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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BORIS JIMENEZ,		1:10-cv-01654-OWW-DLB (HC)
Petitioner,		FINDINGS AND RECOMMENDATION
v.		REGARDING RESPONDENT’S MOTION TO
		DISMISS
		[Doc. 19]
J. HARVEY,		
Respondent.		

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

Petitioner filed the instant petition for writ of habeas corpus on September 13, 2010. Petitioner challenges the Board of Parole Hearings’ December 15, 2008 determination finding him unsuitable for release. Petitioner contends the Board’s decision violated his federal due process rights because it lacked sufficient evidentiary support and because the composition of the Board’s commissioners does not comply with California Penal Code section 5075(b), which instructs the Governor and California Senate to appoint commissioners who “reflect as nearly as possible a cross section of the racial, sexual, and geographic features of the population of the State.”

On February 3, 2011, the Court dismissed Petitioner’s challenge to the sufficiency of the evidence in light of the Supreme Court’s decision in Swarthout v. Cooke, ___ U.S. ___, 131 S.Ct. 859 (2011) (per curiam). The Court directed Respondent to file a response to Petitioner’s challenge to the composition of the Board’s commissioners.

1 Respondent filed a motion to dismiss on March 18, 2011. Petitioner filed an opposition
2 on April 6, 2011, and Respondent filed a reply on April 11, 2011.

3 DISCUSSION

4 I. Procedural Grounds for Motion to Dismiss

5 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
6 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not
7 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases. A
8 motion to dismiss is a proper response to such petitions. Id.; White v. Lewis, 874 F.2d 599, 602-
9 603 (9th Cir. 1997), superseded by statute on other grounds in Binford v. Rhode, 116 F.3d 396,
10 398-399 n.3 (9th Cir. 1997). The rules governing section 2254 proceedings permit the filing of a
11 motion to dismiss to avoid “the necessity of filing an answer on the substantive merits of the
12 petition.” Rules Governing Section 2254 Cases, Rule 4 advisory committee’s note; Lonchar v.
13 Thomas, 517 U.S. 314, 325-326 (1996); White, 874 F.2d at 602. Thus, if the petition fails to
14 state a cognizable claim, it may be dismissed without a review of the merits.

15 II. Review of Petition

16 “[F]ederal habeas corpus relief does not lie for errors of state law. Swarthout v. Cooke,
17 131 S.Ct. at 861 (quoting Estelle v. McGuire, 502 U.S. 62, 67 (1991)); Pulley v. Harris, 465 U.S.
18 37, 41 (1984); Milton v. Wainwright, 407 U.S. 371, 377 (1972). The Antiterrorism and
19 Effective Death Penalty Act (AEDPA) precludes relief unless the state inmate can demonstrate a
20 constitutional violation based on clearly established federal law as determined by the United
21 States Supreme Court. 28 U.S.C. § 2254(a), (d). Petitioner bears the burden of demonstrating
22 entitlement to federal habeas corpus relief under section 2254. O’Bremski v. Maass, 915 F.2d
23 418, 420 (9th Cir. 1990).

24 A. Failure to State a Cognizable Federal Claim

25 Petitioner contends his federal due process rights were violated by the composition of the
26 Board’s commissioners. As an initial matter, Petitioner’s claim appears to be based entirely on a
27 alleged violation of California Penal Code section 5075(b). Petitioner has not demonstrated that
28 the Due Process Clause of the federal Constitution guarantees that he will be considered for

1 parole by a Board comprised of commissioners of any particular race, sex, economic status, or
2 geographic origin. Absent such clearly established federal law, Petitioner's claim is based
3 entirely on the alleged violation of state law, which is not cognizable via section 2254.

4 B. Failure to Challenge Fact or Duration of Custody

5 A federal court may only grant a petition for writ of habeas corpus if the petitioner can
6 show that "he is in custody in violation of the Constitution" 28 U.S.C. § 2254(a). A habeas
7 corpus petition is the correct method for a prisoner to challenge the "legality or duration" of his
8 confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991), *quoting*, Preiser v. Rodriguez,
9 411 U.S. 475, 485 (1973); Rules Governing Section 2254 Cases, Rule 1 advisory committee's
10 note. State inmates seeking federal habeas corpus relief are limited to challenging their
11 "custody." 28 U.S.C. § 2254(a). In determining when inmates may bring a habeas petition, "the
12 [Supreme] Court has focused on the need to ensure that state prisoners use only habeas corpus
13 (or similar state) remedies when they seek to invalidate the duration of their confinement."
14 Wilkinson v. Dotson, 544 U.S. 74, 81 (2005). Therefore, if success on a inmate's claim does not
15 "necessarily spell speedier release, habeas corpus relief is not available. Id. at 81-82 (holding
16 federal habeas jurisdiction lacking where petitioner's challenged parole eligibility and suitability
17 procedures); Ramirez v. Galaza, 334 F.3d 850, 859 (9th Cir. 2003) ("habeas jurisdiction is absent
18 . . . where a successful challenge to a prison condition will not necessarily shorten the prisoner's
19 sentence.").

20 Petitioner's challenge to the composition of the Board's commissioner must have a
21 sufficient nexus to the fact or duration of his confinement. Bailey v. Hill, 599 F.3d 976, 981 (9th
22 Cir. 2010). Any connect between the racial, sexual, economic or geographic background of the
23 commissioners and the chance Petitioner would be granted parole is too speculative and
24 attenuated to warrant habeas jurisdiction. Furthermore, Petitioner's claim that the Board's
25 commissioners all have backgrounds in law enforcement is not a circumstance controlled by
26 California Penal Code section 5075(b). Nothing in that section requires the Board's
27 commissioners to have a spectrum of employment backgrounds or prohibit the appointment of
28 commissioner with law enforcement experience. Moreover, Petitioner has not shown that his

1 actual parole hearing was conducted by commissioners with law enforcement backgrounds. The
2 presiding commissioner had been a correctional counselor, and the deputy commissioner had no
3 law enforcement history. (Ex. 1, to Motion, Board Transcript.) In fact, Petitioner does not allege
4 either of the Board commissioners who denied his release were responsible for his arrest or
5 prosecution, or had stated prior to his hearing that they considered him unfit for parole release.
6 (Pet. at 25.) Therefore, the composition of the Board's commissioners is not type of severe,
7 immediate restraint on liberty that of which habeas corpus relief protects. Bailey, 599 F.3d at
8 980 ("The custody requirement of the habeas corpus statute is designed to preserve the writ of
9 habeas corpus as a remedy for severe restraints on individual liberty.").

10 RECOMMENDATION

11 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 12 1. Respondent's motion to dismiss the instant petition for writ of habeas corpus,
13 namely, Petitioner's challenge to the composition of the Board of Parole
14 Commissioners be GRANTED; and
- 15 2. The Clerk of Court be directed to enter judgment in favor of Respondent.

16 This Findings and Recommendation is submitted to the assigned United States District
17 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
18 Local Rules of Practice for the United States District Court, Eastern District of California.

19 Within thirty (30) days after being served with a copy, any party may file written objections with
20 the court and serve a copy on all parties. Such a document should be captioned "Objections to
21 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served
22 and filed within fourteen (14) days after service of the objections. The Court will then review the
23 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
24 failure to file objections within the specified time may waive the right to appeal the District
25 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

26 IT IS SO ORDERED.

27 **Dated: April 18, 2011**

/s/ Dennis L. Beck
28 UNITED STATES MAGISTRATE JUDGE