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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LEONCIO PALMA,) 1:10-cv-02120-OWW-SKO-HC
)
Petitioner,) ORDER ON RECONSIDERATION OF THE
) COURT'S ORDER DISMISSING THE
) PETITION WITH LEAVE TO AMEND
v.) (DOC. 7)
)
KATTY ALLISON,) ORDER DISMISSING THE PETITION
) WITH LEAVE TO FILE A FIRST
Respondent.) AMENDED PETITION NO LATER THAN
) THIRTY (30) DAYS AFTER SERVICE OF
) THIS ORDER

ORDER DISMISSING PETITIONER'S
MOTION FOR AN EXTENSION OF TIME
AS MOOT (DOC. 8)

DEADLINE: THIRTY (30) DAYS

Petitioner is a state prisoner proceeding in forma pauperis and pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the petition, which was filed on November 15, 2010.

I. Background

In the petition, Petitioner alleged that he was an inmate of

1 the California Substance Abuse Treatment Facility (CSATF) at
2 Corcoran, California, serving a sentence of life with the
3 possibility of parole imposed in 1990 for a conviction of
4 attempted murder in the San Diego Superior Court. (Pet. 1.)
5 Petitioner challenged a decision of the "board" (presumably
6 California's Board of Parole Hearings) denying Petitioner's
7 application for parole. (Pet. 4.) Petitioner claimed that the
8 evidence was insufficient to support the decision that he
9 continued to pose an unreasonable threat to others, there was no
10 individualized consideration of the appropriate factors of parole
11 suitability, and the board failed to articulate a rational nexus
12 between the factors and the conclusion that Petitioner was
13 presently dangerous to society if released. Petitioner alleged
14 that this violated the state and federal constitutions, and that
15 his continued incarceration was a violation of "due process."
16 (Pet. 4, 5.)

17 However, because Petitioner did not specifically allege
18 exhaustion of all claims and did not sufficiently identify the
19 precise parole decision in issue, leave to file a first amended
20 petition to state a more specific claim was granted by order
21 dated January 4, 2011.

22 On February 9, 2011, Petitioner filed a request for a sixty-
23 day extension of time within which to file a first amended
24 petition (FAP).

25 II. Reconsideration of the Order Dismissing the Petition

26 After the Court's order dismissing the petition with leave
27 to amend issued, the United States Supreme Court decided
28 Swarthout v. Cooke, 562 U.S. -, 131 S.Ct. 859, 861-62 (2011).

1
2 Habeas corpus proceedings are characterized as civil in
3 nature. See, Browder v. Director, Department of Corrections of
4 Illinois, 434 U.S. 257, 269 (1978). Rule 12 of the Rules
5 Governing § 2254 Cases in the United States District Courts
6 (Habeas Rules) provides that the Federal Rules of Civil
7 Procedure, to the extent that they are not inconsistent with any
8 statutory provisions or the rules, may be applied to a habeas
9 proceeding. The Advisory Committee's Notes caution that the
10 civil rules apply only when it would be appropriate to do so and
11 would not be inconsistent or inequitable in the overall framework
12 of habeas corpus. Mayle v. Felix, 545 U.S. 644, 654-655 n.4
13 (2005).

14 A district court has the discretion to reconsider and modify
15 intermediate, non-final dispositions at any time before final
16 judgment is entered. Fed. R. Civ. P. 54(b); Holly D. v.
17 California Institute of Technology, 339 F.3d 1158, 1180 (9th Cir.
18 2003). Further, a court has inherent power to control its docket
19 and the disposition of its cases with economy of time and effort
20 for both the court and the parties. Landis v. North American
21 Co., 299 U.S. 248, 254-255 (1936); Ferdik v. Bonzelet, 963 F.2d
22 1258, 1260 (9th Cir. 1992). Because the Swarthout case appears
23 to govern the types of claims that Petitioner alleged in the
24 initial petition, the Court exercises its discretion to
25 reconsider the order dismissing the initial petition in order to
26 determine whether there are additional grounds for dismissing the
27 petition.

28 The Supreme Court has characterized as reasonable the

1 decision of the Court of Appeals for the Ninth Circuit that
2 California law creates a liberty interest in parole protected by
3 the Fourteenth Amendment Due Process Clause, which in turn
4 requires fair procedures with respect to the liberty interest.
5 Swarthout v. Cooke, 562 U.S. -, 131 S.Ct. 859, 861-62 (2011).

6 However, the procedures required for a parole determination
7 are the minimal requirements set forth in Greenholtz v. Inmates
8 of Neb. Penal and Correctional Complex, 442 U.S. 1, 12 (1979).¹
9 Swarthout v. Cooke, 131 S.Ct. 859, 862. In Swarthout, the Court
10 rejected inmates' claims that they were denied a liberty interest
11 because there was an absence of "some evidence" to support the
12 decision to deny parole. The Court stated:

13 There is no right under the Federal Constitution
14 to be conditionally released before the expiration of
15 a valid sentence, and the States are under no duty
16 to offer parole to their prisoners. (Citation omitted.)
17 When, however, a State creates a liberty interest,
18 the Due Process Clause requires fair procedures for its
19 vindication-and federal courts will review the
20 application of those constitutionally required procedures.
21 In the context of parole, we have held that the procedures
22 required are minimal. In Greenholtz, we found
23 that a prisoner subject to a parole statute similar
24 to California's received adequate process when he
25 was allowed an opportunity to be heard and was provided

21 ¹In Greenholtz, the Court held that a formal hearing is not required
22 with respect to a decision concerning granting or denying discretionary
23 parole; it is sufficient to permit the inmate to have an opportunity to be
24 heard and to be given a statement of reasons for the decision made. Id. at
25 16. The decision maker is not required to state the evidence relied upon in
26 coming to the decision. Id. at 15-16. The Court reasoned that because there
27 is no constitutional or inherent right of a convicted person to be released
28 conditionally before expiration of a valid sentence, the liberty interest in
discretionary parole is only conditional and thus differs from the liberty
interest of a parolee. Id. at 9. Further, the discretionary decision to
release one on parole does not involve retrospective factual determinations,
as in disciplinary proceedings in prison; instead, it is generally more
discretionary and predictive, and thus procedures designed to elicit specific
facts are unnecessary. Id. at 13. In Greenholtz, the Court held that due
process was satisfied where the inmate received a statement of reasons for the
decision and had an effective opportunity to insure that the records being
considered were his records, and to present any special considerations
demonstrating why he was an appropriate candidate for parole. Id. at 15.

1 a statement of the reasons why parole was denied.
2 (Citation omitted.)

3 Swarthout, 131 S.Ct. 859, 862. The Court concluded that the
4 petitioners had received the process that was due as follows:

5 They were allowed to speak at their parole hearings
6 and to contest the evidence against them, were afforded
7 access to their records in advance, and were notified
8 as to the reasons why parole was denied....

9 That should have been the beginning and the end of
10 the federal habeas courts' inquiry into whether
11 [the petitioners] received due process.

12 Swarthout, 131 S.Ct. at 862. The Court in Swarthout expressly
13 noted that California's "some evidence" rule is not a substantive
14 federal requirement, and correct application of California's
15 "some evidence" standard is not required by the federal Due
16 Process Clause. Id. at 862-63.

17 Here, in the initial petition, Petitioner asked this Court
18 to engage in the very type of analysis foreclosed by Swarthout.
19 Thus, pursuant to Swarthout, it appears that the claims alleged
20 in the initial petition were not cognizable in this proceeding.
21 Petitioner's allegations did not point to a real possibility of
22 constitutional error or otherwise entitle Petitioner to habeas
23 relief because California's "some evidence" requirement is not a
24 substantive federal requirement. Review of the record for "some
25 evidence" to support the denial of parole is not within the scope
26 of this Court's habeas review under 28 U.S.C. § 2254.

27 Petitioner's claim that he did not receive a sufficiently
28 individualized consideration of the factors appropriate under
California law is likewise not cognizable. The minimal due
process to which Petitioner is entitled under Swarthout does not
include any particular degree of individualized consideration.

1 Petitioner cites state law concerning the process of
2 granting parole and parole suitability. To the extent that
3 Petitioner's claim or claims rest on state law, they are not
4 cognizable on federal habeas corpus. Federal habeas relief is
5 not available to retry a state issue that does not rise to the
6 level of a federal constitutional violation. Wilson v. Corcoran,
7 562 U.S. — , 131 S.Ct. 13, 16 (2010); Estelle v. McGuire, 502
8 U.S. 62, 67-68 (1991). Alleged errors in the application of
9 state law are not cognizable in federal habeas corpus. Souch v.
10 Schiavo, 289 F.3d 616, 623 (9th Cir. 2002).

11 A petition for habeas corpus should not be dismissed without
12 leave to amend unless it appears that no tenable claim for relief
13 can be pleaded were such leave granted. Jarvis v. Nelson, 440
14 F.2d 13, 14 (9th Cir. 1971).

15 Here, Petitioner did not allege or document facts concerning
16 the actual procedures followed in connection with his parole
17 hearing. Although it appears that Petitioner did receive a
18 statement of reasons for the parole board's decision, it is
19 uncertain whether Petitioner had an opportunity to be heard.
20 Thus, it is possible that Petitioner could state a tenable claim
21 for relief under the Due Process Clause.

22 Accordingly, upon reconsideration of the order dismissing
23 the petition with leave to amend, the Court confirms and adopts
24 the earlier order of dismissal. Further, the Court concludes
25 that Petitioner's claims are subject to dismissal not only
26 because of the reasons detailed in the original order of
27 dismissal, namely, a lack of specificity and failure to allege
28 exhaustion of state court remedies, but also because pursuant to

1 the Swarthout decision, the facts alleged would not entitle
2 Petitioner to any relief in a proceeding pursuant to 28 U.S.C.
3 § 2254.

4 The instant petition must be dismissed for the reasons
5 stated above and for those detailed in the Court's order of
6 January 4, 2011. Petitioner will be given an opportunity to file
7 a first amended petition to cure the deficiencies. Petitioner is
8 advised that failure to file a petition in compliance with this
9 order (i.e., a completed petition with specific, identifiable,
10 cognizable federal claims clearly stated and with exhaustion of
11 state remedies clearly stated) within the allotted time will
12 result in a recommendation that the petition be dismissed and the
13 action be terminated. Petitioner is advised that the amended
14 petition should be entitled, "First Amended Petition," and it
15 must refer to the case number in this action.

16 III. Disposition

17 Accordingly, after reconsidering its order of January 4,
18 2011, dismissing the petition with leave to amend, it is ORDERED
19 that:

20 1) The petition is DISMISSED with leave to amend for lack
21 of specificity, failure to allege exhaustion of state court
22 remedies, and failure to state a claim cognizable in a proceeding
23 pursuant to 28 U.S.C. § 2254; and

24 2) Petitioner is GRANTED thirty (30) days from the date of
25 service of this order to file a first amended petition in
26 compliance with this order; and

27 3) Petitioner's motion for an extension of sixty days
28 within which to file a first amended petition is DISMISSED as

1 moot; and

2 4) The Clerk of the Court is DIRECTED to send Petitioner a
3 form petition pursuant to 28 U.S.C. § 2254.

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5 IT IS SO ORDERED.

6 **Dated: May 9, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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