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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

LESLIE JOSEPH SILVA,  
  
Petitioner,  
  
v.  
  
UNKNOWN,  
  
Respondent.

Civil No. 07cv0537-WQH (JMA)

**ORDER GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS AND  
DISMISSING CASE  
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and has filed a Motion to proceed in forma pauperis. Petitioner has no funds on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner’s application to proceed in forma pauperis, and allows Petitioner to prosecute the above-referenced action as a poor person without being required to prepay fees or costs and without being required to post security.

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

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

8 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]  
9 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The  
10 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.  
11 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of  
12 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the  
13 body” if directed to do so by the Court. “Both the warden of a California prison and the Director  
14 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d  
15 at 895. Here, Petitioner has failed to name a Respondent. In order for this Court to entertain the  
16 Petition filed in this action, Petitioner must name the warden in charge of the state correctional  
17 facility in which Petitioner is presently confined or the Secretary of the California Department  
18 of Corrections and Rehabilitation. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.  
19 1992) (per curiam).

20 Further, a review of the Petition indicates that Petitioner has failed to state a claim  
21 cognizable on federal habeas review. Title 28, United States Code, § 2254(a), sets forth the  
22 following scope of review for federal habeas corpus claims:

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

28 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.  
1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800  
F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim

1 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of  
2 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the  
3 United States.” See 28 U.S.C. § 2254(a).

4 Here, Petitioner contends that the trial court failed to sever charges which “caused a spill  
5 over effect in which his guilt was assumed,” and that he received ineffective assistance of  
6 counsel. (Pet. at 6-7.) Petitioner does not explicitly claim that he is “in custody in violation of  
7 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254. For example, if  
8 Petitioner is contending that his Fourteenth Amendment right to due process was violated by the  
9 failure of the trial court to sever the counts, and or that his Sixth Amendment right to the  
10 effective assistance of counsel was violated by his counsel’s actions, he must so state in the  
11 Petition.

12 In addition, the Court notes that Petitioner may not be able simply to amend his Petition  
13 to allege violations of his federal constitutional rights, because he is required to allege  
14 exhaustion of state court remedies with respect to any federal claim. A habeas petitioner must  
15 exhaust state judicial remedies before bringing claims via federal habeas. 28 U.S.C. § 2254(b),  
16 (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a  
17 California state prisoner must present the California Supreme Court with a fair opportunity to  
18 rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b),  
19 (c); Granberry, 481 U.S. at 133-34. Petitioner must allege, in state court, how one or more of  
20 his federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364  
21 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of  
22 prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting  
23 claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example,  
24 “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him  
25 [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say  
26 so, not only in federal court, but in state court.” Id. at 366 (emphasis added). The burden of  
27 pleading that a state court remedies have been exhausted lies with the petitioner. Cartwright v.  
28 Cupp, 650 F.2d 1103, 1104 (9th Cir.1981).

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

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

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

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

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

14 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

15 The statute of limitations does not run while a properly filed state habeas corpus petition  
16 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
17 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
18 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
19 are in compliance with the applicable laws and rules governing filings.”); Bonner v. Carey, 425  
20 F.3d 1145, 1149 (9th Cir.) (holding that a state application for post-conviction relief which is  
21 ultimately dismissed as untimely was neither “properly filed” nor “pending” while it was under  
22 consideration by the state court, and therefore does not toll the statute of limitations), as  
23 amended 439 F.3d 993, cert. denied, 127 S.Ct (2006). However, absent some other basis for  
24 tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v.  
25 Walker, 533 U.S. 167, 181-82 (2001).

### 26 CONCLUSION


27 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
28 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that

1 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.  
2 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas  
3 relief because Petitioner has failed to name a proper respondent.

4 Based on the foregoing, the Court **GRANTS** Petitioner’s Motion to proceed in forma  
5 pauperis and **DISMISSES** this action without prejudice. In order to proceed with this action,  
6 Petitioner must file a First Amended Petition no later than **May 29, 2007** in conformance with  
7 this Order. The Clerk of Court shall send a blank amended petition form to Petitioner along with  
8 this Order.

9 **IT IS SO ORDERED.**

10 DATED: April 3, 2007

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12 **WILLIAM Q. HAYES**  
13 United States District Judge

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