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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.

ORDER

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Petitioner is a state prisoner without counsel seeking a writ of habeas corpus. See 28 U.S.C. § 2254. Petitioner seeks leave to proceed *in forma pauperis*. See 28 U.S.C. § 1915(a). Examination of the *in forma pauperis* affidavit reveals that petitioner is unable to afford the costs of suit.

Petitioner challenges his June 25, 2001, conviction of attempted murder, discharging a firearm at another from a vehicle, discharging a firearm at a dwelling from a vehicle and assault with a deadly weapon rendered by a judge of the Yuba County Superior Court. The court has reviewed the petition pursuant to Rule 4 of the Rules Governing § 2254 Cases, and for the reasons explained below, the court finds that it appears petitioner has failed to exhaust the available state remedies with respect to any of his claims. Therefore, he must demonstrate good

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1 cause for this failure or obtain consent from the respondent to proceed despite his failure to
2 exhaust.

3 A judge “entertaining an application for a writ of habeas corpus shall forthwith award the
4 writ or issue an order directing the respondent to show cause why the writ should not be granted,
5 unless it appears from the application that the applicant or person detained is not entitled
6 thereto.” 28 U.S.C. § 2243. It appears from the face of the application that the petitioner is not
7 entitled to relief.

8 A district court may not grant a petition for a writ of habeas corpus unless “the applicant
9 has exhausted the remedies available in the courts of the State,” or unless there is no State
10 corrective process or “circumstances exist that render such process ineffective to protect the
11 rights of the applicant.” 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion
12 requirement by presenting the “substance of his federal habeas corpus claim” to the state courts.
13 *Picard v. Connor*, 404 U.S. 270, 278 (1971) (no exhaustion where the petitioner presented
14 operative facts but not legal theory to state courts); *see also Duncan v. Henry*, 513 U.S. 364, 365
15 (1995)(to exhaust a claim, a state court “must surely be alerted to the fact that the prisoners are
16 asserting claims under the United States Constitution”). Unless the respondent specifically
17 consents to the court entertaining unexhausted claims, a petition containing such claims must be
18 dismissed. *See* 28 U.S.C. § 2254(b)(3); *Picard*, 404 U.S. at 275. A claim is unexhausted if any
19 state remedy is available. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (petitioner must
20 seek discretionary review from state court of last resort); *Roberts v. Arave*, 874 F.2d 528, 529
21 (9th Cir. 1988)(no exhaustion where state supreme court referred petitioner’s appeal of trial
22 court’s denial of post-conviction relief to lower appellate court and petitioner failed to appeal
23 lower court’s disposition of that appeal to state supreme court). For a California prisoner to
24 exhaust, he must present his claims to the California Supreme Court on appeal in a petition for
25 review or on post-conviction in a petition for a writ of habeas corpus. *See Carey v. Saffold*, 536
26 U.S. 223, 239-40 (2002) (describing California’s habeas corpus procedure); *Gatlin v. Madding*,

1 189 F.3d 882, 888 (9th Cir. 1999) (to exhaust, prisoner must present claims on appeal to
2 California Supreme Court in a petition for review).

3 In the petition, petitioner alleges that he filed an appeal, but does not allege that he
4 sought review of the appellate court's decision in the California Supreme Court. He also asserts
5 that he sought post-conviction relief from the trial court, but does not allege that he filed any
6 application for post-conviction relief in the California Supreme Court. Therefore, the court finds
7 that petitioner failed to exhaust the available state remedies with respect to any of the claims in
8 the federal petition. In order to proceed, petitioner must show cause for this failure or obtain
9 from the respondent an express waiver of the exhaustion requirement.

10 Accordingly, it is ORDERED that:

11 1. Petitioner's May 15, 2008, request for leave to proceed *in forma pauperis* is granted;

12 2. Within 20 days from the date this order is served, petitioner either shall demonstrate
13 that he presented to the California Supreme Court the claims on which he seeks relief in his
14 federal habeas petition or obtain from the respondent an express waiver of the exhaustion
15 requirement. Failure to comply with this order may result in a recommendation that this action
16 be dismissed without prejudice on the ground that petitioner failed to exhaust the available state
17 remedies; and,

18 3. The Clerk of the Court is directed to serve the May 15, 2008, petition and a copy of
19 this order on Michael Patrick Farrell, Senior Assistant Attorney General for the State of
20 California.

21 Dated: July 9, 2009.

22 
EDMUND F. BRENNAN
23 UNITED STATES MAGISTRATE JUDGE
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