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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JOSE G. VELAZQUEZ,

12 Petitioner,

13 v.

14 SUPERIOR COURT,

15 Respondent.

Case No.: 17cv2516-AJB (BGS)

**ORDER DISMISSING PETITION
WITHOUT PREJUDICE AND
NOTIFYING PETITIONER OF
OPTIONS TO AVOID FUTURE
DISMISSAL**

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17 On November 17, 2017, Petitioner, a state prisoner proceeding pro se, filed a Petition
18 for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the District Court for the
19 Central District of California. (ECF No. 1.) On December 18, 2017, the Petition was
20 transferred to this Court because Petitioner is challenging a conviction from the San Diego
21 County Superior Court. (ECF No. 4.) Petitioner filed a Motion to Proceed In Forma
22 Pauperis on January 8, 2018.

23 **MOTION TO PROCEED IN FORMA PAUPERIS**

24 According to Petitioner's prison trust account statement, Petitioner has no funds on
25 account at the California correctional institution in which he is presently confined.
26 Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner's
27 application to proceed in forma pauperis, and allows Petitioner to prosecute the above-
28 referenced action as a poor person without being required to prepay fees or costs and

1 without being required to post security. The Clerk of the Court will file the Petition for
2 Writ of Habeas Corpus without prepayment of the filing fee.

3 **FAILURE TO NAME PROPER RESPONDENT**

4 Review of the Petition reveals that Petitioner has failed to name a proper respondent.
5 On federal habeas, a state prisoner must name the state officer having custody of him as
6 the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule
7 2(a), 28 U.S.C. foll. § 2254). “Typically, that person is the warden of the facility in which
8 the petitioner is incarcerated.” *Id.* Federal courts lack personal jurisdiction when a habeas
9 petition fails to name a proper respondent. *See id.*

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

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

26 Here, Petitioner has incorrectly named “Superior Court” as Respondent. In order
27 for this Court to entertain the Petition filed in this action, Petitioner must name the warden
28 in charge of the state correctional facility in which Petitioner is presently confined or the

1 Director of the California Department of Corrections and Rehabilitation. *Brittingham v.*
2 *United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

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

4 Further, habeas petitioners who wish to challenge either their state court conviction
5 or the length of their confinement in state prison, must first exhaust state judicial remedies.
6 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust
7 state judicial remedies, a California state prisoner must present the California Supreme
8 Court with a fair opportunity to rule on the merits of every issue raised in his or her federal
9 habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to
10 properly exhaust state court remedies a petitioner must allege, in state court, how one or
11 more of his or her federal rights have been violated. The Supreme Court in *Duncan v.*
12 *Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to
13 correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact
14 that the prisoners are asserting claims under the United States Constitution.” *Id.* at 365-66
15 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an
16 evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed
17 by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in
18 state court.” *Id.* at 366 (emphasis added).

19 Nowhere on the Petition does Petitioner allege that he raised his claims in the
20 California Supreme Court. In fact, he specifically indicates he did not seek review in the
21 California Supreme Court. (*See* Pet. at 2-3.) If Petitioner has raised his claims in the
22 California Supreme Court he must so specify. “The burden of proving that a claim has
23 been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.
24 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134
25 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust*
26 *v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

27 Further, the Court cautions Petitioner that under the Antiterrorism and Effective
28 Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a

1 petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a
2 State court. The limitation period shall run from the latest of:

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

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

10 (C) the date on which the constitutional right asserted was
11 initially recognized by the Supreme Court, if the right has been
12 newly recognized by the Supreme Court and made retroactively
13 applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or claims
15 presented could have been discovered through the exercise of
16 due diligence.

17 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

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

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

1 **CONCLUSION AND ORDER**

2 Based on the foregoing, the Court **GRANTS** Petitioner’s request to proceed in forma
3 pauperis and **DISMISSES** this action without prejudice because Petitioner has failed to
4 name a proper respondent, and failed to allege exhaustion of state judicial remedies. To
5 have this case reopened, Petitioner must submit, **no later than March 12, 2018**, file a First
6 Amended Petition which cures the pleading deficiencies outlined above. The Clerk of
7 Court shall send a a blank Southern District of California amended petition form to
8 Petitioner along with a copy of this Order.

9 **IT IS SO ORDERED.**

10 Dated: January 11, 2018

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12 Hon. Anthony J. Battaglia
13 United States District Judge
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