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

DEMETRIUS GATER,  
  
Petitioner,  
  
v.  
  
A. HEDGPETH, Warden, et al.,  
  
Respondents.

Civil No. 10cv0967-MMA (WMc)

**ORDER DISMISSING PETITION  
WITHOUT PREJUDICE AND  
NOTIFYING PETITIONER OF  
OPTIONS**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, but has neither paid the filing fee requirement nor filed a motion to proceed in forma pauperis.

Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than July 12, 2010**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

In addition, although Petitioner has alleged exhaustion of state court remedies with respect to claim one in the Petition, he has not alleged exhaustion as to claims two through six. (See Pet. at 6-9.) The Court hereby notifies Petitioner of the possible dismissal of his Petition for failure to allege exhaustion of state court remedies as to all claims presented, even if he satisfies the filing fee requirement.

1 Generally, applications for writs of habeas corpus that contain unexhausted claims must  
2 be dismissed. See Rose v. Lundy, 455 U.S. 509, 522 (1982). However, federal courts have the  
3 discretion to deny a habeas application on the merits notwithstanding a petitioner’s failure to  
4 fully exhaust state judicial remedies. See 28 U.S.C.A. § 2254(b)(2) (West 2006). The burden  
5 of proving that a claim has been exhausted lies with the petitioner. Cartwright v. Cupp, 650 F.2d  
6 1103, 1104 (9th Cir. 1981).

7 The exhaustion requirement is satisfied by providing the state courts with a “fair  
8 opportunity” to rule on Petitioner’s constitutional claims. Anderson v. Harless, 459 U.S. 4, 6  
9 (1982). In most instances, a claim is exhausted once it is presented to a state’s highest court,  
10 either on direct appeal or through state collateral proceedings.<sup>1</sup> See Sandgathe v. Maass, 314  
11 F.3d 371, 376 (9th Cir. 2002). The constitutional claim raised in the federal proceedings must  
12 be the same as that raised in the state proceedings. See id.

13 Petitioner indicates that although he has presented claim one to the California Supreme  
14 Court, he has not presented claims two through six to that court. (Pet. at 6-9.)

## 15 **I. PETITIONER’S OPTIONS**

16 To avoid the Court dismissing the Petition on its own accord once Petitioner has satisfied  
17 the filing fee requirement, Petitioner may choose one of the following options.

### 18 **i) First Option: Demonstrate Exhaustion**

19 Petitioner may file further papers with this Court to demonstrate that he has in fact  
20 exhausted his state court remedies with respect to every claim presented. If Petitioner chooses  
21 this option, his papers are due no later than **July 12, 2010**.

### 22 **ii) Second Option: Voluntarily Dismiss the Petition**

23 Petitioner may move to voluntarily dismiss his entire federal petition and return to state

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24 <sup>1</sup> 28 U.S.C. § 2254 (b)(1)-(2) states:

25 (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the  
26 judgment of a State court shall not be granted unless it appears that -

27 (A) the applicant has exhausted the remedies available in the courts of the State; or

28 (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that  
render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure  
to the applicant to exhaust the remedies available in the courts of the State.

1 court to exhaust his unexhausted claims. Petitioner may then file a new federal petition  
2 containing only exhausted claims. See Rose, 455 U.S. at 510, 520-21 (stating that a petitioner  
3 who files a mixed petition may dismiss his petition to “return[] to state court to exhaust his  
4 claims”). If Petitioner chooses this second option, he must file a pleading with this Court no  
5 later than **July 12, 2010**.

6 Petitioner is cautioned that any new federal petition must be filed before expiration of the  
7 one-year statute of limitations. Ordinarily, a petitioner has one year from when his conviction  
8 became final to file his federal petition, unless he can show that statutory or equitable “tolling”  
9 applies. Duncan v. Walker, 533 U.S. 167, 176 (2001); 28 U.S.C. § 2244(d).<sup>2</sup> The statute of  
10 limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C.  
11 § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v.  
12 Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery  
13 and acceptance [by the appropriate court officer for placement into the record] are in compliance  
14 with the applicable laws and rules governing filings.”); Bonner v. Carey, 425 F.3d 1145, 1149  
15 (9th Cir. 2005) (holding that a state application for post-conviction relief which is ultimately  
16 dismissed as untimely was neither “properly filed” nor “pending” while it was under  
17 consideration by the state court, and therefore does not toll the statute of limitations), as  
18 amended 439 F.3d 993. However, absent some other basis for tolling, the statute of limitations  
19 continues to run while a federal habeas petition is pending. Duncan, 533 U.S. at 181-82.

