

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

TERRY RAY HAWES,	
	Petitioner,
v.	
UNKNOWN,	
	Respondent.

Case No. 20cv2170 MMA (LL)

**ORDER DENYING MOTION TO  
PROCEED IN FORMA PAUPERIS;**

[Doc. No. 2]

**DISMISSING CASE WITHOUT  
PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a conviction from Marin County California Superior Court. *See* Doc. No. 1. Petitioner also moves to proceed in forma pauperis. *See* Doc. No. 2. For the reasons discussed below, the Court **DENIES** the motion to proceed in forma pauperis and **DISMISSES** the Petition without prejudice.

**MOTION TO PROCEED IN FORMA PAUPERIS**

Upon review, the Court determines that it must deny Petitioner’s motion to proceed because Petitioner has not provided the Court with enough information to determine Petitioner’s financial status.

1 A request to proceed in forma pauperis made by a state prisoner must include “a  
2 certificate from the warden or other appropriate officer of the place of confinement  
3 showing the amount of money or securities that the petitioner has in any account in the  
4 institution.” Rule 3(a)(2), 28 U.S.C. foll. § 2254; *see also* CivLR 3.2. Petitioner has  
5 failed to provide the Court with the required Prison Certificate. Because this Court  
6 cannot proceed until Petitioner has either paid the filing fee or qualified to proceed in  
7 forma pauperis, the Petition is subject to dismissal without prejudice. *See* Rule 3(a), 28  
8 U.S.C. foll. § 2254.

### 9 JURISDICTION

10 A petition for writ of habeas corpus may be filed in the United States District Court  
11 of either the judicial district in which the petitioner is presently confined or the judicial  
12 district in which he was convicted and sentenced. *See* 28 U.S.C. § 2241(d); *Braden v.*  
13 *30th Judicial Circuit Court*, 410 U.S. 484, 497 (1973). The Petition in the instant matter  
14 attacks a judgment of conviction that was entered in Marin County Superior Court, which  
15 is within the jurisdictional boundaries of the United States District Court for the Northern  
16 District of California. 28 U.S.C. § 84(a). Petitioner is presently confined at Richard J.  
17 Donovan State Prison in San Diego, California, located in San Diego County, which is  
18 within the jurisdictional boundaries of the United States District Court for the Southern  
19 District of California. 28 U.S.C. § 84(d). Thus, jurisdiction exists in both the Northern  
20 and Southern Districts.

21 When a habeas petitioner is challenging a judgment of conviction, the district court  
22 of the district in which the judgment of conviction was entered is a more convenient  
23 forum because of the accessibility of evidence, records and witnesses. Thus, it is  
24 generally the practice of the district courts in California to transfer habeas actions  
25 questioning judgments of conviction to the district in which the judgment was entered.  
26 Any and all records, witnesses and evidence necessary for the resolution of Petitioner’s  
27 contentions are available in Marin County. *See Braden*, 410 U.S. at 497, 499 n.15  
28 (stating that a court can, of course, transfer habeas cases to the district of conviction

1 which is ordinarily a more convenient forum); *Laue v. Nelson*, 279 F. Supp. 265, 266  
2 (N.D. Cal. 1968).

3       However, in this instance, it does not appear the interests of justice counsel in  
4 favor of transferring this case because Petitioner has not stated a federal habeas claim.  
5 Petitioner indicates “I’m not getting the help I should be anywhere else so I thought let  
6 me try San Diego U.S. District Court,” and additionally indicates “if you read writ you  
7 might understand why I came to this Southern U.S. district for ‘relief.’” Doc. No. 1 at 1.  
8 Because the Petition is in any event subject to dismissal in view of the numerous  
9 deficiencies discussed below, the furtherance of justice does not favor transfer.

#### 10                                   **FAILURE TO NAME A PROPER RESPONDENT**

11       Upon review of the Petition, Petitioner has failed to name a proper respondent. On  
12 federal habeas, a state prisoner must name the state officer having custody of him as the  
13 respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a),  
14 28 U.S.C. foll. § 2254). “Typically, that person is the warden of the facility in which the  
15 petitioner is incarcerated.” *Id.* Federal courts lack personal jurisdiction when a habeas  
16 petition fails to name a proper respondent. *See id.*

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

25       A longstanding rule in the Ninth Circuit holds “that a petitioner may not seek [a  
26 writ of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is  
27 in custody. The actual person who is [the] custodian [of the petitioner] must be the  
28 respondent.” *Ashley v. Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement

1 exists because a writ of habeas corpus acts upon the custodian of the state prisoner, the  
2 person who will produce “the body” if directed to do so by the Court. “Both the warden  
3 of a California prison and the Director of Corrections for California have the power to  
4 produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d at 895.

