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

RICHARD H. CAREY,

Petitioner,

No. CIV S-07-1642 MCE KJM P

vs.

D.K. SISTO, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus challenging a March 9, 2006 denial of parole.¹ Respondents have filed a motion to dismiss, arguing that this court cannot reach the issues in the petition because of petitioner's

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¹ The petition included challenges to petitioner's underlying conviction, but these were dismissed because they were filed beyond the statute of limitations. See Order filed Mar. 4, 2008 (Docket No. 9).

1 procedural default in state court. Respondent relies on the state Court of Appeal's denial of
2 petitioner's state habeas petition which reads, in relevant part:

3 The petition for writ of habeas corpus filed in this court on
4 December 27, 2006, is denied.

5 Petitioner's parole-related claims are denied for failure to provide
6 the full record needed to evaluate them. (*People v. Duvall* (1995) 9
7 Cal.4th 464, 474.) They are also denied because the record, as
8 presently constituted, does not support petitioner's contentions. In
9 addition, his fourth ground is rejected because the contentions
10 offered in support of it are conclusional. (*In re Swain* (1949) 34
11 Cal.2d 300, 302.)

12 Motion to Dismiss (MTD), Ex. 1 at 2.² The petition filed in the Court of Appeal raised the
13 following challenges to the denial of parole: (1) petitioner's right to due process was violated
14 when the board used petitioner's commitment offense to show unsuitability; (2) petitioner's right
15 to due process because the denial of parole was not based on reliable evidence; (3) petitioner's
16 right to due process was violated because the denial of parole was not based on individualized
17 considerations but was instead arbitrary and capricious; and (4) petitioner's right to a fair hearing
18 was violated because he was denied access to reasonable assistance to prepare for the hearing and
19 the board failed to consider relevant documents presented by petitioner. The petition was
20 supported by several exhibits relating to the claim that he was improperly denied parole: Exhibit
21 A is a transcript of the decision portion of the March 9, 2006 parole hearing; Exhibit B is a
22 transcript of the decision portion of an August 19, 2003 parole hearing; Exhibit C is a transcript
23 of the decision portion of the August 28, 2001 parole hearing; Exhibit D is a psychosocial
24 assessment dated February 9, 2006; Exhibit E is a psychosocial assessment dated March 8, 2001;
25 Exhibit F is a page from the August 19, 2003 parole hearing. MTD, Ex. 1 at 23-69.

26 The California Supreme Court denied petitioner's petition for review without
comment. MTD, Ex. 2 at 2. Accordingly, this court will "look through" the Supreme Court's

² Because the exhibit is not paginated, the court refers to the page numbers assigned by the court's ECF system.

1 silent denial to the Court of Appeal’s decision, which is the last reasoned opinion in the state
2 habeas proceedings, to determine whether the instant federal petition is barred. Ylst v.
3 Nunnemaker, 501 U.S. 797, 803 (1991) (“Where there has been one reasoned state judgment
4 rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same
5 claim rest upon the same ground.”).

6 Respondent argues that the California Court of Appeal’s citation to People v.
7 Duvall, 9 Cal.4th 464 (1995), erects an insurmountable procedural barrier to this court’s
8 consideration of the merits of petitioner’s claims.

9 A federal court will not review a claim of federal constitutional error raised by a
10 state habeas petitioner if the state court determination of the same issue “rests on a state law
11 ground that is independent of the federal question and adequate to support the judgment.”
12 Coleman v. Thompson, 501 U.S. 722, 729 (1991). This rule also applies when the state court’s
13 determination is based on the petitioner’s failure to comply with procedural requirements, so
14 long as the procedural rule is an adequate and independent basis for the denial of relief. Id.

15 In People v. Duvall, the California Supreme Court described some of the
16 procedural requirements for state habeas petitions:

17 To satisfy the initial burden of pleading adequate
18 grounds for relief, an application for habeas corpus
19 must be made by petition, and “[i]f the
20 imprisonment is alleged to be illegal, the petition
21 must also state in what the alleged illegality
22 consists.” The petition should both (i) state fully and
23 with particularity the facts on which relief is sought,
24 as well as (ii) include copies of reasonably available
documentary evidence supporting the claim,
including pertinent portions of trial transcripts and
affidavits or declarations. “Conclusory allegations
made without any explanation of the basis for the
allegations do not warrant relief, let alone an
evidentiary hearing.”

25 9 Cal.4th at 474 (internal citations omitted). The Ninth Circuit has held that a citation to Duvall,
26 in tandem with a citation to In re Swain, 34 Cal.2d 300, means that a defendant has failed to

1 exhaust state remedies because the petitioner is being given an opportunity to amend his
2 pleadings to “allege with sufficient particularity the facts warranting habeas relief.” King v. Roe,
3 340 F.3d 821, 823 (9th Cir. 2003), abrogated on other grounds by Evans v. Chavis, 546 U.S. 189
4 (2006). A citation to that portion of Duvall relating to the necessary evidentiary support for a
5 petition is similarly curable unless the documentary evidence was not “reasonably available” to
6 petitioner. Cf. Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986). Accordingly, the state
7 court’s Duvall citation does not erect a procedural barrier in this case, but may translate into a
8 determination that the claims have not been exhausted. Of course, the exhaustion of state court
9 remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C.
10 § 2254(b)(1).

11 Petitioner did supply the Court of Appeal with the decisional portion of the
12 challenged parole proceeding along with the psychosocial evaluation prepared in anticipation of
13 the hearing. The appellate court found that these materials were insufficient support for the first
14 three claims of his petition. See MTD, Ex. 1 at 2, 24-36 & 53-58. Petitioner argues that this
15 decision on the merits allows the federal court similarly to reach the merits of his claim.
16 Opposition (Opp’n) at 3.

17 In Harris v. Reed, 489 U.S. 255, 264 n.10 (1989), the Supreme Court explained
18 that a state court’s rejection of a claim as both procedurally barred and on the merits does not
19 undermine the application of the bar. However, the state court’s Duvall citation does not erect a
20 procedural bar in this case but raises a failure to exhaust. Moreover, despite the procedural
21 irregularity it found in the state petition, the Court of Appeal reached the merits of the first three
22 claims. As the Supreme Court has recognized, the exhaustion requirement has been satisfied
23 “where the State has actually passed upon the claim. . . .” Castille v. Peoples, 489 U.S. 346, 351
24 (1989); see also Greene v. Lambert, 288 F.3d 1081 (9th Cir. 2002) (claim is exhausted when
25 state court overlooks procedural problem and addresses the merits).

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1 As to the fourth claim, the state relied on Swain and arguably on Duvall without
2 making an additional determination on the merits. Accordingly, the fourth claim in the instant
3 petition, which corresponds to the fourth claim in the state petition, is not exhausted and must be
4 dismissed.³

5 Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to
6 dismiss be granted as to claim four but denied as to claims one through three of the petition.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
12 shall be served and filed within ten days after service of the objections. The parties are advised
13 that failure to file objections within the specified time may waive the right to appeal the District
14 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: February 6, 2009.

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18 U.S. MAGISTRATE JUDGE
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24 ³ In the previous findings and recommendations, this court recommended that
25 petitioner's claims about his underlying conviction, claims five through eight of this petition, be
26 dismissed as time-barred. Docket No. 4. The order adopting these findings dismissed claims
four through eight. Docket No. 9. The reference to four instead of five in the order appears to
have been inadvertent.