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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PAUL D. CARR,
Petitioner,
v.
NEIL McDOWELL, Warden, et al.,
Respondents.

Case No. 21cv900 MMA (MSB)

**ORDER GRANTING MOTION FOR
LEAVE TO PROCEED IN FORMA
PAUPERIS;**

[Doc. No. 5]

**DENYING REQUEST FOR
APPOINTMENT OF COUNSEL;**

**GRANTING EXTENSION OF TIME
TO FILE FIRST AMENDED PETITION**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. *See* Doc. No. 1. On May 19, 2021, the Court denied Petitioner’s motion to proceed in forma pauperis and dismissed the petition without prejudice and with leave to amend for failure to satisfy the filing fee requirement, as the trust account statement accompanying the request for IFP reflected an account balance sufficient to pay the \$5.00 filing fee, and for failure to allege exhaustion of state court remedies as to the claims presented in the Petition. *See* Doc. No. 3. The Court instructed Petitioner that in order to reopen and proceed with this case, Petitioner was

1 required to submit a First Amended Petition that cures the pleading deficiencies outlined
2 in the Court’s May 19, 2021 Order together with the required filing fee on or before July
3 19, 2021, and if Petitioner failed to satisfy the exhaustion requirement as to any claim
4 presented in the action or request a stay of the instant habeas action while he exhausted
5 his unexhausted claims, he would need to file a new petition which will be given a new
6 civil case number. *Id.*

7 On June 30, 2021, *nunc pro tunc* to June 28, 2021, Petitioner submitted a Renewed
8 letter request to proceed IFP in the above-titled case, stating that due to transfers and
9 quarantine he “was in jeopardy of missing the July 19th deadline” and that he was unable
10 to properly respond due to being “denied of law library access and proper medical care.”
11 Doc. No. 5 at 1. Petitioner indicates he included “a current trust account statement that
12 reflects the .15 ¢ balance on my books,” and requests appointment of counsel to “clear
13 up” the IFP matter and “to protect my rights to the federal court access.” *Id.*

14 On July 7, 2021, *nunc pro tunc* to July 1, 2021, Petitioner submitted a second letter
15 to the Court indicating he applied for a prison certificate to support his IFP request, but
16 prison officials have refused to release the certificate and stating: “I can only ask you to
17 accept the previous Trust Account balance sheet that I sent to to [sic] support my In
18 Forma Paperis [sic] status.” Doc. No. 7 at 1. Petitioner also reiterates his request for
19 appointment of counsel, noting he remains without access to the law library or his legal
20 documents and explaining: “I am asking for counsel to properly address the AEDPA
21 time-bar issue before your court.” *Id.*

22 For the reasons discussed, the Court **GRANTS** Petitioner’s motion for leave to
23 proceed in forma pauperis, **DENIES** the request for appointment of counsel without
24 prejudice, and **GRANTS** an extension of time for filing of the First Amended Petition.

FILING FEE REQUIREMENT

26 Petitioner requests reconsideration of the Court’s denial of his prior motion to
27 proceed in forma pauperis. *See* Doc. No. 5 at 1, 3-4. In addition to the current trust
28 account statement reflecting \$0.15 in Petitioner’s inmate trust account, *id.* at 5, Petitioner

1 has submitted a statement explaining that at the time the prior prison certificate was
2 submitted, he had a credit on his account from a disputed charge, and the proper charge
3 had not yet been deducted. *Id.* at 4. Petitioner explains the charge has now been
4 deducted, leaving the current \$0.15 balance. *Id.* Based on Petitioner’s trust account
5 statement and accompanying explanation, it is evident Petitioner cannot afford the \$5.00
6 filing fee. Thus, the Court **GRANTS** Petitioner’s motion to proceed in forma pauperis
7 and allows him to prosecute the above-referenced action without being required to prepay
8 fees or costs and without being required to post security.

9 **REQUEST FOR APPOINTMENT OF COUNSEL**

10 Petitioner requests appointment of counsel to protect his rights to federal court
11 access, to assist with his in forma pauperis application, and to assist in addressing the
12 AEDPA time-bar issue, particularly with respect to obtaining equitable tolling of the
13 AEDPA deadline. *See id.* at 1-3, *see also* Doc. No. 7 at 1.

14 While district courts are provided with statutory authority to appoint counsel in a
15 federal habeas case when a petitioner is financially eligible and “the court determines that
16 the interests of justice so require” pursuant to 18 U.S.C. §3006A(a)(2)(b), the Ninth
17 Circuit has held that “[i]ndigent state prisoners applying for habeas corpus relief are not
18 entitled to appointed counsel unless the circumstances of a particular case indicate that
19 appointed counsel is necessary to prevent due process violations.” *Chaney v. Lewis*, 801
20 F.2d 1191, 1196 (9th Cir. 1986) (citations omitted).

21 With respect to Petitioner’s request for the appointment of counsel to assist with
22 his application to proceed in forma pauperis, that request appears moot in view of the
23 Court’s granting of Petitioner’s request to proceed IFP. With respect to Petitioner’s
24 request for assistance in the other respects asserted, Petitioner has demonstrated the
25 ability to file his pleadings and requests with the Court in a timely manner and request
26 allowances as warranted without the assistance of counsel. Moreover, it is plain from the
27 filings Petitioner has submitted to date that he is able to clearly articulate his arguments
28 without the assistance of counsel. *See e.g., LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir.

