

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY SCOTT DYER,
Petitioner,
v.
WILLIAM “JOE” SULLIVAN,¹
Respondent.

No. 2:18-cv-0814 KJN 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 submitted a declaration that makes the showing required by § 1915(a). Accordingly, the request to proceed in forma pauperis is 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).² A waiver of exhaustion, thus, may

¹ William Sullivan, current warden of the California Correctional Center, is the proper respondent. Fed. R. Civ. P. 25(d); see Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994).

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

1 not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the
2 highest state court with a full and fair opportunity to consider all claims before presenting them to
3 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d
4 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

5 After reviewing the petition for habeas corpus, the court finds that petitioner has failed to
6 exhaust state court remedies. The claims have not been presented to the California Supreme
7 Court. Further, there is no allegation that state court remedies are no longer available to
8 petitioner. Accordingly, the petition should be dismissed without prejudice.³

9 Good cause appearing, IT IS HEREBY ORDERED that:

10 1. Petitioner is granted leave to proceed in forma pauperis;

11 2. 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 3. The Clerk of the Court is directed to assign a district judge to this action; and

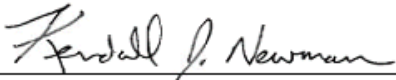
15 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas
16 corpus be dismissed for failure to exhaust state remedies.

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

25 ³ 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 § 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after
2 service of the objections. The parties are advised that failure to file objections within the
3 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
4 F.2d 1153 (9th Cir. 1991).

5 Dated: May 7, 2018

6 
7 _____
KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

8 /dyer0814.103

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28