

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY ASARO,
Plaintiff,
v.
SHERIFF GORE, et al.,
Respondents.

Civil No. 14cv1504 AJB (MDD)
ORDER:
(1) DENYING MOTION TO
PROCEED IN FORMA PAUPERIS,
(Doc. No. 2); and
(2) DISMISSING CASE WITHOUT
PREJUDICE AND WITH LEAVE
TO AMEND, (Doc. No. 1).

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

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner has \$19.86 on account at the California correctional institution in which he is presently confined. The filing fee associated with this type of action is \$5.00. See 28 U.S.C. § 1914(a). It appears Petitioner can pay the requisite filing fee. Accordingly, the Court **DENIES** the request to proceed in forma pauperis.

EXHAUSTION OF STATE JUDICIAL REMEDIES/ABSTENTION

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). Ordinarily, to satisfy the exhaustion requirement, a petitioner must “‘fairly present[]’ his federal claim to the highest state court with jurisdiction to consider it, or . . . demonstrate[] that no state remedy remains available.” *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996)

1 (citations omitted). Moreover, to properly exhaust state court remedies a petitioner must
2 allege, in state court, how one or more of his or her federal rights have been violated.
3 For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state
4 court trial denied him [or her] the due process of law guaranteed by the Fourteenth
5 Amendment, he [or she] must say so, not only in federal court, but in state court.” See
6 *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (emphasis added).

7 It is not clear from the Petition that Petitioner has exhausted his state judicial
8 remedies. Indeed, it appears that he is currently in the process of presenting his claims to
9 the California Supreme Court.¹

10 Moreover, under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts may not
11 interfere with ongoing state criminal proceedings absent extraordinary circumstances.
12 *Id.* at 45-46; see *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S.
13 423, 431 (1982) (*Younger* “espouse[d] a strong federal policy against federal-court
14 interference with pending state judicial proceedings.”). These concerns are particularly
15 important in the habeas context where a state prisoner’s conviction may be reversed on
16 appeal, thereby rendering the federal issue moot. *Sherwood v. Tompkins*, 716 F.2d 632,
17 634 (9th Cir. 1983).

18 Absent extraordinary circumstances, abstention under *Younger* is required when:
19 (1) state judicial proceedings are ongoing; (2) the state proceedings involve important
20 state interests; and (3) the state proceedings afford an adequate opportunity to raise the
21 federal issue. *Columbia Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 799 (9th
22 Cir. 2001). All three of these criteria are satisfied here. At the time Petitioner filed the
23 instant Petition, it appears he has yet to receive a decision on his direct appeal to the
24 California Court of Appeal. Thus Petitioner’s criminal case is still ongoing in the state
25 courts. Further, there is no question that the state criminal proceedings involve impor-
26

27 ¹ The Court takes judicial notice of the California Court of Appeal website which indicates an
28 opening brief was filed in Petitioner’s case in the California Supreme Court on April 3, 2014. (See
http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=41&doc_id=2039905&doc_no=D063557)

1 tant state interests. Finally, Petitioner has failed to show that he has not been afforded an
2 adequate opportunity to raise the federal issues on direct appeal. Petitioner offers
3 nothing to support a contention that the state courts do not provide him an adequate
4 opportunity to raise his claims, and this Court specifically rejects such an argument. His
5 appeal is currently pending and abstention is therefore required. *See Huffman v. Pursue,*
6 *Ltd.*, 420 U.S. 592, 608 (1975) (*Younger* applies to state appellate proceedings as well as
7 ongoing proceedings in state trial court); *see also Drury v. Cox*, 457 F.2d 764, 764-65
8 (9th Cir. 1972) (“[O]nly in the most unusual circumstances is a defendant entitled to
9 have federal interposition by way of injunction or habeas corpus until after the jury
10 comes in, judgment has been appealed from that the case concluded in the state courts.”)

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

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

17 (B) the date on which the impediment to filing an application created
18 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;

19 (C) the date on which the constitutional right asserted was initially
20 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

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

23 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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


1 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533
2 U.S. 167, 181-82 (2001).

3 **CONCLUSION**

4 For the foregoing reasons, the Court **DENIES** Petitioner's motion to proceed in
5 forma pauperis and **DISMISSES** the case without prejudice and with leave to amend. If
6 Petitioner wishes to proceed with this case he must, **no later than August 26, 2014**: (1)
7 pay the \$5.00 filing fee **OR** submit adequate proof of his inability to pay the fee; **AND**
8 (2) file a First Amended Petition that demonstrates he has exhausted his state judicial
9 remedies and that abstention is not required by this Court. If Petitioner is unable to
10 demonstrate exhaustion of his state judicial remedies by August 26,2014, he will have to
11 start over by filing a new petition. *The Clerk of Court is directed to mail Petitioner a*
12 *blank motion to proceed in forma pauperis forma and a blank First Amended Petition*
13 *form together with a copy of this Order*

14 **IT IS SO ORDERED.**

15
16 DATED: June 23, 2014

17 
18 _____
19 Hon. Anthony J. Battaglia
20 U.S. District Judge
21
22
23
24
25
26
27
28