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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 TAUNO AUGUST KOIVISTO,
12 Petitioner,
13 v.
14 WARDEN, CSP LANCASTER,
15 Respondent.
16
17

Case No.: 19cv1647 LAB (NLS)

**ORDER: (1) GRANTING
APPLICATION TO PROCEED IN
FORMA PAUPERIS;**

**(2) DISMISSING PETITION
WITHOUT PREJUDICE**

18 Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of
19 Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma
20 pauperis.

21 **REQUEST TO PROCEED IN FORMA PAUPERIS**

22 Petitioner has no funds on account at the California correctional institution in which
23 he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court
24 **GRANTS** Petitioner's application to proceed in forma pauperis, and allows Petitioner to
25 prosecute the above-referenced action without being required to prepay fees or costs and
26 without being required to post security. The Clerk of the Court shall file the Petition for
27 Writ of Habeas Corpus without prepayment of the filing fee.

28 ///

1 **FAILURE TO STATE A COGNIZABLE CLAIM ON FEDERAL HABEAS**

2 The case must be dismissed because, in accordance with Rule 4 of the rules
3 governing § 2254 cases, Petitioner has failed to allege that his state court conviction or
4 sentence violates the Constitution of the United States.

5 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
6 federal habeas corpus claims:

7 The Supreme Court, a Justice thereof, a circuit judge, or a district
8 court shall entertain an application for a writ of habeas corpus in
9 behalf of a person in custody pursuant to the judgment of a State
10 court only on the ground that he is in custody in violation of the
Constitution or laws or treaties of the United States.

11 28 U.S.C. § 2254(a) (emphasis added). See *Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.
12 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*,
13 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas
14 corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant
15 to a “judgment of a State court,” and that he is in custody in “violation of the Constitution
16 or laws or treaties of the United States.” See 28 U.S.C. § 2254(a).

17 Here, while not entirely clear, Petitioner’s claim appears related to his medical
18 condition while incarcerated. (See Pet. at 6.) In no way, however, does Petitioner claim
19 he is “in custody in violation of the Constitution or laws or treaties of the United States.”
20 28 U.S.C. § 2254 (emphasis added).

21 Further, the Court notes that Petitioner cannot simply amend his Petition to state a
22 federal habeas claim and then refile the amended petition in this case. He must exhaust
23 state judicial remedies before bringing his claims via federal habeas. State prisoners who
24 wish to challenge their state court conviction must first exhaust state judicial remedies. 28
25 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state
26 judicial remedies, a California state prisoner must present the California Supreme Court
27 with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas
28 petition. See 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to

1 properly exhaust state court judicial remedies a petitioner must allege, in state court, how
2 one or more of his or her federal rights have been violated. The Supreme Court in *Duncan*
3 *v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to
4 correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact
5 that the prisoners are asserting claims under the United States Constitution.” *Id.* at 365-66
6 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an
7 evidentiary ruling at a state court trial denied him the due process of law guaranteed by the
8 Fourteenth Amendment, he must say so, not only in federal court, but in state court.” *Id.*
9 (emphasis added).

10 Additionally, the Court cautions Petitioner that under the Antiterrorism and
11 Effective Death Penalty Act of 1996, a one-year period of limitation shall apply to a petition
12 for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.
13 The limitation period shall run from the latest of:

14 (A) the date on which the judgment became final by the
15 conclusion of direct review or the expiration of the time for
16 seeking such review;

17 (B) the date on which the impediment to filing an
18 application created by State action in violation of the
19 Constitution or laws of the United States is removed, if the
applicant was prevented from filing by such State action;

20 (C) the date on which the constitutional right asserted
21 was initially recognized by the Supreme Court, if the right has
22 been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

23 (D) the date on which the factual predicate of the claim
24 or claims presented could have been discovered through the
25 exercise of due diligence.

26 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

27 The Court also notes that the statute of limitations does not run while a properly filed
28 state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see *Nino v. Galaza*, 183

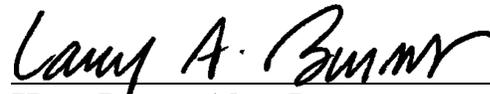
1 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding
2 that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate
3 court officer for placement into the record] are in compliance with the applicable laws and
4 rules governing filings.”). However, absent some other basis for tolling, the statute of
5 limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533
6 U.S. 167, 181-82 (2001).

7 CONCLUSION

8 Based on the foregoing, the Court **GRANTS** Petitioner’s application to proceed in
9 forma pauperis and **DISMISSES** this action without prejudice because Petitioner has failed
10 to state a cognizable federal claim. To have this case reopened, Petitioner must, **no later**
11 **than December 9, 2019**, file a First Amended Petition that cures the pleading deficiencies
12 set forth above. A blank First Amended Petition is included with this Order for Petitioner’s
13 convenience.

14 IT IS SO ORDERED.

15 Dated: October 8, 2019



16 **Hon. Larry Alan Burns**
17 Chief United States District Judge

INSTRUCTIONS FOR FILING
PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY A PERSON IN *STATE* CUSTODY

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the *state* where the judgment was entered. If petitioner has a sentence to be served in the future under a *federal* judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court that entered the judgment.)

- (1) This petition must be legibly handwritten or typewritten. You must tell the truth in the petition and you must sign the petition under penalty of perjury. If you do not tell the truth in this petition, you may be prosecuted for and convicted of perjury.
- (2) Answer all the questions on the form as concisely as you can. You do not need to cite cases. Include the facts supporting your grounds for relief. If briefs or arguments are submitted, they should be submitted as a separate memorandum.
- (3) You must pay a **\$5.00 filing fee** to have your petition filed. The \$5.00 fee must be submitted with the petition, not separately. If you do not have the \$5.00 for the filing fee and any other costs, you may request permission to proceed in forma pauperis. To do so, fill out and submit the “Motion to Proceed in Forma Pauperis” form provided by the Court with your petition. You also **MUST** have an authorized officer at the penal institution complete the “Prison Certificate” statements stating the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You may only challenge a judgment entered by one court in a single petition. If you want to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (5) You must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (6) When the petition is fully completed, the original and at least one copy must be mailed to: Clerk of **U.S. District Court, 333 West Broadway Suite 420, San Diego CA 92101**.
- (7) Petitions that do not conform to these instructions will be returned with a notation as to the deficiency.

NAME

PRISON NUMBER

CURRENT ADDRESS OR PLACE OF CONFINEMENT

CITY, STATE, ZIP CODE

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

(FULL NAME OF PETITIONER)

PETITIONER

v.

(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED
PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

The Attorney General of the State of
California, Additional Respondent.

Civil No _____

(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

**First Amended
PETITION FOR WRIT OF HABEAS CORPUS**

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: _____

2. Date of judgment of conviction: _____
3. Trial court case number of the judgment of conviction being challenged: _____

4. Length of sentence: _____

5. Sentence start date and projected release date: _____

6. Offense(s) for which you were convicted or pleaded guilty (all counts): _____

7. What was your plea? (CHECK ONE)
- (a) Not guilty
 - (b) Guilty
 - (c) Nolo contendere
8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
- (a) Jury
 - (b) Judge only
9. Did you testify at the trial?
 Yes No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the **California Court of Appeal**?
 Yes No
11. If you appealed in the **California Court of Appeal**, answer the following:
- (a) Result: _____
 - (b) Date of result (if known): _____
 - (c) Case number and citation (if known): _____

 - (d) Grounds raised on direct appeal: _____

12. If you sought further direct review of the decision on appeal by the **California Supreme Court** (e.g., a Petition for Review), please answer the following:
- (a) Result: _____
 - (b) Date of result (if known): _____
 - (c) Case number and citation (if known): _____

 - (d) Grounds raised: _____

13. If you filed a petition for certiorari in the **United States Supreme Court**, please answer the following with respect to that petition:

(a) Result: _____

(b) Date of result (if known): _____

(c) Case number and citation (if known): _____

(d) Grounds raised: _____

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Superior Court**?

Yes No

15. If your answer to #14 was “Yes,” give the following information:

(a) **California Superior Court** Case Number (if known): _____

(b) Nature of proceeding: _____

(c) Grounds raised: _____

(d) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

(e) Result: _____

(f) Date of result (if known): _____

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Court of Appeal**?

Yes No

17. If your answer to #16 was “Yes,” give the following information:

- (a) **California Court of Appeal** Case Number (if known): _____
- (b) Nature of proceeding: _____

- (c) Grounds raised: _____

- (d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No
- (e) Result: _____
- (f) Date of result (if known): _____

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?
 Yes No

19. If your answer to #18 was “Yes,” give the following information:

- (a) **California Supreme Court** Case Number (if known): _____
- (b) Nature of proceeding: _____

- (c) Grounds raised: _____

- (d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No
- (e) Result: _____
- (f) Date of result (if known): _____

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the **California Supreme Court**, containing the grounds raised in this federal Petition, explain briefly why you did not:

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

Yes No (IF "YES" SKIP TO #22)

(a) If no, in what federal court was the prior action filed? _____

(i) What was the prior case number? _____

(ii) Was the prior action (CHECK ONE):

Denied on the merits?

Dismissed for procedural reasons?

(iii) Date of decision: _____

(b) Were any of the issues in this current petition also raised in the prior federal petition?

Yes No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

Yes No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies by presenting your claims to the California Supreme Court. Even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* grounds to the California Supreme Court before raising them in your federal Petition.
 - **Single Petition:** If you do not present all your grounds for challenging a specific judgment in this Petition, you may not be able to present additional grounds challenging the same judgment at a later date.
 - **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must say what your attorney did wrong or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.
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23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?

Yes No

24. If your answer to #23 is “Yes,” give the following information:

(a) Name of Court: _____

(b) Case Number: _____

(c) Date action filed: _____

(d) Nature of proceeding: _____

(e) Grounds raised: _____

(f) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

28. Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to proceed before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of judgment, by indicating your consent below.

Choose only one of the following:

Plaintiff consents to magistrate judge jurisdiction as set forth above

OR Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case

29. Date you are mailing (or handing to a correctional officer) this Petition to this court: _____

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

(DATE)

SIGNATURE OF PETITIONER