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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ISAAC MARTINEZ,)	1:11-cv-00215-OWW-SKO-HC
)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS
	)	TO DISMISS PETITIONER'S FIRST,
	)	SECOND, THIRD, AND FIFTH CLAIMS
v.	)	WITHOUT LEAVE TO AMEND FOR
	)	FAILURE TO STATE A COGNIZABLE
JAMES D. HARTLEY,	)	CLAIM (Doc. 1) AND TO DECLINE
	)	TO ISSUE A CERTIFICATE OF
Respondent.	)	APPEALABILITY
)	
	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS PETITIONER'S FOURTH CLAIM
	)	WITH LEAVE TO AMEND (Doc. 1)

**OBJECTIONS DEADLINE:
THIRTY (30) DAYS**

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the petition, which was filed on February 8, 2011.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make

1 a preliminary review of each petition for writ of habeas corpus.
2 The Court must summarily dismiss a petition "[i]f it plainly
3 appears from the petition and any attached exhibits that the
4 petitioner is not entitled to relief in the district court...."
5 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.
6 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
7 1990). Habeas Rule 2(c) requires that a petition 1) specify all
8 grounds of relief available to the Petitioner; 2) state the facts
9 supporting each ground; and 3) state the relief requested.
10 Notice pleading is not sufficient; rather, the petition must
11 state facts that point to a real possibility of constitutional
12 error. Rule 4, Advisory Committee Notes, 1976 Adoption;
13 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.
14 Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in a petition
15 that are vague, conclusory, or palpably incredible are subject to
16 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th
17 Cir. 1990).

18 Further, the Court may dismiss a petition for writ of habeas
19 corpus either on its own motion under Habeas Rule 4, pursuant to
20 the respondent's motion to dismiss, or after an answer to the
21 petition has been filed. Advisory Committee Notes to Habeas Rule
22 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43
23 (9th Cir. 2001).

24 Petitioner, an inmate of the California State Prison at
25 Avenal, California, is serving a sentence of ten (10) years to
26 life imposed by the Los Angeles Superior Court in case number
27 VAO24361 on June 14, 1993. (Pet. 4.) Petitioner challenges a
28 decision of California's Board of Parole Hearings (BPH), which

1 became final on August 12, 2009, after a hearing held on April
2 14, 2009. The BPH denied parole for five years. (Id.)

3 Petitioner raises the following grounds: 1) there was no
4 evidence supporting the denial of parole, and thus Petitioner
5 suffered a violation of due process of law with respect to his
6 liberty interest; 2) there was no evidence of any nexus between
7 the reasons for parole denial and the crime or between the
8 decision and public safety; 3) the BPH violated Petitioner's
9 right to due process of law in relying on Petitioner's
10 confession, which was obtained in violation of Petitioner's
11 privilege against self-incrimination; 4) the trial court's
12 sentencing Petitioner under Cal. Pen. Code, § 667.5 violated
13 Petitioner's rights to due process of law and double jeopardy
14 under the Fifth and Fourteenth Amendments; and 5) the BPH failed
15 to provide an individualized consideration of the parole
16 suitability factors. (Pet. 8-15, 28, 32.) Petitioner also
17 requests "proof of claims" concerning various aspects of the BPH
18 and the California and federal governments. (Pet. 35-39.)¹
19 Petitioner seeks a new parole hearing. (Pet. 40.)

20 Petitioner attaches to his petition a transcript of the
21 hearing before the BPH held at Avenal State Prison on April 14,
22 2009. (Pet. 44-129.) The transcript reflects that Petitioner
23 appeared at the hearing, responded to questions from the
24 commissioners, made a closing statement, and was represented by
25 counsel who participated on Petitioner's behalf. (Pet. 46, 47,
26 50-77, 71-72, 77-109, 111-19.) The transcript further reflects

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28 ¹The Court understands the requests to be prayers for relief and thus
does not analyze them as potential claims.

