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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

MONRELL D. MURPHY,  
Petitioner,  
v.  
RALPH DIAZ,  
Respondent.

Case No. 1:20-cv-01300-DAD-SAB-HC  
FINDINGS AND RECOMMENDATION TO  
DENY PETITIONER’S SECOND  
APPLICATION TO PROCEED *IN FORMA*  
*PAUPERIS*  
(ECF No. 12)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

**I.**

**BACKGROUND**

On September 3, 2020, Petitioner commenced the instant proceeding by filing a petition for writ of habeas corpus in the Sacramento Division of the United States District Court for the Eastern District of California. (ECF No. 1). On September 11, 2020, the petition was transferred to this Court. (ECF No. 4).

On September 15, 2020, the undersigned issued findings and recommendation to deny Petitioner’s application to proceed *in forma pauperis*. (ECF No. 7). The undersigned found that Petitioner was financially able to pre-pay the entire \$5.00 filing fee to commence this habeas action because “Petitioner’s certified inmate account statement indicates that he currently has an

1 available sum of \$104.30 on account to his credit at the California Correctional Institution.  
2 Further, the average monthly balance of Petitioner’s account is \$181.70, and during the past six  
3 months the average monthly deposits to Petitioner’s account is \$168.39.” (ECF No. 7 at 2).<sup>1</sup> The  
4 findings and recommendation also stated that Petitioner may notify the Court “[s]hould  
5 Petitioner have additional information to provide the Court, or should his available balance  
6 change by the time he receives this order.” (Id.).

7 The findings and recommendation was served on Petitioner and contained notice that any  
8 objections were to be filed within twenty-one days of the date of service of the findings and  
9 recommendation. (ECF No. 7 at 3). On October 16, 2020, the Court extended the deadline to file  
10 objections to the findings and recommendation to November 8, 2020. (ECF No. 11). On October  
11 25, 2020, the Court received Petitioner’s second application to proceed *in forma pauperis*. (ECF  
12 No. 12). On November 13, 2020, the Court received Petitioner’s explanation in support of his  
13 second application to proceed *in forma pauperis* in response to the Court’s order. (ECF Nos. 13,  
14 14).

15 **II.**

16 **DISCUSSION**

17 Title 28, United States Code, § 1915(a)(1) permits a plaintiff to bring a civil action  
18 “without prepayment of fees or security thereof” if the plaintiff submits a financial affidavit that  
19 demonstrates the plaintiff “is unable to pay such fees or give security therefor.” A prisoner  
20 seeking to bring a civil action must, in addition to filing an affidavit, “submit a certified copy of  
21 the trust fund account statement . . . for the 6-month period immediately preceding the filing of  
22 the complaint . . . obtained from the appropriate official of each prison at which the prisoner is or  
23 was confined.” 28 U.S.C. § 1915(a)(2).

24 Here, Petitioner has filed an application declaring that, due to his poverty, he is unable to  
25 pre-pay the full amount of fees and costs for these proceedings or give security therefor, and that  
26 he believes that he is entitled to the relief sought in his petition. Petitioner also submitted a  
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28 <sup>1</sup> Page numbers refer to ECF page numbers stamped at the top of the page.

1 certified copy of Petitioner’s inmate trust account statement showing the activity in Petitioner’s  
2 account for the previous six months.

3 Petitioner’s second application to proceed *in forma pauperis* reflects that Petitioner had  
4 \$0 in his account on October 19, 2020, despite an average monthly balance of \$216.76 and  
5 average monthly deposits of \$150.08 during the past six months. (ECF No. 12 at 2). The Court  
6 notes that on September 15, 2020, when the previous findings and recommendation was issued,  
7 Petitioner’s account contained \$73.43. (*Id.* at 6). Despite multiple \$100 and \$250 deposits being  
8 made to Petitioner’s account during May through August, there have been no further deposits  
9 since August 14, 2020. (*Id.* at 4–6). Additionally, despite only having two “sales” expenses of  
10 \$9.95 on May 13, 2020 and \$6 on July 15, 2020, there was a “sales” expense of \$44.48 on  
11 October 13, 2020 when Petitioner had an account balance of \$45.27, effectively depleting his  
12 account. (*Id.*).

