so specify. “The burden of proving that a claim has been exhausted lies  
16 with the petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v.  
17 Pruett, 134 F.3d 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d  
18 Cir. 1997); Oylar v. Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d  
19 155, 160 (6th Cir. 1994).

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

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

27 (B) the date on which the impediment to filing an application  
28 created by State action in violation of the Constitution or laws of

1 the United States is removed, if the applicant was prevented from  
2 filing by such State action;

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

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

10 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

11 The statute of limitations does not run while a properly filed state habeas corpus  
12 petition is pending. 28 U.S.C. § 2244(d)(2); see *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th  
13 Cir. 1999). But see *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is  
14 ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for  
15 placement into the record] are in compliance with the applicable laws and rules governing  
16 filings.”). However, absent some other basis for tolling, the statute of limitations does run  
17 while a federal habeas petition is 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  
19 of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits  
20 annexed to it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28  
21 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not  
22 presently entitled to federal habeas relief because he has not alleged exhaustion of state  
23 court remedies.

### 24 CONCLUSION

25 Accordingly, the Court **DISMISSES** the Petition without prejudice due to  
26 Petitioner’s failure satisfy the filing fee requirement, failure to name a proper respondent,  
27 and failure to allege exhaustion of state judicial remedies. To have this case reopened,  
28 Petitioner must (1) either pay the filing fee or provide adequate proof of his inability to  
pay **and** (2) file a First Amended Petition **no later than September 11, 2017** in

1 conformance with this Order. For Petitioner's convenience, the Clerk of Court shall  
2 include with this Order, a blank petition form and a blank In Forma Pauperis Application.

3 **IT IS SO ORDERED.**

4 Dated: July 25, 2017

5   
6 Hon. Gonzalo P. Curiel  
7 United States District Judge

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