1 that after a brief recess, the board stated its reasons for
2 denying parole. (Pet. 120-28.)

3 II. Failure to Allege a Claim Cognizable on Habeas Corpus

4 Because the petition was filed after April 24, 1996, the
5 effective date of the Antiterrorism and Effective Death Penalty
6 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh
7 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
8 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

9 A district court may entertain a petition for a writ of
10 habeas corpus by a person in custody pursuant to the judgment of
11 a state court only on the ground that the custody is in violation
12 of the Constitution, laws, or treaties of the United States. 28
13 U.S.C. §§ 2254(a), 2241(c)(3); Williams v. Taylor, 529 U.S. 362,
14 375 n.7 (2000); Wilson v. Corcoran, 562 U.S. -, -, 131 S.Ct. 13,
15 16 (2010) (per curiam).

16 The Supreme Court has characterized as reasonable the
17 decision of the Court of Appeals for the Ninth Circuit that
18 California law creates a liberty interest in parole protected by
19 the Fourteenth Amendment Due Process Clause, which in turn
20 requires fair procedures with respect to the liberty interest.
21 Swarthout v. Cooke, 562 U.S. -, - S.Ct. -, 2011 WL 197627, *2
22 (No. 10-133, Jan. 24, 2011).

23 However, the procedures required for a parole determination
24 are the minimal requirements set forth in Greenholtz v. Inmates
25 of Neb. Penal and Correctional Complex, 442 U.S. 1, 12 (1979).²

27 ²In Greenholtz, the Court held that a formal hearing is not required
28 with respect to a decision concerning granting or denying discretionary
parole; it is sufficient to permit the inmate to have an opportunity to be
heard and to be given a statement of reasons for the decision made. Id. at

1 Swarthout v. Cooke, 2011 WL 197627, *2. In Swarthout, the Court
2 rejected inmates' claims that they were denied a liberty interest
3 because there was an absence of "some evidence" to support the
4 decision to deny parole. The Court stated:

5 There is no right under the Federal Constitution
6 to be conditionally released before the expiration of
7 a valid sentence, and the States are under no duty
8 to offer parole to their prisoners. (Citation omitted.)
9 When however, a State creates a liberty interest,
10 the Due Process Clause requires fair procedures for its
11 vindication-and federal courts will review the
12 application of those constitutionally required procedures.
13 In the context of parole, we have held that the procedures
14 required are minimal. In Greenholtz, we found
15 that a prisoner subject to a parole statute similar
16 to California's received adequate process when he
17 was allowed an opportunity to be heard and was provided
18 a statement of the reasons why parole was denied.
19 (Citation omitted.)

20 Swarthout, 2011 WL 197627, *2. The Court concluded that the
21 petitioners had received the following process that was due:

22 They were allowed to speak at their parole hearings
23 and to contest the evidence against them, were afforded
24 access to their records in advance, and were notified
25 as to the reasons why parole was denied....

26 That should have been the beginning and the end of
27 the federal habeas courts' inquiry into whether
28 [the petitioners] received due process.

29 Swarthout, 2011 WL 197627, *3. The Court in Swarthout expressly
30 noted that California's "some evidence" rule is not a substantive
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32 16. The decision maker is not required to state the evidence relied upon in
33 coming to the decision. Id. at 15-16. The Court reasoned that because there
34 is no constitutional or inherent right of a convicted person to be released
35 conditionally before expiration of a valid sentence, the liberty interest in
36 discretionary parole is only conditional and thus differs from the liberty
37 interest of a parolee. Id. at 9. Further, the discretionary decision to
38 release one on parole does not involve retrospective factual determinations,
as in disciplinary proceedings in prison; instead, it is generally more
discretionary and predictive, and thus procedures designed to elicit specific
facts are unnecessary. Id. at 13. In Greenholtz, the Court held that due
process was satisfied where the inmate received a statement of reasons for the
decision and had an effective opportunity to insure that the records being
considered were his records, and to present any special considerations
demonstrating why he was an appropriate candidate for parole. Id. at 15.

