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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LIONEL FALCON,

1:09-CV-00660 OWW GSA HC

Petitioner,

FINDINGS AND RECOMMENDATIONS
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

LYDIA C. HENSE, Warden,

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

BACKGROUND¹

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Merced, following his conviction by guilty plea on May 3, 1988, to second degree murder and manslaughter. On May 31, 1988, Petitioner was sentenced to serve an indeterminate term of nineteen years to life in state prison.

On April 13, 2009, Petitioner filed the instant federal petition for writ of habeas corpus in this Court. On April 14, 2010, the case was reassigned to the undersigned. In his petition, Petitioner claims the parole board has violated the terms of his plea bargain and his due process rights under the Constitution by denying him parole for the fourth time.

¹This information is derived from the petition for writ of habeas corpus.

1 **DISCUSSION**

2 Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

3 If it plainly appears from the petition and any attached exhibits that the petitioner is not
4 entitled to relief in the district court, the judge must dismiss the petition and direct the
clerk to notify the petitioner.

5 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ
6 of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to
7 dismiss, or after an answer to the petition has been filed. See Herbst v. Cook, 260 F.3d 1039 (9th
8 Cir.2001). A petition for habeas corpus should not be dismissed without leave to amend unless it
9 appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson,
10 440 F.2d 13, 14 (9th Cir. 1971).

11 In his first claim for relief, Petitioner contends the parole board has violated the terms of
12 the plea agreement he entered into on May 3, 1988. He states the agreement was for Petitioner to
13 plead guilty to one count of second degree murder and one count of manslaughter. He states the
14 agreement consisted of Petitioner serving a 3-year parole condition “when paroled.” Petitioner
15 points to the plea colloquy, as follows:

16 THE COURT: Do you understand that if you are sent to prison and you are released from
17 state prison, following your incarceration you may be subject to parole of up to three
years?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you further understand that if you should violate the terms and
conditions of your parole, you may be back into prison for at least another year?

20 THE DEFENDANT: Yes, sir.

(Pet. at 5a-2.)

21 Petitioner states the parole board has violated the promises recited above by denying him
22 a parole date. The Court finds the claim to be completely without merit. Nowhere in the plea
23 colloquy is there a promise of release on parole after a certain amount of time served. The
24 sentence, as Petitioner states, is for 19 years to life, with life being the maximum. In the plea
25 colloquy, the sentencing court specifically states Petitioner may be subject to parole for up to
26 three years *if* he is released from state prison, not *when*. Since the claim is plainly without merit,
27 it should be dismissed from the petition.
28

1 **RECOMMENDATION**

2 Accordingly, it is HEREBY RECOMMENDED that Ground One of the petition for writ
3 of habeas corpus be DISMISSED WITH PREJUDICE.

4 This Findings and Recommendations is submitted to the assigned United States District
5 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of
6 the Local Rules of Practice for the United States District Court, Eastern District of California.

7 Within thirty (30) days after service of this order, any party may file written objections with the
8 court and serve a copy on all parties. Such a document should be captioned “Objections to
9 Magistrate Judge’s Findings and Recommendations.” Replies to the objections shall be served
10 and filed within fourteen (14) days after service of the objections. The Court will then review the
11 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
12 failure to file objections within the specified time may waive the right to appeal the District
13 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14
15 IT IS SO ORDERED.

16 **Dated: April 16, 2010**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE