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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOEL A. ALCOX,	1:11-cv-00850-LJO-SMS (HC)
Petitioner,	FINDINGS AND RECOMMENDATION
v.	REGARDING PETITION FOR WRIT OF
	HABEAS CORPUS
	[Doc. 1]
JAMES HARTLEY,	
Respondent.	

Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On May 25, 2011, Petitioner filed the instant petition for writ of habeas corpus. He is currently incarcerated at the Avenal State Prison serving a sentence of fifteen years to life for his 1987 convictions of first degree murder with use of firearm, robbery and burglary. (See Petition at 2.) Petitioner contends that he has a liberty interest in his minimum eligible parole date and the retroactive application of Marsy’s law violates the Ex Post Facto Clause.

DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

1 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ
2 of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to
3 dismiss, or after an answer to the petition has been filed. See Herbst v. Cook, 260 F.3d 1039 (9th
4 Cir.2001). A petition for habeas corpus should not be dismissed without leave to amend unless it
5 appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson,
6 440 F.2d 13, 14 (9th Cir. 1971).

7 B. Failure to State a Cognizable Claim

8 To the extent Petitioner takes issue with the policies, practices and procedures of the
9 Board as applied in its decision to deny him parole, this claim is foreclosed by the Supreme
10 Court's decision in Swarthout v. Cooke, ___ U.S. ___, 131 S.Ct. 859, 2011 WL 197627 (2011).
11 In Swarthout, the Supreme Court held that the federal habeas court's inquiry into whether a
12 prisoner who has been denied parole received due process is limited to determining whether the
13 prisoner "was allowed an opportunity to be heard and was provided a statement of the reasons
14 why parole was denied." Id., *citing*, Greenholtz v. Inmates of Neb. Penal and Correctional
15 Complex, 442 U.S. 1, 16 (1979). Petitioner does not contend he was denied these procedural due
16 process guarantees. Rather, it appears Petitioner contends he has a liberty interest under the Due
17 Process Clause in the application of his good and work time credits used to establish his
18 minimum eligibility release. Petitioner is mistaken. A life prisoner's "Minimum Eligible Parole
19 Date," (MEPD) is the "earliest date on which an Indeterminate Sentence Law or life prisoner may
20 be legally released on parole." See Cal. Code Regs., tit. 15, § 3000; see also Cal. Code Regs., tit.
21 15, § 2000(b)(67). However, the actual length a prisoner must serve prior to release is
22 determined by the Board of Parole. The prisoner's MEPD determines the timing of the
23 prisoner's initial suitability hearing-one year prior to the MEPD. See e.g. Alley v. Carey, 2010
24 WL 4386827 1 6 (9th Cir. Nov. 5, 2010) (unpublished) (good time credit affects minimum
25 eligible parole date).

26 California Penal Code section 190(a) mandates the CDCR apply any good behavior
27 credits against the minimum term for purposes of establishing the MEPD. Those credits need not
28 be reapplied to the actual term it eventually sets if, and when, the prisoner is determined eligible

1 for parole. In re Dayan, 231 Cal.App.3d 184, 188 (1991); see also Cal. Code Regs., tit. 15, §
2 2400 (“The department’s decisions [regarding credit] do not affect the Board’s decision
3 concerning postconviction credit pursuant to these rules.”). It is theoretically possible that if a
4 prisoner is determined eligible for parole at the earliest possible time, credits may be of use in
5 actually reducing the amount of time a prisoner served prior to the initial parole suitability
6 hearing being set. See People v. Rowland, 134 Cal.App.3d 1, 13-14 (1982). However, the
7 determination of Petitioner’s actual release is dependent upon the Board of Parole finding him
8 suitable for release, irrespective of the amount of time served. Cal. Pen. Code § 3041(b); Cal.
9 Code Regs., tit. 15, § 2281(a).

10 Therefore, the credits that Petitioner is allowed to earn by statute as a life prisoner do not
11 have a direct impact upon the amount of time Petitioner must actually serve unless and until the
12 Board of Parole determines he is suitable for release. Petitioner will receive parole consideration
13 hearing at intervals set by the Board and the credits do not direct impact the duration of
14 Petitioner’s sentence. Cal. Pen. Code §§ 3041, 3041.5.

