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FILED
JUN 27 AM 8:45
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
MXN DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL JAMES HEMPHILL,
Petitioner,
v.
WARDEN,
Respondent.

Case No.: 17cv1178 WQH (JLB)

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

2 Further, habeas petitioners who wish to challenge either their state court conviction
3 or the length of their confinement in state prison must first exhaust state judicial
4 remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).
5 To exhaust state judicial remedies, a California state prisoner must present the California
6 Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or
7 her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34.
8 Moreover, to properly exhaust state court remedies a petitioner must allege, in state court,
9 how one or more of his or her federal rights have been violated. The Supreme Court in
10 *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the
11 opportunity to correct alleged violations of prisoners’ federal rights, they must surely be
12 alerted to the fact that the prisoners are asserting claims under the United States
13 Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas petitioner
14 wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due
15 process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not
16 only in federal court, but in state court.” *Id.* at 366 (emphasis added).

17 Nowhere on the Petition does Petitioner allege that he raised his claims in the
18 California Supreme Court. Although he indicates he did seek review in the California
19 Supreme Court, he fails to allege that the claims presented in the federal petition were
20 raised in his state petition for review. (*See* Pet. at 5.) If Petitioner has raised his claims in
21 the California Supreme Court he must so specify. “The burden of proving that a claim
22 has been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th
23 Cir. 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v.*
24 *Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300
25 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

26 Further, the Court cautions Petitioner that under the Antiterrorism and Effective
27 Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a
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1 petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a
2 State court. The limitation period shall run from the latest of:

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

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

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

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

17 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

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

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

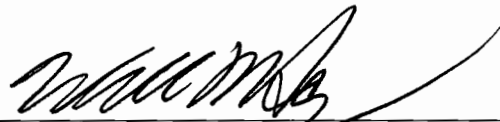
1 **CONCLUSION**

2 The Petition is **DISMISSED** without prejudice for failure to satisfy the filing fee
3 requirement and failing to allege exhaustion of state judicial remedies. In order to have
4 this case reopened, Petition must, **no later than August 21, 2017**, (1) either pay the filing
5 fee or provide adequate proof of his inability to pay, and (2) file a First Amended Petition
6 with adequately alleges exhaustion of state court remedies. The Clerk of Court shall
7 attach to this Order a blank in forma pauperis application and a blank First Amended
8 Petition form.

9 **IT IS SO ORDERED.**

10 Dated:

11 6/26/17



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13 William Q. Hayes
14 United States District Judge
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