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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RODNEY S. PETILLO,
Petitioner,
v.
BRIAN DUFFY,
Respondent.



NO. CV 15-765-DDP (AGR)

ORDER TO SHOW CAUSE

Petitioner filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his 2010 parole denial. For the reasons discussed below, it appears that Petitioner's claims are not cognizable on federal habeas review.

The court therefore orders Petitioner to show cause on or before **April 9, 2015** why the court should not recommend dismissal of the petition.

1 I.

2 **SUMMARY OF PROCEEDINGS**

3 In 1986 Petitioner pled guilty to second degree murder and was sentenced
4 to 15 years to life. (Petition at 2.)

5 On September 23, 2010, the Parole Board denied Petitioner parole.
6 (Petition, Attached Hearing transcript at 1 & Decision at 9.)

7 On June 18, 2012, Petitioner filed a habeas petition in the California Court
8 of Appeal, which was denied on June 27, 2012. California Appellate Courts Case
9 Information online docket in Case No. B241915. On June 20, 2013, Petitioner
10 filed a habeas petition in the California Supreme Court, which was denied on
11 August 21, 2013. (Petition, Attached.)

12 On February 3, 2015, Petitioner filed a Petition for Writ of Habeas Corpus
13 by a Person in State Custody in this court. He raises three grounds. (*Id.* at 5-6.)

14 II.

15 **STANDARD OF REVIEW**

16 A federal court may not grant a petition for writ of habeas corpus by a
17 person in state custody with respect to any claim that was adjudicated on the
18 merits in state court unless it (1) “resulted in a decision that was contrary to, or
19 involved an unreasonable application of, clearly established Federal law, as
20 determined by the Supreme Court of the United States”; or (2) “resulted in a
21 decision that was based on an unreasonable determination of the facts in light of
22 the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d);
23 *Harrington v. Richter*, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011).

24 “[C]learly established Federal law’ . . . is the governing legal principle or
25 principles set forth by the Supreme Court at the time the state court rendered its
26 decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed.
27 2d 144 (2003). A state court’s decision is “contrary to” clearly established
28 Federal law if (1) it applies a rule that contradicts governing Supreme Court law;

1 or (2) it “confronts a set of facts . . . materially indistinguishable” from a decision
2 of the Supreme Court but reaches a different result. *Early v. Packer*, 537 U.S. 3,
3 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002). A state court’s decision cannot be
4 contrary to clearly established Federal law if there is a “lack of holdings from” the
5 Supreme Court on a particular issue. *Carey v. Musladin*, 549 U.S. 70, 77, 127 S.
6 Ct. 649, 166 L. Ed. 2d 482 (2006).

7 Under the “unreasonable application prong” of section 2254(d)(1), a federal
8 court may grant habeas relief “based on the application of a governing legal
9 principle to a set of facts different from those of the case in which the principle
10 was announced.” *Lockyer*, 538 U.S. at 76; see also *Woodford v. Visciotti*, 537
11 U.S. 19, 24-26, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (state court decision
12 “involves an unreasonable application” of clearly established federal law if it
13 identifies the correct governing Supreme Court law but unreasonably applies the
14 law to the facts).

15 “In order for a federal court to find a state court’s application of [Supreme
16 Court] precedent ‘unreasonable,’ the state court’s decision must have been more
17 than incorrect or erroneous.” *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct.
18 2527, 156 L. Ed. 2d 471 (2003). “The state court’s application must have been
19 ‘objectively unreasonable.’” *Id.* at 520-21 (citation omitted); see also *Clark v.*
20 *Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003).

21 “Under § 2254(d), a habeas court must determine what arguments or
22 theories supported or, as here, could have supported, the state court’s decision;
23 and then it must ask whether it is possible fairminded jurists could disagree that
24 those arguments or theories are inconsistent with the holding in a prior decision
25 of this [Supreme] Court.” *Richter*, 131 S. Ct. at 786. “[A] state prisoner must
26 show that the state court’s ruling on the claim being presented in federal court
27 was so lacking in justification that there was an error well understood and
28

1 comprehended in existing law beyond any possibility for fairminded
2 disagreement.” *Id.* at 786-87.

3 “Factual determinations by state courts are presumed correct absent clear
4 and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated
5 on the merits in a state court and based on a factual determination will not be
6 overturned on factual grounds unless objectively unreasonable in light of the
7 evidence presented in the state-court proceeding, § 2254(d)(2).” *Miller-El v.*
8 *Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

9 In applying these standards, this court looks to the last reasoned State
10 court decision. *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006). To the
11 extent no such reasoned opinion exists, as when a state court rejected a claim
12 without explanation, this court must conduct an independent review to determine
13 whether the decisions were contrary to, or involved an unreasonable application
14 of, “clearly established” Supreme Court precedent. *Delgado v. Lewis*, 223 F.3d
15 976, 982 (9th Cir. 2000). If the state court declined to decide a federal
16 constitutional claim on the merits, this court must consider that claim under a *de*
17 *novo* standard of review rather than the more deferential “independent review” of
18 unexplained decisions on the merits authorized by *Delgado*. *Lewis v. Mayle*, 391
19 F.3d 989, 996 (9th Cir. 2004) (standard of *de novo* review applicable to claim
20 state court did not reach on the merits).

