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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS MORGAN,

Petitioner,

v.

PHILLIP GARCIA,

Respondent.

Case No.: 16-2239 BEN (KSC)

**ORDER: (1) DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND; and (2)
DENYING MOTION FOR
APPOINTMENT OF COUNSEL
WITHOUT PREJUDICE**

Petitioner, proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 together with a motion to appoint counsel. He has paid the \$5.00 filing fee.

FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM

In accordance with Rule 4 of the rules governing § 2254 cases, Petitioner has failed to allege that his state court conviction or sentence violates the Constitution of the United States. Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the

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1 ground that he is in custody in violation of the Constitution or laws or
2 treaties of the United States.

3 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th
4 Cir. 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v.*
5 *Shimoda*, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal
6 habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody
7 pursuant to a “judgment of a State court,” and that he is in custody in “violation of the
8 Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2254(a).

9 Here, Petitioner claims that his probation officer is failing to comply with the
10 Interstate Compact Application. (*See* Pet. at 5-14.) In no way does Petitioner claim he is
11 “in custody in violation of the Constitution or laws or treaties of the United States.” 28
12 U.S.C. § 2254.

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

3 Additionally, the Court cautions Petitioner that under the Antiterrorism and
4 Effective Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year
5 period of limitation applies to a petition for a writ of habeas corpus by a person in
6 custody pursuant to the judgment of a State court. The limitation period runs from the
7 latest of:

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

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

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

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

21 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

22 The Court also notes that the statute of limitations does not run while a properly
23 filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*,
24 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). *But see Artuz v.*
25 *Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its
26 delivery and acceptance [by the appropriate court officer for placement into the record]
27 are in compliance with the applicable laws and rules governing filings.”). However,
28 absent some other basis for tolling, the statute of limitations does run while a federal
habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

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1 **CONCLUSION**

2 Based on the foregoing, the Court **DISMISSES** this action without prejudice and
3 with leave to amend. To have this case reopened, Petitioner must, **no later than**
4 **November 14, 2016**, file a First Amended Petition that cures the pleading deficiencies set
5 forth above. The Court also **DENIES** the motion to appoint counsel without prejudice.
6 *The Clerk of Court shall mail Petitioner a blank Pro Se Prisoner Packet to Petitioner*
7 *with a copy of this Order.*

8 **IT IS SO ORDERED.**

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10 DATED: 9/14/2016


Roger T. Benitez

United States District Judge