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

JIMMIE THOMPSON,

Petitioner,

No. CIV S-05-1708 GEB EFB P

vs.

THOMAS L. CAREY,

Respondent.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____ /
On June 8, 2009, the assigned district judge adopted the undersigned’s May 5, 2009 findings and recommendations, granted plaintiff’s application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and directed respondent “to discharge petitioner from parole within 30 days of this order, as provided by California Penal Code section 3000.1(b), unless the Board of Parole Hearings determines that there is good cause to retain petitioner on parole, makes a written record of its determination, and transmits a copy of it to petitioner.” Dckt. No. 84 at 2. On December 2, 2009, petitioner filed a motion for an order discharging petitioner from parole and noticed the matter for hearing before the undersigned on January 6, 2010. Dckt. No. 85. Respondent opposes the motion. Dckt. No. 86.

Petitioner argues that respondent violated the June 8, 2009 order by failing to provide petitioner (by July 8, 2009) with a copy of a written decision to retain him on parole, and by

1 retaining petitioner on parole “despite a lack of ‘good cause’ required by the Court to do so.”
2 Dckt. No. 85 at 3. Petitioner further contends that respondent “violated the Court’s order in that
3 the process that led to the decision to retain [petitioner] on parole was based on errors and
4 omissions, and was highly irregular and suspect indicating lack of good faith compliance with
5 the order.” *Id.* at 3-4. Therefore, petitioner contends that “[b]ecause the Court’s order required
6 that [petitioner] be discharged from parole unless Respondent, in good faith, complied with the
7 conditional terms of the alternative order by July 8, 2009, and Respondent has not complied,
8 [petitioner] must be discharged from parole.” *Id.* at 4.

9 Respondent acknowledges that he “inadvertently” failed to serve petitioner with a written
10 copy of the Board’s decision on July 6, 2009 to retain him on parole, but contends that because
11 petitioner “was notified of the Board’s decision orally and has received a written copy of the
12 Board’s decision, and because the Board found good cause to retain him on parole, his motion
13 should be denied.” Dckt. No. 86 at 2. Respondent argues that the inadvertent failure to timely
14 provide petitioner with a written copy of the Board’s decision did not cause petitioner any harm
15 and does not warrant his discharge from parole. *Id.* at 3. Respondent further contends that,
16 contrary to petitioner’s allegations, the Board found that petitioner’s commitment offense and
17 the fact that he had been in the community for less than two years and needed further supervision
18 constituted good cause to retain him on parole. *Id.* at 3-4. Respondent argues that petitioner’s
19 contention that the Board’s decision is not supported by good cause “is a question of state law,”
20 and if petitioner “wishes to challenge the propriety of the Board’s decision, then he can and
21 should file a state petition for writ of habeas corpus.” *Id.* at 4.

22 Respondent’s “inadvertent” failure to timely provide petitioner with a copy of the
23 Board’s written decision is disconcerting. Nonetheless, petitioner has not shown that the failure
24 warrants his discharge from parole. There is no dispute that he was orally notified of the
25 decision at the end of July 2009. Moreover, he received his denial paperwork a few days later,
26 and has now received a copy of the Board’s formal written decision. Dckt. No. 85-6 at 3; 87 at

1 2. Further, although petitioner raises several potentially legitimate concerns regarding the
2 Board's justification for retaining petitioner on parole, the undersigned will not recommend that
3 this court second guess the Board's "good cause" determination without permitting the state
4 court to first consider the issue.¹ See 28 U.S.C. § 2254(b)(1) ("An application for a writ of
5 habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not
6 be granted unless it appears that – (A) the applicant has exhausted the remedies available in the
7 courts of the State; or (B)(I) there is an absence of available State corrective process; or (ii)
8 circumstances exist that render such process ineffective to protect the rights of the applicant.").
9 As respondent points out, if petitioner wishes to challenge the Board's decision to retain him on
10 parole, he may file a state habeas petition challenging that decision.

11 Accordingly, it is hereby ORDERED that the January 6, 2009 hearing on petitioner's
12 motion is vacated. Further, it is hereby RECOMMENDED that petitioner's motion for discharge
13 from parole, Dckt. No. 85, be denied and the Clerk be directed to enter final judgment.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections

19
20 ¹ Petitioner contends that because the "good cause" requirement was incorporated into
21 the Court's June 8, 2009 order, in order to enforce that order, the Court "is empowered to
22 determine if there is evidence of good cause to retain [petitioner] on parole. If there is not, the
23 Court should order his discharge." Dckt. No. 87 at 3. Petitioner argues that "due process of law
24 requires as much, for retention on parole without any evidence establishing cause for such is
25 arbitrary and capricious – for the same reasons that denial of parole without any supporting
26 evidence violates due process." *Id.* Petitioner is correct that the June 8, 2009 order required the
Board to discharge petitioner absent a determination that there is good cause for his retention.
However, the order specifically referenced and cited to the procedures set forth in California
Penal Code section 3000.1. Here, the Board determined that petitioner's commitment offense
and the fact that petitioner had been in the community for less than two years and needed further
supervision provided good cause to retain petitioner on parole. Whether or not those reasons
amount to "good cause" within the meaning of section 3000.1, and therefore whether petitioner's
retention on parole violates due process, should first be considered by the state court.

1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: January 5, 2010.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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