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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LUIS SANDOVAL,

12 Petitioner,

13 v.

14 UNKNOWN,

15 Respondent.

Case No.: 17cv1275 GPC (BGS)

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

16 Petitioner, proceeding pro se, has filed a document with this Court entitled “In Pro
17 Per Writ of Habeas Corpus.”

18 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

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

23 **IN CUSTODY REQUIREMENT**

24 Upon review of the document filed in this case, it appears Petitioner is not in the
25 custody of the State of California, nor was he when he filed the Petition because he lists
26 his address as “2461½ J. St., San Diego, CA 92102.” “Subject matter jurisdiction under
27 the federal habeas corpus statute, 28 U.S.C. § 2254(a), is limited to those persons ‘in
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1 custody pursuant to the judgment of a State.” Brock v. Weston, 31 F.3d 887, 889 (9th
2 Cir. 1994); see also 28 U.S.C. § 2241(c)(3). It is a jurisdictional requirement that, at the
3 time a habeas petition is filed, “the habeas petitioner be ‘in custody’ under the conviction
4 or sentence under attack.” Maleng v. Cook, 490 U.S. 488, 490-91 (1989) (citing 28
5 U.S.C. §§ 2241(c)(3) & 2254(a)); see Carafas v. LaVallee, 391 U.S. 234, 238 (1968)).

6 **FAILURE TO STATE A COGNIZABLE CLAIM**

7 In addition, it is not clear what Petitioner’s claims are and whether they are
8 cognizable on federal habeas review. Challenges to the fact or duration of confinement
9 are brought by petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254;
10 challenges to conditions of confinement are brought pursuant to the Civil Rights Act, 42
11 U.S.C. § 1983. See Preiser v. Rodriguez, 411 U.S. 475, 488-500 (1973). When a state
12 prisoner is challenging the very fact or duration of his physical imprisonment, and the
13 relief he seeks is a determination that he is entitled to immediate release or a speedier
14 release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Id. at
15 500. On the other hand, a § 1983 action is a proper remedy for a state prisoner who is
16 making a constitutional challenge to the conditions of his prison life, but not to the fact or
17 length of his custody. Id. at 499; see 28 U.S.C. 2254(a); Heck v. Humphrey, 512 U.S.
18 477, 480-85 (1994).

19 Petitioner’s claims are not comprehensible in their current form. If Petitioner
20 wishes to challenge the conditions of prison life, but not the fact or length of his custody,
21 he must file a civil rights complaint pursuant to 42 U.S.C. § 1983. If he wishes to
22 challenge the validity of a state court conviction or the length of his sentence, 28 U.S.C.
23 § 2254 is the appropriate method to do so.

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

25 Further, habeas petitioners who wish to challenge either their state court conviction
26 or the length of their confinement in state prison, must first exhaust state judicial
27 remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987).
28 Ordinarily, to satisfy the exhaustion requirement, a petitioner must “‘fairly present[]’ his

1 federal claim to the highest state court with jurisdiction to consider it, or . . .
2 demonstrate[] that no state remedy remains available.” Johnson v. Zenon, 88 F.3d 828,
3 829 (9th Cir. 1996) (citations omitted). Moreover, to properly exhaust state court
4 remedies a petitioner must allege, in state court, how one or more of his or her federal
5 rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that an
6 evidentiary ruling at a state court trial denied him [or her] the due process of law
7 guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal
8 court, but in state court.” Duncan v. Henry, 513 U.S. 364, 365-66 (1995).

9 Nowhere on the Petition does Petitioner allege that he raised his claims in the
10 California Supreme Court. If Petitioner has raised his claims in the California Supreme
11 Court he must so specify.

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

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

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

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

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

28 U.S.C.A. § 2244(d)(1)(A)-(D).

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

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

15 **FAILURE TO NAME A PROPER RESPONDENT**

16 Petitioner has also failed to name a proper respondent. On federal habeas, a state
17 prisoner must name the state officer having custody of him as the respondent. Ortiz-
18 Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll.
19 § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a
20 proper respondent. See id.

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

1 name his probation or parole officer ‘and the official in charge of the parole or probation
2 agency, or the state correctional agency, as appropriate.’” Id. (quoting Rule 2, 28 U.S.C.
3 foll. § 2254 advisory committee’s note).

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

12 Here, Petitioner has not named a Respondent. In order for this Court to entertain
13 the Petition filed in this action, Petitioner must name the warden in charge of the state
14 correctional facility in which Petitioner is presently confined, the Director of the
15 California Department of Corrections, or if he is on parole, his parole officer and the
16 official in charge of the parole agency. See Brittingham v. United States, 982 F.2d 378,
17 379 (9th Cir. 1992) (per curiam); Ortiz-Sandoval, 81 F.3d at 894. In California, the
18 Director of the Department of Corrections is the official in charge of the parole agency.
19 See In re Lusero, 4 Cal. App. 4th 572, 576 (1992) (“During the period of parole following
20 incarceration, an inmate continues in the custody of the department.”).

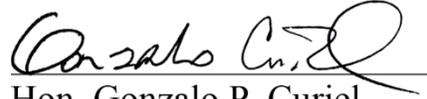
21 CONCLUSION

22 For the foregoing reasons, the Court **DISMISSES** the Petition without prejudice
23 and with leave to amend. To have this case reopened, Petitioner must, **no later than**
24 **August 29, 2017**: (1) pay the \$5.00 filing fee or submit adequate proof of his inability to
25 pay the fee; **AND** (2) file a First Amended Petition that cures the pleading deficiencies
26 outlined in Order. If Petitioner wishes to challenge the conditions of his confinement, he
27 must file a new civil complaint pursuant to 42 U.S.C. § 1983 which will be given a new
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1 case number. *The Clerk of Court is directed to mail Petitioner a blank Prisoner Packet*
2 *together with a copy of this Order.*

3 **IT IS SO ORDERED.**

4 Dated: June 27, 2017

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