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CLERK, U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA

BY: *WJB* DEPUTY

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

ROBERT M. RUBINO,

Petitioner,

v.

DANIEL PARAMO, Warden,

Respondent.

Civil No. 13-cv-2707 BEN (NLS)

ORDER

- (1) GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS, and**
- (2) DISMISSING PETITION WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Docket No. 1), together with a Motion for Leave to Proceed In Forma Pauperis (Docket No. 2).

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.

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1 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

2 The Petition must be dismissed, however, because Petitioner has failed to allege
3 exhaustion of state judicial remedies. Habeas petitioners who wish to challenge either
4 their state court conviction or the length of their confinement in state prison must first
5 exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S.
6 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must
7 present the California Supreme Court with a fair opportunity to rule on the merits of
8 every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c);
9 *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies, a
10 petitioner must allege, in state court, how one or more of his or her federal rights have
11 been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995), reasoned:
12 “If state courts are to be given the opportunity to correct alleged violations of prisoners’
13 federal rights, they must surely be alerted to the fact that the prisoners are asserting
14 claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For
15 example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state
16 court trial denied him [or her] the due process of law guaranteed by the Fourteenth
17 Amendment, he [or she] must say so, not only in federal court, but in state court.” *Id.* at
18 366 (emphasis added).

19 Nowhere on the Petition does Petitioner allege that he raised his claims in the
20 California Supreme Court. In fact, he specifically indicates he did not seek review of the
21 claims raised in the Petition, in the California Supreme Court. (See Pet. at 6-9.) If
22 Petitioner has raised his claims in the California Supreme Court he must so specify.
23 “The burden of proving that a claim has been exhausted lies with the petitioner.”
24 *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); see *Breard v. Pruett*, 134 F.3d
25 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler*
26 *v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir.
27 1994).

28 Further, the Court cautions Petitioner that under the Antiterrorism and Effective
Death Penalty Act of 1996 (AEDPA), a one-year statute of limitation shall apply to a

1 petition for a writ of habeas corpus by a person in custody pursuant to the judgment of
2 a State court. The limitation period shall run from the latest of:

3
4 (A) the date on which the judgment became final by the
5 conclusion of direct review or the expiration of the time for
6 seeking such review;

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

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

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

18 28 U.S.C. § 2244(d)(1)(A)-(D).

19 The statute of limitations does not run while a properly filed state habeas corpus
20 petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006
21 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an
22 application is ‘properly filed’ when its delivery and acceptance [by the appropriate court
23 officer for placement into the record] are in compliance with the applicable laws and
24 rules governing filings.”). However, absent some other basis for tolling, the statute of
25 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533
26 U.S. 167, 181-82 (2001).

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

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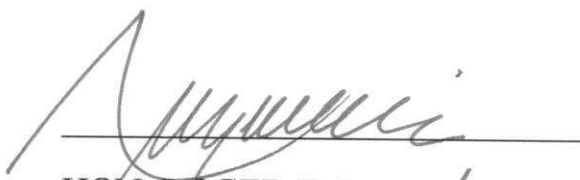
CONCLUSION

For the foregoing reasons, the request to proceed in forma pauperis is **GRANTED** and the Petition is **DISMISSED WITHOUT PREJUDICE** for failure to allege exhaustion of state judicial remedies. In order to have this case reopened, Petitioner must, **no later than January 15, 2014**, file a First Amended Petition which cures the pleading deficiency discussed above.

For Petitioner's convenience, the Clerk of Court shall attach to this Order, a blank First Amended Petition form.

IT IS SO ORDERED.

DATED: November 10, 2013



HON. ROGER T. BENITEZ
United States District Judge