UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTHONY ELIJAH KILGORE, Petitioner, v. ELVIN VALENZUELA, Warden, Respondent.	NO. CV 14-722-BRO(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Beverly Reid O'Connell, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on January 30, 2014. Respondent filed a "Notice of Motion and Motion to Dismiss, etc." ("Motion") on March 28, 2014. Petitioner filed an Opposition on June 27, 2014.

BACKGROUND

In 1987, Petitioner suffered a conviction for first degree murder and received a sentence of twenty-five years to life (Petition, p. 2). On September 9, 2009, the California Board of Prison Terms ("Board") deemed Petitioner unsuitable for parole and denied parole for ten years (Petition, Ex. D, ECF Document No. 1-1, pp. 38-43).[1] On March 25, 2012, Petitioner submitted to the Board a "Petition to Advance Hearing Date," invoking California Penal Code Section 3041.5(b), a provision of "Marsy's Law" (Petition, ECF Document No. 1-1, pp. 1-2).[2] On April 10, 2012, a Board Commissioner/Deputy Commissioner ordered a full review (Petition, Ex. A, ECF Document No. 1-1, p. 4; Respondent's Lodgment 1, p. 0003). On July 19, 2012, a Board Commissioner/Deputy Commissioner denied the "Petition to Advance Hearing Date," stating that Petitioner had failed to establish a "reasonable likelihood that consideration of the public and victim's safety [did] not require the additional incarceration" (Petition, Ex. A, ECF Document No. 1-1, pp. 4-5; Respondent's Lodgment 1, pp. 0003-0004). The Board Commissioner/Deputy Commissioner stated:

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[1] Because the Petition and attached exhibits do not bear consecutive page numbers, the Court uses the ECF pagination. Although some of the pages of the referenced exhibit are out of order and two pages are missing, it clearly appears from the exhibit that the Board denied parole for ten years.

[2] Section 3041.5(b) allows an inmate to request that the Board exercise its discretion to advance a parole suitability hearing to an earlier date, "by submitting a written request to the board, with notice, upon request, and a copy to the victim which shall set forth the change in circumstances or new information that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration of the inmate."

> Inmate's supporting documents do not address the issues raised by the commissioner's [sic] during the denial. The inmate did not speak to the panel[.] Therefore, there is no background or support that would allow this evaluator to provide a proper analysis. Further the letter of insight as provided by the inmate generates more questions than specific responses. Kilgore still needs more time as recommended by the panel.

(Petition, Ex. A, ECF Document No. 1-1, p. 5; Respondent's Lodgment 1, p. 0004).

Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court, which that court denied on the ground that the Board's denial of Petitioner's "Petition to Advance Hearing Date" was not an abuse of discretion under California Penal Code section 3014.5(d)(2) (Respondent's Lodgment 2). Petitioner filed a habeas corpus petition in the California Court of Appeal, which that court similarly denied on the ground that Petitioner had failed to show an abuse of discretion (Respondent's Lodgments 3, 4). Petitioner filed a habeas corpus petition in the California Supreme Court, which that court denied with a citation to People v. Duvall, 9 Cal. 4th 464, 474,

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37 Cal. Rptr. 2d 259, 886 P.2d 1252 (1995) (Respondent's Lodgments 5, 6).[3]

PETITIONER'S CONTENTIONS

Although the Petition is not a model of clarity, Petitioner appears to be contending that:

1. Petitioner did not receive "full review" of his "Petition to Advance Hearing Date" because the evidence Petitioner submitted assertedly supported that petition; the Board allegedly denied Petitioner due process by denying that petition outside Petitioner's presence; the standard allegedly requiring the Board to determine whether Petitioner is a threat to the community is "an impossible standard" which purportedly violates Due Process (Ground One);

2. The application of Marsy's Law to Petitioner allegedly violated the Ex Post Facto Clause (Ground Two); and

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[3] The citation to People v. Duvall indicates a denial for failure to "state fully and with particularly the facts on which relief is sought." People v. Duvall, 9 Cal. 4th at 474; see Gaston v. Palmer, 417 F.3d 1030, 1036-37 (9th Cir. 2005), modified, 447 F.3d 1165 (9th Cir. 2006), cert. denied, 549 U.S. 1134 (2007); In re Reno, 55 Cal. 4th 428, 482, 146 Cal. Rptr. 3d 297, 283 P.3d 1181 (2012), cert. denied, 133 S. Ct. 2345 (2013). However, Respondent does not seek dismissal on the ground of procedural default. Even if a procedural default existed, the Court properly could deny the Petition on the merits, if substantive federal law warrants the denial of Petitioner's claims. See Lambrix v. Singletary, 520 U.S. 518, 523-25 (1997); Franklin v. Johnson, 290 F. 3d 1223, 1229, 1232-33 (9th Cir. 2002); Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir.), cert. denied, 528 U.S. 846 (1999).

