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

WYATT DAVID TORREY,

Petitioner,

v.

JERRY BROWN,

Respondent.

Civil No. 07-0442 WQH (BLM)

**ORDER:**

**(1) DENYING IN FORMA PAUPERIS APPLICATION; and**

**(2) 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 (West 2006), together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).

**MOTION TO PROCEED IN FORMA PAUPERIS**

The request to proceed in forma pauperis is **DENIED** because Petitioner has not provided the Court with sufficient information to determine Petitioner's financial status. A request to proceed in forma pauperis made by a state prisoner must include a certificate from the warden or other appropriate officer showing the amount of money or securities Petitioner has on account

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

### 3 **FAILURE TO NAME A PROPER RESPONDENT**

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

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

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

24 Petitioner has named “Jerry Brown,” who is the Attorney General of the State of  
25 California. Mr. Brown is not a proper respondent in this action. Rule 2 of the Rules following  
26 § 2254 provides that the state officer having custody of the petitioner shall be named as  
27 respondent. Rule 2(a), 28 U.S.C. foll. § 2254. However, “if the applicant is not presently in  
28 custody pursuant to a state judgement against which he seeks relief but may be subject to such

1 custody in the future,” then “the officer having present custody of the applicant as well as the  
2 attorney general of the state in which the judgment which he seeks to attack was entered shall  
3 each be named as respondents.” Rule 2 (b), 28 U.S.C. foll. § 2254. Here, there is no basis for  
4 Petitioner to have named the Attorney General as a respondent in this action.

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

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

10 Further, habeas petitioners who wish to challenge either their state court conviction or the  
11 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
12 § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
13 remedies, a California state prisoner must present the California Supreme Court with a fair  
14 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
15 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court  
16 remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
17 have been violated. For example, “[i]f a habeas petitioner wishes to claim that an evidentiary  
18 ruling at a state court trial denied him [or her] the due process of law guaranteed by the  
19 Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.”  
20 *Id.* at 366 (emphasis added). Nowhere on the Petition does Petitioner allege that he raised his  
21 claims in the California Supreme Court. If Petitioner has raised his claims in the California  
22 Supreme Court he must so specify.

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

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

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

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

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

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

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

**CONCLUSION**

For the foregoing reasons, the Court **DENIES** the request to proceed in forma pauperis, and **DISMISSES** the case without prejudice and with leave to amend. To have the case reopened, Petitioner must submit, **no later than May 27, 2007**: (1) a copy of this Order together with the \$5.00 filing fee or adequate proof that he cannot pay the fee; **AND** (2) a First Amended Petition which cures the pleading deficiencies outlined in this Order. **THE CLERK IS DIRECTED TO MAIL PETITIONER A BLANK MOTION TO PROCEED IN FORMA PAUPERIS FORM, TOGETHER WITH THE APPROPRIATE PRISON CERTIFICATE FORM, AND A BLANK FIRST AMENDED PETITION FORM.**

**IT IS SO ORDERED.**

DATED: March 27, 2007

  
**WILLIAM Q. HAYES**  
United States District Judge