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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY: [Signature]  
DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOSE RAMIREZ-SALGADO,  
Petitioner,  
  
v.  
  
TIM OCHOA, (A) Warden, et al.,  
Respondent.

Civil No. 08-0562 WQH (WMC)

ORDER:

- (1) DISMISSING CASE WITHOUT PREJUDICE AND WITH LEAVE TO AMEND; and
- (2) DETAILING PETITIONER'S OPTIONS

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 paid the \$5.00 filing fee.

**FAILURE TO NAME PROPER RESPONDENT**

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). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

The warden is the typical respondent. However, "the rules following section 2254 do not specify the warden." *Id.* "[T]he 'state officer having custody' may be 'either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal

1 institutions.” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a  
 2 petitioner is in custody due to the state action he is challenging, “[t]he named respondent shall  
 3 be the state officer who has official custody of the petitioner (for example, the warden of the  
 4 prison).” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

5 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]  
 6 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The  
 7 actual person who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v.*  
 8 *Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of  
 9 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the  
 10 body” if directed to do so by the Court. “Both the warden of a California prison and the Director  
 11 of Corrections for California have the power to produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d  
 12 at 895.

13 Here, Petitioner has incorrectly named “Tim Ochoa (A) Warden,” as Respondent. In  
 14 order for this Court to entertain the Petition filed in this action, Petitioner must name the warden  
 15 in charge of the state correctional facility in which Petitioner is presently confined or the  
 16 Director of the California Department of Corrections. *Brittingham v. United States*, 982 F.2d  
 17 378, 379 (9th Cir. 1992) (per curiam).

### 18 FAILURE TO ALLEGE EXHAUSTION

### 19 OF STATE JUDICIAL REMEDIES AS TO ALL CLAIMS

20 Further, Petitioner has not alleged exhaustion as to claim one. (*See* Pet. at 6.) The  
 21 exhaustion requirement is satisfied by providing the state courts with a “fair opportunity” to rule  
 22 on Petitioner’s constitutional claims. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). In most  
 23 instances, a claim is exhausted once it is presented to a state’s highest court, either on direct  
 24 appeal or through state collateral proceedings.<sup>1</sup> *See Sandgathe v. Maass*, 314 F.3d 371, 376 (9th  
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26 <sup>1</sup>28 U.S.C. § 2254 (b)(1)-(2) states:

- 27 (b) (1) An application for a writ of habeas corpus on behalf of a person in custody  
 28 pursuant to the judgment of a State court shall not be granted unless it appears that -  
 (A) the applicant has exhausted the remedies available in the courts of the State; or  
 (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist  
 that render such process ineffective to protect the rights of the applicant.  
 (2) An application for a writ of habeas corpus may be denied on the merits,

1 Cir. 2002). The constitutional claim raised in the federal proceedings must be the same as that  
2 raised in the state proceedings. *See Anderson*, 459 U.S. at 6.

3 Here, Petitioner’s claim that the state courts have deprived him of due process and equal  
4 protection by refusing to hold an evidentiary hearing and denying discovery is unexhausted.

5 **2. PETITIONER’S OPTIONS**

6 Because Petitioner’s petition contains both exhausted and unexhausted claims, he must  
7 choose one of the following options if petitioner wishes to proceed with this case:

8 **i) First Option: Demonstrate Exhaustion**

9 Petitioner may file further papers with this Court to demonstrate that he has in fact  
10 exhausted the claims the Court has determined are likely unexhausted. If Petitioner chooses this  
11 option, his papers are due no later than **May 5, 2008**. Respondent may file a reply by **June 4,**  
12 **2008**.

13 **ii) Second Option: Voluntarily Dismiss the Petition**

14 Petitioner may move to voluntarily dismiss his entire federal petition and return to state  
15 court to exhaust his unexhausted claims. Petitioner may then file a new federal petition  
16 containing only exhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 510, 520-21 (1982) (stating  
17 that a petitioner who files a mixed petition may dismiss his petition to “return[] to state court to  
18 exhaust his claims”). If Petitioner chooses this second option, he must file a pleading with this  
19 Court no later than **May 5, 2008**. Respondent may file a reply by **June 4, 2008**.

