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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MARCO A. PASTOR,

12 Petitioner,

13 v.

14 LOUIS A. MARTINEZ, Warden,

15 Respondent.

Case No.: 21cv1810 BTM (JLB)

**ORDER DENYING MOTION TO
PROCEED IN FORMA PAUPERIS
AND ISSUING ORDER TO SHOW
CAUSE**

16
17 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
18 Corpus pursuant to 28 U.S.C. § 2254, challenging a 2018 San Diego County Superior Court
19 conviction for second degree murder, gross vehicular manslaughter while intoxicated,
20 driving under the influence of alcohol causing injury, driving with a measurable blood
21 alcohol concentration causing injury and related allegations in case number SCN351650,
22 for which Petitioner was sentenced to 15 years to life. (ECF No. 1.) Petitioner has also
23 filed a motion to proceed in forma pauperis. (ECF No. 2.) For the reasons discussed below,
24 the Court **DENIES** Petitioner's motion to proceed in forma pauperis and **ISSUES** an Order
25 to Show Cause requiring action to avoid dismissal of his case.

26 **MOTION TO PROCEED IN FORMA PAUPERIS**

27 Petitioner has filed a motion to proceed in forma pauperis. (ECF No. 2.) The
28 statement of recent account activity accompanying the request to proceed in forma pauperis

1 reflects a \$1,834.66 balance in Petitioner’s inmate trust account as of October 11, 2021.
2 (ECF No. 2 at 6.) The filing fee associated with this type of action is \$5.00. See 28 U.S.C.
3 § 1914(a). Because it appears Petitioner can pay the requisite filing fee, the Court **DENIES**
4 Petitioner’s request to proceed in forma pauperis [ECF No. 2]. To avoid dismissal,
5 Petitioner must submit a copy of this Order along with either the \$5.00 filing fee or submit
6 adequate proof of his inability to do so, on or before **January 4, 2022**.

7 **FAILURE TO ALLEGE EXHAUSTION AS TO ALL CLAIMS IN PETITION**

8 In addition, habeas petitioners who wish to challenge either their state court
9 conviction or the length of their confinement in state prison must first exhaust state judicial
10 remedies. See 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987);
11 see also Picard v. Connor, 404 U.S. 270, 275 (1971) (“[A] state prisoner must normally
12 exhaust available state judicial remedies before a federal court will entertain his petition
13 for habeas corpus.”) “A petitioner has satisfied the exhaustion requirement if: (1) he has
14 ‘fairly presented’ his federal claim to the highest state court with jurisdiction to consider
15 it,” which in this case is the California Supreme Court, “or (2) [s]he demonstrates that no
16 state remedy remains available.” Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996)
17 (citations omitted); see also O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (“[S]tate
18 prisoners must give the state courts one full opportunity to resolve any constitutional issues
19 by invoking one complete round of the State’s established appellate review process.”)

20 Additionally, the claims presented in the federal courts must be the same as those
21 exhausted in state court and must also allege, in state court, how one or more of his federal
22 rights have been violated. See Picard, 404 U.S. at 276 (“Only if the state courts have had
23 the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding
24 does it make sense to speak of the exhaustion of state remedies. Accordingly, we have
25 required a state prisoner to present the state courts with the same claim he urges upon the
26 federal courts.”); see also Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (“If state courts
27 are to be given the opportunity to correct alleged violations of prisoners’ federal rights,
28 they must surely be alerted to the fact that the prisoners are asserting claims under the

1 United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling
2 at a state court trial denied him the due process of law guaranteed by the Fourteenth
3 Amendment, he must say so, not only in federal court, but in state court.”)

4 In the instant Petition, Petitioner indicates Ground One has been raised in the
5 California Supreme Court but fails to indicate whether Ground Two, which alleges
6 ineffective assistance of counsel, has been raised in the California Supreme Court. (See
7 ECF No. 1 at 6-7.) Petitioner further indicates he currently has a habeas corpus petition
8 pending in the San Diego Superior Court in which he raises a claim of ineffective assistance
9 of counsel. (See *id.* at 3, 8.)

