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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 TONY MABRY,

12 Petitioner,

13 v.

14 L. E. SCRIBNER, Warden,

15 Respondent.  
16

Civil No. 08cv0467-JM (AJB)

**ORDER:**

**(1) DENYING IN FORMA PAUPERIS  
APPLICATION AS MOOT; AND**

**(2) DISMISSING CASE WITHOUT  
PREJUDICE**

17 Petitioner, a state prisoner proceeding pro se, has paid the \$5.00 filing fee and has filed  
18 a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to  
19 proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).

20 The request to proceed in forma pauperis is **DENIED** without prejudice as moot because  
21 Petitioner has paid the filing fee.

22 The Petition is subject to dismissal because Petitioner has not alleged exhaustion of state  
23 court remedies. Habeas petitioners who wish to challenge either their state court conviction or  
24 the length of their confinement in state prison, must first exhaust state judicial remedies. 28  
25 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state  
26 judicial remedies, a California state prisoner must present the California Supreme Court with a  
27 fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition.  
28 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state

1 court remedies a petitioner must allege, in state court, how one or more of his or her federal  
 2 rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995)  
 3 reasoned: “If state courts are to be given the opportunity to correct alleged violations of  
 4 prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting  
 5 claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example,  
 6 “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him  
 7 [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say  
 8 so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

9 Nowhere in the Petition does Petitioner allege that he raised his claims in the California  
 10 Supreme Court. In fact, he specifically indicates he did not seek review in the California courts  
 11 because “there can be no useful purpose to enforcing the petitioner to retreat back to square one  
 12 & wend his way anew through a jurisdictional maze.” (Pet. at 6.) Petitioner must exhaust his  
 13 state court remedies with respect to his claims. The burden of proving that a claim has been  
 14 exhausted lies with the petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

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

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

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

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

26 (D) the date on which the factual predicate of the claim or  
 27 claims presented could have been discovered through the exercise  
 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.”). However, absent some other basis for tolling, the statute of limitations does  
7 run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

8 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
9 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that  
10 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.  
11 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas  
12 relief because he has not alleged exhaustion of state court remedies.

13 Accordingly, the Court **DENIES** the request to proceed in forma pauperis as moot, and  
14 **DISMISSES** the case without prejudice. To have the case reopened, Petitioner must, no later  
15 than **May 19, 2008**, provide the Court with: (1) a copy of this Order together with the \$5.00  
16 filing fee; or (2) a copy of this Order together with adequate proof that Petitioner cannot pay the  
17 \$5.00 filing fee.

18 **IT IS SO ORDERED.**

19 DATED: March 20, 2008

20   
21 Hon. Jeffrey T. Miller  
United States District Judge

22 CC: ALL PARTIES  
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