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

LAWRENCE MARTINEZ,

Petitioner,

Respondent.

vs. BEN CURRY,

BEN CURR I

No. C 09-2116 MMC (PR) ORDER TO SHOW CAUSE

On May 14, 2009, petitioner, a California prisoner incarcerated at the Correctional
Training Facility, Soledad, and proceeding pro se, filed the above-titled petition for a writ of
habeas corpus pursuant to 28 U.S.C. § 2254, challenging the denial of parole by the
California Board of Parole Hearings ("Board"). Petitioner has paid the filing fee.

# BACKGROUND

In 1988, in the Superior Court of Imperial County ("Superior Court"), petitioner was
convicted of kidnap for robbery. He was sentenced to a term of seven years to life in state
prison. In 2007, the Board, for the eighth time, denied petitioner parole. Petitioner
challenged that decision by habeas petitions filed in the Superior Court and the California
Court of Appeal, and by a petition for review filed in the California Supreme Court. The
Supreme Court denied the petition for review on March 24, 2009.

### DISCUSSION

# 2 A. <u>Standard of Review</u>

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3 This Court may entertain a petition for a writ of habeas corpus "in behalf of a person 4 in custody pursuant to the judgment of a State court only on the ground that he is in custody 5 in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an 6 7 order directing the respondent to show cause why the writ should not be granted, unless it 8 appears from the application that the applicant or person detained is not entitled thereto." 9 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the 10 petition are vague or conclusory, palpably incredible, or patently frivolous or false. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison, 11 431 U.S. 63, 75-76 (1977)). 12

# 13 B. <u>Petitioner's Claim</u>

In his petition, petitioner asserts the Board's decision to deny him parole violated his
right to due process because it was not based on some reliable evidence that petitioner poses
a risk to the community, but rather was based on unchanging facts regarding his commitment
offense and criminal history. Liberally construed, petitioner's claim is cognizable.

**CONCLUSION** 

For the reasons stated above, the Court orders as follows:

1. The Clerk shall serve by certified mail a copy of this order, the petition and all
 attachments thereto, on respondent and respondent's counsel, the Attorney General for the
 State of California. The Clerk shall also serve a copy of this order on petitioner.

2. Respondent shall file with the Court and serve on petitioner, within ninety (90)
 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
 be granted based on petitioner's cognizable claims. Respondent shall file with the answer
 and serve on petitioner a copy of all portions of the state trial record that previously have
 been transcribed and that are relevant to a determination of the issues presented by the

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petition. 1

2 3. If petitioner wishes to respond to the answer, he shall do so by filing a traverse 3 with the Court and serving it on respondent's counsel within thirty (30) days of the date the answer is filed. 4

5 4. In lieu of an answer, respondent may file, within **ninety** (90) days of the date this order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory 6 7 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files 8 such a motion, petitioner shall file with the Court and serve on respondent an opposition or 9 statement of non-opposition within thirty (30) days of the date the motion is filed, and 10 respondent shall file with the Court and serve on petitioner a reply within fifteen (15) days of the date any opposition is filed.

5. Petitioner is reminded that all communications with the Court must be served on respondent by mailing a true copy of the document to respondent's counsel.

14 6. It is petitioner's responsibility to prosecute this case. Petitioner must keep the Court and respondent informed of any change of address and must comply with the Court's 15 16 orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). 17

18 7. Upon a showing of good cause, requests for a reasonable extension of time will be 19 granted provided they are filed on or before the deadline they seek to extend.

IT IS SO ORDERED.

21 DATED: August 24, 2009

United States District Judge

**United States District Court** For the Northern District of California

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