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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY ALLEN TUCKER,
Petitioner,

v.

WARDEN, SACRAMENTO STATE
PRISON,
Respondent.

No. 2:18-cv-0035 TLN KJN P

ORDER

Petitioner is a state prisoner, proceeding without counsel. Respondent has filed a motion to dismiss this action because petitioner failed to use the proper form; his claims that he received ineffective assistance of trial counsel, that his sentence was unauthorized, and that a firearm enhancement was improperly imposed are untimely; and his claim regarding parole eligibility is not cognizable on federal habeas. Subsequently, petitioner filed a motion to amend to correct or cure the deficiencies addressed in respondent’s motion. Respondent does not oppose the motion to amend, and states that addressing the issues in the motion to dismiss would be premature if the court allows petitioner to file an amended petition. (ECF No. 24 at 1.)

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend shall be given freely when justice requires. In deciding whether justice requires granting leave to amend, factors to be considered include the presence or absence of undue delay, bad faith, dilatory motive,


1 repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing
2 party, and futility of proposed amendment. Based on the foregoing factors, the undersigned
3 concludes that justice requires leave to amend in this instance. In addition to filing his amended
4 petition on the court's habeas form, petitioner should name David Baughman, current warden of
5 California State Prison, Sacramento, as respondent. See Stanley v. California Supreme Court, 21
6 F.3d 359, 360 (9th Cir. 1994). By this order, the undersigned makes no finding as to the
7 timeliness of any of the claims contained in his original petition under 28 U.S.C. § 2244(d)(1).
8 Petitioner is cautioned that failure to file an amended petition may result in the dismissal of this
9 action.

10 Because petitioner is granted leave to file an amended petition, respondent's motion to
11 dismiss is dismissed without prejudice. Similarly, petitioner's motion for discovery is premature,
12 and is denied without prejudice to its renewal after resolution of respondent's renewed motion to
13 dismiss.

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. Petitioner's motion to amend (ECF No. 20) is granted;
- 16 2. Within thirty days from the date of this order, petitioner shall file an amended petition
17 on the court's form for filing a petition for writ of habeas corpus under 28 U.S.C. § 2254;
- 18 3. The Clerk of the Court is directed to send petitioner the form for filing a petition for
19 writ of habeas corpus under 28 U.S.C. § 2254;
- 20 4. Respondent's motion to dismiss (ECF No. 17) is denied without prejudice; and
- 21 5. Petitioner's motion to conduct discovery (ECF No. 25) is denied without prejudice.

22 Dated: January 14, 2019

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25 KENDALL J. NEWMAN
26 UNITED STATES MAGISTRATE JUDGE

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