UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 30 2020

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

WILLIAM JOE LONG, Petitioner-Appellant, v. GEORGE JAIME, Warden, Respondent-Appellee.	No. 20-55447 D.C. No. 2:20-cv-01133-FMO-KES Central District of California, Los Angeles ORDER

Before: WARDLAW and BENNETT, Circuit Judges.

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).

Any pending motions are denied as moot.

DENIED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM JOE LONG,

Petitioner,

v.

GEORGE JAIME, Warden,

Respondent.

Case No. 2:20-cv-01133-FMO-KES

JUDGMENT

Pursuant to the Court's Order Accepting Report and Recommendation of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is **dismissed without prejudice** to Petitioner filing a civil rights complaint raising the same claims for relief.

DATED: March 19, 2020

/s/

FERNANDO M. OLGUIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM JOE LONG,

Petitioner,

v.

GEORGE JAIME, Warden,

Respondent.

Case No. 2:20-cv-01133-FMO-KES

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation ("R&R") is submitted to the Honorable Fernando M. Olguin, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

William Joe Long ("Petitioner") filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 ("Petition" at Dkt. 1). Upon the filing of such a petition, the Court "must promptly examine it" and dismiss it "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief...." Habeas Rule 4.[1]

As explained further below, the claims in the Petition should be raised (if at all) in a civil rights complaint, because success on the Petition would not necessarily lead to Petitioner's immediate or earlier release from confinement. Because the Petition is not amenable to conversion to a civil rights complaint, the Petition should be dismissed without prejudice to Petitioner filing such a complaint, if he wishes to do so.

II.

BACKGROUND

A. Conviction and Sentence

Petitioner was charged in Los Angeles County Superior Court with murder for allegedly stabbing a man 92 times. See People v. Long, No. B216314, 2010 Cal. App. Unpub. LEXIS 8 at *1-4 (Jan. 4, 2010). In 2009, he pled guilty to voluntary manslaughter and was sentenced to 27 years in prison. Id. at *5-6; (Pet. at 50, 61.) This sentence consisted of an 11-year sentence for the manslaughter conviction; an 11-year enhancement based on "one or more prior serious or violent felony convictions" under California Penal Code section 1170.12(a)-(d); and a 5-year enhancement based on a prior conviction for a "serious felony" under

[1] Rules Governing Section 2254 and 2255 Cases, available at: https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf.

California Penal Code section 667(a)(1). (Id.)

B. Prior Federal Habeas Petitions

In 2017, Petitioner filed a habeas petition in this Court arguing that his sentence "was 'doubled' improperly pursuant to California Penal Code § 1170.12(a)-(d)" and that the 5-year enhancement under section 667(a)(1) violated the Double Jeopardy Clause. Long v. Keeton, No. 2:17-cv-07980-FMO-KES ("Long I"), Dkt. 11 at 2. The petition was dismissed as untimely. Id., Dkt. 11, 20, 21, 22.

In August 2019, Petitioner filed a second habeas petition in this Court arguing, "Prop. #57 signed in law allowed non-violent offenders to seek early parole on the portion of the term deemed non-violent." Long v. Jaime, No. 2:19-cv-07398-FMO-KES ("Long II"), Dkt. 5 at 2. In November 2019, this Court dismissed the petition, finding:

> Petitioner does not allege that he is eligible for early parole under Proposition 57. He does not allege that the CDCR denied him early parole or credits for good behavior. But even if Petitioner could amend his Petition to add such factual allegations, he would still fail to state a claim for federal habeas relief.
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> ...
>
> Absent an independent constitutional violation, "it is not the province of a federal habeas court to re-examine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Bonin v. Calderon, 59 F.3d 815, 841 (9th Cir. 1995) (holding that a violation of a "state law right does not warrant habeas corpus relief").
>
> Here, at best, Petitioner alleges that he has been wrongfully deprived of some state law right affecting his eligibility for parole. Because federal habeas corpus only provides a remedy for violations

of the Constitution or laws or treaties of the United States, Petitioner's claim of state law error is not cognizable. See Swarthout v. Cooke, 562 U.S. 216, 222 (2011) ("[T]he responsibility for assuring that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts, and is no part of the Ninth Circuit's business."); see also Wilson v. Biter, 2018 U.S. Dist. LEXIS 106790, 2018 WL 3197815, at *2 (E.D. Cal. June 26, 2018) (dismissing claim of Proposition 57 error because it was "not cognizable under federal habeas review").

Long II, Dkt. 5 at 2-3.

C. Claims Raised in Instant Petition

In February 2020, Petitioner filed the instant Petition, which raises the following claims:

Ground One: "Denial under Prop. #57 early parole consideration. ... Petitioner has completed his primary offense and [is] now serving an enhancement deemed non-violent, pursuant to the Penal Code." (Pet. at 5.)