1 federal requirement, and correct application of California's
2 "some evidence" standard is not required by the federal Due
3 Process Clause. Id. at *3.

4 Petitioner's first and second claims concerning the absence
5 of evidence to support the decision and to demonstrate a nexus
6 between Petitioner's offense or history and the public safety are
7 essentially claims concerning the merits of the decision and the
8 sufficiency of the evidence to support the decision. Likewise,
9 Petitioner's third claim concerning the BPH's reliance on
10 Petitioner's confession also challenges the quality or
11 sufficiency of the evidence to support the decision. In these
12 claims, Petitioner does not state facts that point to a real
13 possibility of constitutional error or that otherwise would
14 entitle Petitioner to habeas relief because California's "some
15 evidence" requirement is not a substantive federal requirement.
16 Swarthout, 2011 WL 197627, *3. Review of the record for "some
17 evidence" to support the denial of parole is not within the scope
18 of this Court's habeas review under 28 U.S.C. § 2254.

19 Petitioner's fifth claim concerning the BPH's failure to
20 give an individualized consideration of the state's substantive
21 factors of parole suitability is also foreclosed by Swarthout.
22 Due process of law requires only that Petitioner have an
23 opportunity to be heard; it does not require any specific degree
24 of individualized consideration.

25 With respect to amendment of the petition, a petition for
26 habeas corpus should not be dismissed without leave to amend
27 unless it appears that no tenable claim for relief can be pleaded
28 were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th

1 Cir. 1971).

2 Petitioner did not allege that the procedures used for
3 determination of his suitability for parole were deficient
4 because of the absence of an opportunity to be heard or the lack
5 of a statement of reasons for the ultimate decision reached.
6 However, the documentation that Petitioner submitted with the
7 petition demonstrates that Petitioner cannot state a tenable
8 claim for relief based on a violation of due process with respect
9 to his first, second, third, and fifth claims. Petitioner
10 attended the parole hearing and had the right to speak at the
11 hearing and to contest the evidence against him. Petitioner's
12 counsel exhibited familiarity with Petitioner's record (pet. 71),
13 and thus it may be concluded that there was effective access to
14 Petitioner's records in advance of the hearing. Petitioner's
15 submission to this Court of the decision of the BPH in which the
16 reasons were stated warrants the conclusion that Petitioner
17 received a statement of reasons why parole was denied. (Pet.
18 120-28.)

19 Accordingly, it is concluded that with respect to the first,
20 second, third, and fifth claims, Petitioner could not state a
21 tenable due process claim for relief. Thus, leave to amend
22 should not be granted with respect to these claims.

23 Petitioner's fourth claim concerns the sentencing court's
24 application of a state statute (Pen. Code § 667.5) at
25 Petitioner's sentencing in 1993. Petitioner alleges that
26 enhancement of his sentence under California's habitual criminal
27 laws was erroneous, constituted multiple punishment in
28 contravention of the Fifth Amendment's protection against double

1 jeopardy, and was a violation of due process.

2 Preliminarily the Court notes that this particular claim
3 appears to address the conduct of the sentencing court and not
4 the BPH. However, in other parts of the petition, Petitioner
5 noted that his criminal record was used against him to deny
6 parole. (Pet. 42.) He also alleged that use of his prior
7 convictions to deny parole was erroneous based on the nature of
8 his criminal history. (Pet. 23-24.) Petitioner may be
9 attempting to argue that the board's consideration or weighing of
10 this evidence constituted a violation of the Federal
11 Constitution's Due Process Clause. To the extent Petitioner
12 raises this claim, the preceding analysis based on Swarthout
13 applies, and the claim is foreclosed.

