UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 27 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LORENZO LORTA, Petitioner-Appellant, v. STUART SHERMAN, Warden, Respondent-Appellee.	No. 18-56600 D.C. No. 2:18-cv-05757-RSWL-JDE Central District of California, Los Angeles ORDER

Before: LEAVY and W. FLETCHER, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent motion for reconsideration. The request for a certificate of appealability is denied because appellant's 28 U.S.C. § 2254 petition fails to state any cognizable habeas claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Nettles v. Grounds*, 830 F.3d 922, 934-35 (9th Cir. 2016) (en banc) (holding that claims fall outside "the core of habeas corpus" if success will not necessarily lead to immediate or earlier release from confinement), *cert. denied*, 137 S. Ct. 645 (2017); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The denial of appellant's request for a certificate of appealability does not preclude him from pursuing conditions of confinement claims in a properly filed civil action brought pursuant to 42 U.S.C. § 1983.

Any pending motions are denied as moot.

DENIED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LORENZO LORTA,
Petitioner,
v.
STEWARD SHERMAN,
Respondent.

No. CV 18-05757-RSWL (JDE)

ORDER SUMMARILY DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

I.
INTRODUCTION

On June 29, 2018, Petitioner Lorenzo Lorta filed a pro se Petition for Writ of Habeas Corpus by a Person in State Custody. Dkt 1 ("Petition" or "Pet."). The sole purported ground for relief in the Petition was based upon California's Proposition 57. Because such a claim is not cognizable on federal habeas review and in Petitioner's case, not within "the core of habeas corpus," on August 9, 2018, the Court issued an Order to Show Cause ("OSC") why the Petition should not be dismissed. Dkt. 7.

On August 22, 2018, Petitioner filed a response to the OSC. Dkt. 8 ("Response"). In the Response, Petitioner continued to assert that he was

being denied the "Protections of Proposition 57," but purported to make other assertions, which were not clear. For example, the Response referred to Cal. Penal Code Sections 207, 207B, 654, and 1260, as well as various provisions of the California Constitution, and asserted that the Petition was "an attack upon the conviction and the duration of the unconstitutional conviction to shorten the duration." Response at 1-3. Petitioner further asserted that his underlying convictions were the result of "trick and scheme in violation of 28 U.S.C. § 1001 also a violation of 28 U.S.C. § 1505, obstruction of justice violating Petitioner's due a proper process." Id. at 2 (emphasis omitted).

On August 29, 2018, the Court dismissed the Petition with leave to amend, concluding that the single ground for relief raised in the Petition was not cognizable; the allegations in the Petition were insufficient to comply with the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"); the Petition was potentially subject to dismissal for failure to exhaust state remedies; and to the extent Petitioner was attempting to alter and amend his Petition in his Response, such attempt was procedurally improper and substantively insufficient. Dkt. 9 ("Dismissal Order").

On September 17, 2018, Petitioner filed the operative First Amended Petition, Dkt. 10 ("FAP"), together with a document the Court interprets as a supporting memorandum. Dkt. 11 ("FAP Mem.").

As explained below, the FAP suffers from the same defects previously identified in the OSC and the Dismissal Order. As such, the FAP must be dismissed pursuant to Rule 4 of the Habeas Rules.

II.

DISCUSSION

Petitioner again seeks relief pursuant to Proposition 57. He asserts a single ground for relief, requesting "Modification of sentence and Re-sentenc[ing] under Proposition 57 [and] Also, Under [Cal.] Penal Code section

1260." FAP at 5. In support of his claim, Petitioner refers the Court to his "Motion to Accept 1-2" and the documents attached to the FAP. Id. The state court motion and habeas petitions attached to the FAP all request modification of Petitioner's sentence under Proposition 57. In his two-page "Motion to Accept Petition 1 of 2 pages Regarding leave to Amend Petitioner's Claims were under Exhaustion Protections," Petitioner maintains that "[r]egarding Proposition 57 and Penal Code Section 1260 / Exhaustion Requir[e]ment met." FAP Mem. at 1 (emphasis omitted).

As previously explained, the application of Proposition 57, which creates a mechanism for parole consideration, see Daniels v. Cal. Dep't of Corr. & Rehab., 2018 WL 489155, at *3 (E.D. Cal. Jan. 19, 2018), is exclusively a matter of state law. As such, Petitioner's claim seeking relief pursuant to Proposition 57 is not cognizable on federal habeas review. See 28 U.S.C. § 2254(a); Swarthout v. Cooke, 562 U.S. 216, 222 (2011) (per curiam) ("the responsibility for assuring that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts"); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (reiterating that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); Smith v. Phillips, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution."); Kennick v. Superior Court, 736 F.2d 1277, 1280 (9th Cir. 1984) (as amended); see also Alford v. Doe, 2018 WL 1896533, at *1 (C.D. Cal. Apr. 18, 2018) (concluding that claim based on Proposition 57 was not cognizable on federal habeas review). Likewise, to the extent Petitioner seeks relief pursuant to Cal. Penal Code § 1260, see FAP at 5, this claim also is based solely on California law, and consequently, is not cognizable on federal habeas review.

