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

MARK ALLAN OUELLETTE,

Petitioner,

No. 2:10-cv-1862 JAM JFM (HC)

vs.

KATHLEEN DICKINSON,

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 2008 decision of California Governor Arnold Schwarzenegger to reverse a decision of the California Board of Parole Hearings finding petitioner suitable for parole. Respondent has moved to dismiss this action, contending that petitioner failed to exhaust state court remedies with respect to his contention, set forth as ground three of the petition, that the Governor lacked authority to make credibility determinations in connection with his review of the Board’s suitability decision.

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985). It is unavailable for alleged error in the interpretation or application of state law. Id. at 1085. The exhaustion of state court remedies is a prerequisite to the granting

1 of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the
2 exhaustion requirement by providing the highest state court with a full and fair opportunity to
3 consider all federal claims before presenting them to the federal court. Picard v. Connor, 404
4 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S.
5 1021 (1986).

6 The claim which respondent contends is unexhausted is predicated solely on state
7 law. For that reason, petitioner's alleged failure to present that claim to the California Supreme
8 Court does not require dismissal of this action, which should proceed on petitioner's claim that
9 the Governor's decision to reverse the Board's suitability finding violated his right to due
10 process.¹

11 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

12 1. Respondent's August 27, 2010 motion to dismiss be denied;

13 2. Respondent be directed to file, within thirty days from the date of any order by
14 the district court adopting these findings and recommendations, an answer to the petition and any
15 and all transcripts or other documents relevant to the determination of the cognizable issues
16 presented in the petition; and

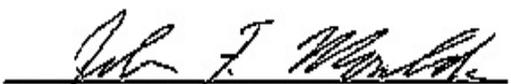
17 3. Petitioner's traverse, if any, be due on or before thirty days from the date
18 respondent's answer is filed.

19 These findings and recommendations will be submitted to the United States
20 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
21 fourteen days after being served with these findings and recommendations, any party may file
22 written objections with the court. The document should be captioned "Objections to Findings
23 and Recommendations." Any response to the objections shall be filed and served within fourteen
24

25 ¹ Petitioner has divided this claim into two separate grounds in the petition, but under
26 controlling precedent he has only one claim available to him: whether the Governor's decision
violated his right to due process.

1 days after service of the objections. The parties are advised that failure to file objections within
2 the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
3 F.2d 1153 (9th Cir. 1991).

4 DATED: November 16, 2010.

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7 UNITED STATES MAGISTRATE JUDGE

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