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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: JD

DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID LERMA,
Petitioner,
v.
UNKNOWN, Warden,
Respondent.

Case No. 17cv1925 BEN (RBB)

**ORDER DISMISSING PETITION
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 and paid the requisite filing fee.

FAILURE TO NAME A PROPER RESPONDENT

Review of the Petition reveals that Petitioner has 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. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

The warden is the typical respondent. However, “the rules following section 2254 do not specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254

1 advisory committee's note). If "a petitioner is in custody due to the state action he is
2 challenging, '[t]he named respondent shall be the state officer who has official custody of
3 the petitioner (for example, the warden of the prison).'" *Id.* (quoting Rule 2, 28 U.S.C.
4 foll. § 2254 advisory committee's note).

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

13 Here, Petitioner has failed to name a Respondent. In order for this Court to
14 entertain the Petition filed in this action, Petitioner must name the warden in charge of the
15 state correctional facility in which Petitioner is presently confined or the Secretary of the
16 California Department of Corrections and Rehabilitation. *Brittingham v. United States*,
17 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

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

19 Further, habeas petitioners who wish to challenge either their state court conviction
20 or the length of their confinement in state prison, must first exhaust state judicial
21 remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).
22 To exhaust state judicial remedies, a California state prisoner must present the California
23 Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or
24 her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34.
25 Moreover, to properly exhaust state court remedies a petitioner must allege, in state court,
26 how one or more of his or her federal rights have been violated. The Supreme Court in
27 *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: "If state courts are to be given the
28 opportunity to correct alleged violations of prisoners' federal rights, they must surely be

1 alerted to the fact that the prisoners are asserting claims under the United States
2 Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas petitioner
3 wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due
4 process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not
5 only in federal court, but in state court.” *Id.* at 366 (emphasis added).

6 Nowhere on the Petition does Petitioner allege that he raised his claims in the
7 California Supreme Court. In fact, he specifically indicates he did not seek review in the
8 California Supreme Court. (*See* Pet. at 6-9.) If Petitioner has raised his claims in the
9 California Supreme Court he must so specify. “The burden of proving that a claim has
10 been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.
11 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*,
12 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir.
13 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

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

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

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

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

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1 (D) the date on which the factual predicate of the claim or claims
2 presented could have been discovered through the exercise of
3 due diligence.

4 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

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

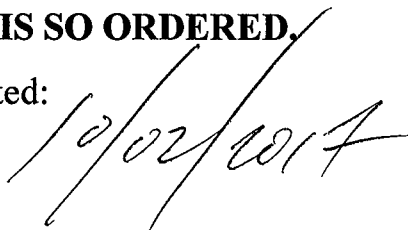
12 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal
13 of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits
14 annexed to it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28
15 U.S.C. foll. § 2254.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

18 CONCLUSION

19 Based on the foregoing, the Court **DISMISSES** this action without prejudice
20 because Petitioner has failed to name a proper respondent and failed to state a cognizable
21 federal claim. To have this case reopened, Petitioner must, **no later December 4, 2017,**
22 file a First Amended Petition that cures the pleading deficiencies set forth above. A
23 blank First Amended Petition is included with this Order for Petitioner’s convenience.

24 **IT IS SO ORDERED.**

25 Dated:

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Hon. Roger T. Benitez
United States District Judge