

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

HUMBERTO REMBAO,  
Petitioner,  
vs.  
B. CURRY, Warden,  
Respondents.

No. C 09-5783 PJH (PR)

**ORDER GRANTING LEAVE  
TO PROCEED IN FORMA  
PAUPERIS; ORDER TO  
SHOW CAUSE**

Petitioner, a California prisoner currently incarcerated at the Correctional Training Facility in Soledad, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee.

The petition attacks denial of parole, so venue is proper in this district, which is where petitioner is confined. See 28 U.S.C. § 2241(d).

**BACKGROUND**

In 1993 a San Diego County jury found petitioner guilty of first degree murder and receiving stolen property. He was sentenced to prison for twenty-five years to life. This petition is directed to a denial of parole on January 10, 2008. He claims to have exhausted these claims by way of state habeas petitions.

**DISCUSSION**

**A. Standard of Review**

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody 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). Habeas corpus petitions must meet

1 heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An  
2 application for a federal writ of habeas corpus filed by a prisoner who is in state custody  
3 pursuant to a judgment of a state court must “specify all the grounds for relief which are  
4 available to the petitioner ... and shall set forth in summary form the facts supporting each  
5 of the grounds thus specified.” Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C.  
6 foll. § 2254. “[N]otice’ pleading is not sufficient, for the petition is expected to state facts  
7 that point to a ‘real possibility of constitutional error.’” Rule 4 Advisory Committee Notes  
8 (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970). “Habeas petitions which  
9 appear on their face to be legally insufficient are subject to summary dismissal.” *Calderon*  
10 *v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102, 1108 (9th Cir. 1996) (Schroeder, J.,  
11 concurring).

12 **B. Legal Claims**

13 As grounds for federal habeas relief, petitioner asserts that: (1) there was not “some  
14 evidence” to support the denial; and (2) the repeated denial of parole after passage of so  
15 much time since the offense and in light of his record of rehabilitation was a violation of his  
16 due process rights.

17 Claim two is a “*Biggs* claim,” so called because in *Biggs v. Terhune*, 334 F.3d 910  
18 (9th Cir. 2003), the Ninth Circuit warned that repeated denials of parole based on the  
19 unchanging characteristics of the prisoner’s offense might violate due process. *Id.* at 916-  
20 17. Any such possibility is, however, foreclosed by the recent en banc decision in *Hayward*  
21 *v. Marshall*, 603 F.3d 546 (9th Cir. 2010). *Id.* at 556 (overruling *Biggs v. Terhune*, 334 F.3d  
22 910 (9th Cir. 2003); *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123 (9th Cir. 2006);  
23 and *Irons v. Carey*, 505 F.3d 846 (9th Cir. 2007), “to the extent they might be read to imply  
24 that there is a federal constitutional right regardless of whether state law entitles the  
25 prisoner to release . . .”).

26 Claim two will be dismissed. Claim one may proceed. See *McQuillion v. Duncan*,  
27 306 F.3d 895, 904 (9th Cir. 2002) (due process requires that at least “some evidence”  
28 support parole denial).

**CONCLUSION**

1  
2 1. Claim two is **DISMISSED**. Claim one may proceed.

3 2. The clerk shall serve by certified mail a copy of this order and the petition and all  
4 attachments thereto on respondent and respondent's attorney, the Attorney General of the  
5 State of California. The clerk also shall serve a copy of this order on petitioner.

6 3. Respondent shall file with the court and serve on petitioner, within sixty days of  
7 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules  
8 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be  
9 granted. Respondent shall file with the answer and serve on petitioner a copy of all  
10 portions of the state trial record that have been transcribed previously and that are relevant  
11 to a determination of the issues presented by the petition.

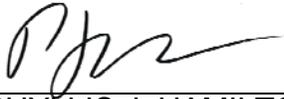
12 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with  
13 the court and serving it on respondent within thirty days of his receipt of the answer.

14 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an  
15 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing  
16 Section 2254 Cases. If respondent files such a motion, petitioner shall file with the court  
17 and serve on respondent an opposition or statement of non-opposition within thirty days of  
18 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply  
19 within fifteen days of receipt of any opposition.

20 5. Petitioner is reminded that all communications with the court must be served on  
21 respondent by mailing a true copy of the document to respondent's counsel. Petitioner  
22 must keep the court informed of any change of address and must comply with the court's  
23 orders in a timely fashion. Failure to do so may result in the dismissal of this action for  
24 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v.*  
25 *Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

26 **IT IS SO ORDERED.**

27 Dated: August 23, 2010.

28   
\_\_\_\_\_  
PHYLLIS J. HAMILTON  
United States District Judge