

United States District Court  
For the Northern District of California

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**FILED**

DEC 27 2012

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH ADRIAN FULLER,  
Petitioner,  
vs.  
STATE OF CALIFORNIA, et al.,  
Respondent.

No. C 10-05501 EJD (PR)  
ORDER DENYING CERTIFICATE  
OF APPEALABILITY; VACATING  
JUDGMENT AND REOPENING  
CASE; GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS

(Docket Nos. 21 & 22)

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This case was transferred to this district on December 3, 2010. Petitioner filed an in forma pauperis (“IFP”) application which was deficient because Plaintiff failed to attach a copy of his prisoner trust account statements showing transactions for the last six months. (Docket No. 4.) On December 14, 2010, Petitioner was informed he needed to file an IFP application within thirty days or the case would be dismissed. (Docket No. 9.) On April 15, 2011, the Court directed Petitioner to file an IFP application or pay the filing fee within thirty days, *i.e.*, by May 15, 2011, to avoid dismissal of the action. (Docket No. 11.) The case was reassigned to the undersigned on April 25, 2011. On June 8, 2011, the case was dismissed without prejudice, as Petitioner had failed to pay the filing fee or file an IFP application.

1 (Docket No. 14.) Petitioner's motion to set aside the judgment was denied on August  
2 24, 2012. (Docket No. 17.) Petitioner filed an appeal with the Ninth Circuit which  
3 remanded the case for the limited purpose of determining if a certificate of appealability  
4 should issue.

5 A certificate of appealability regarding the denial of Petitioner's motion to set  
6 aside the judgment regarding a dismissal without prejudice for failing to file an IFP  
7 application or paying the filing fee is DENIED. See Rule 11(a) of the Rules Governing  
8 Section 2254 Cases. Petitioner has not made "a substantial showing of the denial of a  
9 constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated that  
10 "reasonable jurists would find the district court's assessment of the constitutional claims  
11 debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

12 The Court also notes that on November 20, 2012, Petitioner filed a motion to  
13 proceed IFP and also indicated in his motion for a certificate of appealability, that he  
14 did not receive the Court's dismissal order until three months later. Therefore, the  
15 Court will reopen the case and GRANT the motion to proceed IFP. The Court will  
16 conduct an initial review of the petition in a separate order.

### 17 CONCLUSION

18 For the foregoing reasons and for good cause shown,

19 1. A certificate of appealability is **DENIED**. The Clerk shall forward this  
20 Order to the Ninth Circuit Court of Appeals, Case No. 12-17350.

21 2. The Judgment entered on June 8, 2011, (Docket No. 15) is VACATED.  
22 The Clerk shall reopen the file. The Court will conduct an initial review of the petition  
23 in a separate order.

24 3. Petitioner's motions for leave to proceed in forma pauperis, (Docket No.  
25 22), is GRANTED.

26 This order terminates Docket Nos. 21 and 22.

27 DATED: 12/21/12

  
28 EDWARD J. DAVILA  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

KENNETH ADRIAN FULLER,  
Plaintiff,

Case Number: CV10-05501 EJD

**CERTIFICATE OF SERVICE**

v.

STATE OF CALIFORNIA et al,  
Defendant.

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 27, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Kenneth Adrian Fuller  
45 Pearce Street  
Petaluma, CA 95490

Dated: December 27, 2012

Richard W. Wicking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk