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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**

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17 On June 16, 2017, Petitioner, proceeding pro se, filed a document with this Court
18 entitled “In Pro Per Writ of Habeas Corpus” [ECF No. 1]. The Court dismissed the
19 action without prejudice and with leave to amend on June 27, 2017, because Petitioner
20 had failed to satisfy the filing fee requirement, was not in custody, had failed to state a
21 cognizable federal claim or allege exhaustion of his claims, and had failed to name a
22 proper respondent [ECF No. 2]. Petitioner was given until August 29, 2017, to either pay
23 the \$5.00 filing fee or submit adequate proof of his inability to pay the fee, and to submit
24 a First Amended Petition that cured the pleading deficiencies outlined in the Court’s June
25 27, 2017 Order. Id.

26 On July 13, 2017, Petitioner filed a document which the Court construes as a First
27 Amended Petition.

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1 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

2 Petitioner has again failed to either pay the \$5.00 filing fee or move to proceed in
3 forma pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00
4 filing fee or qualified to proceed in forma pauperis. See Rule 3(a), 28 U.S.C. foll.
5 § 2254.

6 **IN CUSTODY REQUIREMENT**

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

16 **FAILURE TO STATE A COGNIZABLE CLAIM**

17 As with Petitioner’s first filing, it is not clear what Petitioner’s claims are and
18 whether they are cognizable on federal habeas review. Challenges to the fact or duration
19 of confinement are brought by petition for a writ of habeas corpus, pursuant to 28 U.S.C.
20 § 2254; challenges to conditions of confinement are brought pursuant to the Civil Rights
21 Act, 42 U.S.C. § 1983. See Preiser v. Rodriguez, 411 U.S. 475, 488-500 (1973). When a
22 state prisoner is challenging the very fact or duration of his physical imprisonment, and
23 the relief he seeks is a determination that he is entitled to immediate release or a speedier
24 release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Id. at
25 500. On the other hand, a § 1983 action is a proper remedy for a state prisoner who is
26 making a constitutional challenge to the conditions of his prison life, but not to the fact or
27 length of his custody. Id. at 499; see 28 U.S.C. § 2254(a); Heck v. Humphrey, 512 U.S.
28 477, 480-85 (1994).

1 Petitioner’s claims are not comprehensible in their current form. If Petitioner
2 wishes to challenge the conditions of prison life, but not the fact or length of his custody,
3 he must file a civil rights complaint pursuant to 42 U.S.C. § 1983. If he wishes to
4 challenge the validity of a state court conviction or the length of his sentence, 28 U.S.C.
5 § 2254 is the appropriate method to do so.

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

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

20 Nowhere on the Petition does Petitioner allege that he raised his claims in the
21 California Supreme Court. If Petitioner has raised his claims in the California Supreme
22 Court he must so specify.

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

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

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

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

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

12 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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

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

27 **FAILURE TO NAME A PROPER RESPONDENT**

28 Petitioner has again failed to name a proper respondent. On federal habeas, a state
prisoner must name the state officer having custody of him as the respondent. Ortiz-
Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll.

1 § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a
2 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). If a “petitioner is on probation or parole, he may
11 name his probation or parole officer ‘and the official in charge of the parole or probation
12 agency, or the state correctional agency, as appropriate.’” Id. (quoting Rule 2, 28 U.S.C.
13 foll. § 2254 advisory committee’s note).

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

22 In order for this Court to entertain the Petition filed in this action, Petitioner must
23 name the warden in charge of the state correctional facility in which Petitioner is
24 presently confined, the Director of the California Department of Corrections, or if he is
25 on parole, his parole officer and the official in charge of the parole agency. See
26 Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam); Ortiz-
27 Sandoval, 81 F.3d at 894. In California, the Director of the Department of Corrections is
28 the official in charge of the parole agency. See In re Lusero, 4 Cal. App. 4th 572, 576

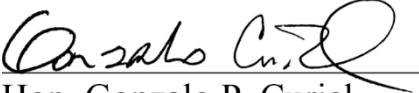
1 (1992) (“During the period of parole following incarceration, an inmate continues in the
2 custody of the department.”).

3 **CONCLUSION**

4 For the foregoing reasons, the Court **DISMISSES** the First Amended Petition
5 without prejudice and with leave to amend. To have this case reopened, Petitioner must,
6 **no later than September 12, 2017**: (1) pay the \$5.00 filing fee or submit adequate proof
7 of his inability to pay the fee; **AND** (2) file a First Amended Petition that cures the
8 pleading deficiencies outlined in Order. If Petitioner wishes to challenge the conditions
9 of his confinement, he must file a new civil complaint pursuant to 42 U.S.C. § 1983
10 which will be given a new case number. *The Clerk of Court is directed to mail*
11 *Petitioner a blank Prisoner Packet together with a copy of this Order. Petitioner’s*
12 **failure to amend and failure to cure the deficiencies may result in dismissal of the**
13 **case with prejudice.**

14 **IT IS SO ORDERED.**

15 Dated: July 17, 2017

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17 Hon. Gonzalo P. Curiel
18 United States District Judge
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