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

MATTHEW A. LAWRIE,  
  
Petitioner,  
  
v.  
  
PEOPLE OF CALIFORNIA,  
  
Respondent.

Civil No. 10-1034 DMS (PCL)

**ORDER:**

- (1) GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS; and**
- (2) DISMISSING CASE WITHOUT PREJUDICE AND WITH LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

**MOTION TO PROCEED IN FORMA PAUPERIS**

Petitioner has \$0.00 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. The Clerk of the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the filing fee.

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1 **FAILURE TO NAME PROPER RESPONDENT**

2 Review of the Petition also reveals that Petitioner has failed to name a proper respondent.  
3 On federal habeas, a state prisoner must name the state officer having custody of him as the  
4  
5 respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28  
6 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to  
7 name a proper respondent. *See id.*

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

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

23 Here, Petitioner has incorrectly named “People of the State of California,” as Respondent.  
24 In order for this Court to entertain the Petition filed in this action, Petitioner must name the  
25 warden in charge of the state correctional facility in which Petitioner is presently confined or the  
26 Director of the California Department of Corrections. *Brittingham v. United States*, 982 F.2d  
27 378, 379 (9th Cir. 1992) (per curiam).

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

3 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

4 The statute of limitations does not run while a properly filed state habeas corpus petition  
5 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).  
6 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
7 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
8 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
9 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
10 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

11 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
12 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
13 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
14 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal  
15 habeas relief because he has not alleged exhaustion of state court remedies.

16 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

17 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner  
18 has failed to allege that his state court conviction or sentence violates the Constitution of the  
19 United States.

20 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
21 federal habeas corpus claims:

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

25 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.  
26 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800  
27 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
28 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of

1 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the  
2 United States.” *See* 28 U.S.C. § 2254(a).

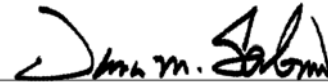
3 Here, Petitioner claims that his conviction is based on inappropriate and misleading  
4 identification of a vehicle. (*See* Pet at 3.) In no way does Petitioner claim he is “in custody in  
5 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

6 **CONCLUSION**

7 For all the foregoing reasons, the Court **GRANTS** Petitioner’s motion to proceed in  
8 forma pauperis and **DISMISSES** this case without prejudice and with leave to amend. If  
9 Petitioner wishes to proceed with this case, he must, **no later than July 20, 2010**, file a First  
10 Amended Petition which cures the pleading deficiencies outlined in this Order. **THE CLERK**  
11 **OF COURT IS DIRECTED TO MAIL PETITIONER A BLANK FIRST AMENDED**  
12 **PETITION FOR TOGETHER WITH A COPY OF THIS ORDER.**

13 **IT IS SO ORDERED.**

14 DATED: May 20, 2010



15  
16 HON. DANA M. SABRAW  
United States District Judge

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