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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KERRY MARTHELL,

Petitioner,

No. CIV S-08-0798 JAM EFB P

vs.

JAMES E. TILTON, et al.,

Respondents.

ORDER

_____ /

Petitioner is a state prisoner without counsel seeking a writ of habeas corpus. See 28 U.S.C. § 2254. He seeks leave to proceed *in forma pauperis*. See 28 U.S.C. § 1915.

Examination of the *in forma pauperis* affidavit reveals that petitioner is unable to afford the costs of suit.

A petitioner seeking a writ of habeas corpus must name as respondent the person having custody over him. 28 U.S.C. § 2242; Rule 2(a), Rules Governing Section 2254 Cases. This person ordinarily is the warden of the facility where petitioner is confined. See *Stanley v. California Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994). Petitioner names as respondent the Director of the California Department of Corrections and Rehabilitations, James E. Tilton, who does not have custody over petitioner. Petitioner has not named the proper respondent.

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1 Accordingly, it is ORDERED that:

2 1. Petitioner's request for leave to proceed *in forma pauperis* is granted; and,

3 2. The April 14, 2008, petition is dismissed with leave to file an amended petition
4 naming the proper respondent within 30 days of the date of this order. Petitioner's failure to file
5 an amended petition will result in a recommendation that this action be dismissed without
6 prejudice. The Clerk of the Court is directed to send to petitioner the form Petition for a Writ of
7 Habeas Corpus used in this court.

8 Dated: January 5, 2009.

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10 EDMUND F. BRENNAN
11 UNITED STATES MAGISTRATE JUDGE
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