15 Petitioner’s second claim for relief, that the Board violated the Ex Post Facto Clause by
16 invoking Marsy’s Law, is without merit. On November 4, 2008, California voters passed
17 Proposition 9, the “Victims’ Bill of Rights Act of 2008: Marsy’s Law,” which, *inter alia*, altered
18 the frequency of parole hearings for prisoners not found suitable for parole. Prior to the passage
19 of Proposition 9, in the event a prisoner was determined unsuitable for parole, a subsequent
20 parole hearing would be held annually thereafter. Cal Penal Code § 3041.5(b)(2) (2008). If the
21 parole board determined it was not reasonable to expect parole would be granted within the next
22 year, it could defer rehearing for two years. Id. If the prisoner was convicted of murder and it
23 was not reasonable to expect he/she would be granted parole within the year, the board could
24 select a rehearing term of up to five years. Id. Proposition 9 changed the frequency of subsequent
25 parole hearings as follows:

26 The board shall schedule the next hearing, after considering the views and
27 interests of the victim, as follows:

28 (A) Fifteen years after any hearing at which parole is denied, unless the board
finds by clear and convincing evidence that the criteria relevant to the setting of parole

1 release dates enumerated in subdivision (a) of Section 3041 are such that consideration of
2 the public and victim’s safety does not require a more lengthy period of incarceration for
the prisoner than 10 additional years.

3 (B) Ten years after any hearing at which parole is denied, unless the board finds
4 by clear and convincing evidence that . . . consideration of the public and victim’s safety
does not require a more lengthy period of incarceration for the prisoner than seven
5 additional years.

6 (C) Three years, five years, or seven years after any hearing at which parole is
7 denied, because . . . consideration of the public and victim’s safety requires a more
lengthy period of incarceration for the prisoner, but does not require a more lengthy
period of incarceration for the prisoner than seven additional years.

8 Cal. Penal Code § 3041.5(b)(3) (November 4, 2008).

9 For a statute to violate the Ex Post Facto Clause, it must: (a) punish as a crime an act
10 previously committed, which was innocent when done; (b) make more burdensome the
11 punishment for a crime, after its commission; or (c) deprive one charged with crime of any
12 defense available according to law at the time when the act was committed. See Collins v.
13 Youngblood, 497 U.S. 37, 42 (1990); Bezell v. Ohio, 269 U.S. 167, 169–70 (1925). In this
14 context, a retroactive procedural change violates the Ex Post Facto Clause only if it “creates a
15 significant risk of prolonging [an inmate’s] incarceration.” Garner v. Jones, 529 U.S. 244, 251
16 (2000). A “speculative” or “attenuated possibility” of prolonging incarceration is insufficient to
17 establish a violation of the Ex Post Facto Clause. Cal. Dep’t of Corr. v. Morales, 514 U.S. 499,
18 509 (1995)

19 In Morales, 514 U.S. at 509, the Supreme Court expressly rejected an Ex Post Facto
20 challenge to a California statute that reduced the frequency of parole reconsideration hearings for
21 prisoners convicted of multiple murders. Finding that the law “did not modify the statutory
22 punishment imposed for any particular offenses,” “alter the standards for determining either the
23 initial date of parole eligibility or an inmate’s suitability for parole,” or “change the basic
24 structure of California’s parole law,” the Supreme Court held that retroactive application of the
25 statute did not create “a sufficient risk of increasing the measure of punishment attached to the
26 covered crimes.” See also Garner, 529 U.S. at 250, *citing Morales*, 514 U.S. 499. Similarly,
27 Proposition 9, the “Victims’ Bill of Rights Act of 2008: Marsy’s Law,” does not violate the Ex
28 Post Facto Clause because its application does not modify the statutory punishment imposed for

1 petitioner's commitment offense, nor does it alter the formula for earning sentence reduction
2 credits or the standards for determining Petitioner's initial parole eligibility date or his suitability
3 for parole. Further, it does not change the basic structure of California's parole law since the
4 Board still must consider the same factors in determining parole suitability. See Cal.Penal Code §
5 3041(b) (as amended).

6 In addition, the Court notes that Penal Code section 3041.5 has been amended several
7 times to allow for longer periods of time between parole suitability hearings, and Ex Post Facto
8 challenges to those amendments have all been rejected. See, e.g., Morales, 514 U.S. at 509 (1981
9 amendment to section 3041.5, which increased maximum deferral period of parole suitability
10 hearings to five years did not violate the Ex Post Facto Clause because it simply altered the
11 method of setting a parole release date and did not create a meaningful “risk of increasing the
12 measure of punishment attached to the covered crimes”); Watson v. Estelle, 886 F.2d 1093,
13 1097-98 (9th Cir.1989) (not a violation of the Ex Post Facto Clause to apply section
14 3041.5(b)(2)(A) to prisoners sentenced to life imprisonment prior to the 1977 implementation of
15 California's Determinate Sentence Law); see also Garner v. Jones, 529 U.S. 244, 249 (2000)
16 (upholding Georgia's change in the frequency of parole hearings for prisoners serving life
17 sentences, from three to eight years); Gilman v. Schwarzenegger, 638 F.3d 1101 (2011)
18 (reversing the district court's order granting Plaintiff's motion for preliminary injunction because
19 it was unlikely that plaintiffs would succeed on the merits of their Ex Post Facto Clause
20 challenge to Marsy's law). For these reasons, Petitioner's challenge to Proposition 9, “Marsy’s
21 Law,” fails.

