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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 THOMAS DANIEL BOVENSIEP,
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14 DEAN BORDERS, Warden,
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Petitioner, v. Respondent.

Case No.: 17cv0074 GPC (NLS)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

17 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of
18 Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the
19 Central District of California and paid the filing fee.

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

21 The Petition must be dismissed without prejudice because it is not clear from the
22 Petition that Petitioner has exhausted his claims. Habeas petitioners who wish to
23 challenge either their state court conviction or the length of their confinement in state
24 prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v.
25 Greer, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy the exhaustion requirement, a
26 petitioner must “fairly present[]’ his federal claim to the highest state court with
27 jurisdiction to consider it, or . . . demonstrate[] that no state remedy remains available.”
28 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996) (citations omitted). Moreover, to

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

7 Petitioner states that he raised “federal and state due process and fairness” claims
8 and statute of limitations claims in state court. (Pet. at 3.) In the body of his Petition,
9 however, he raises speedy trial, destruction of evidence, selective prosecution, and
10 obstruction of justice claims. (Pet. at 11-17.) Thus, it is not clear whether Petitioner has
11 exhausted his claims. If Petitioner has raised his claims in the California Supreme Court
12 he must so specify.

13 Further, the Court cautions Petitioner that under the Antiterrorism and Effective
14 Death Penalty Act of 1996 (AEDPA) a one-year period of limitation applies to a petition
15 for a writ of habeas corpus by a person in custody pursuant to the judgment of a State
16 court. The limitation period runs from the latest of:

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

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

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

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

4 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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


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

19 CONCLUSION

20 For the foregoing reasons, the Court DISMISSES this case without prejudice and
21 with leave to amend. If Petitioner wishes to proceed with this case, he must, file a First
22 Amended Petition that cures the pleading deficiencies outlined in this Order **no later**
23 **than March 21, 2017: The Clerk of Court is directed to send a blank First Amended**
24 **Petition form to Petitioner along with a copy of this Order.**

25 **IT IS SO ORDERED.**

26 Dated: February 16, 2017

27 
28 Hon. Gonzalo P. Curiel
United States District Judge