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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

LUTHER G. JAMISON,
Petitioner,
vs.
ROBERT L. AYERS, Warden,
Respondent.

No. C 08-5601 PJH (PR)

**ORDER DENYING
PETITIONER'S MOTIONS
FOR APPOINTMENT OF
COUNSEL AND TO
RECONSIDER, AND
GRANTING RESPONDENT'S
MOTION TO DISMISS**

This is a habeas case filed pro se by a state prisoner. It was dismissed with leave to amend in the initial review order. After petitioner amended, the court dismissed all claims except his contention that the denial of parole was not supported by "some evidence" and that the denial violated his equal protection rights. Petitioner has moved to reconsider the dismissal and for appointment of counsel, and respondent has moved to dismiss for failure to exhaust.

DISCUSSION

**I. Petitioner's Motions to Reconsider and for Counsel
A. Motion to Reconsider**

The local rules of this court require that a litigant obtain leave of court before filing a motion to reconsider. See Civil L.R. 7-9(a). Petitioner has not asked for or obtained permission; the motion to reconsider will be denied for this reason.

Alternatively, the motion will be treated as a motion for leave to file a motion to reconsider. Under Local Rule 7-9(b), a party seeking leave to file a motion to reconsider must specifically show: (1) that at the time of the motion for leave, a material difference in

United States District Court
For the Northern District of California

1 fact or law exists from that which was presented to the court before entry of the
2 interlocutory order for which the reconsideration is sought, and that in the exercise of
3 reasonable diligence the party applying for reconsideration did not know such fact or law at
4 the time of the interlocutory order; or (2) the emergence of new material facts or a change
5 of law occurring after the time of such order; or (3) a manifest failure by the court to
6 consider material facts which were presented to the court before such interlocutory order.
7 See Civil L.R. 7-9(b).

8 Petitioner's argument in the motion to reconsider is that his rights under California
9 law have been violated, and that there thus was a violation of his constitutional rights. As
10 the court noted in the order to show cause, petitioner may not "transform a state-law issue
11 into a federal one merely by asserting a violation of due process." *Longford v. Day*, 110
12 F.3d 1380, 1389 (9th Cir. 1996). For this reason, allowing the motion to reconsider would
13 be futile, as petitioner cannot state a federal habeas claim as to this ground.

14 **B. Motion for Counsel**

15 The Sixth Amendment's right to counsel does not apply in habeas corpus actions.
16 *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). However, 18 U.S.C. §
17 3006A(a)(2)(B) authorizes appointment of counsel to represent a habeas petitioner
18 whenever "the court determines that the interests of justice so require and such person is
19 financially unable to obtain representation."

20 Petitioner has presented his claims adequately in the petition, and they are not
21 particularly complex. The interests of justice do not require appointment of counsel. The
22 motion for appointment of counsel will be denied.

23 **II. Respondent's Motion to Dismiss**

24 Respondent moves to dismiss the petition on grounds petitioner has not exhausted.

25 An application for a federal writ of habeas corpus filed by a prisoner who is in state
26 custody pursuant to a judgment of a state court may not be granted unless the prisoner has
27 first exhausted state judicial remedies, either by way of a direct appeal or in collateral
28 proceedings, by presenting the highest state court available with a fair opportunity to rule
on the merits of each and every issue he or she seeks to raise in federal court. See 28

1 U.S.C. § 2254(b),(c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).¹ Petitioner has the
2 burden of pleading exhaustion in his or her habeas petition. See *Cartwright v. Cupp*, 650
3 F.2d 1103, 1104 (9th Cir. 1981).

4 “A petitioner fully and fairly presents a claim to the state courts if he presents the
5 claim (1) to the correct forum, see § 2254(c); (2) through the proper vehicle, see *Castille v.*
6 *Peoples*, 489 U.S. 346, 351 (1989); and (3) by providing the factual and legal basis for the
7 claim, see *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). Full and fair
8 presentation additionally requires a petitioner to present the substance of his claim to the
9 state courts, including a reference to a federal constitutional guarantee and a statement of
10 facts that entitle the petitioner to relief.” See *Picard v. Connor*, 404 U.S. 270, 278 (1971).”
11 *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009).

12 In the order to show cause the court discussed the issues raised in petitioner’s
13 amended petition:

14 Petitioner’s first ground for relief in his original petition was a claim that
15 his procedural due process rights were violated in the parole hearing. That
16 claim was dismissed in the initial review order because he did “not say what
17 procedural protections were not provided to him.”

