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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GERROD HERNDON,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

No. 2:15-cv-2013 TLN KJN P
ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Petitioner submitted a declaration that makes the showing required by § 1915(a). Accordingly, the request to proceed in forma pauperis is granted. 28 U.S.C. § 1915(a).

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 providing the highest state court with a full and fair opportunity to consider all claims before presenting them to

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

1 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d
2 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

3 After reviewing the petition for habeas corpus, the court finds that petitioner has failed to
4 exhaust state court remedies. Petitioner states he was sentenced on June 18, 2015. (ECF No. 1 at
5 2.) The claims have not been presented to the California Supreme Court.² Further, there is no
6 allegation that state court remedies are no longer available to petitioner. Accordingly, the petition
7 should be dismissed without prejudice.³

8 Petitioner also mentions a desire to change his plea. Petitioner is advised that he may not
9 seek to change his plea through a petition for writ of habeas corpus in federal court. Petitioner
10 should consult with his defense counsel, or seek relief in the Sacramento County Superior Court.

11 Good cause appearing, IT IS HEREBY ORDERED that:

12 1. Petitioner is granted leave to proceed in forma pauperis;

13 2. The Clerk of the Court is directed to serve a copy of these findings and
14 recommendations together with a copy of the petition filed in the instant case on the Attorney
15 General of the State of California; and

16 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas
17 corpus be dismissed for failure to exhaust state remedies.

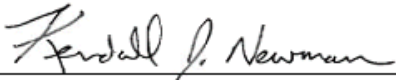
18 These findings and recommendations will be submitted to the United States District Judge
19 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
20 after being served with these findings and recommendations, petitioner may file written

21 ² Pursuant to Rule 201 of the Federal Rules of Evidence, the Court has reviewed, and takes
22 judicial notice of, the electronic dockets for the California Court of Appeal and the California
23 Supreme Court. California Courts, < <http://appellatecases.courtinfo.ca.gov>>, visited November
24 18, 2015. Those judicially-noticed records show that petitioner has not filed any proceeding in
the California Court of Appeal or the California Supreme. Thus, the court has confirmed that
petitioner has not exhausted his state court remedies as to the 2015 conviction.

25 ³ Petitioner is cautioned that the habeas corpus statute imposes a one year statute of limitations
26 for filing non-capital habeas corpus petitions in federal court. In most cases, the one year period
27 will start to run on the date on which the state court judgment became final by the conclusion of
28 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 objections with the court. The document should be captioned “Objections to Findings and
2 Recommendations.” Petitioner is advised that failure to file objections within the specified
3 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153
4 (9th Cir. 1991).

5 Dated: November 24, 2015

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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