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

JASON ALTHEIDE,  
  
Plaintiff,  
  
v.  
  
STATE OF NEVADA,  
  
Defendant.

Case No. 17-cv-01174-BAS-JMA

**ORDER DISMISSING CIVIL  
ACTION FOR FAILURE TO PAY  
FILING FEE**

Plaintiff Jason Altheide, a prisoner detained at the High Desert State Prison in Indian Springs, Nevada and proceeding *pro se*, has filed a petition (the “Petition”) for a writ of mandamus. (ECF No. 1.) Plaintiff’s Petition seeks a writ of mandamus from this Court ordering the Supreme Court of Nevada to reverse its order denying a prior mandamus filed by Plaintiff in that court to direct a lower Nevada state court to process Plaintiff’s pending state habeas petitions. Over a month after filing his Petition, the Plaintiff filed a motion for leave to proceed *in forma pauperis* (“IFP”). For the reasons stated herein, the Court

1 denies Plaintiff's motion to proceed IFP.

2 **I. Failure to Pay Filing Fee or Properly Request IFP Status**

3 All parties instituting any civil action, suit, or proceeding in a district court of the  
4 United States, except an application for writ of habeas corpus, must pay a filing fee of  
5 \$400. *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff's failure to  
6 prepay the entire fee only if the plaintiff is granted leave to proceed *in forma pauperis*  
7 ("IFP") pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051  
8 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a  
9 prisoner who is granted leave to proceed IFP remains obligated to pay the entire fee in  
10 "increments" or "installments," *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016), and  
11 regardless of whether his action is ultimately dismissed, *see* 28 U.S.C. § 1915(b)(1) & (2);  
12 *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

13 Section 1915(a)(2) requires all persons seeking to proceed without full prepayment  
14 of fees to submit an affidavit that includes a statement of all assets possessed and which  
15 demonstrates an inability to pay. *See Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th  
16 Cir. 2015). In support of this affidavit, prisoners like Plaintiff must also submit a "certified  
17 copy of the trust fund account statement (or institutional equivalent) for . . . the 6-month  
18 period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *see*  
19 *also Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). It is from the certified trust  
20 account statement that the Court assesses an initial payment of 20% of (a) the average  
21 monthly deposits in the account for the past six months, or (b) the average monthly balance  
22 in the account for the past six months, whichever is greater, unless he has no assets. *See*  
23 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the  
24 prisoner then collects subsequent payments, assessed at 20% of the preceding month's  
25 income, in any month in which his account exceeds \$10, and forwards those payments to  
26 the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct.  
27 at 629.

28 Plaintiff did not pay the filing fee required to commence a civil action, nor has he

1 filed a motion to proceed IFP that includes *both* the affidavit required by 28 U.S.C.  
2 § 1915(a)(1) *and* the certified copy of his trust fund account statement required by 28  
3 U.S.C. § 1915(a)(2). Although Plaintiff has submitted a document<sup>1</sup> that might satisfy the  
4 affidavit requirement (ECF No. 2), Plaintiff has not submitted a certified copy of his trust  
5 fund account statement. As a prisoner, Plaintiff’s motion to proceed IFP is insufficient to  
6 comply with § 1915’s additional requirements. Therefore, Plaintiff’s case cannot yet  
7 proceed. *See* 28 U.S.C. § 1914(a); *Cervantes*, 493 F.3d at 1051.

## 8 **II. Screening Required by 28 U.S.C. § 1915(e)(2) and § 1915A**

9 In addition, the Court cautions Plaintiff that if he chooses to proceed further by either  
10 pre-paying the full \$400 civil filing fee, or submitting a properly supported motion to  
11 proceed IFP, his Petition will be screened before service upon any defendant and may be  
12 immediately dismissed pursuant to 28 U.S.C. § 1915A(b) or 28 U.S.C. § 1915(e)(2)(B).  
13 This screening will occur regardless of whether Plaintiff pays the full filing fee up front or  
14 is granted leave to proceed IFP and to pay it in monthly installments.<sup>2</sup> *See Lopez v. Smith*,  
15 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not  
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18 <sup>1</sup> This document is a standardized form motion to proceed IFP for inmates, which  
19 appears to be from the United States District Court for the District of Nevada.

20 <sup>2</sup> The Court notes that as currently pled, Plaintiff’s Petition will be subject to *sua*  
21 *sponte* dismissal regardless of whether he pays the full civil filing fee, or submits a properly  
22 supported motion to proceed IFP and pays it in installments. This is because Plaintiff’s  
23 writ of mandamus against the Supreme Court of Nevada is frivolous as a matter of law.  
24 The federal mandamus statute grants federal courts “original jurisdiction of any action in  
25 the nature of mandamus to compel an officer or employee of the United States or any  
26 agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361. Federal courts  
27 have no power to issue writs of mandamus to direct state courts or their judicial officers in  
28 the performance of their duties. *See Demos v. U.S. District Court*, 925 F.2d 1160, 1161-  
62 (9th Cir. 1991) (“[T]his court lacks jurisdiction to issue a writ of mandamus to a state  
court. Thus, to the extent that Demos attempts to obtain a writ in this court to compel a  
state court to take or refrain from some action, the petitions are frivolous as a matter of  
law.”). Likewise, this Court lacks jurisdiction to issue a writ of mandamus ordering the  
Supreme Court of Nevada to take the action Plaintiff seeks.

1 only permits but requires” the court to dismiss *sua sponte* an IFP complaint that is  
2 frivolous, malicious, fails to state a claim, or seeks damages from defendants who are  
3 immune); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing similar  
4 screening required by 28 U.S.C. § 1915A of all complaints filed by prisoners “seeking  
5 redress from a governmental entity or officer or employee of a governmental entity”).

6 The Court further cautions Plaintiff that if his Petition is found to be frivolous or  
7 malicious, or if it fails to state a claim, its dismissal pursuant to 28 U.S.C. § 1915(e)(2)  
8 and/or § 1915A(b) may later count as a third “strike” against him pursuant to 28 U.S.C.  
9 § 1915(g). *See Andrews*, 398 F.3d at 1116 n.1 (“Strikes are prior cases or appeals, brought  
10 while the plaintiff was a prisoner, which were dismissed on the ground that they were  
11 frivolous, malicious, or failed to state a claim.” (internal quotations omitted)). “Pursuant  
12 to § 1915(g), a prisoner with three strikes or more cannot proceed IFP” unless the prisoner  
13 is in “imminent danger of serious physical injury” at the time the complaint is filed. *Id.*;  
14 *see also* 28 U.S.C. § 1915(g); *Williams*, 775 F.3d at 1188 (citing *Cervantes*, 493 F.3d at  
15 1053).

### 16 **III. Conclusion and Order**

17 For the reason explained above, the Court:

18 (1) **DISMISSES WITHOUT PREJUDICE** this action for failure to pay the  
19 \$400 civil filing and administrative fee or to submit a motion to proceed IFP pursuant to  
20 28 U.S.C. §§ 1914(a) and 1915(a); and

21 (2) **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order to  
22 re-open this case by: (a) prepaying the entire \$400 civil filing and administrative fee  
23 required by 28 U.S.C. § 1914(a) in full; or (b) completing and filing a motion to proceed  
24 IFP that includes *both* the affidavit and the certified copies of his trust account statement  
25 for the 6-month period preceding the filing of his Petition as required by 28 U.S.C.  
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1 § 1915(a)(1), (2) and Civil Local Rule 3.2(b).<sup>3</sup>

2 **IT IS SO ORDERED.**

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4 **DATED: September 20, 2017**

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6 **Hon. Cynthia Bashant**  
7 **United States District Judge**

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25 <sup>3</sup> If Plaintiff fails to either prepay the \$400 civil filing fee or file a properly supported  
26 Motion and Declaration in Support of his motion to proceed IFP, together with the trust  
27 account statements required by 28 U.S.C. § 1915(a)(2) within 45 days, this case will remain  
28 dismissed without prejudice based only on Plaintiff's failure to satisfy 28 U.S.C.  
§ 1914(a)'s fee requirements, and will *not* count as a "strike" against him pursuant to 28  
U.S.C. § 1915(g).