21 III.

22 DISCUSSION

23 A. **GROUND ONE: Due Process Violation**

24 The Ninth Circuit’s holding that California law creates a liberty interest in
25 parole “is a reasonable application of our cases.” *Swarthout v. Cooke*, 862 U.S.
26 216, 219, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011). “When . . . a State creates a
27 liberty interest, the Due Process Clause requires fair procedures for its vindication
28 – and federal courts will review the applications of those constitutionally required

1 procedures.” *Id.* at 220. “In the context of parole, . . . a prisoner . . . receive[s]
2 adequate process when he [is] allowed an opportunity to be heard and [is]
3 provided a statement of the reasons why parole was denied.” *Id.*; *see also*
4 *Roberts v. Hartley*, 640 F.3d 1042, 1046 (9th Cir. 2011).

5 In Petitioner’s case, he received “at least [the required] amount of process.”
6 *See Cooke*, 131 S. Ct. at 862. He was represented at the hearing. (Petition,
7 Attached Hearing Transcript at 3.) Petitioner stated he had no questions about
8 his rights. (*Id.* at 8.) Petitioner spoke throughout the hearing (*see, e.g., id.* at 51-
9 53) and made a lengthy statement toward the end of the hearing (*id.* at 85-90.).
10 The Board recited its reasons for denying parole. (Petition, Attached Decision at
11 1-9.)

12 Petitioner’s arguments that the Board failed to demonstrate that he posed
13 a risk of danger to the community (*see, e.g.,* Petition at 5) is effectively based on
14 the “some evidence” standard, which was foreclosed by *Cooke*. 562 U.S. at 221
15 (“[I]t is no federal concern here whether California’s ‘some evidence’ rule of
16 judicial review . . . was correctly applied.”); *see also Lopez v. Valenzuela*, 2014
17 WL 994927, *6 (C.D. Cal. March 13, 2014) (“Whatever label he uses, it is clear
18 that . . . Petitioner is attacking the sufficiency of the evidence supporting the
19 Board Decision and the correctness of the Board’s conclusion that he presents a
20 current threat to public safety.”). Federal habeas review is not available for errors
21 of state law. *Cooke*, 562 U.S. at 222 (“[W]e have long recognized that a mere
22 error of state law is not a denial of due process.”) (citations and quotation marks
23 omitted).

24 **B. GROUND TWO: Ex Post Facto Violation**

25 Petitioner contends that California Proposition 9, also known as Marsy’s
26 Law, was a violation of the Ex Post Facto Clause. (Petition at 5.)

27 Marsy’s Law was enacted by the California voters in 2008. *In re Vicks*, 56
28 Cal. 4th 274, 278 (2013). The law amended Cal. Penal Code § 3041.5 by

1 “increas[ing] the period of time between parole hearings but allow[ing] for the
2 advancement of a hearing if a change in circumstances or new information
3 subsequently establishes that there is a reasonable probability the prisoner is
4 suitable for parole.” *Id.* Prior to the law, the periods between parole hearings
5 varied but were generally shorter. *Id.* at 283-84. *Vicks* held that the law did not
6 violate the ex post facto clauses of the United States or California Constitution.
7 *Id.* at 278.

8 **1. Ex Post Facto Violation**

9 “The States are prohibited from enacting an *ex post facto* law.” *Garner v.*
10 *Jones*, 529 U.S. 244, 249, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000). “One
11 function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive
12 operation, increase the punishment for a crime after its commission.” *Id.*
13 Although retroactive changes in laws governing parole of inmates may violate the
14 Ex Post Facto Clause, “not every retroactive procedural change creating a risk of
15 affecting an inmate’s terms or conditions of confinement is prohibited.” *Id.* at 250.
16 A retroactive procedural change violates the Ex Post Facto Clause when it
17 “creates a significant risk of prolonging [an inmate’s] incarceration.” *Id.* at 251. A
18 “speculative” or “attenuated” risk is insufficient to establish a violation. *California*
19 *Dept. of Corr. v. Morales*, 514 U.S. 499, 509, 115 S. Ct. 1597, 131 L. Ed. 2d 588
20 (1995).

21 Applying these standards to Petitioner, he cannot succeed on his claim
22 unless (1) Proposition 9, on its face, created a significant risk of increasing the
23 punishment of California life-term inmates, or (2) Petitioner can “demonstrate, by
24 evidence drawn from [Proposition 9’s] practical implementation ..., that its
25 retroactive application will result in a longer period of incarceration than under the
26 [prior law].” *See Garner*, 529 U.S. at 255.

