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

ELLIE DUBY, <p style="text-align: center;">v.</p> STATE OF CALIFORNIA, <p style="text-align: right;">Respondent.</p>	 	Civil No. 07cv0915-JM (JMA) ORDER GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS AND DISMISSING CASE WITHOUT PREJUDICE
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16 On April 30, 3007, Petitioner, a state prisoner proceeding pro se, filed a Petition for Writ
17 of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma
18 pauperis, in the District Court for the Eastern District of California. Because Petitioner is
19 challenging a conviction from the San Diego County Superior Court, the Petition was transferred
20 to this Court.

21 Petitioner has no funds on account at the California correctional institution in which he
22 is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS**
23 Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the
24 above-referenced action as a poor person without being required to prepay fees or costs and
25 without being required to post security.

26 However, a review of the Petition reveals that Petitioner has failed to name a proper
27 respondent. On federal habeas, a state prisoner must name the state officer having custody of
28 him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule

07cv0915

1 2(a), 28 U.S.C. foll. § 2254). “Typically, that person is the warden of the facility in which the
2 petitioner is incarcerated.” Id. Federal courts lack personal jurisdiction when a habeas petition
3 fails to name a proper respondent. See id.

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

11 Here, Petitioner has named the State of California as Respondent. A long standing rule
12 in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas corpus against the
13 State under . . . [whose] authority . . . the petitioner is in custody. The actual person who is [the]
14 custodian [of the petitioner] must be the respondent.” Ashley v. Washington, 394 F.2d 125, 126
15 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon the custodian
16 of the state prisoner, the person who will produce “the body” if directed to do so by the Court.
17 “Both the warden of a California prison and the Director of Corrections for California have the
18 power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d at 895. In order for this Court to
19 entertain the Petition filed in this action, Petitioner must name the warden in charge of the state
20 correctional facility in which Petitioner is presently confined or the Secretary of the California
21 Department of Corrections and Rehabilitation. Brittingham v. United States, 982 F.2d 378, 379
22 (9th Cir. 1992) (per curiam).

23 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
24 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that
25 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.
26 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas
27 relief because Petitioner has failed to name a proper respondent.

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1 Based on the foregoing, the Court **GRANTS** Petitioner's Motion to Proceed In Forma
2 Pauperis and **DISMISSES** this action without prejudice. In order to proceed with this action,
3 Petitioner must file a First Amended Petition no later than **July 23, 2007** in conformance with
4 this Order. The Clerk of Court shall send a blank amended petition form to Petitioner along with
5 this Order.

6 **IT IS SO ORDERED.**

7 DATED: _____

5/25/07



Jeffrey T. Miller
United States District Judge

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9 Copies to: ALL PARTIES

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