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

GREGORY DOWNS, III,

Petitioner,

v.

JEFFREY BEARD, Secretary

Respondent.

Civil No. 15-0727 GPC (WVG)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

**FAILURE TO SATISFY FILING FEE REQUIREMENT**

Petitioner has failed to pay the \$5.00 filing fee and has failed to move 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.

**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 remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue

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

11 Nowhere in the Petition does Petitioner allege that he raised his claims in the  
12 California Supreme Court. In fact, he specifically indicates he did not seek review in the  
13 California Supreme Court. (*See* Pet. at 5-8.) If Petitioner has raised his claims in the  
14 California Supreme Court he must so specify. “The burden of proving that a claim has  
15 been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.  
16 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*,  
17 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir.  
18 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

19 Further, the Court cautions Petitioner that under the Antiterrorism and Effective  
20 Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a  
21 petition for a writ of habeas corpus by a person in custody pursuant to the judgment of  
22 a State court. The 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  
26 application created by State action in violation of the  
27 Constitution or laws of the United States is removed, if the  
applicant was prevented from filing by such State action;

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

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

6 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

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

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

21 **FAILURE TO STATE COGNIZABLE CLAIM ON FEDERAL HABEAS**

22 Upon review of the Petition, it appears to the Court that a Petition for Writ of  
23 Habeas Corpus brought pursuant to § 2254 is not the proper vehicle for the claims  
24 Petitioner presents. Petitioner lists various problems he claims he is facing in prison.  
25 Specifically, Petitioner claims the California Board of Prison Terms (BPT) failed to  
26 provide him with forms under the American with Disabilities Act (ADA), which would

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1 permit him to request accommodations for his April 1, 2015 parole hearing.<sup>1</sup> Petitioner’s  
2 claim is not cognizable on habeas because it does not challenge the constitutional  
3 validity or duration of confinement. *See* 28 U.S.C. § 2254(a); *Preiser v. Rodriguez*, 411  
4 U.S. 475, 500 (1973); *Heck v. Humphrey*, 512 U.S. 477, 480-85 (1994). “Section 2254  
5 applies only to collateral attacks on state court judgments.” *McGuire v. Blubaum*, 376  
6 F. Supp. 284, 285 (D. Ariz. 1974).

7 In no way does Petitioner claim his state court conviction violates the Constitution  
8 or laws or treaties of the United States. Rule 4 of the Rules Governing Section 2254  
9 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from  
10 the face of the petition and any exhibits annexed to it that the petitioner is not entitled  
11 to relief in the district court.” Rule 4, 28 U.S.C. foll. § 2254. The parole hearing for  
12 which Petitioner sought accommodation had not yet occurred when the Petition was  
13 filed. Petitioner fails to allege facts to indicate the failure to provide ADA forms or  
14 accommodations impacted his BPT hearing, and as such, the duration of his confinement.

15 Challenges to the fact or duration of confinement are brought by petition for a writ  
16 of habeas corpus, pursuant to 28 U.S.C. § 2254; challenges to conditions of confinement  
17 are brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. *See Preiser*, 411 U.S.  
18 at 488-500. When a state prisoner is challenging the very fact or duration of his physical  
19 imprisonment, and the relief he seeks is a determination that he is entitled to immediate  
20 release or a speedier release from that imprisonment, his sole federal remedy is a writ of  
21 habeas corpus. *Id.* at 500. On the other hand, a § 1983 action is a proper remedy for a  
22 state prisoner who is making a constitutional challenge to the conditions of his prison  
23 life, but not to the fact or length of his custody. *Id.* at 499; *McIntosh v. United States*  
24 *Parole Comm’n*, 115 F.3d 809, 811-12 (10th Cir. 1997). It appears from the face of the  
25 Petition that Petitioner challenges the conditions of his prison life, but not the fact or  
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28 <sup>1</sup> Petitioner signed the Petition on March 22, 2015, ten days before the scheduled April 1, 2015 hearing.


1 length of his custody.<sup>2</sup> Thus, Petitioner has not stated a cognizable habeas claim  
2 pursuant to § 2254.

3 **CONCLUSION**

4 Based on the foregoing, the Court **DISMISSES** this case without prejudice for  
5 failure to satisfy the filing fee requirement, failure to allege exhaustion and failure to  
6 state a cognizable claim on habeas corpus. **IT IS HEREBY ADJUDGED THAT**  
7 **JUDGMENT BE ENTERED DISMISSING THE PETITION AND THE ACTION.**

8 **IT IS SO ORDERED.**

9 **DATED: April 16, 2015**

10   
11 **HON. GONZALO P. CURIEL**  
12 **United States District Judge**

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<sup>2</sup> Petitioner currently has a § 1983 complaint pending in the United States District Court  
28 for the Eastern District (filed March 6, 2015), in which Petitioner alleges he was denied forms  
and accommodation required under the ADA and necessary to prepare for his parole hearing.  
*See Downs v. Balls*, 15cv0501 KJN (PC) (Cal. ED).