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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 MARK CURTIS ORTEGA,) 1:12-cv-00070-AWI-SKO-HC
10)
11 Petitioner,) ORDER GRANTING PETITIONER'S
12) MOTION TO AMEND THE PETITION AND
13 v.) NAME A PROPER RESPONDENT
14) (Doc. 10)
15)
16 MARTIN BITER, Warden,) ORDER DIRECTING THE CLERK TO
17) CHANGE THE NAME OF THE RESPONDENT
18 Respondent.)
19) ORDER REQUIRING RESPONDENT TO
20) FILE A RESPONSE TO THE PETITION
21)
22 ORDER SETTING A BRIEFING SCHEDULE
23)
24 ORDER DIRECTING THE CLERK TO
25 SERVE DOCUMENTS ON THE ATTORNEY
26 GENERAL
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21 Petitioner is a state prisoner proceeding pro se with a
22 petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.
23 The matter has been referred to the Magistrate Judge pursuant to
24 28 U.S.C. § 636(b)(1) and Local Rules 72-302 and 72-303. Pending
25 before the Court is Petitioner's motion to amend the petition to
26 name as Respondent Martin Biter, Warden of the Kern Valley State
27 Prison located in Delano, California. The motion was filed on
28 February 10, 2012, in response to the Court's order of January

1 18, 2012, granting Petitioner leave to file the motion.

2 I. Motion to Amend the Petition

3 A petitioner seeking habeas relief must name the state
4 officer having custody of him or her as the respondent to the
5 petition. Rule 2(a) of the Rules Governing Section 2254 Cases;
6 Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir.1996); Stanley
7 v. California Supreme Court, 21 F.3d 359, 360 (9th Cir.1994).
8 Normally, the person having custody of the prisoner is the warden
9 of the prison because the warden has "day to day control over"
10 the prisoner. Brittingham v. United States, 982 F.2d 378, 279
11 (9th Cir.1992). Therefore, Petitioner's request is proper.

12 II. Order to File a Response to the Petition

13 The Court has conducted a preliminary review of the
14 petition. It is not clear from the face of the petition whether
15 Petitioner is entitled to relief. 28 U.S.C. § 2243.
16 Accordingly, pursuant to Rule 4 of the Rules Governing Section
17 2254 Cases and Rule 16 of the Federal Rules of Civil Procedure,¹
18 the Court will direct Respondent to file a response and will
19 issue a scheduling order.

20 III. Disposition

21 Accordingly, it is ORDERED that:

22 1) Petitioner's motion for leave to amend the petition to
23 name Warden Martin Biter as Respondent in this matter is GRANTED;

24
25 ¹The Federal Rules of Civil Procedure "apply to proceedings for habeas
26 corpus ... to the extent that the practice in those proceedings (A) is not
27 specified in a federal statute, the Rules Governing Section 2254 Cases, or the
28 Rules Governing Section 2255 Cases; and (B) has previously conformed to the
practice in civil actions." Fed. R. Civ. P. 81(a)(4). Rule 12 also provides
"[t]he Federal Rules of Civil Procedure, to the extent that they are not
inconsistent with any statutory provisions or these rules, may be applied to a
proceeding under these rules." Rule 12, Rules Governing Section 2254 Cases.

1 and

2 2) The Clerk of Court is DIRECTED to change the name of
3 Respondent to Martin Biter, Warden; and

4 3) The Court hereby ORDERS:

5 a) Respondent SHALL FILE a RESPONSE to the petition² within
6 **SIXTY (60) days** of the date of service of this order. See Rule
7 4, Rules Governing Section 2254 Cases; Cluchette v. Rushen, 770
8 F.2d 1469, 1473-1474 (9th Cir. 1985) (court has discretion to fix
9 time for filing a response). A response can be made by filing
10 one of the following:

11 i. An ANSWER addressing the merits of the petition.
12 Respondent SHALL INCLUDE with the ANSWER any and all transcripts
13 or other documents necessary for the resolution of the issues
14 presented in the petition. See Rule 5, Rules Governing Section
15 2254 Cases. Any argument by Respondent that a claim of
16 Petitioner has been *procedurally defaulted* SHALL BE MADE in the
17 ANSWER, but must also address the merits of the claim asserted.

18 ii. A MOTION TO DISMISS the petition. A motion to
19 dismiss SHALL INCLUDE copies of all Petitioner's state court
20 filings and dispositive rulings. See Rule 5, Rules Governing
21 Section 2254 Cases.³

22
23 ²Respondent is advised that a scanned copy of the petition is available
in the Court's electronic case filing system (CM/ECF).

24 ³Rule 4 of the Rules Governing Section 2254 Cases provides that upon the
25 Court's determination that summary dismissal is inappropriate, the "judge must
26 order the respondent to file an answer, motion, or other response within a
27 fixed time, or to take other action the judge may order." Rule 4, Rules
28 Governing Section 2254 Cases; see also Advisory Committee Notes to Rules 4 and
5 of Rules Governing Section 2254 Cases (stating that a dismissal may obviate
the need for filing an answer on the substantive merits of the petition and
that the respondent may file a motion to dismiss for failure to exhaust);
White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (providing that a motion
to dismiss pursuant to Rule 4 is proper in a federal habeas proceeding).

1 b. If Respondent files an answer to the petition,
2 Petitioner MAY FILE a traverse within **THIRTY (30) days** of the
3 date Respondent's answer is filed with the Court. If no traverse
4 is filed, the petition and answer are deemed submitted at the
5 expiration of the thirty (30) days.

6 c. If Respondent files a motion to dismiss, Petitioner
7 SHALL FILE an opposition or statement of non-opposition within
8 **TWENTY-ONE (21) days** of the date Respondent's motion is filed
9 with the Court. If no opposition is filed, the motion to dismiss
10 is deemed submitted at the expiration of the thirty (30) days.
11 Any reply to an opposition to the motion to dismiss SHALL BE
12 FILED within **SEVEN (7) days** after the opposition is served.

13 d. Unless already submitted, both Respondent and Petitioner
14 SHALL COMPLETE and RETURN to the Court within **THIRTY (30) days** a
15 consent/decline form indicating whether the party consents or
16 declines to consent to the jurisdiction of the United States
17 Magistrate Judge pursuant to Title 28 U.S.C. § 636(c)(1).

18 e. The Clerk of the Court is DIRECTED to SERVE a copy of
19 this order on the Attorney General or his representative.

20 All motions shall be submitted on the record and briefs
21 filed without oral argument unless otherwise ordered by the
22 Court. Local Rule 230(1). Extensions of time will only be
23 granted upon a showing of good cause. All provisions of Local
24 Rule 110 are applicable to this order.

25 IT IS SO ORDERED.

26 **Dated: March 29, 2012**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE