IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

ROLAND TIREY, Petitioner, vs. WARDEN MIKE MAHONEY; ATTORNEY GENERAL OF THE STATE OF MONTANA, Respondents.	)	CV 11-51-M-DWM-JCL ORDER

Petitioner Tirey, a state prisoner proceeding pro se, filed a motion to proceed in forma pauperis on March 30, 2011, with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Tirey alleged there were four conditions of his probation. However he does not make clear if he is complaining that the conditions were imposed at his resentencing in 2009 or whether he objects to the

trial court's finding that he violated the conditions. In his brief in support, he also alleged several instances of ineffective assistance of counsel at the revocation hearing and on direct appeal. Magistrate Judge Jeremiah C. Lynch entered his Findings and Recommendation on April 20, 2011. Judge Lynch found that while one or two of Tirey's claims may have been fairly presented on direct appeal, most of his claims allege ineffective assistance of counsel at revocation and on appeal. No claims of ineffective assistance have been exhausted in the courts of the State of Montana. Further, Judge Lynch found that Tirey may still file a postconviction petition in the trial court. Tirey has not done so, nor has he appealed any adverse decision to the Montana Supreme Court. Because those remedies remain available to him, he must use them before he proceeds in this Court.

Petitioner Tirey did not timely object and so has waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court reviews the Findings and Recommendation for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000). I can find no clear error with Judge Lynch's recommendation (dkt #6) and therefore adopt it in full.

Accordingly, IT IS HEREBY ORDERED that the Petition and Brief (dkts

#1, 2) are DISMISSED WITHOUT PREJUDICE. The Clerk of Court is directed to enter by separate document a judgment of dismissal.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

Dated this 23rd day of May, 2011.

Donald W. Molloy, District Judge
United States District Court