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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JOSHUA DAVIS BLAND,  
12 Petitioner,  
13 v.  
14 ATTORNEY GENERAL OF THE  
15 STATE OF CALIFORNIA,  
16 Respondent.

Case No.: 17cv2570-GPC (JLB)

**ORDER GRANTING APPLICATION  
TO PROCEED IN FORMA PAUPERIS  
AND DISMISSING THE PETITION  
WITHOUT PREJUDICE**

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18 Petitioner, a state prisoner proceeding pro se, has submitted a Petition for a Writ of  
19 Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma  
20 pauperis. Although the Court grants Petitioner leave to proceed in forma pauperis, the  
21 Petition is subject to dismissal without prejudice due to Petitioner's failure to name a proper  
22 Respondent, failure to state a claim cognizable on federal habeas, and failure to allege  
23 exhaustion of state court remedies.

24 **MOTION TO PROCEED IN FORMA PAUPERIS**

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

1 fees or costs and without being required to post security. The Clerk of the Court shall file  
2 the Petition for 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 “Attorney General of the State of California,”  
27 as Respondent. The Attorney General of the State of California is not a proper respondent  
28 in this action. Rule 2 of the Rules following § 2254 provides that the state officer having

1 custody of the petitioner shall be named as respondent. Rule 2(a), 28 U.S.C. foll. § 2254.  
2 However, “[i]f the petitioner is not yet in custody – but may be subject to future custody –  
3 under the state-court judgment being contested, the petition must name as respondents both  
4 the officer who has current custody and the attorney general of the state where the judgment  
5 was entered.” Rule 2 (b), 28 U.S.C. foll. § 2254. Here, there is no basis for Petitioner to  
6 have named the Attorney General as a Respondent in this action. In order for this Court to  
7 entertain the Petition, Petitioner must name the warden in charge of the state correctional  
8 facility in which he is presently confined or the Director of the California Department of  
9 Corrections and Rehabilitation. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.  
10 1992) (per curiam).

11 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

12 Additionally, Petitioner has failed to allege that his current confinement violates the  
13 Constitution of the United States. Title 28, United States Code, § 2254(a), sets forth the  
14 following scope of review for federal habeas corpus claims:

15 The Supreme Court, a Justice thereof, a circuit judge, or a district court  
16 shall entertain an application for a writ of habeas corpus in behalf of a person  
17 in custody pursuant to the judgment of a State court only on the ground that  
18 he is in custody in violation of the Constitution or laws or treaties of the United  
States.

19 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.  
20 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda,  
21 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas  
22 corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant  
23 to a “judgment of a State court,” and that he is in custody in “violation of the Constitution  
24 or laws or treaties of the United States.” See 28 U.S.C. § 2254(a).

25 Here, Petitioner alleges the state court failed to prove “its jurisdiction over  
26 Petitioner’s being and/or property.” (Pet. at 6.) In no way does Petitioner claim he is “in  
27 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.  
28 § 2254.

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

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

18           Petitioner does not allege that he raised his claim in the California Supreme Court.  
19 In fact, he indicates that he has not presented his claim to that court. (See Pet. at 4, 6.) If  
20 Petitioner has raised his claim in the California Supreme Court he must so specify. The  
21 burden of proving that a claim has been exhausted lies with the petitioner. Cartwright v.  
22 Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

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

- 27                   (A) the date on which the judgment became final by the conclusion of  
28                   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 States is  
3 removed, if the applicant was prevented from filing by such State action;

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

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

10 28 U.S.C.A. § 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 attached  
20 exhibits that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C.  
21 foll. § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled  
22 to federal habeas relief because he has not named a proper Respondent, has not stated a  
23 cognizable federal claim and has not alleged exhaustion of state court remedies.


### 24 CONCLUSION AND ORDER

25 Based on the foregoing, the Court **DISMISSES** this action without prejudice  
26 because Petitioner has failed to name a proper Respondent, failed to state a cognizable  
27 federal claim and failed to allege exhaustion of state court remedies. To have this case  
28 reopened, Petitioner must, **no later than February 28, 2018**, file a First Amended Petition  
which cures the defects of pleading identified in this Order. The Clerk of Court shall send

1 a blank Southern District of California amended petition form to Petitioner along with a  
2 copy of this Order.

3 **IT IS SO ORDERED.**

4 Dated: January 2, 2018

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

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