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

KENNETH BUFORD POLLARD,

Petitioner,

No. 2: 10-cv-2545 GEB KJN P

vs.

COLE, et al.,

Respondents.

ORDER AND

FINDINGS AND RECOMMENDATIONS

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On September 17, 2010, petitioner filed a document titled “Emergency Notice, Illegal Arrest, False Imprisonment.” Petitioner alleged that he was wrongfully found guilty of violating parole. On September 29, 2010, the undersigned issued an order construing this action as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was granted twenty-eight days to file a habeas corpus petition on the proper form and to file an application to proceed in forma pauperis.

On October 1, 2010, the September 29, 2010 order was returned unserved. Accordingly, on October 7, 2010, the court recommended that this action be dismissed based on petitioner’s failure to keep the court apprised of his current address. On October 18, 2010, the findings and recommendations were returned unserved.

On November 17, 2010, petitioner filed a petition for writ of habeas corpus and

1 application to proceed in forma pauperis which were opened as a new action, No. 2: 10-cv-3103  
2 KJN P. On December 6, 2010, the court issued an order finding that petitioner intended to file  
3 these pleadings in the instant case. The Clerk of the Court was directed to close No. 2: 10-cv-  
4 3103 KJN P and file the habeas corpus petition and application for writ of habeas corpus in this  
5 action. The November 17, 2010 order also vacated the October 7, 2010 findings and  
6 recommendations.

7 Examination of the in forma pauperis application reveals that petitioner is unable  
8 to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be  
9 granted. See 28 U.S.C. § 1915(a).

10 In the habeas corpus petition, petitioner appears to claim that he was wrongfully  
11 found guilty of violating parole. Petitioner also claims that his life may be in danger at High  
12 Desert State Prison (“HDSPP”), where he is presently incarcerated.

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

20 After reviewing the petition for habeas corpus, the court finds that petitioner has  
21 failed to exhaust state court remedies. The claims have not been presented to the California  
22 Supreme Court. Further, there is no allegation that state court remedies are no longer available to  
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25 <sup>1</sup> A petition may be denied on the merits without exhaustion of state court remedies. 28  
26 U.S.C. § 2254(b)(2).

1 petitioner. Accordingly, the petition should be dismissed without prejudice.<sup>2</sup> While petitioner  
2 requests that the court order emergency relief, the court is not authorized to address his claims  
3 before they have been presented to the California Supreme Court.

4           Petitioner may also be claiming a violation of Valdivia v. Davis, 206 F.Supp.2d  
5 1068 (E.D.Cal. 2002), which does not require exhaustion. According to time lines agreed to by  
6 the State of California in Valdivia v. Davis, and set out in an unpublished case entitled Valdivia  
7 v. Schwarzenegger, a parolee is supposed to receive a probable cause hearing within 10 business  
8 days of the day of receipt of notification of the parole violation charges, and a revocation of  
9 parole hearing within 35 calendar days of the parole hold date. In re Marquez, 153 Cal.App.4th  
10 1, 4-5 (2007). Although difficult to understand, it appears from the petition that a parole hold  
11 was placed on petitioner on October 7, 2010, and a parole revocation hearing was held on  
12 October 26, 2010.

13           It is not clear that the time requirements set forth in Valdivia were violated.  
14 However, even if they were, there is no claim by petitioner that he has not yet received his parole  
15 revocation hearing. Under these circumstances, the court could not order any relief for any  
16 violation of Valdivia.

17           Petitioner's claims regarding conditions of confinement cannot be addressed in a  
18 habeas corpus petition. Claims regarding conditions of confinement must be raised in a civil  
19 rights action.

20           It appears that the previous orders served on petitioner may have been returned  
21 because petitioner was identified as "Kenneth Buford Pollard, III," rather than "Kenneth Buford  
22 Pollard." Accordingly, the Clerk of the Court is directed to amend court records to reflect the

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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).

1 proper name for service.

2 Accordingly, IT IS HEREBY ORDERED that:

3 1. Petitioner is granted leave to proceed in forma pauperis.

4 2. The Clerk of the Court is directed to serve a copy of these findings and  
5 recommendations together with a copy of the petition filed in the instant case on the Attorney  
6 General of the State of California.

7 3. The Clerk of the Court is directed to amend court records to reflect petitioner's  
8 name as "Kenneth Buford Pollard."

9 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of  
10 habeas corpus be dismissed for failure to exhaust state remedies and because no relief can be  
11 ordered for any claims brought pursuant to Valdivia.

12 These findings and recommendations will be submitted to the United States  
13 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
14 twenty days after being served with these findings and recommendations, petitioner may file  
15 written objections with the court. The document should be captioned "Objections to Findings  
16 and Recommendations." Petitioner is advised that failure to file objections within the specified  
17 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
18 (9th Cir. 1991).

19 DATED: December 27, 2010

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22 KENDALL J. NEWMAN  
23 UNITED STATES MAGISTRATE JUDGE

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