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

TYRONE ROGERS,

Petitioner,

v.

JOSIE GASTELO, Warden,

Respondent.

Case No.: 16-cv1943-MMA (BGS)

**ORDER DENYING PETITIONER’S
MOTION TO PROCEED IN FORMA
PAUPERIS ON APPEAL**

[Doc. No. 23]

Petitioner Tyrone Rogers (“Petitioner”), a state prisoner proceeding *pro se* and *in forma pauperis* (“IFP”), filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. *See* Doc. No. 8. On August 10, 2018, the assigned magistrate judge issued a Report recommending that the Court grant Respondent’s motion to dismiss the Amended Petition. *See* Doc. No. 20. On August 31, 2018, Petitioner filed objections to the Report and Recommendation, a Notice of Appeal, and motion requesting to proceed IFP on appeal. *See* Doc. Nos. 21, 22, 23. The Court has not yet issued a final order or judgment in this case.

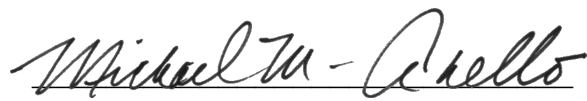
Rule 24(a)(3) of the Federal Rules of Appellate Procedure provides that a party granted leave to proceed IFP in district court may continue that status on appeal unless the district court certifies that the appeal is not taken in good faith, which in this context means that it is frivolous. *See Ellis v. United States*, 356 U.S. 674, 674-75 (1958). Title

1 28 of the United States Code, section 1915(a)(3) similarly provides that an appeal may
2 not be taken IFP if the trial court certifies it is not taken in good faith. For purposes of §
3 1915, an appeal is frivolous if it lacks any arguable basis in law or fact. *See Neitzke v.*
4 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1225 (9th Cir.
5 1984).

6 As explained above, Petitioner’s motion is premature at this stage of the litigation
7 because there has not been a final order or judgment entered in this case, and an
8 interlocutory appeal is not appropriate. Accordingly, the Court concludes that
9 Petitioner’s appeal is frivolous and **DENIES** Petitioner’s motion to proceed IFP on
10 appeal. *See Tran v. Macomber*, No. 11-cv-877-CW, 2015 WL 4035111, at *2 (N.D. Cal.
11 June 30, 2015) (denying the petitioner’s motion to proceed IFP on appeal because the
12 court had not entered a final order or judgment in the case; thus, “such an appeal would
13 be frivolous.”).

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15 **IT IS SO ORDERED.**

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17 Dated: September 4, 2018

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19 HON. MICHAEL M. ANELLO
20 United States District Judge
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