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

HAROLD LEE SAMUELSON,

Petitioner,

No. CIV S-10-0383 GGH P

vs.

DAVID TRISTAN,

Respondent.

ORDER &

FINDINGS AND RECOMMENDATIONS

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By order filed on March 2, 2010, petitioner pro se’s purported petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was dismissed with leave to amend within twenty-eight days. Petitioner was also directed to file an in forma pauperis affidavit or pay the required filing fee (\$5.00). See 28 U.S.C. §§ 1914(a); 1915(a). Petitioner has submitted a declaration that makes the showing required by § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

As to any amended petition, the court will liberally construe his “motion to order H.D.S.P. to correct and update petitioner’s release date,” at docket # 6, as his amended petition, although filed beyond the time for which petitioner was permitted to file an amended petition. Petitioner, in this amended filing, asks the court to order High Desert State Prison to adjust his release date to May 19, 2010, from August 19, 2010, based on his claim that a CDCR administrative committee action has restored 90 days of good time credit to him, but the

1 adjustment has not been made to his release date. Docket # 6, p. 1. Apparently, in the  
2 alternative, petitioner asks that any additional time spent in custody beyond May 19, 2010, be  
3 deducted from his parole discharge date. Id.

4 The exhaustion of state court remedies is a prerequisite to the granting of a  
5 petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must  
6 be waived explicitly by respondent's counsel. 28 U.S.C. § 2254(b)(3).<sup>1</sup> A waiver of exhaustion,  
7 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by  
8 providing the highest state court with a full and fair opportunity to consider all claims before  
9 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.  
10 Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S. 1021 (1986).

11 Petitioner references having made a stymied effort to begin the administrative  
12 appeals effort. He fails altogether, however, to demonstrate that he has exhausted, or even made  
13 an attempt to exhaust, state court remedies and it is apparent that his claims have not been  
14 presented to the California Supreme Court. Further, there is no allegation that state court  
15 remedies are no longer available to petitioner. Accordingly, the petition should be dismissed  
16 without prejudice.<sup>2</sup>

17 Good cause appearing, IT IS HEREBY ORDERED that:

- 18 1. Petitioner is granted leave to proceed in forma pauperis;  
19 2. The Clerk of the Court is directed to make a district judge assignment to this  
20 case.

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

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

