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**FILED**  
JUN 22 2017  
CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY *M. [Signature]* DEPUTY

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

JOSE JUAREZ,  
  
Petitioner,  
  
v.  
  
M. MARTEL, Warden,  
  
Respondent.

Case No.: 17cv1173-WQH-JMA

**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 REQUIRMENT**

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. If Petitioner wishes to proceed with this case, he must submit, **no later than August 21, 2017**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee. The Clerk of Court shall send a blank Southern District of California In Forma Pauperis Application to Petitioner along with a copy of this Order.

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1           **FAIULRE TO STATE A COGNIZABLE CLAIM ON FEDERAL HABEAS**

2           Additionally, in accordance with Rule 4 of the rules governing § 2254 cases,  
3           Petitioner has failed to allege that his state court conviction or sentence violates the  
4           Constitution of the United States.

5           Title 28, United States Code, § 2254(a), sets forth the following scope of review  
6           for federal habeas corpus claims:

7                     The Supreme Court, a Justice thereof, a circuit judge, or a district  
8                     court shall entertain an application for a writ of habeas corpus in behalf of a  
9                     person in custody pursuant to the judgment of a State court only on the  
10                    ground that he is in custody in violation of the Constitution or laws or  
                      treaties of the United States.

11           28 U.S.C. § 2254(a). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991); *Mannhalt*  
12           *v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800 F.2d 1463,  
13           1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under  
14           § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of  
15           a State court,” and that he is in custody in “violation of the Constitution or laws or  
16           treaties of the United States.” *See* 28 U.S.C. § 2254(a).

17           Here, Petitioner asks this Court to “pardon” him so that might have a chance to  
18           remain in the United States. In no way does Petitioner claim he is “in custody in  
19           violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.<sup>1</sup>

20           Further, the Court notes that Petitioner cannot simply amend his Petition to state a  
21           federal habeas claim and then refile the amended petition in this case. He must exhaust  
22           state judicial remedies before bringing his claims via federal habeas. State prisoners who  
23           wish to challenge their state court conviction must first exhaust state judicial remedies.  
24           28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust

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26  
27           <sup>1</sup> Furthermore, the Supreme Court has stated that “pardon and commutation decisions have not  
28           traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial  
                      review.” *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981). In *Dumschat*, the Court  
                      makes clear there is no liberty interest in pardon or commutation. *Id.*

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

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

17 (A) the date on which the judgment became final by the conclusion of  
18 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 States is  
21 removed, if the applicant was prevented from filing by such State action;

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

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

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

The Court also notes that the statute of limitations does not run while a properly

1 filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*,  
2 183 F.3d 1003, 1006 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000)  
3 (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the  
4 appropriate court officer for placement into the record] are in compliance with the  
5 applicable laws and rules governing filings.”). However, absent some other basis for  
6 tolling, the statute of limitations does run while a federal habeas petition is pending.  
7 *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

### 8 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

9 Further, habeas petitioners who wish to challenge either their state court conviction  
10 or the length of their confinement in state prison, must first exhaust state judicial  
11 remedies. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Nowhere on the  
12 Petition does Petitioner allege that he raised his claims in the California Supreme Court.  
13 If Petitioner has raised his claims in the California Supreme Court he must so specify.  
14 The petitioner bears the burden of proving that a claim has been exhausted. *Cartwright v.*  
15 *Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam); *Pereira v. Swarthout*, No. 2:14-  
16 cv-00530-KJM-AC P, 2017 WL 735738, at \*2 (E.D. Ca. Feb. 24, 2017).

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### 21 **CONCLUSION**

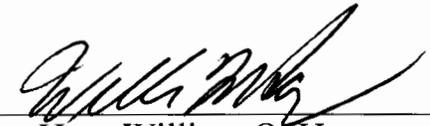
22 Based on the foregoing, the Court **DISMISSES** the Petition without prejudice for  
23 failure to satisfy the filing fee requirement, failure to state a cognizable claim, and failure  
24 to allege exhaustion of state judicial remedies. In order to have this case reopened,  
25 Petition must, **no later than August 21, 2017**, (1) either pay the filing fee or provide  
26 adequate proof of his inability to pay **and** (2) file a First Amended Petition which cures  
27 the pleading deficiencies discussed above. *For Petitioner’s convenience, the Clerk of*  
28 *Court shall attach to this Order a blank in forma pauperis application and a blank form*

1 *petition.*

2 **IT IS SO ORDERED.**

3 Dated:

*6/21/17*



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Hon. William Q. Hayes  
United States District Judge

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