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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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11 KAREN BUTLER,  
12 Petitioner,

13  
14 v.  
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17 DEBORAH K. JOHNSON, Warden,  
18 Respondent.  
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Case No. 1:14-cv-00645-BAM-HC

ORDER GRANTING PETITIONER'S MOTION  
TO AMEND THE PETITION TO NAME A  
PROPER RESPONDENT  
(Doc. 13)

ORDER DIRECTING THE CLERK TO CHANGE  
THE NAME OF THE RESPONDENT

ORDER REQUIRING RESPONDENT TO FILE  
A RESPONSE TO THE PETITION

ORDER SETTING A BRIEFING SCHEDULE

ORDER DIRECTING THE CLERK TO SERVE  
DOCUMENTS ON THE ATTORNEY GENERAL

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21 Petitioner is a state prisoner proceeding pro se and in forma  
22 pauperis with a petition for writ of habeas corpus pursuant to 28  
23 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has  
24 consented to the jurisdiction of the United States Magistrate Judge  
25 to conduct all further proceedings in the case, including the entry  
26 of final judgment, by manifesting Petitioner's consent in a writing  
27 signed by Petitioner and filed on May 8, 2014. Pending before the  
28 Court is the Petitioner's motion to amend the first amended petition

1 (FAP) to name as Respondent Deborah K. Johnson, the warden of  
2 Petitioner's institution of confinement, which was filed on February  
3 26, 2015, in response to the Court's earlier order permitting  
4 Petitioner to file such a motion without having to file a completely  
5 new amended petition.

6 I. Motion to Amend the Petition

7 A petitioner seeking habeas relief must name the state officer  
8 having custody of him or her as the respondent to the petition.

9 Rule 2(a) of the Rules Governing Section 2254 Cases; Ortiz-Sandoval  
10 v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California  
11 Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the  
12 person having custody of the prisoner is the warden of the prison  
13 because the warden has "day to day control over" the prisoner.

14 Brittingham v. United States, 982. F.2d 378, 279 (9th Cir. 1992).  
15 Therefore, Petitioner's request is proper.

16 II. Order to File a Response to the Petition

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

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25 <sup>1</sup>The Federal Rules of Civil Procedure "apply to proceedings for habeas corpus  
26 ... to the extent that the practice in those proceedings (A) is not specified in a  
27 federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing  
28 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        III. Disposition

2        Accordingly, it is ORDERED that:

3        1) Petitioner's motion for leave to amend the petition to name  
4        Warden Deborah K. Johnson as Respondent in this matter is GRANTED;  
5        and

6        2) The Clerk of Court is DIRECTED to change the name of  
7        Respondent to Deborah K. Johnson, Warden; and

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

14            A. An ANSWER addressing the merits of the petition.

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

23            B. A MOTION TO DISMISS the petition. A motion to dismiss  
24            SHALL INCLUDE copies of all Petitioner's state court  
25            filings and dispositive rulings. See Rule 5, Rules  
26            Governing Section 2254 Cases.<sup>3</sup>

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27        <sup>2</sup> Respondent is advised that a scanned copy of the petition is available in the  
28        Court's electronic case filing system (CM/ECF).

- 1           4) If Respondent files an answer to the petition, Petitioner  
2           MAY FILE a traverse within **THIRTY (30) days** of the date  
3           Respondent's answer is filed with the Court. If no  
4           traverse is filed, the petition and answer are deemed  
5           submitted at the expiration of the thirty (30) days.
- 6           5) If Respondent files a motion to dismiss, Petitioner SHALL  
7           FILE an opposition or statement of non-opposition within  
8           **TWENTY-ONE (21) days** of the date Respondent's motion is  
9           filed with the Court. If no opposition is filed, the  
10          motion to dismiss is deemed submitted at the expiration of  
11          thirty (30) days. Any reply to an opposition to the motion  
12          to dismiss SHALL BE FILED within **SEVEN (7) DAYS** after the  
13          opposition is served.
- 14          6) Unless already submitted, both Respondent and Petitioner  
15          SHALL COMPLETE AND RETURN to the Court within **THIRTY (30)**  
16          **days** a consent/decline form indicating whether the party  
17          consents or declines to consent to the jurisdiction of the  
18          United States Magistrate Judge pursuant to 28 U.S.C.  
19          § 636(c)(1).
- 20          7) The Clerk of the Court is DIRECTED to SERVE a copy of this  
21          order on the Attorney General or his representative.
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23       <sup>3</sup> Rule 4 of the Rules Governing Section 2254 Cases provides that upon the Court's  
24       determination that summary dismissal is inappropriate, the "judge must order the  
25       respondent to file an answer, motion or other response within a fixed time, or to  
26       take other action the judge may order." Rule 4, Rules Governing Section 2254  
27       Cases; see also Advisory Committee Notes to Rules 4 and 5 of the Rules Governing  
28       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 All motions shall be submitted on the record and briefs filed  
2 without oral argument unless otherwise ordered by the Court. Local  
3 Rule 230(1). Requests for extensions of time will only be granted  
4 upon a showing of good cause. All provisions of Local Rule 110 are  
5 applicable to this order.

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7 IT IS SO ORDERED.

8 Dated: April 8, 2015

/s/ Barbara A. McAuliffe  
9 UNITED STATES MAGISTRATE JUDGE