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21 <sup>2</sup> 28 U.S.C. § 2244 (d) provides:

22 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in  
custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

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

24 (B) the date on which the impediment to filing an application 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;

25 (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  
26 cases on collateral review; or

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

28 (2) The time during which a properly filed application for State post-conviction or other collateral review  
with respect to the pertinent judgement or claim is pending shall not be counted toward any period of  
limitation under this subsection.

1           **iii) Third Option: Formally Abandon Unexhausted Claims**

2           Petitioner may formally abandon his unexhausted claims and proceed with his exhausted  
3 ones. See Rose, 455 U.S. at 510, 520-21 (stating that a petitioner who files a mixed petition may  
4 “resubmit[] the habeas petition to present only exhausted claims”). If Petitioner chooses this  
5 third option, he must file a pleading with this Court no later than **June 12, 2010**.

6           Petitioner is cautioned that once he abandons his unexhausted claims, he may lose the  
7 ability to ever raise them in federal court. See Slack v. McDaniel, 529 U.S. 473, 488 (2000)  
8 (stating that a court’s ruling on the merits of claims presented in a first § 2254 petition renders  
9 any later petition successive); see also 28 U.S.C. § 2244 (a)-(b).<sup>3</sup>

10           **iv) Fourth Option: File a Motion to Stay the Federal Proceedings**

11           Petitioner may file a motion to stay this federal proceeding while he returns to state court  
12 to exhaust his unexhausted claim(s). There are two methods available to Petitioner, the “stay  
13 and abeyance” procedure and the “withdrawal and abeyance” procedure.

14           If Petitioner wishes to use the “stay and abeyance” procedure he should ask the Court to  
15 stay his mixed petition while he returns to state court to exhaust. Under this procedure he must  
16 demonstrate there are arguably meritorious claim(s) which he wishes to return to state court to  
17 exhaust, that he is diligently pursuing his state court remedies with respect to those claim(s), and  
18 that good cause exists for his failure to timely exhaust his state court remedies. Rhines v.  
19 Webber, 544 U.S. 269, 277-78 (2005).

20           If Petitioner wishes to use the “withdrawal and abeyance” procedure, he must voluntarily  
21 withdraw his unexhausted claim(s), ask the Court to stay the proceedings and hold the  
22 fully-exhausted petition in abeyance while he returns to state court to exhaust, and then seek  
23 permission to amend his petition to include the newly exhausted claim(s) after exhaustion is

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24           <sup>3</sup> 28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive habeas corpus application under  
25 § 2254 shall be dismissed unless:  
26           (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases  
27           on collateral review by the Supreme Court, that was previously unavailable; or  
28           (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise  
              of due diligence; and  
              (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be  
              sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable  
              factfinder would have found the applicant guilty of the underlying offense.

1 complete. King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009). Although under this procedure  
2 Petitioner is not required to demonstrate good cause for his failure to timely exhaust, the newly  
3 exhausted claim(s) must be either timely under the statute of limitations or “relate back” to the  
4 claim(s) in the fully-exhausted petition, that is, they must share a “common core of operative  
5 facts” with the previously exhausted claim(s). King, 564 F.3d at 1141, quoting Mayle v. Felix,  
6 545 U.S. 644, 659 (2005).

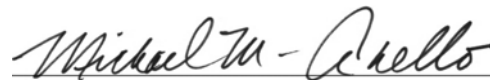
7 If Petitioner chooses this fourth option, he must file a pleading with this Court no later  
8 than **June 12, 2010**.

## 9 **II. CONCLUSION**

10 The Petition for a Writ of Habeas Corpus is **DISMISSED** without prejudice due to  
11 Petitioner’s failure to satisfy the filing fee requirement. If Petitioner wishes to proceed with this  
12 action he must either pay the filing fee or file a motion to proceed in forma pauperis on or before  
13 **July 12, 2010**. The Court also hereby **NOTIFIES PETITIONER THAT HE HAS FAILED**  
14 **TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES AS TO ALL CLAIMS**  
15 **PRESENTED AND THE PETITION IS THEREFORE SUBJECT TO DISMISSAL FOR**  
16 **FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES.**<sup>4</sup> Thus, if  
17 Petitioner wishes to proceed with this action he must, in addition to satisfying the filing fee  
18 requirement, choose one of the options listed above on or before **July 12, 2010**.

19 **IT IS SO ORDERED.**

20 DATED: May 13, 2010

21 

22 Hon. Michael M. Anello  
23 United States District Judge

24 Copies to: ALL PARTIES

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28 <sup>4</sup> Although such a dismissal would be “without prejudice,” Petitioner is again cautioned that any later federal  
petition may be barred by the statute of limitations. See 28 U.S.C. § 2244(d)(1)-(2); see also footnote two of this Order.