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United States District Court
For the Northern District of California

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

VASEGA F. TILI,)	No. C 11-1911 JSW (PR)
)	
Petitioner,)	ORDER OF DISMISSAL; GRANTING
)	LEAVE TO PROCEED IN FORMA
vs.)	PAUPERIS; DENYING MOTION TO
)	HOLD IN ABEYANCE
LELAND MCEWEN, Warden,)	
)	
Respondent.)	(Docket Nos. 2 & 3)
_____)	

Petitioner, a prisoner of the State of California proceeding pro se, has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254.

Petitioner concedes that he presently has a petition for a writ of habeas corpus pending before the California Supreme Court. The Ninth Circuit has held unequivocally that the habeas exhaustion requirement is not satisfied if there is a pending proceeding in state court, even if the issue the petitioner seeks to raise in federal court has been finally determined by the highest available state court. *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). This is because the pending state action might result in reversal of the conviction on some other ground, mooting the federal case. *Id.*

The petition is DISMISSED without prejudice to refiling it when no further proceedings are pending in the California state courts. *See id.* (if state court action is pending, claims are not exhausted). In light of this dismissal, Petitioner’s motion to hold

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the petition in abeyance is DENIED. Petitioner’s motion for leave to proceed in forma pauperis is GRANTED.

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

This order terminates docket numbers 2 and 3. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: May 13, 2011



JEFFREY S. WHITE
United States District Judge