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

TALYON JEROME ORR,

No. C 11-3596 WHA (PR)

Petitioner,

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

vs.

JAMES A. YATES,

Respondent.

(Docket No. 2)

Petitioner filed this pro se petition for a writ of habeas corpus under 28 U.S.C. 2254 challenging a state court conviction.

Petitioner states that he presently has a “petition, appeal or other post-conviction proceeding” pending before the California Supreme Court (Pet. 5). 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, mootng the federal case. *Ibid*.

The petition is **DISMISSED** without prejudice to refileing it when no further proceedings are pending in the California state courts. The application for leave to proceed in forma pauperis (docket number 2) is **GRANTED**. The motion to strike unexhausted claims from the petition (docket number 4) is **DENIED**.

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

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which the petition is dismissed. Petitioner has failed to make a substantial showing that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no certificate of appealability is warranted in this case.

IT IS SO ORDERED.

Dated: August 29, 2011.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE