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\*E-Filed 6/13/11\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

D. OTTINGER,  
Petitioner,  
v.  
JAMES D. HARTLEY,  
Respondent.

No. C 11-1813 RS (PR)  
**ORDER REOPENING ACTION;  
DISMISSING PETITION WITH  
LEAVE TO AMEND  
INSTRUCTIONS TO CLERK**

United States District Court  
For the Northern District of California

**INTRODUCTION**

This is a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. The petition was dismissed when petitioner failed to file a complete application to proceed *in forma pauperis* (“IFP”), or pay the filing fee of \$5.00, by a required date. Petitioner has now filed a complete IFP application. Accordingly, the action is hereby REOPENED. The order of dismissal (Docket No. 9) and the judgment (Docket No. 10) are hereby VACATED. The petition is now before the Court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.

No. C 11-01813 RS (PR)  
ORDER DISMISSING PETITION WITH LEAVE TO AMEND

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**BACKGROUND**

According to the petition, petitioner was convicted of an unnamed offense in 2003 in Santa Clara County, and sentenced to eight years in state prison. The petition fails to specify what crime or crimes petitioner was convicted of, or what judicial relief he pursued after his conviction(s).

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**DISCUSSION**

This Court may entertain a petition for 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). A district court considering an application for a writ of habeas corpus shall “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or false. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

16 The petition (A) fails to state grounds for federal habeas relief, and (B) may be barred. 17 As to (A), petitioner’s sole claim is that he was not advised at his probation report interview 18 of his right to have counsel present. Petitioner has not shown that there is a federal 19 constitutional right to be so advised, or to have counsel present, at such a proceeding.

20 As to (B), the petition may be barred by AEDPA’s statute of limitations. Federal 21 habeas petitions must be filed within one year of the latest of the date on which: (1) the 22 judgment became final after the conclusion of direct review or the time passed for seeking 23 direct review; (2) an impediment to filing an application created by unconstitutional state 24 action was removed, if such action prevented petitioner from filing; (3) the constitutional 25 right asserted was recognized by the Supreme Court, if the right was newly recognized by the 26 Supreme Court and made retroactive to cases on collateral review; or (4) the factual predicate 27 of the claim could have been discovered through the exercise of due diligence. *See* 28 U.S.C.

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1 § 2244(d)(1). Petitioner was convicted in 2003, and he filed the instant petition in 2011, well  
2 more than a year after his conviction. Therefore, on its face, the petition appears untimely.  
3 Petitioner may be entitled to tolling if he pursued judicial relief after he was convicted, or if  
4 the one-year statute of limitations started later than 2003 for some legally sufficient reason.  
5 The petition, however, fails to provide clear details of any relief petitioner pursued, or any  
6 reason the statute of limitations did not start in 2003. Petitioner must provide sufficient  
7 details of what relief he pursued, if any, including the courts to which he applied for relief,  
8 the dates on which he filed for relief, and the dates on which the courts rendered their  
9 decisions.

10 Also as to (2), petitioner has not shown that he has exhausted his claim prior to filing  
11 the instant petition. Prisoners in state custody who wish to challenge collaterally in federal  
12 habeas proceedings either the fact or length of their confinement are first required to exhaust  
13 state judicial remedies, either on direct appeal or through collateral proceedings, by  
14 presenting the highest state court available with a fair opportunity to rule on the merits of  
15 each and every claim they seek to raise in federal court. *See* 28 U.S.C. § 2254(b), (c);  
16 *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981).  
17 The state’s highest court must be given an opportunity to rule on the claims even if review is  
18 discretionary. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

19 Accordingly, the petition is DISMISSED with leave to amend. Petitioner shall file an  
20 amended petition addressing the concerns detailed above within 30 days from the date this  
21 order is filed. More specifically, in addition to providing specific details about his 2003  
22 conviction, petitioner must show that (1) he has a federal constitutional right to counsel at a  
23 probation interview proceeding and to be informed of such right; (2) the petition is timely  
24 under AEDPA; and (3) he exhausted his claim in state court prior to filing the instant habeas  
25 petition.


26 The first amended petition must include the caption and civil case number used in this  
27 order (11-01813 RS (PR)) and the words FIRST AMENDED PETITION on the first page.  
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1 Because an amended petition completely replaces the previous petitions, petitioner must  
2 include in his first amended petition all the claims he wishes to present. Petitioner may not  
3 incorporate material from the prior petition by reference. Failure to file an amended petition  
4 in accordance with this order will result in dismissal of this action without further notice to  
5 petitioner.

6 Petitioner's motion to proceed IFP (Docket No. 11) is GRANTED. The Clerk is  
7 directed to reopen this action.

8 **IT IS SO ORDERED.**

9 DATED: June 13, 2011

  
RICHARD SEEBORG  
United States District Judge

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