

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

RICHARD WALLACE,

Petitioner,

No. CIV S-09-0042 GGH P

VS.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SOLANO,

Respondent,¹

ORDER & 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, but has not filed an in forma pauperis affidavit or paid the required filing fee (\$5.00). See 28 U.S.C. §§ 1914(a); 1915(a). Because, however, it appears on the face of it that petitioner has failed to exhaust state court remedies as to his

¹ “A petitioner for habeas corpus relief must name the state officer having custody of him or her as the respondent to the petition.” Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994) (citing Rule 2(a), 28 U.S.C. foll. § 2254). “Failure to name the petitioner’s custodian as a respondent deprives federal courts of personal jurisdiction. Id., citing Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.1992); Dunne v. Henman, 875 F.2d 244, 249 (9th Cir.1989).” Stanley, supra, at 360. Petitioner has incorrectly named Solano County Superior Court as respondent. “Where the petitioner is on probation or parole, he may name his probation or parole officer ‘and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate.’” Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996)[emphasis in Ortiz-Sandoval, supra]. Petitioner is cautioned that should he return to this court after exhaustion, he should name the proper respondent.

1 challenge to the four-year suspended sentence/probation imposed upon him in March, 2007, the
2 court will simply recommend dismissal of this petition without requiring petitioner to file the
3 appropriate in forma pauperis affidavit or the filing fee at this time.

4 The exhaustion of state court remedies is a prerequisite to the granting of a
5 petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must
6 be waived explicitly by respondent's counsel. 28 U.S.C. § 2254(b)(3).² A waiver of exhaustion,
7 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by
8 providing the highest state court with a full and fair opportunity to consider all claims before
9 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
10 Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S. 1021 (1986).

11 After reviewing the petition for habeas corpus, the court finds that petitioner has
12 failed to exhaust state court remedies. The claims have not been presented to the California
13 Supreme Court. Further, there is no allegation that state court remedies are no longer available to
14 petitioner. Accordingly, the petition should be dismissed without prejudice.³

15 Good cause appearing, IT IS HEREBY ORDERED that the Clerk of the Court is
16 directed to serve a copy of these findings and recommendations together with a copy of the
17 petition filed in the instant case on the Attorney General of the State of California; and the Clerk
18 of Court is directed to assign a district judge to this case; and

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

21
22 ² A petition may be denied on the merits without exhaustion of state court remedies. 28
23 U.S.C. § 2254(b)(2).

24 ³ 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 year
26 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).

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, petitioner may file written objections with the court. The document should be captioned "Objections to Findings and Recommendations." Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 22, 2009

/s/ Gregory G. Hollows

GREGORY G. HOLLOWSS
UNITED STATES MAGISTRATE JUDGE

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