IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA MISSOULA DIVISION



TOBY KITTRELL,

CV 18-86-M-DLC-JCL

Petitioner,

VS.

ORDER

MARC JOHNSON, HEATHER SMITH, ATTORNEY GENERAL OF THE STATE OF MONTANA,

Respondents.

United States Magistrate Judge Jeremiah C. Lynch entered his Order and Findings and Recommendations (Doc. 5) in this case on May 21, 2018, recommending that Petitioner Toby Kittrell's ("Kittrell") habeas petition be dismissed without prejudice as unexhausted. Because Kittrell did not object to the Findings and Recommendations, he has waived his right to de novo review thereof. 28 U.S.C. § 636(b)(1)(C). This Court reviews for clear error findings and recommendations to which no party objects. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists when 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) (citations omitted).

Having reviewed the Findings and Recommendations, the Court finds no clear error in Judge Lynch's conclusion that Kittrell's habeas petition should be dismissed without prejudice for failure to meet the exhaustion requirements under 28 U.S.C. § 2254(b)(1)(A). As Judge Lynch indicates, this Court cannot review Kittrell's claims because he has failed to exhaust his available state court remedies. Additionally, this Court finds no clear error in Judge Lynch's conclusion that a certificate of appealability should be denied.

Accordingly, IT IS ORDERED that Judge Lynch's Findings and Recommendations (Doc. 5) are ADOPTED IN FULL. This matter is DISMISSED WITHOUT PREJUDICE as unexhausted.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter judgment of dismissal.

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

DATED this day of September, 2018.

Dana L. Christensen, Chief Judge

United States District Court