14 To the extent that this claim rests on the application of
15 the state's sentencing law, it is not cognizable on federal
16 habeas corpus. Federal habeas relief is not available to retry a
17 state issue that does not rise to the level of a federal
18 constitutional violation. Wilson v. Corcoran, 562 U.S. - , 131
19 S.Ct. 13, 16 (2010); Estelle v. McGuire, 502 U.S. 62, 67-68
20 (1991). Alleged errors in the application of state law are not
21 cognizable in federal habeas corpus. Souch v. Schiavo, 289 F.3d
22 616, 623 (9th Cir. 2002).

23 With respect to due process, it is established that the
24 Sixth and Fourteenth Amendments do not require proof of the fact
25 of a prior conviction to a jury beyond a reasonable doubt in
26 order to use the prior conviction to increase a sentence. Butler
27 v. Curry, 528 F.3d 624, 643-44 (9th Cir. 2008).

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1 Insofar as Petitioner alleges that the trial court's
2 enhancement of his sentence resulted in multiple punishments
3 prohibited by the prohibition against double jeopardy,
4 Petitioner's claim is devoid of specific facts that point to a
5 real possibility of constitutional error. (Pet. 11.) The Double
6 Jeopardy Clause of the Fifth Amendment protects against not only
7 a second prosecution for the same offense after acquittal or
8 conviction, but also multiple punishments for the same offense.
9 U.S. Const. amend. V; Witte v. United States, 515 U.S. 389, 395-
10 96 (1995). However, reliance on prior convictions or prison
11 terms to enhance punishment for a subsequent offense generally
12 does not constitute imposition of multiple punishments. See,
13 Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998)
14 (noting that recidivism has been the most traditional basis for
15 increasing an offender's sentence, and rejecting a contention
16 that an enhancement for recidivism that significantly increased
17 the sentence must be considered an element of the offense).
18 Generally, the Double Jeopardy Clause requires only that a court
19 not exceed the authorization given to it by the legislature; if
20 the legislature enacts statutes that indicate an intent to impose
21 separate punishments, the statutes define separate offenses, and
22 the punishments do not violate the Double Jeopardy Clause.
23 United States v. Wolfswinkel, 44 F.3d 782, 783-84 (9th Cir. 1995)
24 (Congress); Ohio v. Johnson, 467 U.S. 493, 499 (1984) (state
25 legislature).

26 Further, California state courts have considered the
27 legislative intent and have upheld the use of prior convictions
28 to enhance a sentence in various contexts. See, e.g., People v.

1 Acosta, 29 Cal.4th 105, 128 (2002); People v. Garcia, 25 Cal.4th
2 744, 757-58 (2001); People v. White Eagle, 48 Cal.App.4th 1511,
3 1519-20 (1996).

4 Therefore, Petitioner's generalized allegations do not state
5 a claim cognizable in habeas corpus.

6 It is possible that Petitioner might amend his petition to
7 allege specific facts concerning the use his prior convictions or
8 recidivist history. However, this claim relates to the conduct
9 of the trial court, and not the conduct of the BPH, which is the
10 gravamen of Petitioner's claims in the present petition. A claim
11 challenging the Los Angeles County sentence would concern a
12 different judgment of a different tribunal.

13 Rule 2(e) of the Rules Governing Section 2254 Cases in the
14 United States District Courts (Habeas Rules) provides:

15 A petitioner who seeks relief from judgments of more
16 than one state court must file a separate petition
covering the judgment or judgments of each court.

17 Petitioner thus cannot properly challenge the judgments of two
18 different tribunals in a single proceeding. Bianchi v. Blodgett,
19 925 F.2d 305, 308-11 (9th Cir. 1991). Specifically, it is not
20 permissible to challenge both a denial of parole by the BPH and
21 an underlying conviction in the same habeas corpus action.
22 Williams v. Sisto, 2009 WL 3300038, *12 (E.D.Cal. Oct. 14, 2009).

