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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MARVIN L. JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

Civil No. 08cv0115-L (JMA)

**ORDER DISMISSING PETITION  
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and has paid the \$5.00 filing fee. The Petition is subject to dismissal, however, because Petitioner has failed to name a proper Respondent.

On federal habeas, a state prisoner must name the state officer having 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). “Typically, that person is the warden of the facility in which the petitioner is incarcerated.” Id. Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. See id.

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

1 be the state officer who has official custody of the petitioner (for example, the warden of the  
2 prison).” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

3 Here, Petitioner has incorrectly named “State of California,” “Gov. Schwarzenegger” and  
4 “Bill Lockyer, Attorney General of the State of California” as Respondents. A long standing  
5 rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas corpus against  
6 the State under . . . [whose] authority . . . the petitioner is in custody. The actual person who is  
7 [the] custodian [of the petitioner] must be the respondent.” Ashley v. Washington, 394 F.2d 125,  
8 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon the  
9 custodian of the state prisoner, the person who will produce “the body” if directed to do so by  
10 the Court. “Both the warden of a California prison and the Director of Corrections for California  
11 have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d at 895. Thus, the State of  
12 California and the Governor of California are not proper Respondents to this action.

13 Additionally, Bill Lockyer, the Attorney General of the State of California, is not a proper  
14 respondent in this action. Rule 2 of the Rules following § 2254 provides that the state officer  
15 having custody of the petitioner shall be named as respondent. Rule 2(a), 28 U.S.C. foll. § 2254.  
16 However, “[i]f the petitioner is not yet in custody – but may be subject to future custody – under  
17 the state-court judgment being contested, the petition must name as respondents both the officer  
18 who has current custody and the attorney general of the state where the judgement was entered.”  
19 Rule 2 (b), 28 U.S.C. foll. § 2254. Here, there is no basis for Petitioner to have named the  
20 Attorney General as a respondent in this action.

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

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1           Accordingly, the Court **DISMISSES** the Petition without prejudice due to Petitioner's  
2 failure to name a proper respondent. To have this case reopened, Petitioner must file a First  
3 Amended Petition no later than **March 24, 2008** in conformance with this Order. The Clerk of  
4 Court shall send Petitioner a blank Southern District of California habeas petition form along  
5 with a copy of this Order.

6           **IT IS SO ORDERED.**

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8 DATED: January 25, 2008

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M. James Lorenz  
United States District Court Judge

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