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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

LUTHER G. JAMISON,
Petitioner,

No. C 08-5601 PJH (PR)

vs.

ROBERT L. AYERS, Warden,
Respondent.

**ORDER GRANTING LEAVE
TO PROCEED IN FORMA
PAUPERIS ON APPEAL AND
GRANTING CERTIFICATE OF
APPEALABILITY**

This is a habeas case under 28 U.S.C. § 2254 filed pro se by a state prisoner. The court granted respondent's motion to dismiss in an order entered on August 18, 2010. Judgment was entered that day. Petitioner has filed a timely notice of appeal, a motion for a certificate of appealability, and a motion for leave to proceed in forma pauperis on appeal.

A petitioner may not appeal a final order in a federal habeas corpus proceeding without first obtaining a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). Section 2253(c)(1) applies to an appeal of a final order entered on a procedural question antecedent to the merits, for instance a dismissal for failure to exhaust, as here. See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

"Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Id.* at 484-85. "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable

United States District Court
For the Northern District of California

1 whether the district court was correct in its procedural ruling.” *Id.* at 484. As each of these
2 components is a “threshold inquiry,” the federal court “may find that it can dispose of the
3 application in a fair and prompt manner if it proceeds first to resolve the issue whose
4 answer is more apparent from the record and arguments.” *Id.* at 485. Supreme Court
5 jurisprudence “allows and encourages” federal courts to first resolve the procedural issue,
6 as was done here. *See id.*

7 In the order to show cause the court described the amended petition as presenting
8 three claims. Petitioner’s contention that the Board committed various procedural violations
9 in the hearing was dismissed as being only a state-law claim. The second appeared to be
10 his main claim, a contention that he was being held beyond expiration of his sentence,
11 despite having served only twenty-seven years on a twenty-five to life sentence. This
12 contention was based on his complicated interpretation of state law, although he also
13 contended that his continued detention violated due process. The court dismissed that part
14 of the claim as presenting only an issue of state law, noting that state claims cannot be
15 transformed into federal ones simply by alluding to due process. *See Longford v. Day*, 110
16 F.3d 1380, 1389 (9th Cir. 1996).

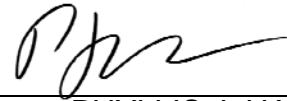
17 Petitioner’s contention that the parole denial was not supported by some evidence,
18 also contained in claim two, was allowed to proceed, as was his third claim, that the denial
19 violated his equal protection rights. These are the claims that were not exhausted.

20 Petitioner’s California Supreme Court petition was before this court as an exhibit to
21 the motion to dismiss. It did not contain the claims that the court allowed to proceed, and
22 petitioner did not even attempt to argue in his opposition that the claims were exhausted.
23 Reasonable jurists therefore would not find the court’s conclusion as exhaustion to be
24 debatable. But reasonable jurists might find debatable the court’s conclusion in its order to
25 show cause that petitioner had stated only a state-law claim when he contended that he
26 was being held beyond his release date. The motion for a certificate of appealability
27 (document number 30 on the docket) is **GRANTED** as to that claim. Petitioner’s motion for
28 leave to proceed in forma pauperis on appeal (document number 29 on the docket) is

1 **GRANTED.** The clerk shall process the appeal.

2 **IT IS SO ORDERED.**

3 Dated: September 16, 2010.



PHYLLIS J. HAMILTON
United States District Judge

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