

1 **FAILURE TO NAME PROPER RESPONDENT**

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

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

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

23 Here, Petitioner has incorrectly named “Court of Appeals 4th District,” as
24 Respondent. In order for this Court to entertain the Petition filed in this action, Petitioner
25 must name the warden in charge of the state correctional facility in which Petitioner is
26 presently confined or the Director of the California Department of Corrections.
27 *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

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1 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

2 Further, habeas petitioners who wish to challenge either their state court conviction
3 or the length of their confinement in state prison, must first exhaust state judicial
4 remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).
5 Ordinarily, to satisfy the exhaustion requirement, a petitioner must “‘fairly present[]’ his
6 federal claim to the highest state court with jurisdiction to consider it, or . . .
7 demonstrate[] that no state remedy remains available.” *Johnson v. Zenon*, 88 F.3d 828,
8 829 (9th Cir. 1996) (citations omitted). Moreover, to properly exhaust state court
9 remedies a petitioner must allege, in state court, how one or more of his or her federal
10 rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that an
11 evidentiary ruling at a state court trial denied him [or her] the due process of law
12 guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal
13 court, but in state court.” *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).

14 Nowhere on the Petition does Petitioner allege that he raised his claims in the
15 California Supreme Court. If Petitioner has raised his claims in the California Supreme
16 Court he must so specify.

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

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

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

27 (C) the date on which the constitutional right asserted was initially
28 recognized by the Supreme Court, if the right has been newly recognized

1 by the Supreme Court and made retroactively applicable to cases on
2 collateral review; or

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

6 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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

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

21 CONCLUSION

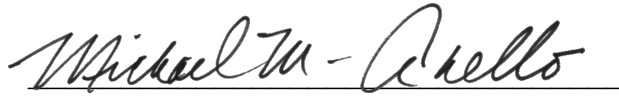
22 For the foregoing reasons, Court **DENIES** the request to proceed in forma
23 pauperis, and **DISMISSES** the case without prejudice. To have the case reopened,
24 Petitioner must, **no later than July 25, 2017**: (1) pay the \$5.00 filing fee OR submit
25 adequate proof that Petitioner cannot pay the \$5.00 filing fee; AND (2) file a First
26 Amended Petition that cures the pleading deficiencies outlined in this Order. *The Clerk*
27 *of Court is directed to mail Petitioner a blank motion to proceed in forma pauperis*

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1 *form and a blank First Amended Petition form together with a copy of this Order.*

2 **IT IS SO ORDERED.**

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4 **DATED:** May 22, 2017



HON. MICHAEL M. ANELLO

United States District Judge

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