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

JOHNNY MACK COTTON,

Petitioner,

No. CIV S-10-3380 KJM CKD P

vs.

GREG LEWIS,

Respondent.

ORDER &

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action is proceeding on the original petition filed on December 20, 2010. Pending before this court is respondent’s March 8, 2011 motion to dismiss the petition on the ground that its sole claim for ineffective assistance of counsel is unexhausted. After carefully reviewing the record and the applicable law, the undersigned concludes that the motion should be granted.

BACKGROUND

In 2008, following a jury trial in the Sacramento County Superior Court, petitioner was convicted of murder committed in the attempted commission of a robbery (Cal. Penal Code §§ 187(a), 190.2(a)(17)) and attempted robbery (Cal. Penal Code §§ 664/211). On May 30, 2008, the trial court sentenced him to life in prison without possibility of parole with a

1 consecutive sentence of 25 years to life. (Dkt. No. 1 (hereinafter “Ptn.”) at 1); Lod. Doc. 1 at 1-
2 2.)

3 On February 5, 2009, petitioner filed an opening brief in the California Court of
4 Appeal, Third Appellate District, raising the following claims: (1) the abstract of judgment
5 should be amended to properly reflect the actual sentence imposed; (2) the trial court improperly
6 imposed and suspended a parole revocation fine; and (3) the trial court improperly denied any
7 presentence credits for actual days in custody. (Lod. Doc. 1.) Respondent has not lodged the
8 court of appeal’s disposition of these claims.

9 On August 27, 2009, petitioner filed a petition for review in the California
10 Supreme Court in which he again challenged the trial court’s imposition of a parole revocation
11 fine. (Lod. Doc. 2.) The California Supreme Court summarily denied the petition on September
12 30, 2009. (Lod. Doc. 3.)

13 Petitioner filed the instant petition on December 20, 2010. Respondent filed the
14 instant motion to dismiss on March 8, 2011. Petitioner filed an opposition to the motion on July
15 13, 2011. Also pending are two motions by petitioner seeking appointment of counsel. (Dkt.
16 Nos. 18, 21.)

17 ANALYSIS

18 I. Exhaustion - Legal Standard

19 The exhaustion of state court remedies is a prerequisite to the granting of a
20 petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it
21 must be waived explicitly by respondent’s counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of
22 exhaustion, thus, may not be implied or inferred. A petitioner satisfies the exhaustion
23 requirement by providing the highest state court with a full and fair opportunity to consider all
24 claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971);

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

1 Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985).

2 It is not enough that all the facts necessary to support the federal claim were
3 before the state courts, Picard, at 277, or that a somewhat similar state-law claim was made. See
4 Duncan v. Henry, 513 U.S. 364, 366 (1995). The habeas petitioner must have “fairly presented”
5 to the state courts the “substance” of his federal habeas corpus claim. Picard, supra, 404 U.S. at
6 275, 277-278. See also, Rose v. Lundy, 455 U.S. 509 (1982).

7 Petitioner has the burden of proving exhaustion of state court remedies and in
8 California a petitioner must present his claims to the California Supreme Court. Cartwright v.
9 Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981); Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir.
10 1986).

11 II. Discussion

12 The instant petition asserts one claim: ineffective assistance of counsel for failing
13 to move to suppress an involuntary confession. (Ptn. at 6.) Petitioner acknowledges that he did
14 not exhaust state remedies as to this claim, as his appellate counsel failed to argue it on direct
15 appeal. (Id.) The court will therefore recommend that the instant petition be dismissed for
16 failure to exhaust state remedies.

17 In his opposition, plaintiff makes a renewed request for appointment of counsel so
18 that he may “properly articulate his claims in state court, given the complexity of the procedural
19 issues involved in properly filing a state writ of habeas corpus[.]” (Dkt. No. 21 at 2.) In Martinez
20 v. Schriro, 623 F.3d 731, 736 (9th Cir. 2010), the Ninth Circuit Court of Appeals stated:

21 The Supreme Court has never recognized a federal constitutional
22 right to the assistance of counsel in collateral review proceedings.
23 Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (“We have never
24 held that prisoners have a constitutional right to counsel when
25 mounting collateral attacks upon their convictions”) [citations]. In
26 several cases, we have concluded that there is no federal
constitutional right to counsel in collateral proceedings, even
where those post-conviction proceedings constitute the first
opportunity for a criminal defendant to present an ineffective
assistance of counsel claim. See Ellis v. Armenakis, 222 F.3d 627,
633 (9th Cir. 2000) (holding there is “no constitutional right to

1 counsel during state habeas proceedings even if that was the first
2 forum in which a defendant could challenge the constitutional
competence of counsel”); [citations].

3 In Martinez, the Ninth Circuit affirmed that “there is no federal constitutional right to the
4 assistance of counsel in connection with state collateral relief proceedings, even where those
5 proceedings constitute the first tier of review for an ineffective assistance of counsel claim.” Id.
6 at 739-740.

7 Here, petitioner faces the prospect of presenting one seemingly straightforward
8 claim of ineffective assistance of counsel for state habeas review. He has had no apparent
9 difficulty articulating this claim or complying with procedural rules in the instant action. Thus,
10 the court will deny petitioner’s motions for appointment of counsel.

11 Accordingly, IT IS HEREBY ORDERED that:

12 1. Petitioner’s June 3, 2011 motion for appointment of counsel (Dkt. No. 18) is
13 denied.

14 2. Petitioner’s July 13, 2011 motion for appointment of counsel (Dkt. No. 21) is
15 denied.

16 IT IS HEREBY RECOMMENDED that:

17 1. Respondent’s March 8, 2011 motion to dismiss (Dkt. No. 14) be granted;
18 2. The petition (Dkt. No. 1) be dismissed for failure to exhaust state remedies,
19 and this case be closed.

20 These findings and recommendations are submitted to the United States District
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
22 one days after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Such a document should be captioned
24 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
25 shall be served and filed within fourteen days after service of the objections. The parties are

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1 advised that failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: August 30, 2011

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5 CAROLYN K. DELANEY
6 UNITED STATES MAGISTRATE JUDGE

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