IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GARY W. STUCKEY,

Petitioner, No. CIV S-09-0584 LKK GGH P

vs.

WARDEN OF SOLEDAD,

Respondents. ORDER

_____/

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction from the Superior Court of San Joaquin County.

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 the federal court. Picard v. Connor, 404 U.S. 270, 276, 92 S. Ct. 509, 512

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

(1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S. 1021 (1986).

After reviewing the petition for habeas corpus, it does not appear that petitioner has exhausted state court remedies. It does not appear that the claims have been presented to the California Supreme Court. Accordingly, petitioner shall show cause why this action should not be dismissed for his failure to exhaust state court remedies. If the claims have been presented to the California Supreme Court, petitioner shall file a short declaration describing in what type of action the claims were presented. If petitioner has a copy of the order by the California Supreme Court denying the claims, he shall file this as well.

In addition, petitioner 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). Petitioner will be provided the opportunity to either submit the appropriate affidavit in support of a request to proceed in forma pauperis or submit the appropriate filing fee.

Good cause appearing, IT IS HEREBY ORDERED that:

1. Within twenty days of the date of this order, petitioner shall show cause why this action should not be dismissed for his failure to exhaust state court remedies.

2. Petitioner shall submit, within thirty days from the date of this order, an affidavit in support of his request to proceed in forma pauperis or the appropriate filing fee;

3. The Clerk of the Court is directed to send petitioner a copy of the in forma pauperis form used by this district.

DATED: April 7, 2009

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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