3. The Board allegedly abused its discretion in denying Petitioner's "Petition to Advance Hearing Date" (Ground Three).

DISCUSSION

I. The Court Has Jurisdiction Over the Petition.

Respondent contends this Court lacks habeas corpus jurisdiction over the Petition because Petitioner assertedly does not challenge the fact or duration of his confinement (Motion, pp. 2-3). Respondent's contention lacks merit.

> Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus. [citation]. An inmate's challenge to the circumstances of his confinement, however, may be brought under § 1983. [citation].

Hill v. McDonough, 547 U.S. 573, 579 (2006); see also Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011) ("Habeas is the exclusive remedy . . . for the prisoner who seeks 'immediate or speedier release' from confinement.") (citation omitted); Preiser v. Rodriguez, 411 U.S. 475, 487-89 (1973) (attack on fact or duration of confinement falls within "core" of habeas corpus).

In Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989) ("Bostic"), the Ninth Circuit ruled that habeas corpus jurisdiction exists "when a petition seeks expungement of a disciplinary finding from his record if expungement is likely to accelerate the prisoner's eligibility for parole." Following Bostic, the Ninth Circuit subsequently held that challenges to the procedures used in denying parole are cognizable on habeas corpus. See Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir. 1997).

In arguing that the Court lacks habeas jurisdiction over the present Petition, Respondent relies on Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997) ("Neal"). In Neal, two prisoners brought a civil rights action pursuant to 42 U.S.C. section 1983 challenging their placement in a state "sex offender treatment program," a placement which rendered the prisoners ineligible for parole. The defendant in Neal argued that the prisoners' remedy lay solely in habeas corpus. The Neal Court disagreed, reasoning that if the prisoners were successful in challenging their sex offender labels, that decision would not undermine the validity of the prisoners' convictions or confinement. Neal, 131 F.3d at 824 (footnote omitted). Rather, the decision would only render the prisoners eligible for parole consideration, without altering "the calculus for the review of parole requests," without guaranteeing parole, and without necessarily shortening the prisoners' sentences. Neal, 131 F.3d at 824 (footnote omitted).

Subsequent to Neal, in Docken v. Chase, 393 F.3d 1024 (9th Cir. 2004) ("Docken"), a state prisoner argued in habeas corpus that the

state parole board had violated the Ex Post Facto Clause by changing the interval between the prisoner's parole reviews from one year to five years. The district court deemed the prisoner's argument not cognizable in habeas corpus, citing Neal. Id. at 1025-26. The Ninth Circuit disagreed, however, ruling that habeas remedies and section 1983 remedies are not "necessarily mutually exclusive." Id. at 1030 (noting suggestion in Preiser v. Rodriguez, 411 U.S. 475, 499 (1973) and dissenting opinion thereto that the two remedies are not mutually exclusive); see also Terrell v. United States, 564 F.3d 442, 446-49 (6th Cir. 2009) (rejecting argument that habeas and section 1983 actions are mutually exclusive, citing Docken). In Docken, the Ninth Circuit reconciled the possible conflict between Bostic and Neal by deeming Neal to have held "only that § 1983 was an *appropriate* remedy in that case, without reaching the issue of whether it was the *exclusive* remedy." Docken, 393 F.3d at 1030 (original emphasis). The Docken Court held that claims "likely" to affect the duration of confinement under Bostic were those "with a sufficient nexus to the length of imprisonment so as to implicate, but not fall squarely within, the 'core' challenges identified by the Preiser Court." Id. Applying Bostic, the Docken Court held that "it was at least possible that Docken's suit would impact the duration of his confinement if the Board's actions in changing the frequency of his parole review violated the Ex Post Facto Clause," and that "the potential relationship between [Docken's] claim and the duration of his confinement is undeniable." Id. at 1031. Despite the uncertainty regarding whether annual parole review would affect the duration of Docken's confinement in light of his status as a "dangerous offender," the Ninth Circuit professed itself "ill-inclined . . . to substitute

[its] substantive analysis of the likely outcome of Docken's parole hearings for that of the Board." Id. The Docken Court concluded that "when prison inmates seek only equitable relief in challenging aspects of their parole review that, so long as they prevail, *could* potentially affect the duration of their confinement, such relief is available under the federal habeas statute." Id.

