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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEROME THOMAS, II,
Petitioner,

No. C 08-3901 MHP (pr)

ORDER OF DISMISSAL

v.

CALIFORNIA BOARD OF
PAROLE HEARINGS,
Respondent.

_____ /

INTRODUCTION

Jerome Thomas, II, formerly a prisoner of the State of California and now on parole, filed this pro se action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has moved to dismiss, and Thomas has not filed an opposition. For the reasons discussed below, the action will be dismissed.

BACKGROUND

Thomas states in his amended petition that he was sentenced in 1983 to an indeterminate term of 15 years to life in prison for a second degree murder conviction, was released from prison on December 28, 2006, and then started a five-year parole term. His release from custody occurred when this court granted his petition for writ of habeas corpus in Thomas v. Curry, C 05-1332 MHP. In granting that petition, the court determined after determining that there was insufficient evidence to support the California Governor's March 2003 decision that reversed the February 2003 grant of parole by the Board of Prison Terms.

United States District Court
For the Northern District of California

1 The petition here focuses on the parole period. When Thomas was released from
2 prison in December 2006, he was told his parole period was five years and that it began when
3 he was released from prison. Thomas believes the parole period should be terminated
4 "because the length of his time in prison and time that he has spent on parole exceeds the
5 amount of time he was required to be in actual custody behind prison walls and/or in the
6 constructive custody that parole constitutes." Amended Petition, p. 3.

7 The court ordered respondent to file a response to Thomas' claim that his right to due
8 process was violated when the parole authority failed to reduce his parole period by applying
9 credit for actual custody time served in excess of the term set by the BPT at the 2003 hearing.
10 The court explained that, "[a]lthough there is disagreement among courts as to whether the
11 matter of early parole termination should be treated as a claim for relief or a remedy or
12 neither, it cannot be said that the claim is patently meritless." Order To Show Cause, p. 2.

13 Respondent then moved to dismiss on the grounds that the petition failed to raise a
14 federal question and was successive. Thomas did not file an opposition to the motion to
15 dismiss.

16 DISCUSSION

17 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
18 custody pursuant to the judgment of a State court only on the ground that he is in custody in
19 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).
20 The writ may issue "only on the basis of some transgression of federal law binding on the
21 state courts." Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac,
22 456 U.S. 107, 119 (1982)). It is unavailable for violations of state law or for alleged error in
23 the interpretation or application of state law. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
24 see, e.g., Little v. Crawford, 449 F.3d 1075, 1082 (9th Cir. 2006).

25 The scope of the federal due process right that exists with regard to California
26 prisoners claiming an entitlement to parole have been discussed in several recent Ninth
27 Circuit cases. A federal district court reviewing a California parole decision "must determine
28 'whether the California judicial decision approving the governor's [or the Board's] decision

1 rejecting parole was an ‘unreasonable application’ of the California ‘some evidence’
2 requirement, or was ‘based on an unreasonable determination of the facts in light of the
3 evidence.’” Hayward v. Marshall, 603 F.3d 546, 562-63 (9th Cir. 2010) (en banc) (quoting
4 28 U.S.C. § 2254(d)(1)-(2)). That requirement was summarized in Hayward as follows:

5 As a matter of California law, ‘the paramount consideration for both the Board
6 and the Governor under the governing statutes is whether the inmate currently
7 poses a threat to public safety.’ There must be ‘some evidence’ of such a
8 threat, and an aggravated offense ‘does not, in every case, provide evidence
9 that the inmate is a current threat to public safety.’

10 Id. at 562 (quoting In re Lawrence, 44 Cal. 4th 1181, 1205 (Cal. 2008));

11 A Ninth Circuit case released in early July 2010 stated that the remedy available to a
12 successful parole habeas applicant was not limited to another hearing and could include an
13 order for his release from custody. Pirtle v. California Board of Prison Terms, 611 F.3d
14 1015, 1025 (9th Cir. 2010). The law then changed. A couple of weeks after Pirtle was
15 issued, the California Supreme Court decided that the power to grant and revoke parole is
16 vested in the state executive branch rather than the judicial branch. See In re Prather, 234
17 P.3d 541 (Cal. 2010). “Prather determined that prisoners whose parole denials were not
18 based on ‘some evidence’ of current dangerousness are entitled under state law only to a new
19 parole-suitability decision by the state executive, and not to release from custody or a judicial
20 parole determination.” Haggard v. Curry, No. 10-16819, slip op. 1, 10 (9th Cir. Oct. 12,
21 2010). Although Haggard’s discussion was in the context of ruling on a motion to stay an
22 order releasing the prisoner pending appeal of his successful habeas petition, the issue
23 resolved was germane to the eventual resolution of the case and is a holding that binds this
24 court. See United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001). Haggard further
25 explained why Pirtle was no longer good authority on the power to order a petitioner’s
26 release from prison:

27 Prather thus represents a further refinement by the California Supreme Court of the
28 scope of state prisoners’ liberty interest in parole. Because Prather clarifies that a
California prisoner’s “right of personal liberty,” Pirtle, 611 F.3d at 1025, does not
encompass the right to release on parole if the parole denial was not based on “some
evidence” of current dangerousness, Prather corrects our prior implicit assumption
that a federal habeas court could enforce California state-created liberty interest by
ordering the release of the prisoner.

