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

10 REGINALD WHITFIELD,

11 Petitioner,

No. CIV-S-10-0646 KJM P

12 vs.

13 GARY SWARTHOUT, Warden,

14 Respondent.

ORDER

15 _____/
16 Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of
17 habeas corpus pursuant to 28 U.S.C. § 2254 together with a request to proceed in forma pauperis
18 pursuant to 28 U.S.C. § 1915. Petitioner has submitted a declaration that makes the showing
19 required by § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.
20 28 U.S.C. § 1915(a).

21 The exhaustion of state court remedies is a prerequisite to the granting of a
22 petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must
23 be waived explicitly by respondent's counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion,
24 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by

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

1 providing the highest state court with a full and fair opportunity to consider all claims before
2 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
3 Cupp, 768 F.2d 1083, 1086 (9th Cir.1986).

4 After reviewing the petition for habeas corpus, the court finds that petitioner has
5 failed to exhaust state court remedies: a state habeas petition is still pending before the California
6 Supreme Court. Moreover, it is unclear whether any of the claims in the petition have been
7 exhausted by being presented to the California Supreme Court as part of the direct appeal. Even
8 if some of the claims have been exhausted, however, this court cannot consider a “mixed”
9 petition containing both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509
10 (1982). The court will proceed with a “mixed” petition only after petitioner has amended to omit
11 the unexhausted claims.

12 IT IS HEREBY ORDERED that:

- 13 1. Petitioner’s motion to proceed in forma pauperis (Docket No. 2) is granted;
14 2. Within thirty days of the date of this order, petitioner is directed to notify the
15 court whether any of the claims in his petition have been fully exhausted and, if so, whether he
16 wishes to file an amended petition raising only the exhausted claims; and
17 3. Failure to respond will result in an order dismissing the petition.

18 DATED: May 7, 2010.

19 
20 U.S. MAGISTRATE JUDGE

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