Subsequent Supreme Court authorities have not overruled or undermined the Ninth Circuit's holding in Docken. In Wilkinson v. Dotson, 544 U.S. 74, 76 (2005) ("Wilkinson"), the Supreme Court held that a claim which, if successful, would result in a new parole eligibility review or a new parole hearing was cognizable as a civil rights claim under 42 U.S.C. section 1983, and was not required to be brought in habeas. The Wilkinson Court did not purport to preclude such a claim from being brought in habeas.[4] In Nelson v. Campbell, 541 U.S. 637, 646 (2004), the Supreme Court held that a challenge to a particular method of execution was cognizable in a section 1983 action, but did not decide whether "method-of-execution claims generally" should be treated as habeas claims or civil rights claims. In Skinner v. Switzer, supra, the Supreme Court held that a prisoner could seek DNA testing of crime scene evidence in a civil rights action, but did not hold that habeas and civil rights actions are mutually exclusive. See Skinner v. Switzer, 131 S. Ct. at 1298.

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[4] The Ninth Circuit has interpreted Wilkinson as "confirm[ing] [the Ninth Circuit's] prior understanding, articulated in Docken [citation], that § 1983 and habeas are not always mutually exclusive." See Osborne v. District Attorney's Office for the Third Judicial District, 423 F.3d 1050, 1055 (9th Cir. 2005).

The Ninth Circuit's holding in Docken controls the jurisdictional issue in the present case. Petitioner's challenge to the denial of his "Petition to Advance Hearing Date" potentially could affect the duration of his confinement because the relief could compel the Board to accelerate Petitioner's next suitability hearing and could result in an earlier suitability finding. Therefore, this Court has jurisdiction to consider the Petition. Accord, Nettles v. Grounds, 2013 WL 3967652, at *2-3 (N.D. Cal. July 31, 2013); Mendez v. Ochoa, 2012 WL 4740802, at *1 n.2 (C.D. Cal. Sept. 17, 2012), adopted, 2012 WL 4740458 (C.D. Cal. Oct. 4, 2012); but see Bryant v. Haviland, 2011 WL 23064 (E.D. Cal. Jan. 4, 2011) ("Bryant") (without acknowledging Docken, deeming the petitioner's challenge to the deferral provisions of Marsy's Law "too remote" to be cognizable on habeas).

II. Petitioner's Due Process Claim Does Not Merit Habeas Relief.[5]

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979) ("Greenholtz"). In some instances, however, state statutes may create liberty interests in parole release entitled to protection under the federal Due Process Clause. See Bd. of Pardons v. Allen, 482 U.S. 369, 371 (1987);

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[5] The Court applies a de novo standard of review to all of Petitioner's claims. See Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc) (federal habeas court may determine whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States" under 28 U.S.C. section 2254(a) prior to, or in lieu of, applying the standard of review set forth in 28 U.S.C. section 2254(d)).

Greenholtz, 442 U.S. at 12. The Ninth Circuit has held that California's statutory provisions governing parole create such a liberty interest. See Hayward v. Marshall, 603 F.3d 546, 555 (9th Cir. 2010) (en banc), disapproved on other grounds, Swarthout v. Cooke, 131 S. Ct. 859 (2011).[6]

"In the context of parole, . . . the procedures required are minimal." Swarthout v. Cooke, 131 S. Ct. 859, 862 (2011). Due process requires that the State furnish a parole applicant with an opportunity to be heard and a statement of reasons for a denial of parole. Greenholtz, 442 U.S. at 16. "The Constitution does not require more." Id.; accord Swarthout v. Cooke, 131 S. Ct. at 862 (citation omitted); Styre v. Adams, 645 F.3d 1106, 1108 (9th Cir. 2011); see also Roberts v. Hartley, 640 F.3d 1042, 1046 (9th Cir. 2011) ("there is no substantive due process right created by the California's parole scheme").

The Court assumes arguendo that Greenholtz applies to proceedings regarding the deferral or advancement of California parole hearings. Petitioner received the benefit of the minimal procedures required in Greenholtz. Petitioner initiated the "Petition to Advance Hearing Date" and was afforded the opportunity to submit evidence regarding "the change in circumstances or new information that establishes a

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[6] In Swarthout v. Cooke, the Supreme Court did not reach the question of whether California law creates a liberty interest in parole, but observed that the Ninth Circuit's affirmative answer to this question "is a reasonable application of our cases." Swarthout v. Cooke, 131 S. Ct. at 861-62 (citations omitted).

reasonable likelihood that consideration of the public safety does not require the additional period of incarceration of the inmate." See Cal. Penal Code § 3041.5(d)(1). The Board provided Petitioner with a statement of reasons for the decision denying the "Petition to Advance Hearing Date."[7] The Constitution did not "require more." Greenholtz, 442 U.S. at 16.

