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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRED HUANTE,
Petitioner,
v.
SCOTT FRAUENHEIM,
Respondent.

No. 2:17-cv-1886 DB 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. 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). 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 1083, 1086 (9th Cir. 1985).

After reviewing the petition for habeas corpus, the court finds that petitioner has failed to exhaust state court remedies. The claims have not been presented to the state courts through a

1 petition for a writ of habeas corpus.¹ Further, there is no allegation that state court remedies are
2 no longer available to petitioner. Accordingly, the petition should be dismissed without
3 prejudice.²

4 Good cause appearing, IT IS HEREBY ORDERED that:

- 5 1. Petitioner is granted leave to proceed in forma pauperis;
- 6 2. The Clerk of the Court shall assign a district judge to this case;

7 2. The Clerk of the Court shall serve a copy of these findings and recommendations
8 together with a copy of the petition filed in the instant case on the Attorney General of the State
9 of California; and

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

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
14 after being served with these findings and recommendations, petitioner may file written
15 objections with the court. Such a document should be captioned "Objections to Magistrate
16 Judge's Findings and Recommendations." If petitioner files objections, he shall also address
17 whether a certificate of appealability should issue and, if so, why and as to which issues. A
18 certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a
19 substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Petitioner is

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21 ¹ In fact, petitioner points out that the California Court of Appeal instructed him to file a habeas
22 petition in the state superior court seeking retesting of the ballistics evidence. (See Pet. (ECF No.
23 1) at 5; see also People v. Huante, Nos. C080122, C080600, 2016 WL 6123920, at *3 (Cal. Ct.
24 App. Oct. 20, 2016) ("This decision does not preclude defendants from filing habeas petitions in
the trial court in order to obtain the bullets and an expert, or from working with the People to
obtain the bullets under sections 1417 et seq. as suggested by the trial court.")

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).

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: September 20, 2017

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/s/ DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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DLB:9
DLB1/prisoner-habeas/Huan1886.103

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