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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE EASTERN DISTRICT OF CALIFORNIA

5 RUSSELL LANG,

6 Petitioner,

7 v.

8 K. MENDOZA-POWERS, et al.,

9 Respondents.
10 _____/

No. C 07-00608 CW (HC)

ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS

United States District Court
For the Northern District of California

11
12 On April 2, 2007, Petitioner Russell Lang, a state prisoner
13 incarcerated at Avenal State Prison, filed a petition for a writ of
14 habeas corpus on the ground that the Board of Parole Hearings'
15 failure to fix a primary term of punishment proportionate to his
16 individual culpability for the commitment offense constitutes cruel
17 and unusual punishment. On March 11, 2008, Respondents filed an
18 answer. On April 7, 2008, Petitioner filed a traverse, entitled,
19 "Denial and Exception to the Return." Having read all the papers
20 filed by the parties, the Court DENIES the petition.

21 BACKGROUND

22 In 1974, Petitioner conspired with several other individuals
23 to attack three unrelated people in three separate incidents.
24 Resps' Ex. 3 at 1-3. All the individuals involved in the
25 commission of the crimes, including Petitioner, were associated
26 with the Nation of Islam, which taught that Caucasians were devils
27 and that it was the duty of each Muslim to murder four devils. Id.
28

1 at 3. A jury found Petitioner guilty of conspiracy to commit
2 murder, first degree murder and possession of a weapon. Id. at 1.
3 Petitioner was sentenced to two terms of life, plus one year, with
4 the possibility of parole. Id.

5 Petitioner filed a petition for a writ of habeas corpus in the
6 Sacramento County Superior Court alleging that the Board violated
7 his state and federal constitutional rights to freedom from cruel
8 and unusual punishment by its failure to set his primary term
9 proportionate to his individual culpability. He also claimed the
10 Board's failure violated California Penal Code § 1170.2. On March
11 9, 2006, the superior court denied the petition explaining that,
12 under People v. Wingo, 14 Cal. 3d 169, 183 (1975), and In re
13 Rodriguez, 14 Cal. 3d 639, 651-53 (1975), superseded by statute as
14 stated in People v. Jefferson, 21 Cal. 4th 86, 95 (1999),
15 Petitioner's maximum term is deemed to be life imprisonment because
16 no maximum term has been set by the Board. Resps' Ex. 4 at 1.
17 Citing Harmelin v. Michigan, 501 U.S. 957 (1991), the court held
18 that Petitioner's life term does not constitute cruel and unusual
19 punishment. Id.

20 Petitioner filed habeas petitions in the California court of
21 appeal and the California Supreme Court, both of which denied the
22 petitions without comment. Resps' Exs. 5 and 6.

23 LEGAL STANDARD

24 A federal court may entertain a habeas petition from a state
25 prisoner "only on the ground that he is in custody in violation of
26 the Constitution or laws or treaties of the United States." 28
27 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death
28 Penalty Act (AEDPA), a district court may not grant a petition

1 challenging a state conviction or sentence on the basis of a claim
2 that was reviewed on the merits in state court unless the state
3 court's adjudication of the claim: "(1) resulted in a decision that
4 was contrary to, or involved an unreasonable application of,
5 clearly established federal law, as determined by the Supreme Court
6 of the United States; or (2) resulted in a decision that was based
7 on an unreasonable determination of the facts in light of the
8 evidence presented in the State court proceeding." 28 U.S.C.
9 § 2254(d). A decision is contrary to clearly established federal
10 law if it fails to apply the correct controlling authority, or if
11 it applies the controlling authority to a case involving facts
12 materially indistinguishable from those in a controlling case, but
13 nonetheless reaches a different result. Clark v. Murphy, 331 F.3d
14 1062, 1067 (9th. Cir. 2003).

15 The only definitive source of clearly established federal law
16 under 28 U.S.C. § 2254(d) is the holdings of the Supreme Court as
17 of the time of the relevant state court decision. Williams v.
18 Taylor, 529 U.S. 362, 412 (2000).

19 To determine whether the state court's decision is contrary
20 to, or involved an unreasonable application of, clearly established
21 law, a federal court looks to the decision of the highest state
22 court that addressed the merits of a petitioner's claim in a
23 reasoned decision. LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th
24 Cir. 2000). In the present case, the only state court to address
25 the merits of Petitioner's claim is the Sacramento superior court.

26 DISCUSSION

27 A criminal sentence that is not proportionate to the crime for
28 which the defendant was convicted violates the Eighth Amendment's

1 prohibition against cruel and unusual punishment. Solem v. Helm,
2 463 U.S. 277, 303 (1983) (sentence of life imprisonment without
3 possibility of parole for seventh non-violent felony violates
4 Eighth Amendment). But "outside the context of capital punishment,
5 successful challenges to the proportionality of particular
6 sentences will be exceedingly rare." Id. at 289-90. For the
7 purposes of review under 28 U.S.C. § 2254(d)(1), it is clearly
8 established that "[a] gross proportionality principle is applicable
9 to sentences for terms of years." Lockyer v. Andrade, 538 U.S. 63,
10 72 (2003). But the precise contours of the principle are not
11 clear, and "applicable only in the 'exceedingly rare' and 'extreme'
12 cases." Id. at 73.

