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6	UNITED STATES DISTRICT COURT
7	EASTERN DISTRICT OF CALIFORNIA
8	FERNANDO SERNA,) 1:10-CV-01252 GSA HC
9) Petitioner,
10	v.) ORDER GRANTING PETITIONER LEAVE TO FILE A MOTION TO AMEND THE
11) PETITION AND NAME A PROPER BOARD OF PRISON HEARINGS, et al.,) RESPONDENT
12	Respondents.
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14	Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
15	pursuant to 28 U.S.C. § 2254.
16	DISCUSSION
17	Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review
18	of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears
19	from the petition that the petitioner is not entitled to relief." Rule 4 of the Rules Governing
20	2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas
21	corpus should not be dismissed without leave to amend unless it appears that no tenable claim for
22	relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).
23	In this case, Petitioner names the Board of Prison Hearing as Respondent. A petitioner
24	seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer having custody of
25	him as the respondent to the petition. Rule 2 (a) of the Rules Governing § 2254 Cases; Ortiz-
26	Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme Court, 21 F.3d
27	359, 360 (9th Cir. 1994). Normally, the person having custody of an incarcerated petitioner is the
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warden of the prison in which the petitioner is incarcerated because the warden has "day-to-day
control over" the petitioner. <u>Brittingham v. United States</u>, 982 F.2d 378, 379 (9th Cir. 1992); <u>see</u>
<u>also, Stanley v. California Supreme Court</u>, 21 F.3d 359, 360 (9th Cir. 1994). However, the chief
officer in charge of state penal institutions is also appropriate. <u>Ortiz</u>, 81 F.3d at 894; <u>Stanley</u>, 21
F.3d at 360. Where a petitioner is on probation or parole, the proper respondent is his probation or
parole officer and the official in charge of the parole or probation agency or state correctional
agency. <u>Id</u>.

8 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition for 9 lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326 10 (9th Cir. 1970); see also, Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976). However, the Court will give Petitioner the opportunity to cure this defect by amending the petition 11 12 to name a proper respondent, such as the warden of his facility. See West v. Louisiana, 478 F.2d 13 1026, 1029 (5th Cir.1973), vacated in part on other grounds, 510 F.2d 363 (5th Cir.1975) (en banc) 14 (allowing petitioner to amend petition to name proper respondent); Ashley v. State of Washington, 394 F.2d 125 (9th Cir. 1968) (same). In the interests of judicial economy, Petitioner need not file an 15 16 amended petition. Instead, Petitioner may file a motion entitled "Motion to Amend the Petition to 17 Name a Proper Respondent" wherein Petitioner may name the proper respondent in this action.

ORDER

Accordingly, Petitioner is GRANTED thirty (30) days from the date of service of this order in
which to file a motion to amend the instant petition and name a proper respondent. Failure to amend
the petition and state a proper respondent will result in dismissal for lack of jurisdiction.

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IT IS SO ORDERED.

Dated: <u>August 16, 2010</u>

/s/ Gary S. Austin UNITED STATES MAGISTRATE JUDGE