Ground Two: "Denial under Senate Bill 1393, violating the equal protection on me being eligible [sic] for consideration by the court. ... This new bill grants authority to the court to resentence or strike a prison sentencing enhancement in the interest of justice, or correct a term." (Id.)

Ground Three: "Denial of new Assembly Bill 2942, not being equally protected under this new enactment on having the term recalled and the retroactive clause. ... The bill states it's retroactive pursuant to section (j)...." (Id. at 6.)

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III.

DISCUSSION

A. The Claims in the Petition Must Be Raised (If At All) in a Civil Rights Complaint, Not in a Habeas Petition.

1. Legal Standard

"Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus ... and a [civil rights] complaint under ... 42 U.S.C. § 1983." Muhammad v. Close, 540 U.S. 749, 750 (2004). Courts have sometimes "struggled to draw a line between habeas and § 1983 actions...." Nettles v. Grounds, 830 F.3d 922, 927 (9th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 645 (2017). Generally, "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus; requests for relief turning on circumstances of confinement may be presented in a § 1983 action." Muhammad, 540 U.S. at 750 (citations omitted).

In Nettles, the Ninth Circuit held "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." 830 F.3d at 931 (citations omitted). Claims within the "core" of habeas are those that would "necessarily lead to [the petitioner's] immediate or earlier release from confinement." Id. at 935.

2. Analysis

In Ground One, Petitioner seeks relief under California Proposition 57, which expanded eligibility for parole to certain felons convicted of non-violent crimes. See Travers v. California, No. 17-cv-06126, 2018 U.S. Dist. LEXIS 18715 at *2-6, 2018 WL 707546 at *2-3 (N.D. Cal. Feb. 5, 2018). It added language to the California Constitution that stated, in relevant part: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term of his or her primary offense." Cal. Const., art. I, § 32(a)(1).

Many federal courts have found, based on Nettles, that a claim seeking parole consideration under California Proposition 57 should be raised in a civil rights complaint, rather than in a habeas petition, because success on such a claim would not necessarily result in Petitioner's immediate release from prison. As one court has explained:

> Assuming arguendo that [the petitioner] wants to force prison officials to comply with the parole provisions of Proposition 57, success on his claims will not necessarily lead to immediate or speedier release from custody and therefore falls outside the core of habeas corpus. If he prevails on his claim that he is entitled to relief under Proposition 57, it does not necessarily follow that he will be released from prison on a date sooner than otherwise would occur. This is because Proposition 57 (if it applies to him) only makes him *eligible for parole consideration*, and does not command his release from prison.

Travers, 2018 U.S. Dist. LEXIS 18715 at *7-8, 2018 WL 707546 at *3 (emphasis added); see also Sandoval v. CSP Sacramento Warden, No. 18-cv-1960, 2019 U.S. Dist. LEXIS 55896 at *5-6, 2019 WL 1438554 at *3 (E.D. Cal. Apr. 1, 2019) (same); Solano v. California Substance Abuse Treatment Facility, No. 17-cv-2671-RGK (AGR), 2017 U.S. Dist. LEXIS 193862 at *5, 2017 WL 5640920 at *2 (C.D. Cal. Oct. 24, 2017), R&R adopted, 2017 U.S. Dist. LEXIS 193865, 2017 WL 5641027 (C.D. Cal. Nov. 21, 2017) (same).

Petitioner's other claims appear to suffer from the same defect. In Ground Two, he cites California Senate Bill 1393, which "effective January 1, 2019, amends [California Penal Code] sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes." People v. Garcia, 28 Cal. App. 5th 961, 971 (2018), review denied (Jan. 16, 2019). "The amendment applies retroactively to all cases not final

on its effective date." People v. Dearborne, 34 Cal. App. 5th 250, 268 (Ct. App. 2019), review denied (July 17, 2019). Ground Two argues that Petitioner is "eligible for consideration" under Senate Bill 1393.[2] (Pet. at 5.)

In Ground Three, Petitioner cites California Assembly Bill 2942, which "revised California Penal Code Section 1170(d)(1) to give state prosecutors the ability to reevaluate past sentences and recommend sentence reductions." Housh v. Rackley, No. 17-cv-04222, 2019 U.S. Dist. LEXIS 38825 at *4, 2019 WL 1117530 at *2 (N.D. Cal. Mar. 11, 2019). Section 1170(d)(1) provides that, if properly invoked by the court, the secretary of the CDCR, the Board of Parole Hearings, or the district attorney, the resentencing court has discretion to reduce the defendant's sentence "if it is in the interest of justice." Cal. Pen. Code § 1170(d)(1). The court "may consider postconviction factors" such as the defendant's "disciplinary record and record of rehabilitation while incarcerated" and the defendant's "risk for future violence." Id.

It appears that, even if Petitioner were granted federal habeas relief on Grounds Two and Three, the appropriate relief would merely be an order requiring the state courts to hold a resentencing hearing, which might not necessarily result in a reduced sentence. Thus, under Nettles, these claims should be brought (if at all) in a civil rights complaint rather than in a habeas petition.