13 In Harmelin v. Michigan, 501 U.S. 957 (1991), Chief Justice
14 Rehnquist and Justice Scalia joined in a two-justice plurality to
15 conclude that Solem should be overruled and that no proportionality
16 review is required under the Eighth Amendment except with respect
17 to death sentences. Id. at 961-985. A three-justice concurrence
18 made up of Justices Kennedy, O'Connor and Souter concluded that
19 Solem should not be rejected and that the Eighth Amendment contains
20 a narrow proportionality principle that is not confined to death
21 penalty cases, but that forbids only extreme sentences which are
22 grossly disproportionate to the crime. Id. at 997-1001.¹ After
23 Harmelin, only extreme sentences that are grossly disproportionate
24 to the crime violate the Eighth Amendment. United States v. Carr,

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26 ¹Because no majority opinion emerged in Harmelin on the
27 question of proportionality, Justice Kennedy's view--the Eighth
28 Amendment forbids only extreme sentences that are grossly
disproportionate to the crime--is considered the holding of the
Court. See United States v. Bland, 961 F.2d 123, 128-29 (9th
Cir.), cert. denied, 506 U.S. 858 (1992).

1 56 F.3d 38, 39 (9th Cir. 1995). See, e.g., Ewing v. California,
2 538 U.S. 11, 29-31 (2003) (upholding sentence of twenty-five-years-
3 to-life for recidivist convicted most recently of grand theft);
4 Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (upholding sentence of
5 two consecutive terms of twenty-five-years-to-life for recidivist
6 convicted most recently of two counts of petty theft with a prior
7 conviction); but see, Gonzalez v. Duncan, ___ F.3d ___, 2008 WL
8 5399079 (9th Cir.) (sentence of twenty-eight years to life for
9 failing to update annual sex offender registration grossly
10 disproportionate).

11 Petitioner has been sentenced to two indeterminate life terms
12 for first degree murder and conspiracy to commit murder.² Because
13 Petitioner's sentence has not been set at a lesser fixed term, it
14 is considered to be the statutory maximum of life with the
15 possibility of parole. See Rodriguez, 14 Cal. 3d at 646 (the
16 Indeterminate Sentencing Act does not expressly require the Adult
17 Authority to fix a sentence at less than the maximum). As the
18 state habeas court correctly explained, this sentence is not
19 disproportionate to Petitioner's crimes in light of the fact that
20 the Supreme Court, in Harmelin, 501 U.S. at 993-94, found that a
21 sentence of life in prison without the possibility of parole for
22 possession of twenty-four ounces of cocaine raised no inference of
23 gross disproportionality. See also, Solem v. Helm, 463 U.S. 277,
24 290 n.15 (1983) (any sentence of imprisonment is not

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26 ²Prior to 1977, the Indeterminate Sentence law provided that
27 the court did not fix the term or duration of the period of
28 imprisonment; the authority to determine the actual length of the
sentence was vested in the Adult Authority. Rodriguez, 14 Cal. 3d
at 645. This sentencing scheme was replaced with the Determinate
Sentencing Act. People v. Jefferson, 21 Cal. 4th 86, 95 (1999).

1 disproportionate for crime of felony murder). Because Harmelin's
2 crime was less severe than Petitioner's and his sentence harsher,
3 Petitioner's claim of cruel and unusual punishment must fail.

4 Therefore, the state habeas court's decision was not contrary
5 to, or an unreasonable application of, clearly established federal
6 law as determined by the United States Supreme Court.

7 Because a state inmate is entitled to federal habeas relief
8 only if he is in custody in violation of the United States
9 Constitution or federal laws, Petitioner's claims based upon
10 violations of the California constitution and California statutes
11 are not cognizable in this proceeding.

12 The record indicates that Petitioner has been granted parole
13 twice, but the decisions were rescinded by the Governor.
14 The Supreme Court has clearly established that a parole board's
15 decision deprives a prisoner of due process with respect to his
16 constitutionally protected liberty interest in a parole release
17 date if the board's decision is not supported by "some evidence in
18 the record," or is "otherwise arbitrary." Sass v. California Bd.
19 of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006) (citing
20 Superintendent v. Hill, 472 U.S. 445, 457 (1985)). The Governor's
21 decision must also comply with due process which requires a
22 rescission of parole to be supported by some evidence. Miller v.
23 Davis, 521 F.3d 1142, 1146 (9th Cir. 2008).

24 If Petitioner wishes to challenge the denial of parole, he
25 should exhaust this claim in state court and then seek federal
26 habeas relief.

27 CONCLUSION

28 For the foregoing reasons, Petitioner's petition for a writ of

1 habeas corpus is DENIED. The Clerk of the Court shall enter
2 judgment and close the case.

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4 IT IS SO ORDERED.

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6 Dated: 1/28/09



CLAUDIA WILKEN
United States District Judge

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