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

XAI XIONG,

Petitioner,

No. CIV S-08-1052 WBS EFB P

vs.

T. FELKER, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding without counsel on a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. The court previously ordered petitioner to show cause why this action should not be dismissed for his failure to exhaust the available state remedies. Dckt. No. 7. Petitioner has responded, Dckt. No. 9, and for the reasons explained below the court finds that this action must be dismissed without prejudice.

Petitioner challenges his June 25, 2001, conviction in Yuba County Superior Court of one count of attempted murder, two counts of discharging a firearm from a vehicle and one count of assault with a deadly weapon. Dckt. No. 1. He alleges three grounds for relief. *Id.*, at 3-4. However, it appears that his petition for relief is barred. His petition alleges that he filed an appeal and that he filed a petition for a writ of habeas corpus, both in the trial court. Dckt. No. 7, at 3. He had not, however, sought any relief in the California Supreme Court. Thus, this court

1 found that petitioner had not exhausted the available state remedies as to any of his claims  
2 asserted in this federal petition as required by 28 U.S.C. 2254(b)(1). Dckt. No. 7, at 3. This  
3 court's earlier order explained the applicable law and gave petitioner 20 days to demonstrate that  
4 he had complied with federal statute. *Id.*, at 2-3.


5         Petitioner submitted with his response to this court's order to show cause a copy an order  
6 of Yuba County Superior Court denying him relief on two of the claims he presents in his federal  
7 petition. Dckt. No. 9. However, he has neither alleged that he pursued any of his claims to the  
8 California Supreme Court nor submitted documents to that effect. Thus, the court finds that  
9 petitioner failed to exhaust the available state remedies. *See O'Sullivan v. Boerckel*, 526 U.S.  
10 838 (1999) (to exhaust, a federal habeas petitioner must present his claim to the state supreme  
11 court even if that court's review is discretionary). Accordingly, this action must be dismissed  
12 without prejudice. *See* 28 U.S.C. 2254(b)(1)(a) (federal court cannot grant habeas relief unless  
13 petitioner has exhausted the available state remedies); *Picard v. Connor*, 404 U.S. 270, 275  
14 (1971) (once exhaustion requirement is satisfied, petition may seek habeas relief from the federal  
15 courts).

16         For the reasons stated above, it is hereby RECOMMENDED that this action be dismissed  
17 without prejudice for petitioner's failure to exhaust the available state remedies.

18         These findings and recommendations are submitted to the United States District Judge  
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one  
20 days after being served with these findings and recommendations, any party may file written  
21 objections with the court and serve a copy on all parties. Such a document should be captioned  
22 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
23 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
24 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In  
25 his objections petitioner may address whether a certificate of appealability should issue in the  
26 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing

1 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it  
2 enters a final order adverse to the applicant).

3 Dated: February 22, 2010.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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