



1 court remedies.

2 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

3 Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing  
4 fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without  
5 prejudice. *See* Rule 3(a), Rules Governing §2254 Cases, 28 U.S.C. foll. § 2254.

6 **FAILURE TO NAME PROPER RESPONDENT**

7 Review of the Petition reveals that Petitioner has failed to name a proper respondent.  
8 On federal habeas, a state prisoner must name the state officer having custody of him as  
9 the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule  
10 2(a), 28 U.S.C. foll. § 2254). “Typically, that person is the warden of the facility in which  
11 the petitioner is incarcerated.” *Id.* Federal courts lack personal jurisdiction when a habeas  
12 petition fails to name a proper respondent. *See id.*

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

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

1 *Sandoval*, 81 F.3d at 895.

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

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

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

22 Petitioner does not allege that he raised his claims in the California Supreme Court.  
23 If Petitioner has raised his claims in the California Supreme Court he must so specify. The  
24 burden of proving that a claim has been exhausted lies with the petitioner. *Cartwright v.*  
25 *Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981).

26 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  
28 a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

1 The limitation period shall run from the latest of:

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

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

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

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

13 28 U.S.C.A. § 2244(d)(1)(A)-(D).

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

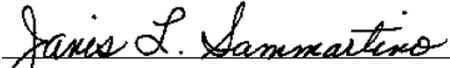
### 21 CONCLUSION AND ORDER

22 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal  
23 of a habeas petition “[i]f it plainly appears from the face of the petition and any attached  
24 exhibits that the petitioner is not entitled to relief in the district court . . . .” Rule 4, 28  
25 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not presently  
26 entitled to federal habeas relief because he has not alleged exhaustion of state court  
27 remedies, has not satisfied the filing fee requirement, and has not named a proper  
28 respondent. Based on the foregoing, the Court **DISMISSES** this action **WITHOUT**  
**PREJUDICE**. To have this case reopened, Petitioner must submit, **no later than January**

1 **15, 2018**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to  
2 pay the fee and file a First Amended Petition which cures the pleading defects identified  
3 above. The Clerk of Court shall send a blank Southern District of California In Forma  
4 Pauperis Application and a blank Southern District of California amended petition form to  
5 Petitioner along with a copy of this Order.

6 **IT IS SO ORDERED.**

7 Dated: November 16, 2017

  
8 Hon. Janis L. Sammartino  
9 United States District Judge

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28