

FILED

17 JUN 20 PM 12:19

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY *MYL* DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MARTIN MANZO ORTEGA,  
Petitioner,  
v.  
JUDGE TIMOTHY R. WALSH,  
Respondent.

Case No.: 17cv1107 - BEN (JLB)

**ORDER 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. The Petition is subject to dismissal because Petitioner has failed to satisfy the filing fee requirement, has failed to use a court-approved petition form, and has failed to name a proper Respondent.

**FAILURE TO SATISFY FILING FEE REQUIREMENT**

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254.

**FAILURE TO USE PROPER FORM**

Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with the Local Rules of the United States District Court for the Southern District of

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

5 **FAILURE TO NAME PROPER RESPONDENT**

6 Review of the Petition reveals that Petitioner has failed to name a proper respondent.  
7 On federal habeas, a state prisoner must name the state officer having custody of him as  
8 the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule  
9 2(a), 28 U.S.C. foll. § 2254). “Typically, that person is the warden of the facility in which  
10 the petitioner is incarcerated.” Id. Federal courts lack personal jurisdiction when a habeas  
11 petition fails to name a proper respondent. See id.

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

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

28 ///

1 Here, Petitioner has incorrectly named "Judge Timothy R. Walsh" as Respondent.  
2 In order for this Court to entertain the Petition filed in this action, Petitioner must name the  
3 warden in charge of the state correctional facility in which Petitioner is presently confined  
4 or the Director of the California Department of Corrections and Rehabilitation.  
5 Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

6 **CONCLUSION AND ORDER**

7 Accordingly, the Court **DISMISSES** the Petition without prejudice due to  
8 Petitioner's failure to satisfy the filing fee requirement, failure to use a court-approved  
9 petition form, and failure to name a proper respondent. If Petitioner wishes to proceed with  
10 this case, he must submit, **no later than August 14, 2017**, a copy of this Order with the  
11 \$5.00 fee or with adequate proof of his inability to pay the fee and file a First Amended  
12 Petition which cures the defects identified above. The Clerk of Court shall send a blank  
13 Southern District of California In Forma Pauperis Application and a blank Southern  
14 District of California amended petition form to Petitioner along with a copy of this Order.

15 **IT IS SO ORDERED.**

16 Dated: June 13, 2017

17   
18 Hon. Roger T. Benitez  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26  
27  
28