UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL C. JONES,

Petitioner,

v.

GARY SWARTHOUT,

Respondent.

No. 2:11-cv-1497-KJM-EFB P

FINDINGS AND RECOMMENDATIONS

This is an action by a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On July 18, 2012, findings and recommendations were filed which recommended that the petition be dismissed. ECF Nos. 8, 11. The petition contains five claims for relief. The findings and recommendations addressed all but one of the claims on the merits. *See id.* The remaining claim, that the Board of Parole Hearings violated petitioner's First Amendment rights, was found to be unexhausted and it was recommended, mistakenly, that it be dismissed on that basis. ECF No. 11 at 5-6. The district judge reviewed the findings and recommendations, and concluded that the First Amendment claim could not be dismissed on the basis of exhaustion. Rather, "[w]hen a prisoner files a petition containing both exhausted and unexhausted claims, the district court may dismiss the entire petition or stay the petition, allowing the prisoner to fulfill the exhaustion requirement before continuing with federal proceedings." *See* ECF No. 12 at 2 (citing *Rhines v. Weber*, 544 U.S. 269, 275-276 (2005)*; King v. Ryan*, 564 F.3d 1133, 1141 (9th Cir. 2009)). Thus, as the district judge explained, the court may not dismiss

unexhausted claims for failure to exhaust while also reviewing exhausted claims on the merits. Therefore, the district judge referred the matter back to the assigned magistrate judge to determine whether the petition should be (1) dismissed in its entirety based on the unexhausted claim; (2) stayed to allow petitioner to exhaust state remedies for his First Amendment claim; or (3) dismissed on the merits. *Id.* at 3. For the reasons explained below, it is recommended that the petition be dismissed on the merits.

As to the unexhausted claim, petitioner alleges that the Board of Parole Hearings violated his First Amendment right to "free speech" by "trying to force petitioner to admit guilt to his offense." ECF No. 8 at 5. However, there is no constitutional right not to admit guilt at a parole hearing. *Mezhbein v. Early*, No. C 98-4048 PJH, 2002 U.S. Dist. LEXIS 7735, at *12-14 (N.D. Cal. Apr. 22, 2002). Although California law precludes the Board from requiring an inmate to admit guilt, *see* Cal. Pen. Code § 5011(b) ("The Board . . . shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed"), it does not follow that "[t]he United States Constitution . . . preclude[s] harsher punishment for convicted felons who deny their guilt." *Ochoa v. Marshall*, No. CV 08-5337 AHS, 2008 U.S. Dist. LEXIS 118829, at *21-22 (C.D. Cal. Oct. 9, 2008). Thus, even if the Board found petitioner unsuitable because he would not admit his guilt, it would not entitle him to federal habeas relief. *Id.* at 22.

As noted in the July 18, 2012 findings and recommendations, petitioner was present at his parole hearing, was given an opportunity to be heard, and was provided a statement of reasons for the denial of parole. ECF No. 11 at 3. While petitioner may disagree with the Board's reasons for denying parole, "[t]he Constitution does not require more." *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 16 (1979).

To the extent petitioner seeks habeas relief on the ground that the Board violated section 5011(b), this is a state law claim for which federal habeas relief is not available. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (federal habeas unavailable for violations of state law or for alleged error in the interpretation or application of state law); *Roberts v. Hartley*, 640 F.3d 1042, 1046 (9th Cir. 2011) ("A state's misapplication of its own laws does not provide a basis for granting a federal writ of habeas corpus.").

Therefore, petitioner's First Amendment claim lacks merit and must be dismissed on the merits. Further, for the reasons previously stated in the July 18, 2012 findings and recommendations (ECF No. 11), the other claims also lack merit and should be dismissed.

Accordingly, it is hereby RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus be dismissed; and

2. The Clerk be directed to close the case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In his objections petitioner may address whether a certificate of appealability should issue in the event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing § 2255 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

Dated: February 4, 2014.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE