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28IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEON BENAVIDEZ,

No. C 10-5159 WHA (PR)

Petitioner,

**ORDER OF DISMISSAL;
GRANTING LEAVE TO PROCEED
IN FORMA PAUPERIS**

v.

JAMES D. HARTLEY, Warden,

Respondents.

(Docket No. 2)

Petitioner, a California state prisoner, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court may not be granted unless the prisoner has first exhausted state judicial remedies, either by way of a direct appeal or in collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every issue he or she seeks to raise in federal court. *See* 28 U.S.C. § 2254(b),(c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).

In California, the supreme court, intermediate courts of appeal, and superior courts all have original habeas corpus jurisdiction. *See Nino v. Galaza*, 183 F.3d 1003, 1006 n.2 (9th Cir. 1999). Although a superior court order denying habeas corpus relief is non-appealable, a state prisoner may file a new habeas corpus petition in the court of appeals. *See id.* If the court of appeals denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review, or may instead file an original habeas petition in the supreme court. *See id.* at n.3.

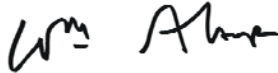
1 Petitioner has the burden of pleading exhaustion in his habeas petition. *See Cartwright*
2 *v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981). Petitioner has not done so. He indicates in his
3 petition that he has presented his claims only to the state superior court in two habeas petitions
4 (Pet. 3-4). The last of these petitions was denied on August 26, 2010, approximately two
5 months prior to the filing of the instant petition. No appeals or petitions in petitioner's name
6 appear in the California Supreme Court's electronic database of cases. To properly exhaust his
7 claims, petitioner must properly raise them in the California Supreme Court. Petitioner has also
8 not presented any exceptional circumstances to excuse his failure to exhaust. *See Granberry*,
9 481 U.S. at 134. The petition is therefore **DISMISSED** without prejudice to refiling after
10 available state judicial remedies are exhausted.

11 Good cause appearing, petitioner's application to proceed in forma pauperis (docket
12 number 2) is **GRANTED**.

13 The clerk shall close the file.

14 **IT IS SO ORDERED.**

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16 Dated: November 23 , 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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