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

LEROY DALE HOLSEY,

Petitioner,

No. 2:13-cv-0962 GGH P

vs.

WILLIAM KNIPP,

Respondent.

ORDER AND

FINDINGS & 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. 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. 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

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. 1985), cert. denied, 478 U.S. 1021 (1986).

4 After reviewing the petition for habeas corpus, the court finds that petitioner has
5 failed to exhaust state court remedies. The claims have not been presented to the California
6 Supreme Court. Further, there is no allegation that state court remedies are no longer available to
7 petitioner. Accordingly, the petition should be dismissed without prejudice.²

8 Good cause appearing, IT IS HEREBY ORDERED that:

- 9 1. Petitioner is granted leave to proceed in forma pauperis;
- 10 2. The Clerk of the Court shall randomly assign a District Judge to this action;
- 11 3. The Clerk of the Court is directed to serve a copy of these findings and
12 recommendations together with a copy of the petition filed in the instant case on the Attorney
13 General of the State of California; and

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

16 These findings and recommendations will be submitted to the United States
17 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
18 fourteen days after being served with these findings and recommendations, petitioner may file
19 written objections with the court. The document should be captioned "Objections to Findings
20 and Recommendations." Any response to the objections shall be filed and served within fourteen
21 days after service of the objections. Petitioner is advised that failure to file objections within the

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23 ² Petitioner is cautioned that the habeas corpus statute imposes a one year statute of
24 limitations for filing non-capital habeas corpus petitions in federal court. In most cases, the one
25 year period will start to run on the date on which the state court judgment became final by the
26 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).

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

3 DATED: June 17, 2013

4 /s/ Gregory G. Hollows
5 UNITED STATES MAGISTRATE JUDGE

6 GGH:076/Hols0962.103.wpd

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