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

CYNTHIA MICHELLE MARQUEZ,
Petitioner,
vs.
SAN DIEGO SUPERIOR COURT,
Respondent.

CASE NO. 13-CV-2355-BEN (KSC)

**ORDER DENYING IN FORMA
PAUPERIS APPLICATION AND
DISMISSING CASE WITHOUT
PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, accompanied by a motion to proceed in forma pauperis.

IN FORMA PAUPERIS APPLICATION

Petitioner has filed a request to proceed in forma pauperis which reflects a \$8.21 balance in her prison trust account. The filing fee associated with this type of action is \$5.00. See 28 U.S.C. § 1914(a). It appears Petitioner can pay the requisite filing fee. Accordingly, the Court **DENIES** the request to proceed in forma pauperis, and **DISMISSES** the case without prejudice; Petitioner may submit a copy of this order along with the requisite fee or sufficient proof that she is unable to pay the fee no later than **December 2, 3013**, to have the case reopened.

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

1 custody of her as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir.
2 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). “Typically, that person is the warden
3 of the facility in which the petitioner is incarcerated.” *Id.* Federal courts lack personal
4 jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

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

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

21 Here, Petitioner has incorrectly named “San Diego Superior Court” as
22 Respondent. In order for this Court to entertain the Petition filed in this action,
23 Petitioner must name the warden in charge of the state correctional facility in which
24 Petitioner is presently confined or the Director of the California Department of
25 Corrections and Rehabilitation. *Brittingham v. United States*, 982 F.2d 378, 379 (9th
26 Cir. 1992) (per curiam).

27 **FAILURE TO USE PROPER FORM**

28 Additionally, a Petition for a Writ of Habeas Corpus must be submitted in

1 accordance with the Local Rules of the United States District Court for the Southern
2 District of California. *See* Rule 2(d), 28 U.S.C. foll. § 2254. In order to comply with
3 the Local Rules, the petition must be submitted upon a court-approved form and in
4 accordance with the instructions approved by the Court. *Id.*; S.D. Cal. CivLR HC.2(b).
5 Presently, Petitioner has not submitted an application for a writ of habeas corpus on a
6 court-approved form.

7 **CONCLUSION AND ORDER**

8 Based on the forgoing, the Court **DENIES** Petitioner's in forma pauperis
9 application and **DISMISSES** the Petition without prejudice. If Petitioner wishes to
10 proceed with this action, she must, on or before **December 2, 2013**, either pay the
11 \$5.00 filing fee or submit adequate proof she is unable to pay the fee **and** file a First
12 Amended Petition which cures the defects identified above. The Clerk of Court shall
13 send Petitioner a blank Southern District of California amended petition form along
14 with a copy of this Order.

15 **IT IS SO ORDERED.**

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17 DATED: October 3, 2013

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20 **HON. ROGER T. BENITEZ**
21 United States District Judge
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