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

RAUL GARCIA ESCOBEDO,
Petitioner,
v.
JEFFREY MACOMBER, Warden,
Respondent.

Case No.: 16cv0971 GPC (PCL)

**ORDER DENYING IN FORMA
PAUPERIS APPLICATION AND
DISMISSING CASE WITHOUT
PREJUDICE**

On February 24, 2016, Petitioner, a state prisoner proceeding pro se filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United District Court for the Eastern District of California. On March 28, 2016, the District Court for the Eastern District of California, dismissed the petition with leave to amend and ordered Petitioner to either pay the filing fee or submit an application to proceed in forma pauperis. On April 6, 2016, Petitioner filed a First Amended Petition, together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). On April 21, 2016, having determined that jurisdiction for the Petition was proper in the Southern District of California, the District Court of the Eastern District of California transferred the case to this Court.

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1 habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody
2 pursuant to a “judgment of a State court,” and that he is in custody in “violation of the
3 Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2254(a).

4 Here, the First Amended Petition (“Petition”) is quite difficult to read. Petitioner
5 appears to mention a jury instruction and testimony of a witness who was possibly given
6 immunity. (*See* Pet. at 4-5.) It is impossible to discern from the vague allegations in the
7 Petition, what Petitioner is specifically alleging as grounds for relief. Moreover,
8 Petitioner has failed to allege that due to these purported errors, he is “in custody in
9 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

10 The Court additionally notes that Petitioner cannot simply amend his Petition to
11 state a federal habeas claim and then refile the amended petition in this case. He must
12 exhaust state judicial remedies before bringing his claims via federal habeas. State
13 prisoners who wish to challenge their state court conviction must first exhaust state
14 judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34
15 (1987). To exhaust state judicial remedies, a California state prisoner must present the
16 California Supreme Court with a fair opportunity to rule on the merits of every issue
17 raised in his or her federal habeas petition. *See* 28 U.S.C. § 2254(b), (c); *Granberry*, 481
18 U.S. at 133-34. Moreover, to properly exhaust state court judicial remedies a petitioner
19 must allege, in state court, how one or more of his or her federal rights have been
20 violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If
21 state courts are to be given the opportunity to correct alleged violations of prisoners’
22 federal rights, they must surely be alerted to the fact that the prisoners are asserting
23 claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For
24 example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state
25 court trial denied him the due process of law guaranteed by the Fourteenth Amendment,
26 he must say so, not only in federal court, but in state court.” *Id.* (emphasis added).

27 Additionally, the Court cautions Petitioner that under the Antiterrorism and
28 Effective Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year

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

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
applicant was prevented from filing by such State action;

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

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

16 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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

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

26 Further, as discussed above, habeas petitioners who wish to challenge either their
27 state court conviction or the length of their confinement in state prison, must first exhaust
28 state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-

1 34 (1987). To exhaust state judicial remedies, a California state prisoner must present the
2 California Supreme Court with a fair opportunity to rule on the merits of every issue
3 raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481
4 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must
5 allege, in state court, how one or more of his or her federal rights have been violated.
6 The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts
7 are to be given the opportunity to correct alleged violations of prisoners’ federal rights,
8 they must surely be alerted to the fact that the prisoners are asserting claims under the
9 United States Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas
10 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or
11 her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must
12 say so, not only in federal court, but in state court.” *Id.* at 366 (emphasis added).

13 Nowhere on the Petition does Petitioner allege that he raised his claims in the
14 California Supreme Court. If Petitioner has raised his claims in the California Supreme
15 Court he must so specify. “The burden of proving that a claim has been exhausted lies
16 with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); *see Breard v.*
17 *Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d
18 Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d
19 155, 160 (6th Cir. 1994).

20 Further, the Court cautions Petitioner that, as discussed above, under AEDPA a
21 one-year period of limitation applies to a petition for a writ of habeas corpus by a person
22 in custody pursuant to the judgment of a State court. 28 U.S.C. § 2244(d)(1)(A)-(D)
23 (West 2006).

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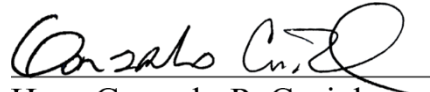
1 presently entitled to federal habeas relief because he has not alleged exhaustion of state
2 court remedies.

3 **CONCLUSION**

4 Based on the foregoing, the Court **DENIES** the application to proceed in forma
5 pauperis and **DISMISSES** this action without prejudice because Petitioner has failed to
6 satisfy the filing fee requirement, failed to state a cognizable claim, and failed to allege
7 exhaustion. To have this case reopened, Petitioner must, **no later June 27, 2016**, do two
8 things: (1) either pay the filing fee **or** provide adequate proof of his inability to pay, **and**
9 (2) file a First Amended Petition that cures the pleading deficiencies set forth above. *For*
10 *Petitioner's convenience, the Clerk of Court shall attach to this Order a blank in forma*
11 *pauperis application and a blank amended petition form.*

12 **IT IS SO ORDERED.**

13 Dated: April 25, 2016

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15 Hon. Gonzalo P. Curiel
16 United States District Judge
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