

1 In the present case, on September 2, 2008, Respondent filed a
2 motion to dismiss the petition, alleging that: (1) some of
3 Petitioner's claims were not properly exhausted at the state level;
4 and (2) even if they were exhausted, they are without merit and do
5 not warrant federal habeas relief. (Mot. to Dismiss at 3-4.) On
6 October 10, 2008, Petitioner filed an opposition as well as a
7 motion for leave to amend the petition to strike his equal
8 protection claim as unexhausted. (Opp'n at 2.) On October 21,
9 2008, Respondent filed a reply. On November 6, 2008, Petitioner
10 filed a response to the reply.

11 For the reasons discussed below, the Court GRANTS
12 Petitioner's motion to amend the petition by striking the equal
13 protection claim, DENIES Respondent's motion to dismiss the
14 petition as not fully exhausted, appoints counsel for Petitioner on
15 its own motion, and reinstates the Court's May 2, 2008 order to
16 show cause as to the now fully exhausted petition.

17 BACKGROUND

18 On March 13, 1987, Petitioner was convicted of one count of
19 second degree murder and one count of attempted murder. (Pet. at
20 1.) He was sentenced to fifteen years to life imprisonment. (Id.)
21 On January 26, 2006, Petitioner appeared before the Board for his
22 seventh parole suitability hearing. (Id. at 6.) The Board found
23 Petitioner unsuitable for parole. (Id. at 16.)

24 Petitioner challenged the Board's decision by filing a state
25 habeas petition in the Los Angeles County Superior Court, which
26 denied it on May 16, 2007. (Id. at 3.) On October 23, 2007,
27 Petitioner filed a state habeas petition in the California Court of
28 Appeal, which denied it on October 26, 2007. (Pet., Ex. 9.) On

1 November 5, 2007, Petitioner filed a petition for review in the
2 California Supreme Court, which denied it on January 3, 2008.
3 (Id., Ex. 10.)

4 Petitioner filed the present petition, alleging that: (1) the
5 commitment offense no longer constitutes "some evidence" of current
6 dangerousness (Claim One); (2) the Board violated his due process
7 rights by failing to consider his age at the time of the offense
8 (Claim Two); (3) the Board violated his due process rights by
9 failing to consider significant stress related to the offense
10 (Claim Three); and (4) he was denied equal protection under the law
11 (Claim Four).¹ (Id. at 5.)

12 DISCUSSION

13 Respondent argues that not all of Petitioner's claims were
14 properly presented to the California Supreme Court. In his
15 opposition, Petitioner concedes that the equal protection claim is
16 unexhausted, and moves for leave to amend the petition to strike
17 that unexhausted claim.

18 Petitioner lists four grounds for relief. (Pet. at 5.)
19 Claims One through Three can be characterized as a single due
20 process claim. (Id.) In Claim Four, Petitioner alleges the
21 California courts violated his right to equal protection under the
22 law by denying his petition. (Id. at 19.)

23 In the motion to dismiss, Respondent describes Claim One as a
24 due process claim, which he concedes is exhausted. (Mot. to
25 Dismiss at 2.) Respondent then conflates Claims Two, Three and
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27 ¹ In the petition, these claims are labeled "Claims I.C.(a)
28 through I.C.(d)." For clarity, the Court will refer to them in
this Order as Claims One through Four.

1 Four into one equal protection claim. (Id.) Respondent argues
2 that Petitioner's composite equal protection claim is unexhausted
3 because he failed to raise it in the state courts before seeking
4 federal relief. (Id. at 3.)

5 Petitioner argues that Claims Two and Three, identified by
6 Respondent as part of his unexhausted equal protection claim, are
7 clearly part of his due process claim. (Sur-reply at 2.)

8 The Court finds unavailing Respondent's argument that Claims
9 Two and Three should be considered as part of Petitioner's
10 unexhausted equal protection claim. In his federal petition,
11 Petitioner labels Claims Two and Three as due process claims in
12 their titles. However, when describing these claims in detail, he
13 states that "Petitioner's right to due process and equal
14 protection . . . was violated." (Id. at 27.)