18 In the amended petition, he says that “[t]he Board’s most memorable”
19 violation of his right to procedural due process was at its hearing in 2004.
20 This hearing is, of course, not the subject of this petition, and given the one-
21 year statute of limitations, probably could not now be challenged in a federal
22 habeas proceeding.

23 Petitioner also contends that the Board ignored the declaration he had
24 counsel read into the record at the hearing and did not put forth any effort to
25 listen. These allegations do not implicate federal due process rights.

26 Finally, petitioner contends that the Board failed to comply with several
27 state statutes, and that this violated procedural due process. Federal habeas
28 relief is available only for violations of federal law, usually the Constitution.
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). The claims petitioner raises in this ground for
relief are state law claims, and cannot be the basis for federal habeas relief.
See *Longford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996) (petitioner may not

25 ¹ In California, the supreme court, intermediate courts of appeal, and superior courts
26 all have original habeas corpus jurisdiction. *Nino v. Galaza*, 183 F.3d 1003, 1006 n.2 (9th Cir.
27 1999). Although a superior court order denying habeas corpus relief is non-appealable, a state
28 prisoner may file a new habeas corpus petition in the court of appeals. *Id.* If the court of
appeals denies relief, the petitioner may seek review in the California Supreme Court by way
of a petition for review, or may instead file an original habeas petition in the supreme court.
Id. at 1006 n.3.

1 "transform a state-law issue into a federal one merely by asserting a violation
2 of due process.").

3 For the above reasons, ground one does not "state facts that point to
4 a 'real possibility of constitutional error.'" Rule 4 Advisory Committee Notes
5 (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970). It will be
6 dismissed.

7 Petitioner's second ground for relief was that the Board's action was
8 cruel and unusual punishment. It was dismissed in the initial review order
9 because it was unclear why he thought he was being held beyond expiration
10 of his sentence, which after all was twenty-five years to life. Although
11 petitioner once again provides an extensive and unclear exposition of his
12 theories regarding determinate ("DSL") and indeterminate ("ISL") sentencing,
13 he does not address the issue pointed out in the initial review order, namely
14 that contrary to his argument, it appears he is a DSL prisoner, not an ISL
15 prisoner. He also has failed to explain how it is that an inmate sentenced to a
16 maximum term of life can be said to have passed the expiration date of his
17 sentence when he has only served approximately twenty-seven years. In this
18 issue he does, however, also allege that the denial of his parole was not
19 supported by "some evidence." See *McQuillion v. Duncan*, 306 F.3d 895, 904
20 (9th Cir. 2002). That claim, and that claim only, may proceed from ground
21 two. All other claims contained in [this ground] for relief, including the Eighth
22 Amendment claim, will be dismissed.

23 In his third ground for relief in the original petition, petitioner claimed
24 that his equal protection rights were violated by the Board's decision. In the
25 initial review order, the court dismissed the claim because petitioner had
26 failed to provide "factual allegations regarding other prisoners similarly
27 situated who were paroled or released, for instance their names, sentences,
28 and release dates." In the amended petition he provides the names and
sentences served for several inmates who were released, although all were in
the 1980's. Whether these inmates were similarly situated will have to be
determined later in the case, but at this point the allegations are sufficient to
proceed.

In short, the only claims remaining in the case are petitioner's contention that the
parole denial was not supported by some evidence and his contention that the denial
violated equal protection.

Respondent has provided a copy of petitioner's state habeas petition filed in the
California Supreme Court, the highest state court available to him. Mot. Dismiss, Ex. 1. It
contains neither a some evidence claim nor an equal protection claim. Respondent is
correct that petitioner has failed to exhaust. In his opposition, petitioner argues only that
his position as to the dismissed state law claim was correct as a matter of state law, and
does not even contend that the "some evidence" or equal protection claims were raised in
state court. The motion will be granted.

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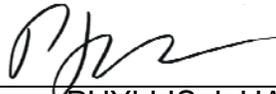
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CONCLUSION

Petitioner's motion to reconsider (document number 20 on the docket) and his motion for appointment of counsel (document number 19) are **DENIED**. Respondent's motion to dismiss (document number 21) is **GRANTED**. The petition is **DISMISSED**.² The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 18, 2010.



PHYLLIS J. HAMILTON
United States District Judge

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² The court does not have discretion to stay a petition containing only unexhausted claims, so that option cannot be offered to petitioner here. See *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006).