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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ARTHUR FREDRICK LUTE, III,
Petitioner,
v.
GEORGE NEOTTI, Warden, et al.,
Respondents.

Civil No. 09-2501 DMS (WMC)

**ORDER GRANTING APPLICATION
TO PROCEED IN FORMA
PAUPERIS AND DISMISSING
PETITION WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has submitted a First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

REQUEST TO PROCEED IN FORMA PAUPERIS

Petitioner has no funds on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner’s application to proceed in forma pauperis, and allows Petitioner to prosecute the above-referenced action without being required to prepay fees or costs and without being required to post security. The Clerk of the Court shall file the Petition for Writ of Habeas Corpus without prepayment of the filing fee.

FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES

Further, 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

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

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

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

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

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

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

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

3 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

4 The statute of limitations does not run while a properly filed state habeas corpus petition
5 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).
6 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
7 when its delivery and acceptance [by the appropriate court officer for placement into the record]
8 are in compliance with the applicable laws and rules governing filings.”). However, absent some
9 other basis for tolling, the statute of limitations does run while a federal habeas petition is
10 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

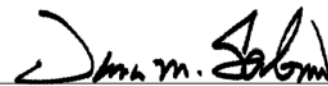
11 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
12 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
13 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
14 § 2254.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

16 **CONCLUSION**

17 Based on the foregoing, the Court **GRANTS** Petitioner’s request to proceed in forma
18 pauperis and **DISMISSES** this action without prejudice because Petitioner has failed to
19 allege exhaustion of state judicial remedies. Petitioner was advised in the preceding dismissal
20 Order that if he filed an Amended Petition which failed to allege exhaustion of state judicial
21 remedies, he would be given no further opportunities to amend the present case, but would have
22 to begin again by filing a new federal habeas petition which will be given a new civil case
23 number.

24 **IT IS SO ORDERED.**

25 DATED: December 15, 2009

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27 HON. DANA M. SABRAW
28 United States District Judge