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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 PAMELA J. BAKER,

12 Petitioner,

13 v.

14 DEBORAH L. PATRICK, Warden,

15 Respondent.

Civil No. 07cv2163-L (CAB)

**ORDER DENYING IN FORMA  
PAUPERIS APPLICATION AND  
DISMISSING CASE WITHOUT  
PREJUDICE**

16 Petitioner is a state prisoner proceeding pro se with a Petition for a Writ of Habeas  
17 Corpus pursuant to 28 U.S.C. § 2254. On November 15, 2007, the Court denied Petitioner's  
18 application to proceed in forma pauperis because it appeared from her prison trust account  
19 statement that she could afford to pay the \$5.00 filing fee. The Court also dismissed the Petition  
20 because it presented only state law claims. Petitioner was instructed that in order to have this  
21 case reopened, she had to pay the filing fee and file a First Amended Petition on or before  
22 January 14, 2008. Petitioner has now filed a Motion to Proceed In Forma Pauperis and a First  
23 Amended Petition.

24 The request to proceed in forma pauperis reflects a \$16.95 balance in Petitioner's prison  
25 trust account. The filing fee associated with this type of action is \$5.00. See 28 U.S.C.  
26 § 1914(a).

27 It appears Petitioner can pay the requisite filing fee. Accordingly, the Court **DENIES** the  
28 request to proceed in forma pauperis, and **DISMISSES** the case without prejudice; Petitioner

1 may submit a copy of this order along with the requisite fee no later than **February 14, 2008**,  
2 to have the case reopened.

3 Additionally, the First Amended Petition is also once again subject to dismissal in  
4 accordance with Rule 4 of the rules governing § 2254 cases, because Petitioner has once again  
5 failed to state a claim cognizable on federal habeas in that she has failed to allege that her state  
6 court conviction or sentence violates the Constitution of the United States.

7 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
8 federal habeas corpus claims:

9 The Supreme Court, a Justice thereof, a circuit judge, or a district  
10 court shall entertain an application for a writ of habeas corpus in  
11 behalf of a person in custody pursuant to the judgment of a State  
12 court only on the ground that he is in custody in violation of the  
13 Constitution or laws or treaties of the United States.

14 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.  
15 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800  
16 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
17 under § 2254, a state prisoner must allege both that she is in custody pursuant to a “judgment of  
18 a State court,” and that she is in custody in “violation of the Constitution or laws or treaties of  
19 the United States.” See 28 U.S.C. § 2254(a).

20 Here, Petitioner once again claims that she “was convicted of both receiving and stealing  
21 the same property,” that “the jury was not instructed that it could not convict me of both stealing  
22 and receiving the same property,” and “the trial court abused its discretion under Evidence Code  
23 352.” (First Amended Petition at 6-8.) In no way does Petitioner claim she is “in custody in  
24 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.  
25 Although Petitioner states that she incorporates by reference her opening brief on appeal as she  
26 did in her original Petition, that document is again not attached to her pleading.

27 Further, the Court once again notes that Petitioner may not be able to simply amend her  
28 Petition to state a federal habeas claim and then refile the amended petition in this case. She  
must exhaust state judicial remedies before bringing her claims via federal habeas. Habeas  
petitioners who wish to challenge either their state court conviction or the length of their

1 confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);  
 2 Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a  
 3 California state prisoner must present the California Supreme Court with a fair opportunity to  
 4 rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b),  
 5 (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a  
 6 petitioner must allege, in state court, how one or more of his or her federal rights have been  
 7 violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state  
 8 courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights,  
 9 they must surely be alerted to the fact that the prisoners are asserting claims under the United  
 10 States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner  
 11 wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process  
 12 of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal  
 13 court, but in state court.” Id. at 366 (emphasis added).

14 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
 15 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
 16 of habeas corpus by a person in custody pursuant to the judgment of a State court. The  
 17 limitation period shall run from the latest of:

18 (A) the date on which the judgment became final by the  
 19 conclusion of direct review or the expiration of the time for seeking  
 such review;

20 (B) the date on which the impediment to filing an application  
 21 created by State action in violation of the Constitution or laws of the  
 United States is removed, if the applicant was prevented from filing  
 22 by such State action;

23 (C) the date on which the constitutional right asserted was  
 initially recognized by the Supreme Court, if the right has been  
 24 newly recognized by the Supreme Court and made retroactively  
 applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or  
 26 claims presented could have been discovered through the exercise  
 27 of due diligence.

28 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

1 The statute of limitations does not run while a properly filed state habeas corpus petition  
2 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999),  
3 cert. denied, 529 U.S. 1104 (2000). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that  
4 “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court  
5 officer for placement into the record] are in compliance with the applicable laws and rules  
6 governing filings.”); Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir.) (holding that a state  
7 application for post-conviction relief which is ultimately dismissed as untimely was neither  
8 “properly filed” nor “pending” while it was under consideration by the state court, and therefore  
9 does not toll the statute of limitations), as amended 439 F.3d 993, cert. denied, 127 S.Ct (2006).  
10 However, absent some other basis for tolling, the statute of limitations continues to run while  
11 a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

12 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
13 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that  
14 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.  
15 Here, it appears plain from the First Amended Petition that Petitioner is not presently entitled  
16 to federal habeas relief because she has not stated a cognizable claim.

### 17 CONCLUSION

18 Based on the foregoing, the Court **DISMISSES** this action without prejudice because  
19 Petitioner has failed to satisfy the filing fee requirement and has failed to state a cognizable  
20 claim. To have this case reopened, Petitioner must satisfy the filing fee requirement **and** file a  
21 Second Amended Petition no later than **February 14, 2008** that cures the pleading deficiencies  
22 set forth above. Further, Petitioner is advised that if the Second Amended Petition once again

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1 fails to state a cognizable federal claim, this action will be subject to dismissal without further  
2 leave to amend. The Clerk of Court shall send a blank Southern District of California amended  
3 petition form to Petitioner along with a copy of this Order.

4 **IT IS SO ORDERED.**

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6 DATED: January 14, 2008

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8 M. James Lorenz  
United States District Court Judge

9 CC: ALL PARTIES  
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