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

FATIMA BINETA LO,  
  
Petitioner,  
  
v.  
  
NEW JERSEY IMMIGRATION COURT,  
  
Respondent.

Civil No. 13-0648 LAB (BLM)

**ORDER:**  
  
**(1) DENYING IN FORMA PAUPERIS APPLICATION AND**  
  
**(2) DISMISSING CASE WITHOUT PREJUDICE**

Petitioner, a detainee in the custody of the Department of Homeland Security, Bureau of Immigration and Customs Enforcement, proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, along with a Motion for Leave to Proceed In Forma Pauperis. [ECF Nos. 1,2.]

**FAILURE TO STATE COGNIZABLE 28 U.S. C. § 2254 CLAIM**

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

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in 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.

1 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.  
2 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800  
3 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
4 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of  
5 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the  
6 United States.” See 28 U.S.C. § 2254(a).

7 Although Petitioner filed this action pursuant to 28 U.S.C. §2254, Petitioner does not  
8 challenge a state court conviction within her Petition. Section 2254 is properly understood as  
9 “in effect implement[ing] the general grant of habeas corpus authority found in § 2241 as long  
10 as the person is in custody pursuant to the *judgment* of a state court, and not in state custody for  
11 some other reason, such as pre-conviction custody, custody awaiting extradition, or other forms  
12 of custody that are possible without a conviction.” [citations omitted.] Id. at 1006 (quoting  
13 Walker v. O’Brien, 216 F.3d 626, 633 (7th Cir. 2000) (emphasis in original). “By contrast, the  
14 general grant of habeas authority in § 2241 is available for challenges by a state prisoner who  
15 is not in custody pursuant to a state court judgment—for example, a defendant in pre-trial  
16 detention or awaiting extradition. In these situations, not covered by the limitations in § 2254,  
17 the general grant of habeas authority provided by the Constitution and § 2241 will provide  
18 jurisdiction for state prisoners' habeas claims.” Id. at 1006 (citing McNeely v. Blanas, 336 F.3d  
19 822 (9th Cir.2003) (allowing a pre-trial detainee to proceed under § 2241).

20 Based on the current Petition, it appears the only potential habeas relief available to Petitioner  
21 would be the general habeas relief set forth in 28 U.S.C. §2241.<sup>1</sup>

### 22 **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

23 To the extent Petitioner is raising a challenge under 28 U.S.C. § 2254, the request to  
24 proceed in forma pauperis is denied because Petitioner has not provided the Court with sufficient  
25 information to determine Petitioner’s financial status. A request to proceed in forma pauperis  
26 made by a state prisoner must include a certificate from the warden or other appropriate officer

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28 <sup>1</sup>Petitioner currently has a petition pending in this Court pursuant to 28 U.S.C. §2241 in case  
number 13cv0647 JLS (BGS).

1 showing the amount of money or securities Petitioner has on account in the institution.  
2 Rule 3(a)(2), 28 U.S.C. foll. § 2254; Local Rule 3.2. Petitioner has failed to provide the Court  
3 with the required Prison Certificate.

4 **FAILURE TO NAME PROPER RESPONDENT**

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

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

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

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27 Here, Petitioner has incorrectly named “New Jersey Immigration Court,” as Respondent.  
28 In order for this Court to entertain the Petition filed in this action, Petitioner must name the

1 warden in charge of the state correctional facility in which Petitioner is presently confined or the  
2 Director of the California Department of Corrections. Brittingham v. United States, 982 F.2d  
3 378, 379 (9th Cir. 1992) (per curiam).

#### 4 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

5 Further, habeas petitioners who wish to challenge either their state court conviction or the  
6 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
7 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
8 remedies, a California state prisoner must present the California Supreme Court with a fair  
9 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
10 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court  
11 remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
12 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:  
13 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal  
14 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the  
15 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas  
16 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the  
17 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only  
18 in federal court, but in state court.” Id. at 366 (emphasis added).

19 Nowhere on the Petition does Petitioner allege that she raised her claims in the California  
20 Supreme Court. In fact, she specifically indicates she did not seek review in the California  
21 Supreme Court. (See Pet. at 6-9.) If Petitioner has raised her claims in the California Supreme  
22 Court she must so specify. “The burden of proving that a claim has been exhausted lies with the  
23 petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d  
24 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v.  
25 Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

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

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

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

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

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

12 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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

20 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
21 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
22 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
23 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal  
24 habeas relief because she has not alleged exhaustion of state court remedies.

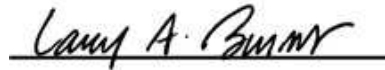
### 25 **CONCLUSION AND ORDER**

26 Accordingly, the Court **DENIES** the request to proceed in forma pauperis, and  
27 **DISMISSES** the case without prejudice for Petitioner’s failure to name state a cognizable  
28 habeas claim, name a proper respondent, and allege exhaustion of state court remedies. If

1 Petitioner wishes to proceed with this case under Section 2254, Petitioner must, **no later than**  
2 **June 11, 2013**, provide the Court with: (1) a copy of this Order together with the \$5.00 filing  
3 fee; or (2) a copy of this Order together with adequate proof that Petitioner cannot pay the \$5.00  
4 filing fee **AND** a First Amended Petition that remedies the pleading deficiencies noted above.  
5 *The Clerk of Court is directed to send Petitioner a blank Application to Proceed In Forma*  
6 *Pauperis, and a blank section 2254 First Amended Petition.*

7 **IT IS SO ORDERED.**

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9 DATED: April 11, 2013

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11 **HONORABLE LARRY ALAN BURNS**  
12 United States District Judge

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