15 Despite Petitioner mis-characterizing these claims as both
16 equal protection and due process claims in his federal petition,
17 the record demonstrates that he raised Claims Two and Three as due
18 process claims in state court. In his state appellate petition,
19 Petitioner presented these claims initially under the umbrella of
20 his single due process claim that it was a "violation of
21 Petitioner's right to due process . . . when the Board of Parole
22 Hearings denied him parole absent 'some evidence'" (Resp't
23 Ex. 2 at 5.) Petitioner also labeled Claims Two and Three as both
24 equal protection and due process claims in his petition for review
25 before the California Supreme Court, stating: "Was it a violation
26 of due process and equal protection under the law for the [B]oard
27 (1) to not consider and weigh Petitioner's age at the time of the
28 commitment offense? and (2) failed to consider the significant

1 stress he was under when he committed the offense?" (Resp't Ex. 1
2 at 5.) However, in the body of his petition, he claimed a due
3 process violation based on the Board's failure to consider his age
4 and significant stress factors at the time of the offense. (Id. at
5 5-6.) While Petitioner's confusion may have led to Claims Two and
6 Three being mis-labeled in the petition for review as equal
7 protection claims, his confused arguments will not defeat his
8 adequate efforts to assert his federal due process claim in state
9 court, particularly in light of his pro se status. See Sandgathe
10 v. Maass, 314 F.3d 371, 378 (9th Cir. 2002) (neither confused
11 arguments nor poor lawyering will necessarily defeat a pro se
12 petitioner's otherwise adequate efforts to assert a federal claim
13 in state court). For purposes of exhaustion, pro se petitions in
14 state court may be read differently from counseled petitions.
15 Peterson v. Lampert, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc)
16 ("[T]he complete exhaustion rule is not to trap the unwary pro se
17 prisoner.") (citation omitted). "When a document has been written
18 by counsel, a court should be able to attach ordinary legal
19 significance to the words used in that document." Id. at 1158.
20 When it has been written by a pro se petitioner, a court may need
21 to be more flexible. See, e.g., Sanders v. Ryder, 342 F.3d 991,
22 999 (9th Cir. 2003) (petitioner's pro se status in state court was
23 a factor in favor of finding exhaustion where prisoner claimed
24 ineffective assistance of counsel but failed to cite federal
25 constitution or federal case law in support of his claim). Here,
26 Petitioner "fairly presented" Claims Two and Three as part of his
27 federal due process claim in state court; therefore, the Court
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1 finds that they are exhausted and considers them as part of Claim
2 One, his exhausted due process claim.

3 Petitioner requests that the Court strike Claim Four, the
4 unexhausted equal protection claim. He indicates that, for
5 "judicial economy," he does not wish to pursue Claim Four;
6 therefore, the Court should proceed with the remaining exhausted
7 due process claim.

8 A federal district court must dismiss a federal habeas
9 petition containing any claim as to which state remedies have not
10 been exhausted. Rose v. Lundy, 455 U.S. 509, 522 (1982). When
11 faced with a post-AEDPA mixed petition, such as the present
12 petition, the court must on its own motion provide the petitioner
13 an opportunity to amend the mixed petition by striking unexhausted
14 claims as an alternative to suffering dismissal. Jefferson v.
15 Budge, 419 F.3d 1013, 1016 (9th Cir. 2005) (citing Rhines v.
16 Webber, 544 U.S. 269, 277 (2005)); Hunt v. Pliler, 384 F.3d 1118,
17 1125 (9th Cir. 2004); Olvera v. Giurbino, 371 F.3d 569, 573 (9th
18 Cir. 2004); James v. Pliler, 269 F.3d 1124, 1125-26 (9th Cir.
19 2001); Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000); see
20 also Guillory v. Roe, 329 F.3d 1015, 1017-18 (9th Cir. 2003) (error
21 for district court to deny petitioner's motion to strike
22 unexhausted claims as an alternative to suffering dismissal).

