

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL TONNEMACHER,

Petitioner,

No. CIV S-11-1363 KJM DAD P

vs.

EL DORADO COUNTY SHERIFF'S  
DEPARTMENT,

Respondent.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_/

Petitioner, a county jail inmate proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis.<sup>1</sup>

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

////

\_\_\_\_\_  
<sup>1</sup> On August 2, 2011, the court issued findings and recommendations, recommending that this action be dismissed due to petitioner's failure to inform the court of any address change. Petitioner recently clarified for the court that he is incarcerated in the El Dorado County Jail in Placerville, CA. Under these circumstances, the court will vacate its previous findings and recommendations, and the case will proceed in accordance with these findings and recommendations.



1 requirement by providing the highest state court with a full and fair opportunity to consider all  
2 claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971);  
3 Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986). In this case, petitioner concedes that he  
4 has not presented any of the claims set forth in his federal petition for relief to the California  
5 Supreme Court. Accordingly, to the extent that petitioner seeks to challenge his 2004 judgment  
6 of conviction, this action should be dismissed without prejudice due to petitioner’s failure to  
7 exhaust state court remedies.

8           Insofar as petitioner is challenging his more recent arrest for purported violations  
9 of the terms and conditions of his probation, he is advised that this court may entertain a habeas  
10 corpus application on behalf of a person who is in custody pursuant to a state court judgment.  
11 See 28 U.S.C. § 2254. Here, the probation violation charges against petitioner are still pending  
12 in state court, so there is no judgment for petitioner to challenge with respect to these violations.  
13 In addition, any claims related to petitioner’s purported violations of his probation would be  
14 unexhausted. Finally, this court is barred from directly interfering with petitioner’s ongoing  
15 criminal proceedings in state court, except under extraordinary circumstances. See Younger v.  
16 Harris, 401 U.S. 37, 46 (1971); Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir. 1985) (“When a state  
17 criminal prosecution has begun the Younger rule directly bars a declaratory judgment action” as  
18 well as a section 1983 action for damages “where such an action would have a substantially  
19 disruptive effect upon ongoing state criminal proceedings.”). Here, plaintiff has not alleged that  
20 such extraordinary circumstances exist. Younger, 401 U.S. at 48-50. Moreover, plaintiff may  
21 raise any constitutional claims in his ongoing criminal proceedings in state court. Lebbos v.  
22 Judges of the Superior Court, 883 F.2d 810, 813 (9th Cir. 1989) (“Abstention is appropriate  
23 based on ‘interest of comity and federalism [that] counsel federal courts to abstain from  
24 jurisdiction whenever federal claims have been or could be presented in ongoing state judicial  
25 proceedings that concern important state interests.”).

26 ////

1           Accordingly, for all of the foregoing reasons, the court will recommend that  
2 petitioner's application for a writ of habeas corpus be dismissed without prejudice and that all of  
3 petitioner's pending motions be denied as moot.

4   **CONCLUSION**

5           IT IS HEREBY ORDERED that:

- 6           1. Petitioner's motion to proceed in forma pauperis (Doc. No. 2) is granted; and
- 7           2. The court's August 2, 2011 findings and recommendations are vacated;

8           IT IS HEREBY RECOMMENDED that:

- 9           1. Petitioner's application for a writ of habeas corpus (Doc. No. 1) be dismissed  
10 without prejudice;
- 11           2. All pending motions (Doc. Nos. 6 and 9) be denied as moot; and
- 12           3. This action be closed.

13           These findings and recommendations are submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
15 one days after being served with these findings and recommendations, any party may file written  
16 objections with the court and serve a copy on all parties. Such a document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
18 shall be served and filed within seven days after service of the objections. The parties are  
19 advised that failure to file objections within the specified time may waive the right to appeal the  
20 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21           In any objections he elects to file, petitioner may address whether a certificate of  
22 appealability should issue in the event he files an appeal of the judgment in this case. See Rule  
23 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a  
24 certificate of appealability when it enters a final order adverse to the applicant); Hayward v.

25           /////

26           /////

1 Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc), abrogated on other grounds in Swarthout v.

2 Cooke, \_\_\_ U.S. \_\_\_, 131 S. Ct. 859 (2011).

3 DATED: October 7, 2011.

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

  
\_\_\_\_\_  
DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

DAD:9  
tonn1363.103