20 Petitioner is cautioned that any new federal petition must be filed before expiration of the  
21 one-year statute of limitations. Ordinarily, a petitioner has one year from when his conviction  
22 became final to file his federal petition, unless he can show that statutory or equitable “tolling”  
23 applies. *Duncan v. Walker*, 533 U.S. 167, 176 (2001); 28 U.S.C. § 2244(d).<sup>2</sup> Filing a petition

24 \_\_\_\_\_  
25 notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

26 <sup>2</sup>28 U.S.C. § 2244 (d) provides:

27 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus  
28 by a person in custody pursuant to the judgment of a State court. The limitation period  
shall run from the latest of--

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

(B) the date on which the impediment to filing an application created by State

1 in federal court does not stop the statute of limitations from running. *Id.* at 181-82; *Frye v.*  
2 *Hickman*, 273 F.3d 1144, 1145-46 (9th Cir. 2001); 28 U.S.C. § 2244(d).

3 **iii) Third Option: Formally Abandon Unexhausted Claim**

4 Petitioner may formally abandon his unexhausted claims and proceed with his exhausted  
5 ones. *See Rose*, 455 U.S. at 510, 520-21 (stating that a petitioner who files a mixed petition may  
6 “resubmit[] the habeas petition to present only exhausted claims”). If Petitioner chooses this  
7 third option, he must file a pleading with this Court no later than **May 5, 2008**. Respondent may  
8 file a reply by **June 4, 2008**.

9 Petitioner is cautioned that once he abandons his unexhausted claims, he may lose the  
10 ability to ever raise it in federal court. *See Slack v. McDaniel*, 529 U.S. 473, 488 (2000) (stating  
11 that a court’s ruling on the merits of claims presented in a first § 2254 petition renders any later  
12 petition successive); *see also* 28 U.S.C. § 2244 (a)-(b).<sup>3</sup>

13 **iv) Fourth Option: File a Motion to Stay the Federal Proceedings**

14 Petitioner may move to stay this federal proceeding while he returns to state court to  
15 exhaust his unexhausted claims. *See Jackson v. Roe*, 425 F.3d 654, 660 (9th Cir. 2005)  
16 (interpreting *Rhines v. Weber*, 544 U.S. 269 (2005) as permitting a district court to stay a mixed  
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18 action in violation of the Constitution or laws of the United States is removed, if the  
19 applicant was prevented from filing by such State action;

20 (C) the date on which the constitutional right asserted was 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

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

22 (2) The time during which a properly filed application for State post-conviction or other  
collateral review with respect to the pertinent judgement or claim is pending shall not be  
23 counted toward any period of limitation under this subsection.

24 <sup>3</sup>28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive habeas corpus  
application under § 2254 shall be dismissed unless:

25 (A) the applicant shows that the claim relies on a new rule of constitutional law, made  
retroactive to cases on collateral review by the Supreme Court, that was previously  
26 unavailable; or

27 (B) (i) the factual predicate for the claim could not have been discovered previously  
through the exercise of due diligence; and

28 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a  
whole, would be sufficient to establish by clear and convincing evidence that, but for  
constitutional error, no reasonable factfinder would have found the applicant guilty of  
the underlying offense.

1 petition while the petitioner returns to state court); *Valerio v. Crawford*, 306 F.3d. 742, 770-71  
2 (9th Cir. 2002) (en banc); *Calderon v. United States Dist. Ct. for the N. Dist. of Cal.*, 134 F.3d  
3 981, 986-88 (9th Cir. 1998). If Petitioner chooses this fourth option, he must file a pleading with  
4 this Court no later than **May 5, 2008**. Respondent may file a reply by **June 4, 2008**.

5 **CONCLUSION**

6 For the foregoing reasons, the Court DISMISSES this case without prejudice and with  
7 leave to amend. If Petitioner wishes to proceed with this case, he must, **no later than May 5,**  
8 **2008**, respond to this order by choosing one of the options outlined below **AND** by filing a  
9 petition which names a proper respondent.<sup>4</sup> See *Rose*, 455 U.S. at 522.

10 **IT IS SO ORDERED.**

11 DATED: 4/24/08 

12 William Q. Hayes  
13 United States District Judge  
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28 <sup>4</sup>Although the dismissal is “without prejudice,” Petitioner is again cautioned that any later federal  
petition may be barred by the statute of limitations. See 28 U.S.C. § 2244(d)(1)-(2); see also footnote  
two of this Order.