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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

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11 WILLIAM CATO SELLS, JR.,

12 Plaintiff,

13 v.

14 JUDGE GORDON L. GODFREY,
PROSECUTOR H. STEWART
15 MENELEE,

16 Defendant.

CASE NO. 3:13-cv-05634-RJB

ORDER ADOPTING REPORT AND
RECOMMENDATION

17 This matter comes before the Court on the Report and Recommendation of the Magistrate
18 Judge. Dkt. 7. The court has considered the relevant documents and the remainder of the file
19 herein.

20 On July 29, 2013, Petitioner William Cato Sells filed an application to proceed *in forma*
21 *pauperis* and a proposed "Petition for Writ of Mandamus." Dkt. 1; Dkt. 1-1. Because Sells is a
22 prisoner claiming to be in custody in violation of the United States Constitution, his Petition was
23 properly treated as petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

1 On August 1, 2013, the Court Clerk advised Sells that his filings were deficient because
2 they were not submitted on this Court's forms. Dkt. 3. The Clerk provided Sells with the correct
3 forms for filing his 28 U.S.C. § 2254 petition and his application to proceed *in forma pauperis*.
4 *Id.* The Clerk further advised Sells that he must submit these forms by September 3, 2013, or else
5 his action may be subject to dismissal. *Id.* The Court later extended this deadline to September
6 20, 2013. Dkt. 6.

7 On August 26, 2013, Sells appealed the Court's "order . . . refusing to treat Petitioner's
8 Petition for Writ of Mandamus as a civil proceeding, and to perform a clear nondiscretionary
9 duty." Dkt. 4. The Ninth Circuit dismissed the appeal for lack of jurisdiction because the district
10 court had not issued any final or appealable orders. Dkt. 8.

11 Because Sells did not file his petition and application on the appropriate forms by
12 September 20, 2013, Magistrate Judge Strombom issued a Report and Recommendation
13 recommending that his application be denied. Dkt. 7. The Magistrate Judge recommended that
14 the case be dismissed without prejudice. *Id.*

15 On October 23, 2013, Sells requested leave to file his objections to the Magistrate Judge/s
16 Report and Recommendation because he was unable to mail his objections until two days after
17 the noting date. Dkt. 9. In the interest of fairness, Sells' motion should be granted.

18 In his objections, Sells argues that the Magistrate Judge's denial constituted an abuse of
19 discretion. Dkt. 10, at 1. Petitioner reemphasized his qualifications, and argued that the form he
20 used was provided by the Washington State Penitentiary law librarian. *Id.* at 1-2.

21 The court has reviewed the record *de novo*. The court concurs with the Magistrate
22 Judge's recommendation. The Magistrate Judge's decision to deny Sells' application did not
23 constitute an abuse of discretion. The Court properly treated his petition as a § 2254 petition for
24

1 writ of habeas corpus. Moreover, Sells needed only to comply with the Court's directives and
2 complete the provided forms to avoid dismissal. For the reasons provided in the Report and
3 Recommendation, Sells' application to proceed *in forma pauperis* should be denied, and
4 Petitioner's case should be dismissed without prejudice.

5 ***IFP on Appeal.*** In the event that Petitioner appeals this order, and/or appeals dismissal
6 of this case, IFP status should be denied by this court, without prejudice to Petitioner to filing in
7 the Ninth Circuit U.S. Court of Appeals an application to proceed *in forma pauperis*.

8 Therefore, it is hereby

9 **ORDERED** that Petitioner's motion for leave to file his objections (Dkt. 9) is
10 **GRANTED**; the Report and Recommendation (Dkt. 7) is **ADOPTED**; Petitioner's application
11 to proceed *in forma pauperis* (Dkt. 1) is **DENIED**, and this case is **DISMISSED WITHOUT**
12 **PREJUDICE**. In the event that plaintiff appeals this order, IFP status is **DENIED** by this court,
13 without prejudice to Petitioner to filing in the Ninth Circuit U.S. Court of Appeals an application
14 to proceed *in forma pauperis*.

15 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
16 to any party appearing *pro se* at said party's last known address.

17 Dated this 24th day of October, 2013.

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19 ROBERT J. BRYAN
20 United States District Judge