In addition, federal courts "shall entertain an application for a 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). "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). The "core of habeas corpus" is an attack on "the fact or duration of his confinement," in which a prisoner "seeks either immediate release from that confinement or the shortening of its duration." Id. at 489. The Ninth Circuit has adopted a rule that if "a state prisoner's claim does not lie at 'the core of habeas corpus,' it may not be brought in habeas corpus but must be brought, 'if at all,' under § 1983." Nettles v. Grounds, 830 F.3d 922, 934 (9th Cir. 2016) (en banc) (quoting Preiser, 411 U.S. at 487; Skinner v. Switzer, 562 U.S. 521, 535 n.13 (2011)). Therefore, if "success on [Petitioner's] claims would not necessarily lead to his immediate or earlier release from confinement, [Petitioner's] claim does not fall within 'the core of habeas corpus,' and he must instead bring his claim under § 1983." Nettles, 830 F.3d at 935 (quoting Skinner, 562 U.S. at 535 n.13).

Here, because Petitioner is serving an indeterminate sentence of eighty-five years to life, see FAP at 2, even if his claim was cognizable on federal habeas review, success on Petitioner's claim "would not necessarily lead to his immediate or earlier release from" custody. Under Nettles, Petitioner's claim is not within "the core of habeas corpus" and may not be brought pursuant to Section 2254.

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III.

ORDER

Pursuant to Rule 4 of the Habeas Rules, IT IS ORDERED that judgment be entered summarily dismissing this action without prejudice.

Dated: 10/15/2018

s/ RONALD S.W. LEW
RONALD S. W. LEW
United States District Judge

Presented by:

John D. Early
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LORENZO LORTA,
Petitioner,
v.
STEWARD SHERMAN,
Respondent.

Case No. CV 18-05757-RSWL (JDE)

ORDER DISMISSING PETITION WITH LEAVE TO AMEND

On June 29, 2018, the Court received a Petition for Writ of Habeas Corpus by Lorenzo Lorta ("Petitioner"). Dkt 1 ("Petition" or "Pet."). The Petition stated "N/A" in response to the request for information about any Petition for Review filed with the California Supreme Court. Pet. at 3. The Petition contained only one ground, but did not specify the nature or facts supporting the purported ground, but instead referenced only "MC-275's and its attachments and Exhibits," presumably referring the California state court form number for a state petition for writ of habeas corpus, multiple version of which are attached. Pet. at 5, 9-21 (CM/ECF pagination). Those state court petitions identify the sole ground for relief as "Modification of Sentence and Resentence under Proposition 57 Also, Modification under Penal Code

Section 1260." Pet. at 11, 18 (CM/ECF pagination). The Petition contains a total of approximately 44 pages of attachments. With respect to whether the claim had been raised before the California Court of Appeal or California Supreme Court, the Petition contained various blackened, circles, cross-outs, and interlineations, rendering the meaning of the response incomprehensible. Id.

Pursuant to Rule 4 of Rules Governing Section 2254 Proceedings for the United States District Court ("Habeas Rules"), the Court reviewed the Petition and, on August 9, 2018, issued an Order to Show Cause (Dkt. 7 ("OSC") why the Petition should not be dismissed as it appeared, among other things, that the Petition sought relief based upon a claim that he had been improperly denied a parole hearing under California's Proposition 57, approved by California voters in November 2016, making parole available to certain felons that were convicted of nonviolent crimes. As noted in the OSC, the plain text of Proposition 57 does not provide for existing prisoners to be resentenced; rather, it creates a mechanism for parole consideration. See Daniels v. California Dep't of Corr. & Rehab., 2018 WL 489155, at *4 (E.D. Cal. Jan. 19, 2018). Further, as also noted in the OSC, as the application of Proposition 57 is exclusively a matter of state law, Petitioner's claim appeared to be not cognizable under federal habeas review. See 28 U.S.C. § 2254(a); Swarthout v. Cooke, 562 U.S. 216, 222 (2011) ("the responsibility for assuring that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts"); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (reiterating that it is not the province of a federal habeas court to reexamine state court determinations on state law questions); Smith v. Phillips, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution."); Christian v. Rhode, 41 F.3d 461, 469 (9th

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Cir. 1994); Kennick v. Superior Court, 736 F.2d 1277, 1280 (9th Cir. 1984); see also Alford v. Doe, 2018 WL 1896533, at *1 (C.D. Cal. Apr. 18, 2018) (dismissing habeas petition based upon a claim of error in applying Proposition 57). As a result, in the OSC, the Court ordered Petitioner to show cause, in writing, why the Petition should not be dismissed.