22 Furthermore, the Court takes judicial notice of the docket and orders in the class action
23 Gilman v. Fisher, 2:05-cv-00830 LKK GGH, which is pending in the Sacramento Division of
24 this Court, including the order granting motion for class certification filed on March 4, 2009
25 (Doc. 182, 9:7–15), which indicates that the Gilman class is made up of California state prisoners
26 who: 1) have been sentenced to a term that includes life; 2) are serving sentences that include the
27 possibility of parole; 3) are eligible for parole; and 4) have been denied parole on one or more
28 occasions. The docket further reflects that the Ninth Circuit affirmed the order certifying the

1 class. (Docs. 257, 258.) The Court also takes judicial notice of the order of March 4, 2009, in
2 which the court described the case as including challenges to Proposition 9's amendments to Cal.
3 Pen.Code § 3041.5 based on the Ex Post Facto Clause, and a request for injunctive and
4 declaratory relief against implementation of the changes. (Doc. 182, 5–6.)

5 The relief sought by Petitioner concerns in part the future scheduling of Petitioner's next
6 suitability hearing and necessarily implies the invalidation of state procedures used to deny
7 parole suitability, matters removed from the fact or duration of confinement. Such types of
8 claims have been held to be cognizable under 42 U.S.C. § 1983 as claims concerning conditions
9 of confinement. Wilkinson v. Dotson, 544 U.S. 74, 82 (2005). Thus, they may fall outside the
10 core of habeas corpus relief. See Preiser v. Rodriguez, 411 U.S. 475, 485-86 (1973); Nelson v.
11 Campbell, 541 U.S. 637, 643 (2004); Muhammad v. Close, 540 U.S. 749, 750 (2004).

12 Further, the relief Petitioner requests overlaps with the relief requested in the Gilman
13 class action. A plaintiff who is a member of a class action for equitable relief from prison
14 conditions may not maintain an individual suit for equitable relief concerning the same subject
15 matter. Crawford v. Bell, 599 F.2d 890, 891–92 (9th Cir.1979). It is contrary to the efficient and
16 orderly administration of justice for a court to proceed with an action that would possibly conflict
17 with or interfere with the determination of relief in another pending action, which is proceeding
18 and in which the class has been certified.

19 Here, Petitioner's allegations reflect that he qualifies as a member of the class in Gilman.
20 The court in Gilman has jurisdiction over the same subject matter and may grant the same relief.
21 A court has inherent power to control its docket and the disposition of its cases with economy of
22 time and effort for both the court and the parties. Landis v. North American Co., 299 U.S. 248,
23 254-255 (1936); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.1992). In the exercise of its
24 inherent discretion, this Court concludes that dismissal of Petitioner's ex post facto claim in this
25 action is appropriate and necessary to avoid interference with the orderly administration of
26 justice. C.f. Crawford v. Bell, 599 F.2d 890, 892-93; see Bryant v. Haviland, 2011 WL 23064,
27 *2–*5 (E.D.Cal. Jan.4, 2011).

28 Therefore, the instant petition does not present cognizable claims for relief, and no

1 cognizable claim could be raised if leave to amend were granted. Jarvis v. Nelson, 440 F.2d 13,
2 14 (9th Cir. 1971). The petition must be dismissed.

3 **RECOMMENDATION**

4 Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be
5 DISMISSED because the petition does not allege grounds that would entitle Petitioner to habeas
6 corpus relief.

7 This Findings and Recommendation is submitted to the Honorable Lawrence J. O’Neill,
8 United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and
9 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of
10 California. Within thirty (30) days after service of the Findings and Recommendation, Petitioner
11 may file written objections with the Court. Such a document should be captioned “Objections to
12 Magistrate Judge’s Findings and Recommendation.” The Court will then review the Magistrate
13 Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file
14 objections within the specified time may waive the right to appeal the District Court’s order.
15 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16
17 IT IS SO ORDERED.

18 **Dated:** August 9, 2011

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE