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

ROBERT ALAN HECKER,

Petitioner,

No. CIV S-08-2728 DAD P

vs.

MIKE KNOWLES,

Respondent.

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).¹ A waiver of exhaustion, thus, may not be implied or inferred.

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

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

6 In his habeas petition, petitioner challenges the loss of five days of good time
7 credits due to a prison disciplinary action in 1997 charging petitioner with engaging in mutual
8 combat. After reviewing the habeas petition, the court finds that petitioner has failed to exhaust
9 state court remedies. Petitioner has not alleged nor has he shown that his challenge concerning
10 the loss of five days of good time credits has been presented to the California Supreme Court.
11 Accordingly, the petition should be dismissed without prejudice.

12 In addition to his failure to exhaust state court remedies, it appears that the
13 pending habeas petition may be a successive petition pursuant to 28 U.S.C. § 2244(b)(1) or an
14 untimely-filed petition. In this regard, petitioner indicates that he filed a habeas petition in 2008
15 challenging the loss of good time credits, including the five days of lost credits challenged here.
16 See Hecker v. Hubbard, No. CIV S-07-1511 FCD GGH P. That earlier filed habeas action was
17 dismissed as time barred in response to the respondent's motion to dismiss on the ground that the
18 action was barred by the statute of limitations. Accordingly, it appears that the instant petition
19 would be barred by the statute of limitations as well.

20 Accordingly, IT IS HEREBY ORDERED that:

- 21 1. Petitioner is granted leave to proceed in forma pauperis;
- 22 2. The Clerk of the Court is directed to serve a copy of these findings and
23 recommendations together with a copy of the petition filed in the instant case on the Attorney
24 General of the State of California;
- 25 3. The Clerk of the Court is directed to randomly assign this action to a District
26 Judge; and

1 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of
2 habeas corpus be dismissed without prejudice due to petitioner's failure to exhaust his claims
3 through presentation to the highest state court.

4 These findings and recommendations will be submitted to the United States
5 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
6 twenty days after being served with these findings and recommendations, petitioner may file
7 written objections with the court. The document should be captioned "Objections to Findings
8 and Recommendations." Petitioner is advised that failure to file objections within the specified
9 time may waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d
10 1153 (9th Cir. 1991).

11 DATED: October 7, 2009.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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