On August 22, 2018, Petitioner filed a response to the OSC. Dkt. 8 ("Response"). In the Response, Petitioner continues to assert that he is being denied the "Protections of Proposition 57," but purports to make other assertions, which are not clear. For example, the Response refers various to California Penal Code Sections 207, 207B, 654, and 1260, as well as various provisions of the California Constitution, and asserts that the Petition "is an attack upon the conviction and duration of the unconstitutional conviction to shorten the duration." Response at 1-3. Plaintiff asserts that his underlying convictions, resulting in sentences of 85 and 43 years, were the result of "trick and scheme in violation of 28 U.S.C. § 1001 also a violation of 28 U.S.C. § 1505, obstruction of justice violating Petitioner's due a proper process. " Id. at 2. The Court interprets Petitioner's federal statutory references to refer to 18 U.S.C. §§ 1001 and 1505, statutes setting forth criminal violations for false statements and obstruction of justice.

As noted, the Petition raised only one claim, incorporating state petitions that also only raised one claim, based upon Proposition 57, requesting a resentencing under state law. As noted by the Court in the OSC, such a claim appears to be both not available under Proposition 57, which does not provide for resentencing, but more significantly, not cognizable in federal habeas proceedings as it involves a matter solely of the application of state law. See Estelle, 502 U.S. at 67-68. It is not clear to the Court whether Petitioner is attempting to alter or amend his Petition in the Response to also challenge a prior underlying conviction, as opposed to just the Proposition 57

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determination. However, any such attempt would be procedurally improper in the form of a response to an OSC, and is substantively insufficient as the Court has no information about the date or efforts to exhaust state appellate remedies of any such prior conviction(s) to assess timeliness and exhaustion issues, nor sufficient information regarding the grounds for any such additional challenge.

Based upon the allegations contained in the Petition, Petitioner is not entitled to relief for the reasons set forth above and in the OSC and the Petition is subject to dismissal under Rule 4 of the Habeas Rules.

Further, Habeas Rules 2(c), 4, and 5(b) require a statement of all grounds for relief and the facts supporting each ground; the petition should state facts that point to a real possibility of constitutional error and show the relationship of the facts to the claim. Habeas Rule 4, Advisory Committee Notes, 1976 Adoption; Mayle v. Felix, 545 U.S. 644, 655 (2005); O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in a petition that are vague, conclusory, palpably incredible, or unsupported by a statement of specific facts, are insufficient to warrant relief, and are subject to summary dismissal. Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994). The Petition falls far short of the minimal clarity required to proceed.

In addition, under 28 U.S.C. § 2254(b), habeas relief may not be granted unless Petitioner has exhausted the remedies available in state courts or an exception to the exhaustion requirement applies. Exhaustion requires that a petitioner's contentions be fairly presented to the state courts and be disposed of on the merits by the highest court of the state. See James, 24 F.3d at 24; Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). A claim has not been fairly presented unless the petitioner has described in the state-court proceedings both the operative facts and the federal legal theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995); Picard v.

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Connor, 404 U.S. 270, 275-78 (1971). As a matter of comity, a federal court will not entertain a habeas corpus petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in the petition. See Rose v. Lundy, 455 U.S. 509, 518-22 (1982). Petitioner has the burden of demonstrating that he has exhausted available state remedies. See, e.g., Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982). Here, it does not appear from the face of the Petition that Petitioner has exhausted any federal constitutional claims contained in the Petition to the state courts, meaning the Petition may subject to dismissal for failure to exhaust state remedies.

* * * * * * * * * *

For the foregoing reasons, the Petition is DISMISSED with leave to amend.

If Petitioner still desires to pursue this action, he is ORDERED to file an amended petition rectifying the deficiencies discussed above within thirty (30) days of the date of this Order. The Clerk is directed to send Petitioner a blank copy of the Central District habeas petition form for this purpose. The amended petition should reflect the same case number, be clearly labeled "First Amended Petition," and be filled out completely. In ¶ 9 of the Amended Petition, Petitioner should specify separately and concisely each federal constitutional claim that he seeks to raise and answer all of the questions pertaining to each such claim. If Petitioner contends that he exhausted his state remedies, he should list such filings in ¶¶ 10-11 of the habeas petition form and provide all of the other requested information. For each filing listed in ¶ 11, Petitioner should specify all of the grounds raised in such filing, along with the case number, the date of decision, and the result.

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Petitioner is cautioned that a failure to timely file a First Amended Petition in compliance with this Order may result in a recommendation that this action be dismissed without prejudice for failure to prosecute and failure to comply with a Court order. See Fed. R. Civ. P. 41(b).

Dated: August 29, 2018

JOHN D. EARLY
United States Magistrate Judge

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Additional material from this filing is available in the Clerk's Office.