To the extent Petitioner contends the Board denied the "Petition to Advance Hearing" without sufficient evidence to support the denial and despite Petitioner's assertedly favorable evidence, Petitioner fails to state any claim for federal habeas relief. In Swarthout v. Cooke, supra, the United States Supreme Court rejected the contention that the federal Due Process Clause contains a guarantee of evidentiary sufficiency with respect to a parole determination. Swarthout v. Cooke, 131 S. Ct. at 862 ("No opinion of ours supports converting California's 'some evidence' rule into a substantive federal requirement."). If the evidentiary sufficiency pertaining to a parole suitability determination does not implicate federal Due Process, the evidentiary sufficiency pertaining to the deferral of a suitability determination similarly cannot implicate federal Due Process. See Saffold v. Hill, 2013 WL 6283893, at *1 (E.D. Cal. Dec. 4, 2013) ("District Courts throughout the Ninth Circuit have consistently rejected claims advanced by state prisoners that the Board violates federal law when it denies a petition to advance parole hearings") (citations omitted); Johnson v. Hartley, 2013 WL 440990, at

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[7] Petitioner may dispute the persuasiveness of the Board's reasoning, but the Board did furnish Petitioner with a statement of reasons.

*2 (E.D. Cal. Feb. 5, 2013) (finding no authority for proposition that Board violated federal Due Process by refusing to advance inmate's parole hearing).

For the foregoing reasons, Petitioner is not entitled to habeas relief on Ground One of the Petition.

III. The Court Should Deny Petitioner's Ex Post Facto Claim Without Prejudice Because Petitioner Is a Member of the Gilman Class.

Petitioner argues that the application of Marsy's Law to Petitioner violates the Ex Post Facto Clause. Prior to Marsy's Law, when the Board would deem an inmate serving a life sentence for murder unsuitable for parole, the Board would conduct a subsequent parole hearing one year later, except the Board could defer the subsequent hearing up to five years if the Board found that it was not reasonable to expect that parole would be granted sooner. See former Cal. Penal Code § 3041.5(b)(2). Marsy's Law increased the maximum deferral period to fifteen years and also provided for a presumptive deferral period of ten years unless the Board "finds by clear and convincing evidence that the [statutory] criteria relevant to the setting of parole release dates . . . are such that consideration of the public and victim's safety do not require a more lengthy period of incarceration. . . ." See Cal. Penal Code § 3041.5(b)(3)(B). In such case, the Board has discretion to set a three-, five-, or seven-year deferral period. Id. As previously indicated, the Board imposed a ten-year deferral period for Petitioner.

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Respondent contends that Petitioner is a class member in a class action presently pending in the United States District Court for the Eastern District of California, Gilman v. Brown, Civ. S 05-830 LKK GGH ("Gilman"). Respondent asserts that the present Petition is the equivalent of a suit for injunctive and equitable relief which cannot be brought where there exists a pending class action concerning the same subject matter. See Crawford v. Bell, 599 F.2d 890, 892-93 (9th Cir. 1979) (district court may dismiss individual plaintiff's action where plaintiff is member of a pending class action raising the same claims); see also McNeil v. Guthrie, 945 F.2d 1163, 1165 (10th Cir. 1991); Gillespie v. Crawford, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc).

The Gilman plaintiffs allege, among other things, that the provisions of Marsy's Law extending deferral periods violate the Ex Post Facto Clause. See Gilman v. Schwarzenegger, 638 F.3d 1101, 1103 (9th Cir. 2011).[8] On March 4, 2009, the District Court in Gilman certified, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, a class of all California state prisoners convicted of murder currently serving sentences of life with the possibility of parole. See Gilman v. Davis, 2009 WL 577767 (E.D. Cal. Mar. 4, 2009), aff'd, 382 Fed. App'x 544 (9th Cir. 2010). On April 25, 2011, the

[8] The Court takes judicial notice of the docket and records in Gilman v. Brown, Civ. S 05-830 LKK GGH, available on the PACER database. See Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of court records). The docket reflects a change in the identity of the California Governor, a named Defendant. The Gilman caption presently reflects that California Governor Jerry Brown is the lead Defendant.

