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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JENNIFER LYNN DEMENT,  
Petitioner,  
v.  
DAWN DAVIDSON, Warden,  
Respondent.

Civil No. 09-1845 WQH (AJB)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE AND WITH  
LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and paid the filing fee.

After a preliminary review of the Petition, the Court finds it must be dismissed for failure to exhaust state judicial remedies. Habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners

1 are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For  
2 example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial  
3 denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she]  
4 must say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

5 Nowhere on the Petition does Petitioner allege that she raised her claims in the California  
6 Supreme Court. In fact, she specifically indicates she did not seek review in the California  
7 Supreme Court. (See Pet. at 9.) If Petitioner has raised her claims in the California Supreme  
8 Court she must so specify. “The burden of proving that a claim has been exhausted lies with the  
9 petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d  
10 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v.  
11 Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

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

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

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

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

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

25 28 U.S.C. § 2244(d)(1)(A)-(D) (2006).

26 The statute of limitations does not run while a properly filed state habeas corpus petition  
27 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
28 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’

1 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
2 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
3 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
4 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).


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

10 **CONCLUSION**

11 For the foregoing reason, the Petition is **DISMISSED** without prejudice and with leave  
12 to amend. In order to have this case reopened, Petitioner must, no later than November 28,  
13 2009, file a First Amended Petition which cures the pleading deficiency outlined above. *For*  
14 *Petitioner’s convenience, the Clerk of Court shall attach to this Order a blank First Amended*  
15 *Petition form.*

16 **IT IS SO ORDERED.**

17 DATED: September 29, 2009

18   
19 **WILLIAM Q. HAYES**  
20 United States District Judge

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