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

SHAWN CONLEY,

Petitioner,

No. CIV S-11-0126 LKK DAD P

vs.

L.S. McEWEN,

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 together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Petitioner has submitted a declaration that makes the showing required by § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

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

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

1 requirement by fairly presenting to the highest state court all federal claims before presenting  
2 them to the federal court. See Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor,  
3 404 U.S. 270, 276 (1971); Crotts v. Smith, 73 F.3d 861, 865 (9th Cir. 1996); Middleton v. Cupp,  
4 768 F.2d 1083, 1086 (9th Cir. 1986).

5           After reviewing the petition for habeas corpus filed in this case, the court finds  
6 that petitioner has failed to exhaust state court remedies. Petitioner is proceeding with two  
7 claims for federal habeas relief: (1) the imposition of an upper term sentence violated his Sixth  
8 Amendment right to a jury trial, and (2) his conviction on multiple counts for the same offense  
9 violates the double jeopardy clause of the Fifth Amendment. Petitioner indicates that he raised  
10 his claim concerning the imposition of the upper term sentence in a habeas petition he filed with  
11 the Sacramento County Superior Court and that he raised an ineffective assistance of counsel  
12 claim in his habeas petition filed with the California Court of Appeal for the Third Appellate  
13 District. However, petitioner has not alleged, nor is there any indication that, the claims raised in  
14 this federal habeas petition have been presented by petitioner to the California Supreme Court.  
15 Accordingly, the pending federal habeas petition should be dismissed without prejudice.<sup>2</sup>

16           Good cause appearing, IT IS HEREBY ORDERED that:

- 17           1. Petitioner is granted leave to proceed in forma pauperis;  
18           2. The Clerk of the Court is directed to serve a copy of these findings and  
19 recommendations together with a copy of the petition filed in the instant case on the Attorney  
20 General of the State of California; and

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

23 \_\_\_\_\_  
24 <sup>2</sup> Petitioner is cautioned that the federal habeas corpus statute imposes a one year statute  
25 of limitations for filing non-capital habeas corpus petitions in federal court. In most cases, the  
26 one year 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. See 28 U.S.C. § 2244(d).

1           These findings and recommendations will be submitted to the United States  
2 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
3 twenty-one days after being served with these findings and recommendations, petitioner may file  
4 written objections with the court. The document should be captioned “Objections to Findings  
5 and Recommendations.” Petitioner is advised that failure to file objections within the specified  
6 time may waive the right to appeal the District Court’s order. See Martinez v. Ylst, 951 F.2d  
7 1153 (9th Cir. 1991).

8 DATED: October 7, 2011.

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11 \_\_\_\_\_  
12 DALE A. DROZD  
13 UNITED STATES MAGISTRATE JUDGE

12 DAD:4  
13 conl0126.ftc