

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GENE AMBERT,
FL DOC #A50783,

Plaintiff,

vs.

STEVEN C. STAFFORD, Marshal,
Southern District of California and U.S.
Marshal Service,

Defendant.

Case No.: 3:22-cv-00996-RBM-BLM

**ORDER GRANTING MOTION
TO PROCEED IN FORMA PAUPERIS**

[Doc. 2]

I. INTRODUCTION

Plaintiff Gene Ambert (“Plaintiff”), currently housed at the Blackwater River Correctional Facility, located in Milton, Florida, and proceeding pro se, has filed a Petition for Writ of Mandamus pursuant to 28 U.S.C. § 1361. (Doc. 1). Plaintiff did not pay the filing fee required by 28 U.S.C. § 1914(a) to commence a civil action; instead, he filed a Motion to Proceed in Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). (Doc. 2.) For the reasons discussed below, Plaintiff’s Motion to Proceed IFP is **GRANTED**, and the Court further finds Plaintiff’s Petition for Writ of Mandamus is sufficient to survive an initial screening.

///

///

1 **II. DISCUSSION**

2 **A. Motion to Proceed IFP**

3 All parties instituting any civil action, suit or proceeding in a district court of the
4 United States, except an application for writ of habeas corpus, must pay a filing fee of
5 \$402. *See* 28 U.S.C. § 1914(a).¹ The action may proceed despite a plaintiff’s failure to
6 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
7 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
8 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed
9 IFP remains obligated to pay the entire fee in “increments” or “installments,” *Bruce v.*
10 *Samuels*, 577 U.S. 82, 83–84 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir.
11 2015), and regardless of whether his action is ultimately dismissed. *See* 28 U.S.C.
12 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

13 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
14 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
15 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
16 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
17 trust account statement, the Court assesses an initial payment of 20% of (a) the average
18 monthly deposits in the account for the past six months, or (b) the average monthly balance
19 in the account for the past six months, whichever is greater, unless the prisoner has no
20 assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody
21 of the prisoner then collects subsequent payments, assessed at 20% of the preceding
22 month’s income, in any month in which his account exceeds \$10, and forwards those
23 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,

24
25
26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
27 fee of \$52. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court
28 Misc. Fee Schedule, § 14 (eff. Dec. 1, 2020)). The additional \$52 administrative fee does
not apply to persons granted leave to proceed IFP. *Id.*

1 577 U.S. at 84–85.

2 In support of his IFP Motion, Plaintiff’s prison certificate shows he had an average
3 monthly balance of \$0.00 and average monthly deposits of \$0.00 for the 6 months
4 preceding the filing of this action, and an available balance of \$0.00. (Doc. 2 at 4.)

5 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP and declines to
6 impose an initial partial filing fee pursuant to 28 U.S.C. § 1915(b)(1) because his prison
7 certificate indicates he may have “no means to pay it.” See 28 U.S.C. § 1915(b)(4)
8 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or
9 appealing a civil action or criminal judgment for the reason that the prisoner has no assets
10 and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850
11 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a
12 prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available
13 to him when payment is ordered.”) Instead, the Court directs the Secretary of the Florida
14 Department of Corrections, or his or her designee, to collect the entire \$350 balance of the
15 filing fee required by 28 U.S.C. § 1914 and to forward it to the Clerk of the Court pursuant
16 to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

17 **B. Screening**

18 Before service on defendants, all in forma pauperis complaints, not just prisoner
19 complaints, must be screened to ensure that they are not frivolous or malicious, that they
20 state a claim on which relief may be granted, and that they do not seek monetary relief
21 against an immune defendant. 28 U.S.C. § 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122,
22 1129 (9th Cir. 2000). The standard for adequately stating a claim is the same as the one
23 that is applied under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Watison v.*
24 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). A complaint “must contain sufficient factual
25 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*
26 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
27 570 (2007)). A claim is facially plausible “when the plaintiff pleads factual content that
28

1 allows the court to draw the reasonable inference that the defendant is liable for the
2 misconduct alleged.” *Iqbal*, 556 U.S. at 678.

