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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DeARCEY JAMUL STEWART,  
  
Petitioner,  
  
v.  
  
MATTHEW CATE, Secretary,  
  
Respondent.

Civil No. 05cv1059-BTM (CAB)

**ORDER:**

- (1) CONSTRUING MOTION TO PROCEED IN FORMA PAUPERIS ON APPEAL AS A REQUEST TO PROCEED IN FORMA PAUPERIS IN THE DISTRICT COURT;**
- (2) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS; AND**
- (3) GRANTING IN PART AND DENYING IN PART MOTION FOR COPIES OF TRANSCRIPTS**

Petitioner is a state prisoner proceeding pro se with a First Amended Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, which has been dismissed as untimely. Petitioner has filed a Notice of Appeal (doc. no. 95), a Motion for leave to appeal in forma pauperis (doc. no. 96), a certified copy of his inmate trust account statement (doc. no. 97), and a Motion requesting copies of his trial transcripts and other documents (doc. no. 98).

**I. Motion for Leave to Appeal In Forma Pauperis**

To the extent Petitioner seeks leave to appeal in forma pauperis, his motion is insufficiently supported. Federal Rule of Appellate Procedure 24(a) provides that a motion for

1 leave to proceed in forma pauperis on appeal which is filed in the district court by a party who  
2 has not been granted leave to proceed in forma pauperis in the district court, such as Petitioner,  
3 must be accompanied by an affidavit that:

- 4 (A) shows in the detail prescribed by Form 4 of the Appendix of Forms the  
5 party's inability to pay or to give security for fees and costs;
- 6 (B) claims an entitlement to redress; and
- 6 (C) states the issues that the party intends to present on appeal.

7 Fed.R.App.P. 24(a)(1).

8 Petitioner's in forma pauperis application does not satisfy these requirements. However,  
9 it is clear that Petitioner is also seeking leave to proceed in forma pauperis in this Court. His  
10 previous such request (doc. no. 82) was denied as improperly supported (doc. no. 84), and he  
11 was sent a blank Southern District of California in forma pauperis application, which he has  
12 properly filled out and supported with the necessary certified prison trust account statement.  
13 (Doc. Nos. 96-97.) In addition, Petitioner has indicated in the past his intent to acquire in forma  
14 pauperis status in this Court in order to request copies of his trial transcripts. (Doc. No. 82.)

15 Accordingly, the Court **CONSTRUES** Petitioner's Motion to proceed in forma pauperis  
16 on appeal as a Motion to proceed in forma pauperis in this Court. Based on the documents  
17 submitted in support, the Motion to proceed in forma pauperis is **GRANTED**. Petitioner's in  
18 forma pauperis status will automatically continue for his appeal of this Court's Order dismissing  
19 this action. See Fed.R.App.P. 24(a)(3).

## 20 **II. Motion for Trial Transcripts**

21 Petitioner has also filed a Motion for Trial Transcripts in which he requests copies of the  
22 transcripts of his trial pertaining to the testimony of a number of witnesses, along with opening  
23 and closing arguments. (Doc No. 98.) Petitioner also requests copies of the exhibits and police  
24 reports entered as evidence at his trial. (Id.)

25 The exhibits from Petitioner's trial were not lodged by Respondent in this action and the  
26 Court is unable to provide Petitioner with copies of those documents. Therefore, with respect  
27 to his request for copies of those documents, the Motion is **DENIED** in part without prejudice  
28 to Petitioner to file his request in the appellate court.

1 With respect to the request for portions of the trial transcripts, Petitioner has supported  
2 the request with his declaration indicating that he was required by prison authorities to send the  
3 transcripts home to his mother, who turned them over to a pro bono legal organization, which  
4 declined to take the case and lost the transcripts. (Doc. No. 98-1 at 1-2.) Petitioner indicates  
5 that he needs the transcripts in order to argue on appeal that he has made a showing of actual  
6 innocence necessary to overcome the untimeliness of his First Amended Petition. (Doc. No. 98.)

7 The Court **GRANTS** in part Petitioner's Motion to the extent it seeks copies of certain  
8 portions of his trial transcripts.<sup>1</sup> The Clerk of Court shall provide to Petitioner copies of the  
9 following pages of the trial transcript lodged by Respondent as Docket Item No. 14, Lodgment  
10 No. 2, Reporter's Transcript:

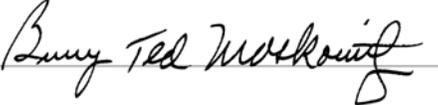
11 vol. 4, pp. 336-354; vol. 5, pp. 506-746;  
12 vol. 6, pp. 747-892 and 927-962; vol. 7, pp. 984-1151;  
13 vol. 8, pp. 1212-1319; vol. 9, pp. 1457-1526;  
14 vol. 10, pp. 1554-1563 and 1580-1614; vol. 11, pp. 1638-1660 and 1764-1801;  
15 vol. 12, pp. 1852-1936 and 1962-1969.

16 **III. Conclusion and Order**

17 Petitioner's Motion for leave to appeal in forma pauperis is **CONSTRUED** as a Motion  
18 to proceed in forma pauperis in this Court and is **GRANTED**. Petitioner's Motion for Trial  
19 Transcripts is **GRANTED** in part and **DENIED** in part as set forth in this Order.

20 **IT IS SO ORDERED.**

21 DATED: June 28, 2010

22   
23 Honorable Barry Ted Moskowitz  
24 United States District Judge

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28 <sup>1</sup> Petitioner includes a request for opening statements and copies of the trial testimony of his trial attorney and William Allen. (Doc. No. 98 at 3) However, neither person testified at his trial and the opening statements are not part of the record lodged in this Court.