13 As noted in the previous findings and recommendation, “the Court has the authority to  
14 consider any reasons and circumstances for any change in Petitioner’s available assets and funds.  
15 See Collier v. Tatum, 722 F.2d 653, 656 (11th Cir. 1983) (district court may consider an  
16 unexplained decrease in an inmate’s trust account, or whether an inmate’s account has been  
17 depleted intentionally to avoid court costs).” (ECF No. 7 at 2). As set forth above, from the face  
18 of the second application to proceed *in forma pauperis* and Petitioner’s trust account statement,  
19 there is an unexplained stop in deposits and what appears to be an intentional depletion of funds.

20 In Petitioner’s explanation in support of the second application to proceed *in forma*  
21 *pauperis*, Petitioner states that he has no control over when prison officials actually withdraw  
22 funds from his trust account to pay for his multiple filing fees. Petitioner also states that he  
23 attempted to withdraw the \$5.00 filing fee from his account but was barred because he required  
24 the signature of the prison law librarian and he has been unable to access to the law library due to  
25 COVID-19 restrictions. (ECF No. 14 at 1, 3). Petitioner explains that the sales expense was for  
26 “the purchase of life necessities,” including food and hygiene items, and that this order was  
27 placed before Petitioner knew his attempt to withdraw the filing fee had failed. (*Id.* at 3).

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1 It appears that Petitioner did attempt to withdraw a \$5.00 filing fee, but the request was  
2 canceled because Petitioner did not have the correct approval signature on the form. (ECF No. 10  
3 at 3). However, Petitioner’s explanation does not address the stop in deposits. Additionally,  
4 although Petitioner states that the October 13, 2020 sales expense of \$44.48 that effectively  
5 depleted his account was an innocent purchase of food and hygiene items, the Court is skeptical  
6 of this explanation given that in the past six months Petitioner only had two other sales expenses  
7 of \$9.95 and \$6.

8 Accordingly, the undersigned recommends that Petitioner’s second application to proceed  
9 *in forma pauperis* be denied. If Petitioner wishes to proceed with this action, Petitioner must pre-  
10 pay the \$5.00 filing fee in full.

11 **III.**

12 **RECOMMENDATION & ORDER**

13 Based on the foregoing, the undersigned HEREBY RECOMMENDS that:

- 14 1. Petitioner’s second application to proceed *in forma pauperis* (ECF No. 12) be DENIED;  
15 and  
16 2. Petitioner be granted forty-five (45) days to pay the \$5.00 filing fee.<sup>2</sup>

17 This Findings and Recommendation is submitted to the assigned United States District  
18 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
19 Rules of Practice for the United States District Court, Eastern District of California. Within  
20 **FOURTEEN (14) days** after service of the Findings and Recommendation, Petitioner may file  
21 written objections with the court and serve a copy on all parties. Such a document should be  
22 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” The assigned  
23 District Judge will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C.  
24 § 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may

25 \_\_\_\_\_  
26 <sup>2</sup> Petitioner “consent[s] to the \$5.00 filing fee be[ing] directly withdrawn from his prison trust account as all other  
27 court fees are currently being withdrawn.” (ECF No. 14 at 2). However, as Petitioner has not been granted *in forma*  
28 *pauperis* status, the process set forth in 28 U.S.C. § 1915(b) for the prisoner’s custodian to forward payments from  
the prisoner’s account to the clerk of court is not available. Accordingly, Petitioner will be responsible for  
withdrawing the filing fee from his account. If Petitioner pays the \$5.00 filing fee before the objection period closes,  
the Court will vacate the findings and recommendation and proceed with the case.

1 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839  
2 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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4 IT IS SO ORDERED.

5 Dated: November 19, 2020

  
UNITED STATES MAGISTRATE JUDGE

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