B. The Petition is Not Amenable to Conversion to a Civil Rights Complaint.

1. Legal Standard

In some circumstances, a district court may convert an improperly filed habeas petition into a civil rights complaint. Nettles, 830 F.3d at 935-36. "If the

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[2] Petitioner's conviction appears to have become final in 2010, long before Senate Bill 1393's effective date. See Long, 2010 Cal. App. Unpub. LEXIS 8 at *1 (Court of Appeal's opinion affirming Petitioner's sentence on direct appeal on January 4, 2010); Long I, Dkt. 11 at 8 (finding Petitioner's conviction became final for purposes of federal habeas review on February 15, 2010).

complaint is amenable to conversion on its face, meaning that it names the correct defendants and seeks the correct relief, the court may recharacterize the petition so long as it warns the pro se litigant of the consequences of the conversion and provides an opportunity for the litigant to withdraw or amend his or her complaint." Id. at 936 (quoting Glaus v. Anderson, 408 F.3d 382 (7th Cir. 2005)). Some of the consequences of conversion include:

- The filing fee in a habeas action is $5, but the filing fee in a civil rights action is $400 (with $50 of that fee reduced if the prisoner is allowed to proceed in forma pauperis).
- Even if granted leave to proceed in forma pauperis (i.e., without *pre-paying* the filing fee) in a civil rights action, a prisoner plaintiff is required to pay the full amount of the $350 filing fee by way of deductions from income to his prison trust account. See 28 U.S.C. § 1915(b)(1).
- If, while incarcerated, a prisoner files 3 civil rights complaints that are dismissed as "frivolous, malicious, or [for] fail[ure] to state a claim upon which relief may be granted," the prisoner may not file future actions without the prepayment of filing fees "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).
- There are different pre-filing exhaustion requirements for habeas petitions and civil rights complaints. Before filing a habeas petition, the petitioner generally must exhaust his remedies *in state court* by filing habeas petitions. Before filing a civil rights complaint, in contrast, a prisoner plaintiff generally must exhaust his *administrative* remedies by, for example, filing grievances at the prison where he is housed. See Nettles, 830 F.3d at 932 n.8.

2. Analysis

In the present case, the Petition is not amenable to conversion to a civil rights complaint. Respondent, the warden of the prison where Petitioner is housed, likely

would not be the proper defendant in a civil rights action. The Petition also does not seek any specific relief. See, e.g., Travers, 2018 U.S. Dist. LEXIS 18715 at *9, 2018 WL 707546 at *3 (declining to convert petition bringing claim under Proposition 57 because the petition did "not name the proper defendant or seek the correct relief").

Additionally, "Petitioner may decide he does not wish to incur the filing fee for a [civil rights] complaint that does not state a claim on its face." Solano, 2017 U.S. Dist. LEXIS 193862 at *6, 2017 WL 5640920 at *2. As Grounds One through Three are currently pled in the Petition, they do not state a claim under either the federal habeas statute, 28 U.S.C. § 2254, or the applicable civil rights statute, 42 U.S.C. § 1983.

Violations of *state* law are not actionable under § 1983, unless they also violate the plaintiff's *federal* constitutional rights. See generally Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 370 (9th Cir. 1996). In Ground One, Petitioner does not cite any federal law. (Pet. at 5.) In Grounds Two and Three, he alleges that his federal constitutional right to equal protection was violated (id. at 5-6), but he fails to explain how. The Fourteenth Amendment's Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Petitioner can plead an equal protection claim by alleging facts showing either that: (a) he was intentionally discriminated against based on his membership in a protected class, see Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001), or (b) similarly situated individuals were intentionally treated differently without a rational basis for the difference in treatment, see Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Engquist v. Oregon Dep't of Agriculture, 553 U.S. 591, 601-02 (2008). To state a valid claim under § 1983, he would need to add allegations clarifying which theory he is trying to pursue and providing supporting facts.

In light of these considerations, it is recommended that the Petition be dismissed without prejudice rather than converted to a civil rights complaint.

IV.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this R&R; and (2) dismissing the Petition without prejudice to Petitioner filing a civil rights complaint raising the same claims for relief.

DATED: February 13, 2020

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals but are subject to the right of any party to timely file objections as provided in the Federal Rules of Civil Procedure and the instructions attached to this Report. This Report and any objections will be reviewed by the District Judge whose initials appear in the case docket number.

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

No. 20-55447

2:20-cv-01133FMOKES

IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

William Joe Long — PETITIONER
(Your Name)

VS.

California-CDCR — RESPONDENT(S)

PROOF OF SERVICE

I, William Joe Long, do swear or declare that on this date, July 19th, 2020, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

U.S. Supreme Court

Washington, D.C. 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19th, 2020

(Signature)