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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 TOMMY LEE WILLIAMS,
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14 v.
15 RAYTHEL FISHER, Warden,
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Petitioner,
Respondent.

Case No.: 3:21-cv-1167-CAB-WVG

**ORDER: (1) GRANTING
APPLICATION TO PROCEED IN
FORMA PAUPERIS AND (2)
DISMISSING FIRST AMENDED
PETITION WITHOUT PREJUDICE**

On April 14, 2021, Petitioner, currently detained at Vista Detention Facility (“VDF”) in Vista, California and proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.¹ On June 30, 2021, the Court dismissed the case without prejudice because Petitioner failed to satisfy the filing fee requirement, failed to name a proper respondent, and failed to state a cognizable claim. *See* ECF No. 3. The Court notified Petitioner that to have his case reopened, he must do two things: (1) satisfy

¹ The Petition was originally filed in the United States Court of Appeals for the Ninth Circuit as an “Application for Leave to File Second or Successive Petition under 28 U.S.C. § 2254.” *See* Pet., ECF No. 1 at 1. The Ninth Circuit found Petitioner did not need leave to file a habeas petition in the district court because he had not previously challenged his conviction on federal habeas. *See Williams v. Fisher*, No. 21-70067 (9th Cir. June 24, 2021), ECF No. 1-2. Accordingly, the Ninth Circuit transferred the case to this Court, while “expressing no opinion as to the merits of the applicant’s claims or whether the procedural requirements of 28 U.S.C. §§ 2244(d) and 2254 are satisfied.” *See id.* at 1.

1 the filing fee requirement by either paying the \$5.00 filing fee or by providing adequate
2 proof of his inability to pay and (2) file a First Amended Petition which cures the
3 pleading deficiencies outlined in the Court's Order. *See id.*

4 On September 30, 2021, Petitioner submitted a letter in which he stated that VDF
5 officials had refused to give him access to funds in his trust account, and those same
6 officials further declined to submit the \$5.00 filing fee to this Court, despite Petitioner's
7 repeated requests. ECF No. 7 at 1. Petitioner stated that VDF official informed him that
8 they require a Court order to release his trust account funds. *Id.* On October 1, 2021, the
9 Court granted Petitioner an extension of time to file his amended petition and satisfy the
10 filing fee requirement. ECF No. 8. The Court noted in its Order that VDF officials were
11 required to process Petitioner's filing fee request. *See id.* at 2, *citing* CDCR Op. Manual §
12 54010.23. On October 14, 2021, Petitioner filed a First Amended Petition and a Request
13 to Proceed In Forma Pauperis. ECF Nos. 11 & 12.

14 **REQUEST TO PROCEED IN FORMA PAUPERIS**

15 Petitioner has submitted his Request to Proceed In Forma Pauperis ("IFP") along
16 with a prison certificate showing he has sufficient funds in his trust account to pay the
17 \$5.00 filing fee. *See* ECF No. 12 at 4. Attached to the IFP application, Petitioner includes
18 an "Inmate Request" he submitted to VDF officials, asking that funds be sent to the Court
19 to satisfy the filing fee. *Id.* at 6. In response to Petitioner, a VDF staffer wrote: "[W]e
20 cannot do that. We collect funds only after we receive a court order that instructs us to do
21 so." *Id.*

22 First, the Court has now issued not one, but two Orders stating that the filing fee
23 must be submitted. *See* ECF Nos. 3 & 8. The Court fails to understand why VDF officials
24 have failed to forward the \$5.00 filing fee to the Court. Furthermore, as noted in this
25 Court's October 1, 2021 Order, Petitioner is not required to obtain an order from the
26 Court to withdraw a filing fee from his prison trust account statement. *See* CDCR Op.
27 Manual § 54010.23. Indeed, this Court does not routinely provide such orders and
28 declines to issue a third Order now. Because the onus was on VDF to release the funds,

1 and not on Petitioner to obtain a Court order (or on this Court to provide one), the Court
2 **GRANTS** Petitioner’s application to proceed IFP in the interest of justice. The Court
3 therefore allows Petitioner to prosecute the above-referenced action without being
4 required to prepay fees or costs and without being required to post security. The Clerk of
5 the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the
6 filing fee.

7 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

8 The First Amended Petition must be dismissed, however, because Petitioner has
9 failed to allege exhaustion. Habeas petitioners who wish to challenge either their state
10 court conviction or the length of their confinement in state prison, must first exhaust state
11 judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34
12 (1987). To exhaust state judicial remedies, a California state prisoner must present the
13 California Supreme Court with a fair opportunity to rule on the merits of every issue
14 raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S.
15 at 133–34. Moreover, to properly exhaust state court remedies a petitioner must allege, in
16 state court, how one or more of his or her federal rights have been violated. The Supreme
17 Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given
18 the opportunity to correct alleged violations of prisoners’ federal rights, they must surely
19 be alerted to the fact that the prisoners are asserting claims under the United States
20 Constitution.” *Id.* at 365–66 (emphasis added). For example, “[i]f a habeas petitioner
21 wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due
22 process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not
23 only in federal court, but in state court.” *Id.* at 366 (emphasis added).

24 Nowhere on the First Amended Petition does Petitioner allege that he raised his
25 claims in the California Supreme Court. In fact, he specifically indicates he did not seek
26 such review. *See* Am. Pet., ECF No. 11 at 6. If Petitioner has raised his claims in the
27 California Supreme Court, he must so specify. “The burden of proving that a claim has
28 been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.

1 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134
2 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994);
3 *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

4 Further, the Court cautions Petitioner that under the Antiterrorism and Effective
5 Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a
6 petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a
7 State court. The limitation period shall run from the latest of:

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

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

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

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

20 28 U.S.C. § 2244(d)(1)(A)–(D) (West 2006).

21 The statute of limitations does not run while a properly filed state habeas corpus
22 petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th
23 Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is
24 ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for
25 placement into the record] are in compliance with the applicable laws and rules
26 governing filings.”). However, absent some other basis for tolling, the statute of
27 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533
28 U.S. 167, 181–82 (2001).

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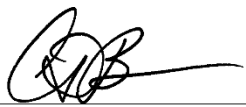
1 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal
2 of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits
3 annexed to it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28
4 U.S.C. foll. § 2254. Here, it appears plain from the First Amended Petition that Petitioner
5 is not presently entitled to federal habeas relief because he has not alleged exhaustion of
6 state court remedies.

7 **CONCLUSION**

8 Accordingly, the Court **GRANTS** the request to proceed IFP, and **DISMISSES** the
9 case without prejudice. To have the case reopened, Petitioner must, no later than
10 **December 3, 2021**, file a Second Amended Petition which adequately alleges exhaustion.
11 Further, Petitioner is advised that if he has not submitted a Second Amended Petition
12 alleging exhaustion of the claim(s) raised therein before **December 3, 2021**, he will have
13 to start over by filing a completely new habeas petition in this Court. *See In re Turner*,
14 101 F.3d 1323 (9th Cir. 1997).

15 **IT IS SO ORDERED.**

16 Dated: October 25, 2021

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19 Hon. Cathy Ann Bencivengo
20 United States District Judge
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