10 It appears Petitioner has filed a “mixed” petition, that is, a petition which presents
11 both exhausted and unexhausted claims. In *Rose v. Lundy*, 455 U.S. 509 (1982), the United
12 States Supreme Court held that a mixed petition is subject to dismissal because it violates
13 the “total exhaustion rule” required in habeas petitions brought pursuant to § 2254, but that
14 a petitioner must be permitted an opportunity to cure that defect prior to dismissal. *Id.* at
15 514-20. Having preliminarily determined the Petition contains both an exhausted and an
16 unexhausted claim, the Court notifies Petitioner of his options should he avoid dismissal
17 for failure to satisfy the filing fee requirement by either paying the filing fee or qualifying
18 to proceed in forma pauperis.

19 **i) First Option: Demonstrate Exhaustion**

20 Petitioner may file further papers with this Court to demonstrate that he has in fact
21 exhausted all of the claims in the Petition. If Petitioner chooses this option, these papers
22 are due no later than **January 4, 2022**. Respondent may file a reply by **February 3, 2022**.

23 **ii) Second Option: Voluntarily Dismiss the Petition**

24 Petitioner may move to voluntarily dismiss his entire federal petition and return to
25 state court to exhaust the unexhausted claim. Petitioner may then file a new federal petition
26 containing only exhausted claims. See *Rose*, 455 U.S. at 510, 520-21 (stating that a
27 petitioner who files a mixed petition may dismiss his petition to “return[] to state court to
28 exhaust his claims”). If Petitioner chooses this second option, he must file a pleading with

1 this Court no later than **January 4, 2022**. Respondent may file a reply by **February 3,**
2 **2022**.

3 Petitioner is cautioned that any new federal petition must be filed before expiration
4 of the one-year statute of limitations. Ordinarily, a petitioner has one year from when his
5 conviction became final to file his federal petition, unless he can show that statutory or
6 equitable “tolling” applies. Duncan v. Walker, 533 U.S. 167, 176 (2001); 28 U.S.C.
7 § 2244(d).¹ The statute of limitations does not run while a properly filed state habeas
8 corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003,
9 1006 (9th Cir. 1999). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an
10 application is ‘properly filed’ when its delivery and acceptance [by the appropriate court
11 officer for placement into the record] are in compliance with the applicable laws and rules
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14 ¹ 28 U.S.C. § 2244 (d) provides:

15 (1) A 1-year period of limitation shall apply to an application for a writ of
16 habeas corpus by a person in custody pursuant to the judgment of a State court.
17 The limitation period shall run from the latest of--

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

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

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

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

(2) The time during which a properly filed application for State post-
conviction or other collateral review with respect to the pertinent judgement
or claim is pending shall not be counted toward any period of limitation under
this subsection.

1 governing filings.”); Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005) (holding that a
2 state application for post-conviction relief which is ultimately dismissed as untimely was
3 neither “properly filed” nor “pending” while it was under consideration by the state court,
4 and therefore does not toll the statute of limitations), as amended 439 F.3d 993. However,
5 absent some other basis for tolling, the statute of limitations continues to run while a federal
6 habeas petition is pending. Duncan, 533 U.S. at 181-82.

7 **iii) Third Option: Formally Abandon Unexhausted Claim**

8 Petitioner may formally abandon his unexhausted claim and proceed with his
9 exhausted one. See Rose, 455 U.S. at 510, 520-21 (stating that a petitioner who files a
10 mixed petition may “resubmit[] the habeas petition to present only exhausted claims”). If
11 Petitioner chooses this third option, he must file a pleading with this Court no later than
12 **January 4, 2022**. Respondent may file a reply by **February 3, 2022**.

