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

ANTHONY TORAN,

Petitioner,

No. CIV S-10-1252 GGH P

vs.

PEOPLE OF THE STATE OF
CALIFORNIA,

Respondents.

ORDER and 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. Petitioner has not, however, filed an appropriately completed in forma pauperis affidavit or paid the required filing fee (\$5.00). See 28 U.S.C. §§ 1914(a); 1915(a). Moreover, petitioner states that he is challenging an April 19, 2010, Sutter County conviction for which he was sentenced to “two years with half CTR 216,” and, on the face of it, petitioner has failed to exhaust his claims in state court. Petition, p. 1. The grounds for his challenge are 1) conviction obtained by unconstitutional failure of prosecution to disclose evidence to petitioner; 2) ineffective assistance of counsel. Petition, p. 4.

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

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

6 After reviewing the petition for habeas corpus, the court finds that petitioner has
7 failed to exhaust state court remedies. In fact, petitioner indicates that he has not filed a direct
8 state court appeal much less proceeded on any state court habeas petition. Petition, pp. 1-3. Nor
9 does the recency of his sentence indicate that he has even had time to exhaust his state court
10 claims. Thus, petitioner's claims have not been presented to the California Supreme Court.
11 Further, there is no allegation that state court remedies are no longer available to petitioner.
12 Accordingly, the petition should be dismissed without prejudice.²

13 In accordance with the above, IT IS HEREBY ORDERED that:

- 14 1. Petitioner has not made the requisite showing to proceed in forma pauperis;
15 2. The Clerk of the Court is directed to serve a copy of these findings and
16 recommendations together with a copy of the petition filed in the instant case on the Attorney
17 General of the State of California; and

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

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

24 ² 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).

