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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID T. ATZET,  
Petitioner,  
v.  
GERALD BENITO,  
Respondent.

No. 2:13-cv-00709 DAD P

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an amended application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

**I. Application to Proceed In Forma Pauperis**

Petitioner has submitted a declaration that makes the showing required by § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted. 28 U.S.C. § 1915(a).

**II. Exhaustion of State Court Remedies**

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent’s counsel. 28 U.S.C. § 2254(b)(3).<sup>1</sup> A waiver of exhaustion, thus, may

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<sup>1</sup> A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. § 2254(b)(2).

1 not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the  
2 highest state court with a full and fair opportunity to consider all claims before presenting them to  
3 the federal habeas court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768  
4 F.2d 1083, 1086 (9th Cir. 1985).

5 Upon reviewing the amended petition for habeas corpus pending before the court, the  
6 undersigned t finds that petitioner has failed to exhaust state court remedies. In his amended  
7 petition for federal habeas relief petitioner alleges that he has filed two habeas petitions with the  
8 Shasta County Superior Court. (ECF No. 7, ¶ 11(c) at 3.) However, petitioner concedes that the  
9 claims contained in the amended petition before this court have not been presented to the  
10 California Supreme Court. (Id.) Further, there is no allegation that state court remedies are no  
11 longer available to petitioner. Accordingly, the amended petition for federal habeas relief should  
12 be dismissed without prejudice.<sup>2</sup>

### 13 **III. Other Matters**

#### 14 A. Request for Appointment of Counsel

15 There currently exists no absolute right to appointment of counsel in habeas proceedings.  
16 See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A  
17 authorizes the appointment of counsel at any stage of the case “if the interests of justice so  
18 require.” See Rule 8(c), Fed. R. Governing § 2254 Cases. In the present case, the court does not  
19 find that the interests of justice would be served by the appointment of counsel at the present time  
20 and in light of the recommendation that the amended petition be dismissed without prejudice.  
21 Therefore, petitioner’s request for appointment of counsel will be denied.

#### 22 B. Request for Equitable Tolling

23 Petitioner also requests that he be granted equitable tolling of the applicable statute of  
24 limitations from March 2, 2012, when his direct appeal in state court was denied, to October 1,

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25 <sup>2</sup> Petitioner is cautioned that the habeas corpus statute imposes a one year statute of limitations  
26 for filing non-capital habeas corpus petitions in federal court. In most cases, the one year period  
27 will start to run on the date on which the state court judgment became final by the conclusion of  
28 direct review or the expiration of time for seeking direct review, although the statute of  
limitations is tolled while a properly filed application for state post-conviction or other collateral  
review is pending. 28 U.S.C. § 2244(d).

1 2012, when according to petitioner was able to “adequally [sic] pursue these legal matters.” (ECF  
2 No. 9 at 1.) The court need not address whether equitable tolling is necessary or appropriate at  
3 this time in light of the court’s recommendation that this action be dismissed for failure to exhaust  
4 any of his claims by presenting them to the state high court.

5 **IV. Conclusion**

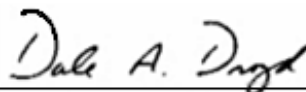
6 In accordance with the above, IT IS HEREBY ORDERED that:

- 7 1. Petitioner's May 15, 2013 application requesting leave to proceed in forma pauperis  
8 (ECF No. 10) is granted;
- 9 2. The Clerk of the Court is directed to randomly assign this action to a District Judge;  
10 and
- 11 3. The Clerk of the Court is directed to serve a copy of these findings and  
12 recommendations together with a copy of the petition filed in the instant case on the Attorney  
13 General of the State of California.

14 Also, IT IS HEREBY RECOMMENDED that petitioner’s amended application for a writ  
15 of habeas corpus be dismissed for failure to exhaust any of the claims contained therein.

16 These findings and recommendations will be submitted to the United States District Judge  
17 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
18 after being served with these findings and recommendations, petitioner may file written  
19 objections with the court. The document should be captioned “Objections to Findings and  
20 Recommendations.” Petitioner is advised that failure to file objections within the specified  
21 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153  
22 (9th Cir. 1991).

23 Dated: December 17, 2013

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26 DALE A. DROZD  
27 UNITED STATES MAGISTRATE JUDGE

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