13 Petitioner is cautioned that once he abandons his unexhausted claim he may lose the
14 ability to ever raise it in federal court. See Slack v. McDaniel, 529 U.S. 473, 488 (2000)
15 (stating that a court’s ruling on the merits of claims presented in a first § 2254 petition
16 renders any later petition successive); see also 28 U.S.C. § 2244 (a)-(b).²

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21 ² 28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive habeas
22 corpus application under § 2254 shall be dismissed unless:

23 (A) the applicant shows that the claim relies on a new rule of constitutional
24 law, made retroactive to cases on collateral review by the Supreme Court, that
25 was previously unavailable; or

26 (B) (i) the factual predicate for the claim could not have been discovered
27 previously through the exercise of due diligence; and

28 (ii) the facts underlying the claim, if proven and viewed in light of the
evidence as a whole, would be sufficient to establish by clear and convincing
evidence that, but for constitutional error, no reasonable factfinder would have
found the applicant guilty of the underlying offense.

1 **iv) Fourth Option: File a Motion to Stay the Federal Proceedings**

2 Petitioner may file a motion to stay this federal proceeding while he returns to state
3 court to exhaust his unexhausted claim. There are two methods available to Petitioner, the
4 “stay and abeyance” procedure and the “withdrawal and abeyance” procedure.

5 If Petitioner wishes to use the “stay and abeyance” procedure he should ask the Court
6 to stay his mixed petition while he returns to state court to exhaust. Under this procedure
7 he must demonstrate there are arguably meritorious claim(s) which he wishes to return to
8 state court to exhaust, that he is diligently pursuing his state court remedies with respect to
9 those claim(s), and that good cause exists for his failure to timely exhaust his state court
10 remedies. Rhines v. Weber, 544 U.S. 269, 277-78 (2005).

11 If Petitioner wishes to use the “withdrawal and abeyance” procedure, he must
12 voluntarily withdraw his unexhausted claim(s), ask the Court to stay the proceedings and
13 hold the fully-exhausted petition in abeyance while he returns to state court to exhaust, and
14 then seek permission to amend his petition to include the newly exhausted claim(s) after
15 exhaustion is complete. King v. Ryan, 564 F.3d. 1133, 1135 (9th Cir. 2009). Although
16 under this procedure Petitioner is not required to demonstrate good cause for his failure to
17 timely exhaust, the newly exhausted claim(s) must be either timely under the statute of
18 limitations or “relate back” to the claim(s) in the fully-exhausted petition, that is, they must
19 share a “common core of operative facts” with the previously exhausted claim(s). King,
20 564 F.3d at 1141, quoting Mayle v. Felix, 545 U.S. 644. 659 (2005).

21 If Petitioner chooses this fourth option, he must file a pleading with this Court no
22 later than **January 4, 2022**. Respondent may file a reply by **February 3, 2022**.

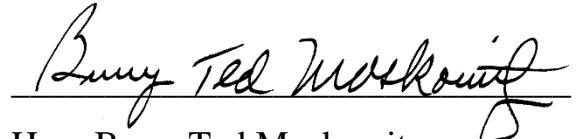
23 **CONCLUSION AND ORDER**

24 For the foregoing reasons, the Court **DENIES** Petitioner’s motion to proceed in
25 forma pauperis [ECF No. 2] and **ISSUES** an Order to Show Cause requiring action. To
26 avoid dismissal of this habeas case, Petitioner must, no later than **January 4, 2022**: (1) pay
27 the \$5.00 filing fee **OR** submit adequate proof of his inability to pay the fee; **AND** (2)
28 choose one of the options outlined above. Petitioner is cautioned that if he fails to respond

1 to this Order, the Petition will be dismissed without prejudice. See Rose, 455 U.S. at 522.
2 The Clerk of Court shall send a blank Southern District of California In Forma Pauperis
3 Application to Petitioner along with a copy of this Order.

4 **IT IS SO ORDERED.**

5 Dated: November 4, 2021



Hon. Barry Ted Moskowitz
United States District Judge

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