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

MARK OWEN CLARK,

Petitioner,

No. 2:08-cv-1798-GEB-JFM (HC)

vs.

JAMES HARTLEY,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2007 decision of the California Board of Parole Hearings (Board) finding him unsuitable for parole. This matter is before the court on respondent’s motion to dismiss this action on the grounds that petitioner failed to exhaust his federal claims in the California Supreme Court and that this court lacks jurisdiction over petitioner’s state law claims.

Petitioner raises two claims in his petition. In the first claim, petitioner contends that the Board’s decision violated his federal constitutional right to due process because there was no evidence to support the decision. In the second claim, petitioner contends that the decision violated his rights under the state and federal constitutions because it was not supported by a preponderance of evidence as required by California Penal Code § 3041(a).

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

8 In support of the motion to dismiss, respondent has presented a copy of a
9 document filed by petitioner in the California Supreme Court and styled as a “Petition for
10 Review to Exhaust State Remedies.” Ex. 1 to Motion to Dismiss, filed October 31, 2008. In that
11 petition, petitioner alleges that he is raising federal constitutional claims and he incorporates by
12 reference a petition for writ of habeas corpus “filed with the court below” and the memorandum
13 of points and authorities and exhibits submitted in support of that petition. Ex. 1 at 4. Neither
14 the petition nor the memorandum nor any exhibits are appended to the petition for review.
15 Petitioner does not allege in the petition for review that he is challenging the Board’s decision as
16 unsupported by the evidence; he alleges only that the Board had “stated petitioner’s crime was
17 carried out in a especially cruel, dispassionate, and callous manner; therefore petitioner ‘would
18 pose an unreasonable risk of danger to society or a threat to public safety if released from prison’.
19 However, the Board did not state how petitioner is still currently an unreasonable risk of danger
20 to society.” Id.

21 The allegations of the petition for review are insufficient to exhaust the federal
22 due process claim in the instant petition. This court finds that petitioner failed to exhaust state
23 court remedies with respect to that claim and it should therefore be dismissed without prejudice.¹
24

25 ¹ This court makes no findings with respect to respondent’s contention that the petition
26 for review was not timely filed in the California Supreme Court, which petitioner disputes.
Resolution of that dispute is not necessary to the disposition of the instant motion.

1 California law gives rise to a liberty interest in parole that is protected by the due
2 process clause of the United States Constitution. Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir.
3 2003). “In the parole context, the requirements of due process are satisfied if ‘some evidence’
4 supports the decision. McQuillion [v. Duncan], 306 F.3d [895,] . . . 904 [(9th Cir. 2002)];
5 Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389 (9th Cir.1987) (adopting the “some evidence”
6 standard set forth by the Supreme Court in Superintendent v. Hill, 472 U.S. 445, 456, 105 S.Ct.
7 2768, 86 L.Ed.2d 356 (1985)). ‘Additionally, the evidence underlying the board's decision must
8 have some indicia of reliability.’ Jancsek, 833 F.2d at 1390.” Biggs at 915.

9 Petitioner’s second claim for relief is not cognizable in these federal habeas
10 corpus proceedings, his citation to the United States Constitution notwithstanding, because the
11 federal due process clause does not require a parole decision to be supported by a preponderance
12 of evidence. Respondent’s motion to dismiss should be granted as to this claim.

13 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 14 1. Respondent’s October 31, 2008 motion to dismiss be granted;
- 15 2. Petitioner’s first claim for relief be dismissed without prejudice for failure to
16 exhaust state court remedies; and
- 17 3. Petitioner’s second claim for relief be dismissed for failure to state a federal
18 claim.

19 These findings and recommendations are submitted to the United States District
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
21 days after being served with these findings and recommendations, any party may file written
22 objections with the court and serve a copy on all parties. Such a document should be captioned
23 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that

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1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: August 10, 2009.

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6 UNITED STATES MAGISTRATE JUDGE

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