

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

BOB EUGENE WEST, JR.,

Petitioner,

v.

MARK NOOTH,

Respondent.

Case No. 2:13-cv-00182-SU

ORDER

United States Magistrate Judge Patricia Sullivan issued Findings and Recommendation in this case on June 24, 2013. Dkt. 18. Judge Sullivan recommended that respondent's Motion to Dismiss (Dkt. 11) should be granted and petitioner's Petition for Writ of Habeas Corpus (Dkt. 2) should be dismissed on the basis that petitioner had not exhausted his state court remedies at the time he filed his habeas petition. Judge Sullivan further recommended that, (1) the court enter a Judgment dismissing the case without prejudice, and (2) the court decline to issue a Certificate of Appealability on the basis that the habeas petition was clearly premature.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.

§ 636(b)(1). If a party files objections to a magistrate's findings and recommendations, "the court

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shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” *Id.*; Fed. R. Civ. P. 72(b)(3).

Petitioner timely filed an objection. Dkt. 26. Petitioner argues that the State and its contractors “exhausted petitioner’s state remedies by altering and destroying evidence [and] discovery.” Dkt. 26 at 1. He further argues that exhaustion should not be required because circumstances exist that render “such process ineffective to protect the rights of the petitioner.” Dkt. 26 at 17. Petitioner seeks the appointment of counsel and an evidentiary hearing. Dkt. 26 at 18. The Court has reviewed *de novo* those portions of Judge Sullivan’s Findings and Recommendation to which petitioner has objected, as well as petitioner’s objections and respondent’s response. The Court agrees with Judge Sullivan’s reasoning regarding her finding that petitioner’s post conviction state court remedies had not been exhausted when the habeas petition was filed and ADOPTS those portions of the Findings and Recommendation.

For those portions of a magistrate’s findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) (“There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate’s report[.]”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*) (the court must review *de novo* magistrate’s findings and recommendations if objection is made, “but not otherwise”). Although in the absence of objections no review is required, the Magistrates Act “does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard.” *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that “[w]hen no timely objection is filed,” the Court review the magistrate’s recommendations for “clear error on the face of the record.”

For those portions of Judge Sullivan's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.

The Court **ADOPTS** Judge Sullivan's Findings and Recommendation, Dkt. 18. Respondent's Motion to Dismiss (Dkt. 11) is granted. Petitioner's Petition for Writ of Habeas Corpus (Dkt. 2) is dismissed without prejudice.

The Court declines to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

Petitioner's Motion for Appointment of Counsel (Dkt. 25) is **DENIED. IT IS SO ORDERED.**

DATED this 4th day of September, 2013.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge