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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MATTHEW A. MOLINA,
Petitioner,
v.
HEIDI M. LACKNER,
Respondent.

No. 2:13-cv-1926 GGH P

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. The court has not ruled on the request to proceed in forma pauperis.

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

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

1 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

2 After reviewing the petition for habeas corpus, the court finds that petitioner has failed to
3 exhaust state court remedies. Although petitioner has filed a motion to stay pursuant to Rhines v.
4 Weber, 544 U.S. 269, 125 S. Ct. 1528 (2005), it clearly appears that the petition is not mixed, but
5 rather that none of the claims have been exhausted. According to the petition, none of the claims
6 have been presented to the California Supreme Court. Further, there is no allegation that state
7 court remedies are no longer available to petitioner. Accordingly, the motion to stay should be
8 denied, and the petition should be dismissed without prejudice.² See Jiminez v. Rice, 276 F.3d
9 478, 481 (9th Cir. 2001) (dismissal is mandated when the petition contains no exhausted claims).

10 Petitioner has requested the appointment of counsel. There currently exists no absolute
11 right to appointment of counsel in habeas proceedings. See Neivius v. Sumner, 105 F.3d 453, 460
12 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at any stage
13 of the case “if the interests of justice so require.” See Rule 8(c), Fed. R. Governing § 2254 Cases.
14 In the present case, the court does not find that the interests of justice would be served by the
15 appointment of counsel at the present time.

16 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must
17 issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A
18 certificate of appealability may issue only “if the applicant has made a substantial showing of the
19 denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). For the reasons set forth in these
20 findings and recommendations, a substantial showing of the denial of a constitutional right has
21 not been made in this case.

22 Good cause appearing, IT IS HEREBY ORDERED that:

23 1. Petitioner’s September 17, 2013 request for appointment of counsel (ECF No. 3) is
24 denied without prejudice;

25 ² Petitioner is cautioned that the habeas corpus statute imposes a one year statute of limitations
26 for filing non-capital habeas corpus petitions in federal court. In most cases, the one year period
27 will start to run on the date on which the state court judgment became final by the conclusion of
28 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).