23 Amendment of the present petition to allege facts in support
24 of Petitioner's fourth claim would thus be proper only if the
25 remaining claims against the BPH do not go forward in this
26 action; otherwise, the result would be improper joinder of
27 claims.

28 ///

1 In summary, with respect to the fourth claim, Petitioner has
2 not stated a violation of due process of law or other basis for
3 relief. It is possible that Petitioner could state a tenable
4 claim for relief. Petitioner should be given an opportunity to
5 amend the present petition if the remaining claims against the
6 BPH are dismissed. If any of the claims against the BPH remain,
7 then Petitioner's fourth claim should be dismissed without
8 prejudice to refileing it in a separate action.

9 III. Certificate of Appealability

10 Unless a circuit justice or judge issues a certificate of
11 appealability, an appeal may not be taken to the Court of Appeals
12 from the final order in a habeas proceeding in which the
13 detention complained of arises out of process issued by a state
14 court. 28 U.S.C. § 2253(c) (1) (A); Miller-El v. Cockrell, 537
15 U.S. 322, 336 (2003). A certificate of appealability may issue
16 only if the applicant makes a substantial showing of the denial
17 of a constitutional right. § 2253(c) (2). Under this standard, a
18 petitioner must show that reasonable jurists could debate whether
19 the petition should have been resolved in a different manner or
20 that the issues presented were adequate to deserve encouragement
21 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
22 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
23 certificate should issue if the Petitioner shows that jurists of
24 reason would find it debatable whether the petition states a
25 valid claim of the denial of a constitutional right and that
26 jurists of reason would find it debatable whether the district
27 court was correct in any procedural ruling. Slack v. McDaniel,
28 529 U.S. 473, 483-84 (2000). In determining this issue, a court

1 conducts an overview of the claims in the habeas petition,
2 generally assesses their merits, and determines whether the
3 resolution was debatable among jurists of reason or wrong. Id.
4 It is necessary for an applicant to show more than an absence of
5 frivolity or the existence of mere good faith; however, it is not
6 necessary for an applicant to show that the appeal will succeed.
7 Miller-El v. Cockrell, 537 U.S. at 338.

8 A district court must issue or deny a certificate of
9 appealability when it enters a final order adverse to the
10 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

11 Here, it does not appear that reasonable jurists could
12 debate whether the petition should have been resolved in a
13 different manner. Petitioner has not made a substantial showing
14 of the denial of a constitutional right. Accordingly, the Court
15 should decline to issue a certificate of appealability.

16 IV. Recommendation

17 Accordingly, it is RECOMMENDED that:

18 1) Petitioner's first, second, third, and fifth claims be
19 DISMISSED without leave to amend for failure to state a claim
20 cognizable in a habeas corpus proceeding pursuant to 28 U.S.C. §
21 2254; and

22 2) Petitioner's fourth claim be DISMISSED with leave to
23 file a first amended petition within thirty days; and

24 3) The Court DECLINE to issue a certificate of
25 appealability; and

26 3) The Clerk be DIRECTED to close the action because this
27 order terminates the proceeding in its entirety.

28 These findings and recommendations are submitted to the

1 United States District Court Judge assigned to the case, pursuant
2 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of
3 the Local Rules of Practice for the United States District Court,
4 Eastern District of California. Within thirty (30) days after
5 being served with a copy, any party may file written objections
6 with the Court and serve a copy on all parties. Such a document
7 should be captioned "Objections to Magistrate Judge's Findings
8 and Recommendations." Replies to the objections shall be served
9 and filed within fourteen (14) days (plus three (3) days if
10 served by mail) after service of the objections. The Court will
11 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §
12 636 (b) (1) (C). The parties are advised that failure to file
13 objections within the specified time may waive the right to
14 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
15 1153 (9th Cir. 1991).

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17
18 IT IS SO ORDERED.

19 **Dated: February 23, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE