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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLIFFORD LEE BAIR,

Petitioner,

No. CIV S-07-2356 MCE DAD P

vs.

CLAUDE FINN, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On June 11, 2008, the undersigned ordered respondent to file and serve a response to the petition. On June 30, 2008, respondent moved to dismiss the petition on the grounds that it fails to state a cognizable claim for federal habeas relief and is untimely. Petitioner has filed an opposition to respondent’s motion to dismiss. Respondent has not filed a reply.

BACKGROUND

On October 19, 2007, petitioner commenced this action by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. On November 2, 2007, the Northern District transferred the case to this court where venue was proper.

1 In the petition it is claimed that the Board of Parole Hearings (“Board”) has
2 delayed petitioner’s parole hearings and effectively added nineteen months to his sentence.
3 Specifically, petitioner claims that the Board scheduled his initial parole hearing for August
4 1999. However, the hearing did not take place until April 2000. Similarly, petitioner claims that
5 the Board scheduled his first subsequent parole hearing for April 2003. However, that hearing
6 did not take place until July 2003. Finally, petitioner claims that the Board scheduled his second
7 subsequent hearing for July 2006. However, the hearing did not take place until March 2007.
8 According to petitioner’s calculation, the Board’s delays have added nineteen months to his
9 sentence in violation of his rights under the Due Process Clause. (Pet. at 5 & Ex. A.)

10 **RESPONDENT’S MOTION TO DISMISS**

11 Respondent has moved to dismiss the petition, arguing that petitioner’s claims are
12 based on alleged violations of state law for which he is not entitled to federal habeas relief.
13 Specifically, respondent observes that petitioner is claiming that the delays in holding his parole
14 hearings should be added together and applied so as to advance the date he is to appear before the
15 Board for his third subsequent parole hearing. Respondent contends that petitioner’s claims
16 amount to nothing more than an alleged violation of state law. (Resp’t’s Mot. to Dismiss at 4.)

17 Respondent also argues that petitioner’s claims pertaining to his April 2000 and
18 July 2003 parole hearings are barred by the applicable statute of limitations. Specifically,
19 respondent argues that any possible claims stemming from these hearings were obvious to
20 petitioner at the time of the hearings. Thus, absent any applicable tolling he had one year
21 thereafter, until April 2001 and July 2003 respectively, to bring any federal claims related to
22 these parole hearings. Petitioner did not initiate any challenge to the hearing delays in the state
23 courts until May 2007. By that time, the statute of limitations had expired. (Resp’t’s Mot. to
24 Dismiss at 6.)

25 Finally, respondent argues that petitioner’s allegations do not establish standing
26 and are too vague and conclusory to challenge his March 2007 parole hearing. Specifically,

1 respondent argues that petitioner has not alleged any facts or set forth any evidence to support a
2 challenge to the March 2007 parole hearing. (Resp't's Mot. to Dismiss at 5-6.)

3 **PETITIONER'S OPPOSITION**

4 In opposition to respondent's motion to dismiss, petitioner argues that he has a
5 federal liberty interest in parole and in timely parole hearings. He argues that, because the Board
6 denied him parole three times for three years, his next parole hearing should have been scheduled
7 for August 2008, which is nine years after his initial parole hearing was scheduled. Petitioner's
8 next parole hearing, however, is not scheduled to take place until March 2010, ten years and
9 seven months after his initial parole hearing was scheduled. Petitioner contends that he has been
10 prejudiced by the delay in his parole hearings and asks this court to schedule his next hearing
11 according to the Board's denials not including its delays. (Pet'r's Opp'n to Resp't's Mot. to
12 Dismiss at 2-5.)

13 **ANALYSIS**

14 I. Standard of Review

15 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
16 dismiss a petition if it "plainly appears from the face of the petition and any exhibits annexed to
17 it that the petitioner is not entitled to relief in the district court. . . ." Rule 4, Rules Governing
18 Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may
19 dismiss a petition for writ of habeas corpus at several stages of a case, including "summary
20 dismissal under Rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the
21 answer and petition are considered; or a dismissal after consideration of the pleadings and an
22 expanded record."

23 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
24 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,
25 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.
26 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the

1 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
2 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas
3 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377
4 (1972).

5 II. Discussion

6 In this case, petitioner does not challenge a specific Board of Parole Hearings'
7 decision to deny him parole. Rather, petitioner claims that the Board's delays in his parole
8 hearings violate his rights under the Due Process Clause. However, petitioner cites no authority
9 in support of his claim and has failed to demonstrate that any delays in his parole hearings
10 violated his rights under the United States Constitution. See Candray v. Hartley, No. CIV F-08-
11 1860 SMS HC, 2009 WL 55016 *1 (E.D. Cal. Jan. 8, 2009) (dismissing petitioner's claims
12 regarding parole board's alleged failure to provide him with timely parole hearings because due
13 process does not require accordance with the specific time periods provided for by state law and
14 the prisoner had failed to establish prejudice resulting from any delay); Wyatt v. Sisto, No. CIV
15 S-07-0636 GHK(E), 2008 WL 2620356 *3 (C.D. Cal. June 30, 2008) (eight-month delay in the
16 holding of a parole hearing does not merit federal habeas relief because he did not establish
17 prejudice). Cf. Johnson v. Papaarozzi, 219 F. Supp. 2d 635, 652 (D.N.J 2002) (dismissing §
18 1983 claim regarding parole board's late hearings and decisions because "due process 'does not
19 include receiving a parole hearing in exact accordance with the specific time period required by
20 [state regulations].'"); Winfield v. Schwarzenegger, No. CIV S-07-1076 LKK GGH P, 2008 WL
21 662958 *1 (E.D. Cal. Mar. 7, 2008) (dismissing § 1983 action because two-week delay in parole
22 hearing does not violate due process). But see Cook v. Sisto, No. CIV S-07-0387 LKK GGH P,
23 2008 WL 72845 *1 (E.D. Cal. Jan. 4, 2008) (finding that petitioner may state a colorable
24 procedural due process claim for Board's failure to provide him with written basis for extending
25 the date of his suitability hearings).

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1 Moreover, to the extent that petitioner has stated a cognizable habeas claim, the
2 denial of a timely parole proceeding is not a per se violation of due process. To show an
3 untimely parole hearing violated due process, petitioner must show that the delays were
4 unreasonable and prejudicial. Federal courts grant habeas relief for delay where the petitioner
5 demonstrates that the delay was unreasonable and prejudicial. Hopper v. U.S. Parole
6 Commission, 702 F.2d 842, 847 (9th Cir. 1983); Meador v. Knowles, 990 F.2d 503, 506 (9th Cir.
7 1993) (parole commission's delay in holding parole revocation hearing violates due process if it
8 is unreasonable and prejudicial). Here, the delays in conducting petitioner's parole hearings,
9 while certainly not ideal, were reasonable in their purpose. For example, the Board explained to
10 petitioner that it postponed his May 2003 parole hearing because of a Board member's illness
11 and then scheduled petitioner's hearing on the next available calendar date of July 25, 2003. In
12 addition, the Board postponed petitioner's October 2006 hearing because it appears it was
13 awaiting petitioner's psychological report. Again, in that instance the Board scheduled
14 petitioner's hearing on the next available calendar date of March 30, 2007. (Pet. Ex. B.)

15 More importantly, petitioner has not shown that any of the alleged delay in
16 conducting his parole hearings prejudiced him. For example, petitioner does not contend, and
17 the record does not show, that any delay influenced the Board's decisions to deny him parole.
18 Nor did any of the alleged delays affect the Board's ability to consider material evidence.
19 Finally, at each of petitioner's parole hearings, the Board has denied him parole. Accordingly,
20 the court concludes that respondent's motion to dismiss should be granted, and petitioner's
21 federal petition for a writ of habeas corpus should be dismissed.¹

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25 ¹ In light of the court's recommendations that respondent's motion to dismiss be granted,
26 the court need not address respondent's alternative arguments regarding the timeliness of the
petitioner's federal petition.

1 **CONCLUSION**

2 IT IS HEREBY RECOMMENDED that:

- 3 1. Respondent's June 30, 2008 motion to dismiss (Doc. No. 9.) be granted; and
4 2. This action be closed.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen
7 days after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
10 shall be served and filed within ten days after service of the objections. The parties are advised
11 that failure to file objections within the specified time may waive the right to appeal the District
12 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

13 DATED: January 26, 2009.

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16 DALE A. DROZD
17 UNITED STATES MAGISTRATE JUDGE

17 DAD:9
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