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

BENJAMIN CHOYCE,	)	No. C 09-1458 JSW (PR)
	)	
Petitioner,	)	
	)	<b>ORDER OF DISMISSAL</b>
vs.	)	
	)	
SAN FRANCISCO SUPERIOR	)	
COURT,	)	
	)	
Respondent.	)	

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Petitioner, incarcerated in the San Francisco County Jail and proceeding pro se, filed this pro se habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging his 2008 state court conviction for disregard for public safety and being an unlicensed driver. Petitioner filed the instant habeas petition on what appears to be a state court habeas petition form and, in the space where the form requires that the Court be identified, Petitioner has written in his own handwriting, "In the Superior Court of the State of California, City and County of San Francisco," rather than this Court. It appears from the petition that he seeks to withdraw his guilty plea. In addition, this Court has determined that Petitioner has a habeas petition pending in the California Court of Appeal for the First Appellate District under Case Number A124522 with the same subject matter as the instant petition. *See*, California Appellate Courts Case Information at <http://appellatecases.courtinfo.ca.gov>. It is unclear to this Court whether Petitioner

1 inadvertently filed this petition in federal court when it was intended for the state courts,  
2 or whether Petitioner intentionally filed a petition simultaneously in both courts.

3 This Court may entertain a petition for a writ of habeas corpus “in behalf of a  
4 person in custody pursuant to the judgment of a State court only on the ground that he is  
5 in custody in violation of the Constitution or laws or treaties of the United States.” 28  
6 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). A district court shall “award  
7 the writ or issue an order directing the respondent to show cause why the writ should not  
8 be granted, unless it appears from the application that the applicant or person detained is  
9 not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where  
10 the allegations in the petition are vague, conclusory, palpably incredible, or patently  
11 frivolous or false. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (citing  
12 *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977)).

13 The exhaustion requirement applicable to federal habeas petitions is not satisfied if  
14 there is a pending post-conviction proceeding in state court. *See* 28 U.S.C. § 2254(b)-(c);  
15 *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). If a post-conviction challenge  
16 to a criminal conviction is pending in state court, a potential federal habeas petitioner  
17 must await the outcome of that challenge before his state remedies are considered  
18 exhausted. *See id.* This rule applies irrespective of whether the issue raised in the  
19 pending state petition is included in the federal petition, for the reason that a pending state  
20 court challenge may result in a reversal of the petitioner's conviction, thereby mooting the  
21 federal petition. *See id.* (citations omitted).

22 As Petitioner has a petition pending in the California Court of Appeal, the instant  
23 petition for a writ of habeas corpus is hereby DISMISSED without prejudice to  
24 Petitioner’s refiling his claims after all state court post-conviction challenges to  
25 petitioner’s conviction have been completed and all claims exhausted in accordance with  
26 28 U.S.C. § 2254(b)-(c). *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) (holding every  
27 claim raised in federal habeas petition must be exhausted).



1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4

5 BENJAMIN CHOYCE,  
6  
7 Plaintiff,

Case Number: CV09-01458 JSW

**CERTIFICATE OF SERVICE**

8 v.

9 SAN FRANCISCO SUPERIOR COURT, et  
al,

10 Defendant.  
11 \_\_\_\_\_/

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
13 Court, Northern District of California.

14 That on April 15, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said  
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
17 receptacle located in the Clerk's office.

18 Benjamin C. Choyce  
19 #2380465  
20 San Francisco County Jail  
850 Bryant Street  
San Francisco, CA 94103

21 Dated: April 15, 2009

  
22 Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk  
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