5 Here, Petitioner has not named a Respondent. For this Court to entertain the  
6 Petition filed in this action, Petitioner must name the warden in charge of the state  
7 correctional facility in which Petitioner is presently confined or the Director of the  
8 California Department of Corrections and Rehabilitation. *Brittingham v. United States*,  
9 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

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

11 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases,  
12 Petitioner has failed to allege that his state court conviction or sentence violates the  
13 Constitution of the United States.

14 Title 28, United States Code, § 2254(a), sets forth the following scope of review  
15 for federal habeas corpus claims:

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

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

26 With respect to the enumerated claims for relief, Petitioner simply indicates  
27 “innocent” in Grounds One, Two, Three and Four, without any allegations of a federal  
28 constitutional violation. Doc. No. 1 at 11-14. However, the Supreme Court has stated “a

1 claim of ‘actual innocence’ is not itself a constitutional claim, but instead a gateway  
2 through which a habeas petitioner must pass to have his otherwise barred constitutional  
3 claim considered on the merits.” *Herrera v. Collins*, 506 U.S. 390, 404 (1993).  
4 Petitioner also appears to claim he is being “involuntarily medicated with mind altering  
5 psychiatric drugs and having my blood involuntarily taken.” Doc. No. 1 at 2. Thus, in no  
6 way does Petitioner claim he is “in custody in violation of the Constitution or laws or  
7 treaties of the United States.” 28 U.S.C. § 2254. Further, the Court notes that Petitioner  
8 cannot simply amend his Petition to state a federal habeas claim and then refile the  
9 amended petition in this case. He must exhaust state judicial remedies before bringing  
10 his claims in a federal habeas action.

#### 11 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

12 Habeas petitioners who wish to challenge either their state court conviction or the  
13 length of their confinement in state prison, must first exhaust state judicial remedies. 28  
14 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust  
15 state judicial remedies, a California state prisoner must present the California Supreme  
16 Court with a fair opportunity to rule on the merits of every issue raised in his or her  
17 federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34.  
18 Ordinarily, to satisfy the exhaustion requirement, a petitioner “‘must fairly present[]’ his  
19 federal claim to the highest state court with jurisdiction to consider it, or . . .  
20 demonstrate[] that no state remedy remains available. *Johnson v. Zenon*, 88 F.3d 828,  
21 829 (9th Cir. 1996) (citations omitted). Moreover, to properly exhaust state court  
22 remedies a petitioner must allege, in state court, how one or more of his or her federal  
23 rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that an  
24 evidentiary ruling at a state court trial denied him [or her] the due process of law  
25 guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal  
26 court, but in state court.” *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (emphasis  
27 added).

28

1 Petitioner does not allege that he raised his claims in the California Supreme Court.  
2 *See e.g.* Doc. No. 1 at 11-14. If Petitioner has raised his claims in the California Supreme  
3 Court, he must so specify.

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

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

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

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

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

18 28 U.S.C. § 2244(d)(1)(A)-(D).

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

27 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal  
28 of a habeas petition “[i]f it plainly appears from the face of the petition and any attached  
exhibits that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28

1 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not  
2 presently entitled to federal habeas relief because he has not alleged exhaustion of state  
3 court remedies.

4 **SECTION 1983**

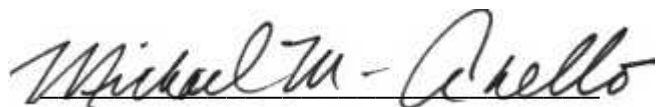
5 As noted above, Petitioner also appears to claim he is being “involuntarily  
6 medicated with mind altering psychiatric drugs and having my blood involuntarily  
7 taken.” Doc. No. 1 at 2. To the extent Petitioner seeks to challenge the conditions of his  
8 confinement, he must do so, if at all, in a civil rights complaint filed pursuant to 42  
9 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (“[A] § 1983 action  
10 is a proper remedy for a state prisoner who is making a constitutional challenge to the  
11 conditions of his prison life, but not to the fact or length of his custody.”); *see also*  
12 *Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016) (en banc) (“[W]e hold that if a state  
13 prisoner’s claim does not lie at ‘the core of habeas corpus,’ it may not be brought in  
14 habeas corpus but must be brought, ‘if at all,’ under § 1983.”), quoting *Preiser*, 411 U.S.  
15 at 487, and *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011). If Petitioner wishes to  
16 pursue claims concerning the conditions of his confinement, he must file a new civil  
17 rights action pursuant to 42 U.S.C. § 1983 which will be given a new civil case number.

18 **CONCLUSION**

19 For the reasons discussed above, the Court **DENIES** Petitioner’s motion to  
20 proceed in forma pauperis and **DISMISSES** this case without prejudice to Petitioner  
21 seeking habeas relief in the Northern District of California with respect to his Marin  
22 County Superior Court judgment of conviction. The Court **DIRECTS** the Clerk to enter  
23 judgment accordingly and close the case.

24 **IT IS SO ORDERED.**

25 DATE: November 16, 2020



26 HON. MICHAEL M. ANELLO  
27 United States District Judge  
28