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

WESLEY W. HUNTER,

Petitioner,

v.

G.J. GIURBINO, Warden

Respondent.

Civil No. 06-2414 IEG (BLM)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to either pay the \$5.00 filing fee or move to proceed in forma pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis. See Rule 3(a), 28 U.S.C. foll. § 2254.

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 current 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). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. See *id.*

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

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

16 Here, Petitioner has incorrectly named “G..J. Giurbino,” as Respondent. In order for this
17 Court to entertain the Petition filed in this action, Petitioner must name the warden in charge of
18 the state correctional facility in which Petitioner is presently confined or the Director of the
19 California Department of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.
20 1992) (per curiam).

21 CONCLUSION

22 Accordingly, the Court **DISMISSES** the Petition without prejudice and with leave to
23 amend due to Petitioner’s failure to satisfy the filing fee requirement and name a proper
24 respondent. To have this case reopened, Petitioner must **no later than January 12, 2007**: (1)
25 pay the \$5.00 filing fee or submit adequate proof of his inability to pay the fee, **AND** (2) file a
26 First Amended Petition which cures the pleading deficiencies outlined in this Order. **THE**

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1 **CLERK OF COURT IS DIRECTED TO MAIL PETITIONER A BLANK MOTION TO**
2 **PROCEED IN FORMA PAUPERIS FORM AND A BLANK FIRST AMENDED**
3 **PETITION FORM.**

4 **IT IS SO ORDERED.**

5 **DATED: November 7, 2006**

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7 **IRMA E. GONZALEZ, Chief Judge**
8 **United States District Court**

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