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

TONY LESSIE,  
  
Petitioner,  
  
v.  
  
UNKNOWN,  
  
Respondent.

Civil No. 10cv2065-IEG (RBB)

**ORDER GRANTING APPLICATION  
TO PROCEED IN FORMA PAUPERIS  
AND DISMISSING PETITION  
WITHOUT PREJUDICE**

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

**IN FORMA PAUPERIS APPLICATION**

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.

**FAILURE TO NAME A 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). “Typically, that person is the warden of the facility in which the petitioner is incarcerated.” Id. Federal

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

2 The warden is the typical respondent. However, “the rules following section 2254 do not specify  
3 the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the institution in  
4 which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.’” Id.  
5 (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a petitioner is in custody due  
6 to the state action he is challenging, ‘[t]he named respondent shall be the state officer who has official  
7 custody of the petitioner (for example, the warden of the prison).’” Id. (quoting Rule 2, 28 U.S.C. foll.  
8 § 2254 advisory committee’s note). This requirement exists because a writ of habeas corpus acts upon  
9 the custodian of the state prisoner, the person who will produce “the body” if directed to do so by the  
10 Court. “Both the warden of a California prison and the Director of Corrections for California have the  
11 power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d at 895.

12 Here, Petitioner has failed to name a Respondent. In order for this Court to entertain the Petition  
13 filed in this action, Petitioner must name the warden in charge of the state correctional facility in which  
14 Petitioner is presently confined or the Director of the California Department of Corrections and  
15 Rehabilitation. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

#### 16 **EXHAUSTION OF STATE COURT REMEDIES**

17 In addition, Petitioner has indicated that he has not presented claim three to the state supreme  
18 court. (See Pet. at 8.) Habeas petitioners who wish to challenge either their state court conviction or  
19 the length of their confinement in state prison, must generally first exhaust state judicial remedies. 28  
20 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
21 remedies, a California state prisoner must present the California Supreme Court with a fair opportunity  
22 to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c);  
23 Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must  
24 allege, in state court, how one or more of his or her federal rights have been violated. The Supreme  
25 Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity  
26 to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the  
27 prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added).  
28 For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial

1 denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must  
2 say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

3 Here, Petitioner has indicated that he has exhausted state judicial remedies with respect to claims  
4 one and two, but indicates that he has not presented claim three to the state supreme court. (Pet. at 6-8.)  
5 Petitioner contends in claim three that he was denied his right under California law with respect to the  
6 provisions of California Welfare and Institutions Code section 707. (Pet. at 8.) Claim three as presently  
7 phrased does not state a federal claim because Petitioner does not claim he is “in custody in violation  
8 of the Constitution or laws or treaties of the United States” as a result of the violation of state law. 28  
9 U.S.C. § 2254; see also Estelle v. McGuire, 502 U.S. 62, 70-72 (1991) (holding that federal habeas relief  
10 is not available for state law errors which do not rise to the level of federal due process violations);  
11 Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (holding that arbitrary deprivation of state law protections  
12 can rise to the level of a federal due process violation). Petitioner is cautioned that if he wishes to  
13 present claim three as a violation of federal due process in an amended petition, he must exhaust state  
14 court remedies with respect to such a claim.

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

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

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

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

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

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


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

8 **CONCLUSION**

9 Based on the foregoing, the Court **GRANTS** Petitioner’s Motion to proceed in forma pauperis  
10 and **DISMISSES** this action without prejudice because Petitioner has failed to name a proper  
11 respondent. To have this case reopened, Petitioner must file a First Amended Petition no later than  
12 **December 6, 2010**, that cures the pleading deficiencies set forth above. The Clerk of Court shall send  
13 Petitioner a blank Southern District of California amended petition form along with a copy of this Order.

14 **IT IS SO ORDERED.**

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16 **DATED: October 7, 2010**

17   
18 **IRMA E. GONZALEZ, Chief Judge**  
**United States District Court**

19 **Copies to: ALL PARTIES**

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