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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN ROSS BEAM,
Petitioner,
v.
S. FRAUENHEIM, Warden,
Respondent.

No. 2:16-cv-1240 MCE KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has now submitted a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, including 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.² The claims have not been presented to the California Supreme
5 Court. Further, there is no allegation that state court remedies are no longer available to
6 petitioner. Accordingly, the petition should be dismissed without prejudice.³

7 Good cause appearing, IT IS HEREBY ORDERED that:

- 8 1. Petitioner is granted leave to proceed in forma pauperis;
- 9 2. The Clerk of the Court is directed to serve a copy of these findings and
10 recommendations together with a copy of the petition filed in the instant case on the Attorney
11 General of the State of California; and

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

14 These findings and recommendations will be submitted to the United States District Judge
15 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, petitioner may file written
17 objections with the court. The document should be captioned "Objections to Findings and
18 Recommendations." Petitioner is advised that failure to file objections within the specified

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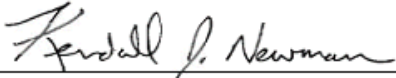
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22 ² In his petition, petitioner states that he "appeals the summary denial of" the petition for writ of
23 habeas corpus issued by the Placer County Superior Court on May 10, 2016. (ECF No. 1 at 1.)

24 ³ Petitioner is cautioned that a one year statute of limitations is applicable to all claims presented
25 in a federal habeas corpus petition. See 28 U.S.C. § 2244(d)(1); see also Mardesich v. Cate, 668
26 F.3d 1164 (9th Cir. 2012) (holding that the one year statute of limitations applied to each claim in
27 a habeas petition on an individual basis). In most cases, the one year period will start to run on
28 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 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
2 (9th Cir. 1991).

3 Dated: July 5, 2016

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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