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

LEON BENAVIDEZ,

No. C 10-5159 JSW (PR)

Petitioner,

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

v.

JAMES D. HARTLEY, Warden,

Respondents.

(Docket No. 2)

INTRODUCTION

Petitioner, a prisoner of the State of California, has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging the constitutionality of his conviction in the state courts. This order dismisses the petition for failing to state a cognizable claim for federal habeas relief, and grants Petitioner’s motion to proceed in forma pauperis (docket number 2).¹

DISCUSSION

I Standard of Review

This court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

¹This order also vacates the prior order of dismissal and judgment inadvertently entered in this case by a different judge of this court.

1 It shall “award the writ or issue an order directing the respondent to show cause
2 why the writ should not be granted, unless it appears from the application that the
3 applicant or person detained is not entitled thereto.” *Id.* § 2243.

4 II Legal Claims

5 An application for a federal writ of habeas corpus filed by a prisoner who is in
6 state custody pursuant to a judgment of a state court may not be granted unless the
7 prisoner has first exhausted state judicial remedies, either by way of a direct appeal or in
8 collateral proceedings, by presenting the highest state court available with a fair
9 opportunity to rule on the merits of each and every issue he or she seeks to raise in
10 federal court. *See* 28 U.S.C. § 2254(b),(c); *Granberry v. Greer*, 481 U.S. 129, 133-34
11 (1987).

12 In California, the supreme court, intermediate courts of appeal, and superior
13 courts all have original habeas corpus jurisdiction. *See Nino v. Galaza*, 183 F.3d 1003,
14 1006 n.2 (9th Cir. 1999). Although a superior court order denying habeas corpus relief
15 is non-appealable, a state prisoner may file a new habeas corpus petition in the court of
16 appeals. *See id.* If the court of appeals denies relief, the petitioner may seek review in
17 the California Supreme Court by way of a petition for review, or may instead file an
18 original habeas petition in the supreme court. *See id.* at n.3.

19 Petitioner has the burden of pleading exhaustion in his habeas petition. *See*
20 *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981). Petitioner has not done so.
21 He indicates in his petition that he has presented his claims only to the state superior
22 court in two habeas petitions (Pet. 3-4). The last of these petitions was denied on August
23 26, 2010, approximately two months prior to the filing of the instant petition. No
24 appeals or petitions in Petitioner’s name appear in the California Supreme Court’s
25 electronic database. To properly exhaust his claims, Petitioner must properly present
26 them to the California Supreme Court. Petitioner has also not presented any exceptional
27 circumstances to excuse his failure to exhaust. *See Granberry*, 481 U.S. at 134. The
28 petition will therefore be dismissed without prejudice to refile after available state

1 judicial remedies are exhausted.

2 **CONCLUSION**

3 For the foregoing reasons and for good cause shown the petition for a writ of
4 habeas corpus is DISMISSED without prejudice.

5 Rule 11(a) of the Rules Governing Section 2254 Cases now requires a district
6 court to rule on whether a Petitioner is entitled to a certificate of appealability in the same
7 order in which the petition is decided. Petitioner has failed to make a substantial showing
8 that his claims amounted to a denial of his constitutional rights or demonstrate that a
9 reasonable jurist would find this Court's denial of his claim debatable or wrong. *Slack v.*
10 *McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no certificate of appealability is
11 warranted in this case

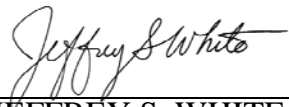
12 In light of Petitioner's lack of funds, his application for leave to proceed in forma
13 pauperis is GRANTED (docket number 2).

14 The order of dismissal and judgment inadvertently entered in this matter on
15 November 24, 2010, are VACATED.

16 The Clerk shall enter judgment and close the file.

17 IT IS SO ORDERED.

18 DATED: November 30, 2010

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21 JEFFREY S. WHITE
22 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 LEON DAMIEN BENAVIDEZ,
6 Plaintiff,

Case Number: CV10-05159 JSW

7 **CERTIFICATE OF SERVICE**

8 v.

9 JAMES D HARTLEY et al,
10 Defendant.

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

13 That on November 30, 2010, I SERVED a true and correct copy(ies) of the attached, by
14 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter
15 listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an
16 inter-office delivery receptacle located in the Clerk's office.

17 Leon Damien Benavidez
18 AB-3606
19 Avenal State Prison
20 PO Box 9
21 Avenal, CA 93204

22 Dated: November 30, 2010



23 Richard W. Wieking, Clerk
24 By: Jennifer Ottolini, Deputy Clerk
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