23 Because Petitioner has asked to strike the unexhausted equal
24 protection claim, the Court construes his request as a motion to
25 amend the petition to delete that claim. The Court GRANTS
26 Petitioner's motion, strikes the unexhausted equal protection
27 claim, and reinstates the Court's May 2, 2008 order to show cause
28 as to the now fully exhausted petition. The parties are directed

1 to abide by the briefing schedule outlined below.

2 Because the Court has construed Claims Two and Three as part
3 of Petitioner's due process claim, it need not address Respondent's
4 alternative argument that the equal protection claims asserted in
5 Claims Two and Three are without merit and do not warrant habeas
6 relief.

7 As discussed above, Petitioner has two prior habeas actions.
8 In both of these actions Petitioner is represented by Steve M.
9 Defilippis of Picone & Defilippis, APLC. Mr. Defilippis has
10 informed clerk's office staff that he is willing and able to accept
11 appointment on Petitioner's behalf because he is already familiar
12 with Petitioner's file.

13 The Sixth Amendment's right to counsel does not apply in
14 habeas corpus actions. See Knaubert v. Goldsmith, 791 F.2d 722,
15 728 (9th Cir. 1986). The Court may, however, appoint counsel to
16 represent a habeas petitioner whenever "the court determines that
17 the interests of justice so require and such person is financially
18 unable to obtain representation." 18 U.S.C. § 3006A(a)(2)(B). The
19 decision to appoint counsel is within the discretion of the
20 district court. See Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir.
21 1986); Knaubert, 791 F.2d at 728; Bashor v. Risley, 730 F.2d 1228,
22 1234 (9th Cir. 1984).

23 The Court finds that the appointment of Mr. Defilippis to
24 represent Petitioner is warranted in this action. Accordingly, in
25 the interests of justice and good cause appearing, the Court on its
26 own motion appoints Mr. Defilippis to represent Petitioner.

27 CONCLUSION

28 1. Petitioner's motion to amend the petition to strike

1 Claim Four, the unexhausted equal protection claim, (docket no. 5)
2 is GRANTED. Therefore, the Court strikes the unexhausted equal
3 protection claim.

4 2. Respondent's motion to dismiss (docket no. 4) is DENIED.

5 3. The Court on its own motion appoints Stephen M.
6 Defilippis (SBN 117292) of Picone & Defilippis, APLC of 625 North
7 First Street, San Jose, California 95112, to represent Petitioner
8 in this action. Petitioner's counsel should seek reimbursement
9 pursuant to 18 U.S.C. § 3006A(d) and (e) via the Federal Public
10 Defender's Office. The Court directs Petitioner's counsel to abide
11 by the briefing schedule outlined below.

12 4. The Court's May 2, 2008 order to show cause is
13 reinstated as to his due process claim, which includes Claims One
14 through Three.

15 Respondent is ordered to file an answer and supporting
16 documents within sixty (60) days from the date of this Order.
17 Respondent shall file with an answer a copy of all state records
18 that have been transcribed previously and that are relevant to a
19 determination of the issues presented by the petition.

20 If Petitioner's counsel wishes to respond to the answer, he
21 shall do so by filing a traverse with the Court and serving it on
22 Respondent within thirty (30) days of his receipt of the answer.
23 Should Petitioner's counsel fail to do so, the petition will be
24 deemed submitted and ready for decision thirty (30) days after the
25 date Petitioner's counsel is served with Respondent's answer.


26 5. The Clerk of the Court shall send a copy of this Order
27 to Petitioner's counsel, to Petitioner, to the Federal Public
28 Defender, and to Respondent.

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6. This Order terminates Docket nos. 4 and 5.

IT IS SO ORDERED.

DATED: September 22, 2009



CLAUDIA WILKEN
United States District Judge