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

DAVID LERMA,  <p style="text-align: right;">Petitioner,</p> v. RAYMOND MADDEN, Warden,  <p style="text-align: right;">Respondent.</p>	
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Case No. 17cv1925 BEN (RBB)

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

On September 21, 2017, Petitioner, a state prisoner proceeding pro se, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 and paid the requisite filing fee. (ECF No.1.) The Court dismissed the action without prejudice and with leave to amend on October 4, 2017 because Petitioner had failed to name a proper respondent and had failed to allege exhaustion of his state judicial remedies. (ECF No. 2.) Petitioner was given until December 4, 2017 to file a First Amended Petition that cured the pleading deficiencies outlined in the Court’s dismissal Order. (*Id.*) On December 2, 2017, Petitioner constructively filed a First Amended Petition. (ECF No. 3.)

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

Petitioner has again failed to allege exhaustion of his state judicial remedies. Habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.

1 § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state  
2 judicial remedies, a California state prisoner must present the California Supreme Court  
3 with a fair opportunity to rule on the merits of every issue raised in his or her federal  
4 habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. This can be  
5 accomplished via direct appeal of a conviction or via a habeas corpus petition filed in the  
6 state supreme court. Moreover, to properly exhaust state court remedies a petitioner must  
7 allege, in state court, how one or more of his or her federal rights have been violated.  
8 The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts  
9 are to be given the opportunity to correct alleged violations of prisoners’ federal rights,  
10 they must surely be alerted to the fact that the prisoners are asserting claims under the  
11 United States Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas  
12 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or  
13 her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must  
14 say so, not only in federal court, but in state court.” *Id.* at 366 (emphasis added).

15 Nowhere on the Petition does Petitioner allege that he raised his claims in the  
16 California Supreme Court. In fact, he specifically indicates he did not seek review in the  
17 California Supreme Court. (*See* Pet. at 6-7.) If Petitioner has raised his claims in the  
18 California Supreme Court he must so specify. “The burden of proving that a claim has  
19 been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.  
20 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134  
21 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994);  
22 *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

23 Further, the Court cautions Petitioner that under the Antiterrorism and Effective  
24 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); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th  
20 Cir. 1999). *But see 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.

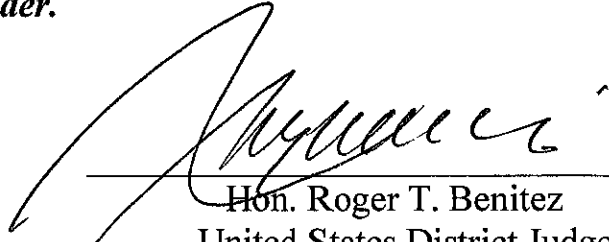
1 **CONCLUSION**

2 Based on the foregoing, the Court **DISMISSES** this action without prejudice and  
3 with leave to amend because Petitioner has failed to allege exhaustion of his state judicial  
4 remedies. To have this case reopened, Petitioner must, **no later February 21, 2018,**  
5 **2018**, file a Second Amended Petition that cures the pleading deficiencies set forth above.  
6 *The Clerk of Court is directed to mail Petitioner a blank Second Amended Petition*  
7 *form together with a copy of this Order.*

8 **IT IS SO ORDERED.**

9 Dated:

10 *12/19/2017*

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Hon. Roger T. Benitez  
United States District Judge