District Court in Gilman amended the definition of the certified class to provide, inter alia, that, as to the Ex Post Facto challenge to the deferral periods, the class is defined as "all California state prisoners who have been sentenced to a life term with the possibility of parole for an offense that occurred before November 4, 2008" (Docket Entry 340). Plaintiff is a member of this class.[9]

On February 4, 2010, the District Court in Gilman granted a preliminary injunction enjoining the defendants from enforcing the deferral period provisions of Marsy's Law as to the named plaintiffs. See Gilman v. Schwarzenegger, 690 F. Supp. 2d 1105 (E.D. Cal. 2010), rev'd, 638 F.3d 1101 (9th Cir. 2011). On January 24, 2011, the Ninth Circuit reversed, holding that the plaintiffs had failed to show a likelihood of success on this claim. See Gilman v. Schwarzenegger, 638 F.3d 1101 (9th Cir. 2011).

Following a bench trial, on February 28, 2014, the District Court in Gilman declared, inter alia, that the deferral provisions of Marsy's Law violate the Ex Post Facto Clause (Docket Entry 532). The District Court ordered the Board to apply former California Penal Code section 3014.5 to all class members and to afford all class members an annual parole suitability hearing unless the Board finds, under former law, that a longer deferral period is warranted (Docket Entry 532). The District Court stayed this order for 31 days and indicated that the order would "go[] into effect immediately thereafter, unless a timely appeal is filed." (Id.). Judgment was entered on February 28,

[9] The Gilman docket does not show that Plaintiff ever filed an "opt out" request.

2014 (Docket Entry 533).

On March 27, 2014, the Gilman Defendants filed a notice of appeal. On April 21, 2014, the plaintiffs filed a motion to enforce the judgment, noticed for hearing on May 19, 2014. On May 5, 2014, the defendants filed an opposition to the motion. On May 12, 2014, the plaintiffs filed a Reply. On May 13, 2014, the District Court vacated the hearing and took the matter under submission.

Because Petitioner is a member of the Gilman class, it appears that Petitioner's interests will be, and are being, represented in that action. For this reason, Petitioner's Ex Post Facto claim should be dismissed without prejudice. See Hung Duong Nguon v. Virga, 2014 WL 996215, at *3 (E.D. Cal. Mar. 13, 2014) (recommending that petitioner's Ex Post Facto challenge to Marsy's Law be dismissed in light of Gilman litigation, given petitioner's putative membership in Gilman class); Garcia v. Valenzuela, 2014 WL 683795, at *5 (C.D. Cal. Feb. 18, 2014) (same); Smith v. Valenzuela, 2014 WL 348480 (E.D. Cal. Jan. 31, 2014) (same); Wallach v. Melanson, 2013 WL 5418051 (S.D. Cal. Sept. 26, 2013) (same); Rivers v. Swarthout, 2011 WL 6293756, at *2-3 (E.D. Cal. Dec. 13, 2011) (same).

IV. Petitioner's Claim that the Board's Denial of the "Petition to Advance Hearing Date" Was an "Abuse of Discretion" Does Not Merit Federal Habeas Relief.

In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or

treaties of the United States. Estelle v. McGuire, 502 U.S. 62, 68 (1991). To the extent Petitioner contends the Board violated state discretionary rules concerning the advancement of a parole hearing date, Petitioner is not entitled to federal habeas relief. See Roberts v. Hartley, 640 F.3d 1042, 1047 (9th Cir. 2011) (federal habeas court is not authorized "to reevaluate California's application of its rules for determining parole eligibility") (citation omitted); see generally Wilson v. Corcoran, 131 S. Ct. 13, 16 (2010) ("We have repeatedly held that federal habeas corpus relief does not lie for errors of state law") (citations and internal quotations omitted); Estelle v. McGuire, 502 U.S. at 67-68 (same). Therefore, Petitioner is not entitled to habeas relief on Ground Three of the Petition.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing

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Petitioner's ex post facto claim without prejudice and denying and dismissing Petitioner's other claims with prejudice.[10]

DATED: July 10, 2014.

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CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[10] The Court would reach this same ultimate result regardless of the resolution of the jurisdictional issue discussed in section I, supra. If no habeas jurisdiction existed, the Court would convert the present action into a civil rights action. See Wilwording v. Swenson, 404 U.S. 249, 251-52 (1971); Hanson v. May, 502 F.2d 728, 729-30 (9th Cir. 1974). The Court then would dismiss Grounds One and Three with prejudice for failure to state a claim on which relief could be granted and would dismiss Ground Two without prejudice because Petitioner/Plaintiff is a member of the Gilman class.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.