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

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DANNY CARDENAS, JR.,

No. C 12-5562 JSW (PR)

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Petitioner,

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

10

v.

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WARDEN,

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Respondents.

(Docket No. 3)

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**INTRODUCTION**

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Petitioner, a prisoner of the State of California, has filed a habeas corpus petition challenging the constitutionality of his conviction in the state courts. He previously filed a petition (Case No. C 12-2141 JSW) that was dismissed without prejudice for failure to exhaust his state court remedies as Petitioner indicated in his petition that he had not sought review of his conviction in the California Supreme Court. Petitioner states once again in his petition that he has not sought review of his conviction or sentence in the California Supreme Court. Accordingly, the petition is DISMISSED without prejudice to filing a new federal petition once all claims have been exhausted. This order also grants Petitioner's motion to proceed in forma pauperis (docket number 3).

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**DISCUSSION**

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I Standard of Review

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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).

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, such as petitioner, may not be  
7 granted unless the prisoner has first exhausted state judicial remedies, either by way of a  
8 direct appeal or in collateral proceedings, by presenting the highest state court available  
9 with a fair opportunity to rule on the merits of each and every issue he or she seeks to  
10 raise in federal court. *See* 28 U.S.C. § 2254(b),(c); *Granberry v. Greer*, 481 U.S. 129,  
11 133-34 (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). He states in his petition that  
21 he has not sought review of his conviction or sentence in the California Supreme Court.  
22 To properly exhaust his claims, Petitioner must properly present them to the California  
23 Supreme Court. He has not presented any exceptional circumstances to excuse his  
24 failure to exhaust. *See Granberry*, 481 U.S. at 134. Petitioner indicates that his appeal  
25 to the California Court of Appeal was denied as untimely. Petitioner does not explain  
26 why he was precluded from filing a petition for review of the Court of Appeal’s decision  
27 in the California Supreme Court, or alternatively filing his claims in a habeas petition in  
28 the California Supreme Court. The petition will therefore be dismissed without

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prejudice to refiling after available state judicial remedies are exhausted.

**CONCLUSION**

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

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 his claims amounted to a denial of his constitutional rights or demonstrate that a reasonable jurist would find this Court's denial of his claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no certificate of appealability is warranted in this case

In light of Petitioner's lack of funds, his application for leave to proceed in forma pauperis is GRANTED (docket number 3).

IT IS SO ORDERED.

DATED: December 14, 2012

  
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JEFFREY S. WHITE  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
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5 DANNY CARDENAS,  
6 Plaintiff,  
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Case Number: CV12-05562 JSW  
**CERTIFICATE OF SERVICE**

8 v.

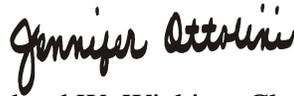
9 WARDEN et al,  
10 Defendant.  
\_\_\_\_\_ /

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

13 That on December 19, 2012, I SERVED a true and correct copy(ies) of the attached, by placing  
14 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
15 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office  
16 delivery receptacle located in the Clerk's office.

17 Danny Cardenas G-36254  
18 M.C.S.P.  
19 P.O. Box 409020  
#G36254  
Ione, CA 95640

20 Dated: December 19, 2012



21 Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk  
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