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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY CAPPS,

Petitioner,

No. 2:10-cv-1929 GEB KJN P

vs.

MIKE MCDONALD, Warden,

FINDINGS & RECOMMENDATIONS

Respondent.

_____ /

Petitioner is a state prisoner proceeding without counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2009 conviction on seventeen counts of committing a lewd and lascivious act on a child under the age of fourteen. Respondents have moved to dismiss the petition for failure to exhaust state remedies. Petitioner has not filed an opposition.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent’s counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion, thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by

¹ A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. § 2254(b)(2).

1 providing the highest state court with a full and fair opportunity to consider all claims before
2 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
3 Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S. 1021 (1986).

4 After reviewing the petition for habeas corpus, the court finds that petitioner has
5 failed to exhaust state court remedies. The four claims raised in his first amended petition have
6 not been presented to the California Supreme Court. Further, there is no allegation that state
7 court remedies are no longer available to petitioner. Accordingly, the petition should be
8 dismissed without prejudice.²

9 IT IS HEREBY RECOMMENDED that:

- 10 1. Respondent's November 18, 2010 motion to dismiss (dkt. no. 15) be granted.
- 11 2. Petitioner's application for a writ of habeas corpus be dismissed for failure to
12 exhaust state remedies.

13 These findings and recommendations will be submitted to the United States
14 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
15 twenty-one days after being served with these findings and recommendations, petitioner may file
16 written objections with the court. The document should be captioned "Objections to Findings
17 and Recommendations." If petitioner files objections, he shall also address whether a certificate
18 of appealability should issue and, if so, why and as to which issues. A certificate of appealability
19 may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the
20 denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Any response to the objections shall be
21 filed and served within fourteen days after service of the objections. Petitioner is advised that


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24 ² Petitioner is cautioned that the habeas corpus statute imposes a one year statute of
25 limitations for filing non-capital habeas corpus petitions in federal court. In most cases, the one
26 year period will start to run on the date on which the state court judgment became final by the
conclusion of direct review or the expiration of time for seeking direct review, although the
statute of limitations is tolled while a properly filed application for state post-conviction or other
collateral review is pending. 28 U.S.C. § 2244(d).

1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: December 14, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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