1 1987) (district court did not abuse discretion is declining to appoint counsel where
2 “district court pleadings illustrate to us that [the petitioner] had a good understanding of
3 the issues and the ability to present forcefully and coherently his contentions.”). As such,
4 the Court finds the interests of justice do not necessitate appointment of counsel at the
5 present time and Petitioner’s request for the appointment of counsel is **DENIED** without
6 prejudice.

7 However, in view of Petitioner’s statements about facility transfers and lack of
8 access to the law library or his legal documents, the Court **GRANTS** an extension of time
9 for filing of a First Amended Petition to September 20, 2021, to allow Petitioner an
10 opportunity to clarify whether he intends to bring any exhausted claims in the instant
11 habeas action and whether he intends to seek a stay of this action while he exhausts.

12 The Court again cautions Petitioner that any claims raised in a habeas petition in
13 this Court must be filed before the expiration of the one-year statute of limitations. *See*
14 28 U.S.C. § 2244(d).¹ The statute of limitations does not run while a properly filed state
15 habeas corpus petition is pending. 28 U.S.C. § 2244(d); *see Evans v. Chavis*, 546 U.S.
16 189, 193 (2006) (“As long as the prisoner filed a petition for appellate review within a
17 ‘reasonable time,’ he could count as ‘pending’ (and add to the 1–year time limit) the days
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20 ¹ 28 U.S.C. § 2244(d) provides:

21 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a
22 person in custody pursuant to the judgment of a State court. The limitation period shall run from
23 the latest of--

24 (A) the date on which the judgment became final by the conclusion of direct review or the
25 expiration of the time for seeking such review;

26 (B) the date on which the impediment to filing an application created by State action in
27 violation of the Constitution or laws of the United States is removed, if the applicant was
28 prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the
Supreme Court, if the right has been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have
been discovered through the exercise of due diligence.

1 between (1) the time the lower state court reached an adverse decision, and (2) the day he
2 filed a petition in the higher state court.”), citing *Carey v. Saffold*, 536 U.S. 214, 222-23
3 (2002); *but see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is
4 ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for
5 placement into the record] are in compliance with the applicable laws and rules
6 governing filings.”); *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (“Because the state
7 court rejected petitioner’s [post-conviction] petition as untimely, it was not ‘properly
8 filed,’ and he is not entitled to statutory tolling under § 2244(d)(2).”). However, absent
9 some other basis for tolling, the statute of limitations continues to run while a federal
10 habeas petition is pending. *See Duncan v. Walker*, 533 U.S. 167, 181-182 (2001).

11 SECTION 1983 ALLEGATIONS

12 Finally, several of Petitioner’s contentions, particularly those related to Petitioner’s
13 alleged denial of meaningful access to the courts, denial of law library access and to his
14 legal documents, and denial of medical care, *see e.g.*, Doc. No. 5 at 1-3; Doc. No. 7 at 1,
15 appear to relate not to challenges to his conviction or sentence, but to the conditions of
16 his confinement. To the extent Petitioner seeks to challenge the conditions of his
17 confinement, such a challenge must be brought, if at all, in a civil rights complaint filed
18 pursuant to 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (“[A]
19 § 1983 action is a proper remedy for a state prisoner who is making a constitutional
20 challenge to the conditions of his prison life, but not to the fact or length of his
21 custody.”); *see also Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016) (*en banc*)
22 (“[W]e hold that if a state prisoner’s claim does not lie at ‘the core of habeas corpus,’ it
23 may not be brought in habeas corpus but must be brought, ‘if at all,’ under § 1983.”),
24 quoting *Preiser*, 411 U.S. at 487, and *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011).
25 If Petitioner wishes to pursue claims concerning the conditions of his confinement, he
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1 must file a new civil rights action pursuant to 42 U.S.C. § 1983 which will be given a
2 new civil case number.²

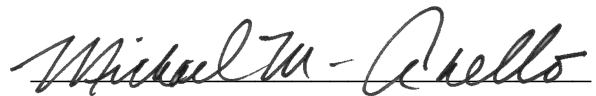
3 **CONCLUSION**

4 For the reasons discussed above, the Court **GRANTS** Petitioner’s motion for leave
5 to proceed in forma pauperis. While the instant habeas action remains dismissed without
6 prejudice and with leave to amend for failure to allege exhaustion of state court remedies
7 as to the claims presented in the Petition, the Court **GRANTS** an extension of time for
8 filing of a First Amended Petition to **September 20, 2021**, to allow Petitioner an
9 opportunity to clarify whether he intends to bring any exhausted claims in the instant
10 habeas action and whether he intends to seek a stay of this action while he exhausts. If,
11 on or before **September 20, 2021**, Petitioner has not satisfied the exhaustion requirement
12 as to any claim presented in the action or requested a stay of this action while he exhausts
13 his unexhausted claims, he will need to file a new habeas petition which will be given a
14 new civil case number. Finally, to the extent Petitioner wishes to pursue claims
15 concerning the conditions of his confinement, he must file a new civil rights action
16 pursuant to 42 U.S.C. § 1983 which will be given a new civil case number.

17 The Clerk of Court is directed to send Petitioner a blank Southern District of
18 California amended petition form along with a copy of this Order.

19 **IT IS SO ORDERED.**

20 DATE: July 9, 2021



21 HON. MICHAEL M. ANELLO
22 United States District Judge

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24 _____
25 ² Petitioner indicates he has initiated a civil rights action in the Central District of California (*see* ECF No.
26 5 at 3), but as the Court has not examined the contentions raised in that action, it is not known whether
27 the contentions articulated here are presented in that complaint. In any event, the Court provides the above
28 information about the filing of a civil rights complaint in an abundance of caution, because it appears
several of the contentions referenced in Petitioner’s letters concern the conditions of his confinement.