3 On July 6, 2022, Plaintiff filed a Petition for Writ of Mandamus pursuant to 28
4 U.S.C. § 1361 requesting that the Court direct the U.S. Marshals Service to respond to
5 Plaintiff’s request for records under the Freedom of Information Act (“FOIA”) and Privacy
6 Act. (Doc 1 at 3.) Specifically, Plaintiff seeks public records related to Plaintiff’s three
7 arrests by the U.S. Marshals Service. (Doc. 1 at 6.) On August 5, 2022, Plaintiff filed a
8 “motion for judicial notice,” wherein he alleges that on July 20, 2022, the U.S. Marshals
9 Service provided a non-responsive and/or incomplete version of a custody/detention report
10 subject to the FOIA request. (Doc. 4.) Plaintiff alleges he is not satisfied with the U.S.
11 Marshals’ production of records, and thus, he contends his claim remains viable. (*Id.*)
12 Plaintiff’s requests are mandamus actions “to compel an officer or employee of the United
13 States or any agency thereof to perform a duty owed to the Plaintiff.” 28 U.S.C. § 1361.
14 A district court may issue a writ of mandamus only if (1) plaintiff has a clear right to relief;
15 (2) defendant’s duty is ministerial and free from doubt, and (3) no other adequate remedy
16 is available. *Johnson v. Reilly*, 349 F.3d 1149, 1143 (9th Cir. 2003). Mandamus is an
17 extraordinary remedy, and district courts retain the discretion to deny relief, even if the test
18 is met. *Id.*

19 The Ninth Circuit has held that with respect to FOIA claims, exhaustion of
20 administrative remedies is a prudential consideration in determining whether the district
21 court should exercise jurisdiction, rather than a jurisdictional prerequisite. *See Yagman v.*
22 *Pompeo*, 868 F.3d 1075, 1083 (9th Cir. 2017). In the present case, the Court will not
23 dismiss sua sponte Plaintiff’s Petition for Writ of Mandamus, and will allow it to go
24 forward, permitting Plaintiff to proceed in forma pauperis and authorizing service of the
25 complaint and summons. *See Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir. 2012)
26 (explaining there is a “low threshold for proceeding past the screening stage”); *see also*
27 *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (finding that where the petitioner
28 is pro se, courts have an obligation “to construe pleadings liberally and to afford petitioner

1 benefit of any doubt”). In so doing, the Court does not decide whether Plaintiff has
2 exhausted administrative remedies, whether any failure to exhaust should be excused, and
3 whether, if Plaintiff has failed to exhaust, the Court should in its discretion continue to
4 exercise jurisdiction. The Court’s sua sponte examination of the FOIA claim on screening
5 under section 1915(e)(2) does not prevent the bringing of any motion authorized under
6 Rule 12 of the Federal Rules of Civil Procedure.

7 Thus, the Court finds Plaintiff’s Petition for Writ of Mandamus is sufficient to
8 survive an initial screening.

9 III. CONCLUSION

10 For the foregoing reasons, the Court:

11 (1) **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
12 (Doc. 2);²

13 (2) **ORDERS** the agency having custody of the prisoner’s account or any
14 subsequent “agency having custody” of Plaintiff to collect from Plaintiff’s prison trust
15 account the \$350 filing fee owed by collecting monthly payments from Plaintiff’s account
16 in an amount equal to twenty percent (20%) of the preceding month’s income and
17 forwarding those payments to the Clerk of the Court each time the amount in the account
18 exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). All payments should be clearly identified
19 by the name and number assigned to this action.

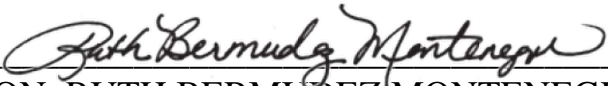
20 (3) **DIRECTS** the Clerk of the Court to serve a copy of this Order on Ricky D.
21 Dixon, Secretary, Florida Department of Corrections, 501 South Calhoun Street,

22
23
24 ² The Court acknowledges that “a party proceeding in forma pauperis is entitled to have
25 the summons and complaint served by the U.S. Marshal.” *See Puett v. Blandford*, 912 F.2d
26 270, 273 (9th Cir. 1990); FED. R. CIV. P. 4(c)(3). However, in this case, Steven C. Stafford
27 of the United States Marshals Service is the named defendant, and Rule 4 also explains that
28 a party to a lawsuit may not perform service of process. FED. R. CIV. P. 4(c)(2). Thus, the
Court does not direct service by the U.S. Marshals Service at this time. *See* FED. R. CIV.
P. 4 (“[a]t the plaintiff’s request, the court may order that service be made by a United
States marshal or deputy marshal or by a person specially appointed by the court . . .”).

1 Tallahassee, Florida 32399-2500. ALL PAYMENTS SHALL BE CLEARLY
2 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

3 **IT IS SO ORDERED.**

4 DATE: August 9, 2022

5
6 
7 HON. RUTH BERMUDEZ MONTENEGRO
8 UNITED STATES DISTRICT JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28