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

JESUS PEREDA RAMOS,

Petitioner,

v.

J. TIM OCHOA, Warden,

Respondent.

Civil No. 10-2143 DMS (JMA)

ORDER:

(1) DENYING IN FORMA PAUPERIS APPLICATION;

(2) DISMISSING CASE WITHOUT PREJUDICE; and

(3) NOTIFYING PETITIONER OF FAILURE TO ALLEGE EXHAUSTION OF HIS STATE COURT REMEDIES AND PROVIDING OPTIONS

Petitioner, a state prisoner proceeding pro se, has not paid the \$5.00 filing fee and has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).

REQUEST TO PROCEED IN FORMA PAUPERIS

The request to proceed in forma pauperis is denied because Petitioner has not provided the Court with sufficient information to determine Petitioner’s financial status. A request to proceed in forma pauperis made by a state prisoner must include a certificate from the warden or other appropriate officer showing the amount of money or securities Petitioner has on account

1 in the institution. Rule 3(a)(2), 28 U.S.C. foll. § 2254; Local Rule 3.2. Petitioner has failed to
2 provide the Court with the required Prison Certificate.

3 **FAILURE TO ALLEGE EXHAUSTION AS TO ALL CLAIMS**

4 Further, Petitioner has not alleged exhaustion as to claims two and three. (*See* Pet. at 8-
5 9.) Having preliminarily determined the petition contains unexhausted claims, the Court notifies
6 Petitioner of the possible dismissal of his petition.

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.¹ *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.* Here, claim three, that the victim
13 suffered from “mental issues,” and claim four, that he should have been permitted to present
14 expert testimony at trial, appear to be unexhausted. (*See* Pet. at 8-9.)

15 **2. PETITIONER’S OPTIONS**

16 If Petitioner wishes to pursue this case, he must choose one of the following options.

17 **I) First Option: Demonstrate Exhaustion**

18 Petitioner may file further papers with this Court to demonstrate that he has in fact
19 exhausted the claims the Court has determined are likely unexhausted. If Petitioner chooses this
20 option, his papers are due no later than **December 15, 2010**. Respondent may file a reply by
21 **January 14, 2011**.

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25 ¹ 28 U.S.C. § 2254 (b)(1)-(2) states:

26 (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the
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 **ii) Second Option: Voluntarily Dismiss the Petition**

2 Petitioner may move to voluntarily dismiss his entire federal petition and return to state
3 court to exhaust his unexhausted claims. Petitioner may then file a new federal petition
4 containing only exhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 510, 520-21 (stating that
5 a petitioner who files a mixed petition may dismiss his petition to “return[] to state court to
6 exhaust his claims”). If Petitioner chooses this second option, he must file a pleading with this
7 Court no later than **December 15, 2010**. Respondent may file a reply by **January 14, 2011**.

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

21 ² 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
23 custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

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

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

 (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

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

(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 amended 439 F.3d 993. However, absent some other basis for tolling, the statute of limitations
2 continues to run while a federal habeas petition is pending. *Duncan*, 533 U.S. at 181-82.

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

4 Petitioner may formally abandon his unexhausted claims and proceed with his exhausted
5 ones. *See Rose*, 455 U.S. at 510, 520-21 (stating that a petitioner who files a mixed petition may
6 “resubmit[] the habeas petition to present only exhausted claims”). If Petitioner chooses this
7 third option, he must file a pleading with this Court no later than **December 15, 2010**
8 Respondent may file a reply by **January 14, 2011**.

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

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

14 Petitioner may file a motion to stay this federal proceeding while he returns to state court
15 to exhaust his unexhausted claims. There are two methods available to Petitioner, the “stay and
16 abeyance” procedure and the “withdrawal and abeyance” procedure.

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

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25 ³ 28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive habeas corpus application under
§ 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
on collateral review by the Supreme Court, that was previously unavailable; or
27 (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise
of due diligence; and
28 (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 If Petitioner wishes to use the “withdrawal and abeyance” procedure, he must voluntarily
2 withdraw his unexhausted claim(s), ask the Court to stay the proceedings and hold the
3 fully-exhausted petition in abeyance while he returns to state court to exhaust, and then seek
4 permission to amend his petition to include the newly exhausted claim(s) after exhaustion is
5 complete. *King v. Ryan*, 564 F.3d 1133, 1141-42 (9th Cir. 2009). Although under this
6 procedure Petitioner is not required to demonstrate good cause for his failure to timely exhaust,
7 the newly exhausted claim(s) must be either timely under the statute of limitations or “relate
8 back” to the claim(s) in the fully-exhausted petition, that is, they must share a “common core of
9 operative facts” with the previously exhausted claim(s). *Id.* at 1142-43, quoting *Mayle v. Felix*,
10 545 U.S. 644. 659 (2005).

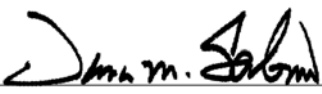
11 If Petitioner chooses this fourth option, he must file a pleading with this Court no later
12 than **December 15, 2010**. Respondent may file a reply by **January 14, 2011**.

13 CONCLUSION

14 For all the foregoing reasons, the Court **DENIES** Petitioner’s request to proceed in forma
15 pauperis and **DISMISSES** this case without prejudice and with leave to amend and notifies
16 Petitioner that he has filed a petition that contains both exhausted and unexhausted claims. In
17 order to proceed with this case, Petitioner must, no later than December 15, 2010: (1) pay the
18 filing fee or provide adequate proof of his inability to pay; **and** (2) choose one of the options
19 outlined above. If Petitioner fails to respond to this Order, the case will remain dismissed
20 without prejudice.⁴ *See Rose*, 455 U.S. at 522. *For Petitioner’s convenience, the Clerk of Court*
21 *shall attach to this Order a blank in forma pauperis application.*

22 **IT IS SO ORDERED.**

23 DATED: November 3, 2010

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25 _____
26 HON. DANA M. SABRAW
27 United States District Judge

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⁴ Although the dismissal is “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.