27 In *Gilman v. Schwarzenegger*, 638 F.3d 1101, 1103 (9th Cir. 2011),
28 California state prisoners serving a life term with the possibility of parole brought

1 a civil rights class action and alleged that Proposition 9 violated the Ex Post Facto
2 Clause.¹ The district court granted a preliminary injunction, finding that the
3 plaintiffs were likely to succeed on the merits, but the Ninth Circuit reversed. *Id.*
4 The Ninth Circuit found that Proposition 9 “appear[s] to create a significant risk of
5 prolonging Plaintiffs’ incarceration.” *Id.* at 1108 (citation, brackets, and quotation
6 marks omitted). At the same time, the court found that the availability of
7 advanced hearings “would remove any possibility of harm to prisoners because
8 they would not be required to wait a minimum of three years for a hearing.” *Id.* at
9 1109 (citation and quotation marks omitted). Reversing the injunction, the court
10 found that the plaintiffs were not “likely to succeed on the merits of their *ex post*
11 *facto* claim.” *Id.* at 1111.

12 On February 28, 2014, the *Gilman* district court found an ex post facto
13 violation. *Gilman v. Brown*, Case No. S 05-830 LKK CKD, Dkt. No. 532. On
14 August 12, 2014, the Ninth Circuit granted a motion to stay the district court’s
15 order. *Gilman v. Brown*, Case No. 14-15680, Dkt. No. 26.

16 **2. *Gilman* Class action**

17 “One of the claims presented by the plaintiffs in the class action *Gilman*
18 case is that the amendments to [Cal. Penal Code] § 3041.5(b)(2) regarding
19 parole deferral periods imposed under Marsy’s Law violates the Ex Post Facto
20 Clause because ‘when applied retroactively, [they] create a significant risk of
21 increasing the measure of punishment attached to the original crime.’”
22 *Bagdasaryan v. Swarthout*, 2012 WL 6203113, *8 (E.D. Cal. Dec. 8, 2012))
23 (citing *Gilman v. Governor* (E.D. Cal. CV-05-830) Dkt. No. 154-1 at 13). “[T]he
24 class in *Gilman* is comprised of ‘all California state prisoners who have been
25 sentenced to a life term with the possibility of parole for an offense that occurred
26 before November 4, 2008’”, *Bagdasaryan*, 2012 WL 6203113 at *8 (quoting
27

28 ¹ The court discusses the *Gilman* class action in greater detail below.

1 *Gilman* Dkt. No. 340), were eligible for parole, and have been denied parole. See
2 *Johnson v. Hartley*, 2013 WL 440990, *4 (E.D. Cal. Feb. 5, 2013) (describing
3 *Gilman* class).

4 In March 2009, the Eastern District certified the class. See *Gilman v.*
5 *Brown*, 2013 WL 1904424, *1 and n.3 (E.D. Cal. May 7, 2013) (citing E.D. Cal.
6 CV 05-830 Dkt. No. 182).

7 In April 2011, the plaintiffs sought leave to amend the definition of the
8 class. The court granted the motion and modified the class definitions as follows:

9 As to Claim 8 (ex post facto challenge to Proposition 9 deferral provisions),
10 the class is defined as “all California state prisoners who have been
11 sentenced to a life term with possibility of parole for an offense that
12 occurred before November 4, 2008.”

13 E.D. Cal. CV 05-830 Dkt. No. 340 at 2 ¶¶ 1-3, cited by *Gilman*, 2013 WL 1904424
14 at *1 n.3.

15 The trial court subsequently addressed the definition of the certified class.
16 “The first certified class of plaintiffs were sentenced to life terms for offenses that
17 occurred before November 4, 2008. On that date, Proposition 9 [Marsy’s Law]
18 increased the interval between parole hearings available to these prisoners from
19 a default period of one year (with a maximum of two, three, or five years), to a
20 default period of fifteen years (with a minimum of three years).” *Gilman*, 2013 WL
21 1904424 at *1. The court explained that “[t]he class[] [was] certified pursuant to
22 Fed. R. Civ. P. 23(b)(2), which permits class members to ‘opt out’ at the
23 discretion of the court.” *Id.* at *1 n.1 (citing *Linney v. Cellular Alaska P’ship*, 151
24 F.3d 1234, 1242 n.6 (9th Cir. 1998)).

25 Petitioner satisfies the definition for class membership in a Fed. R. Civ. P.
26 23(b)(2) opt-out class. Petitioner is a member of *Gilman*’s certified class as he is
27 (1) a California state prisoner (2) sentenced to a term of life in prison with the
28 possibility of parole and (3) sentenced before the November 8, 2008 effective

1 date of Proposition 9. Because Petitioner does not allege he has opted out of
2 that class or seeks relief different and beyond that sought by the class, he is
3 bound by the terms of the orders certifying and defining the class. Those orders
4 expressly prohibit class members from bringing individual lawsuits challenging
5 Marsy's Law as violative of the Federal Constitution's Ex Post Facto Clause. See
6 *Sims v. Swarthout*, 2012 WL 5381408, *7 (C.D. Cal. July 30, 2012) ("Petitioner
7 has not alleged or presented any evidence indicating that he requested
8 permission from the *Gilman* court to opt out of the action."), *adopted by* 2012 WL
9 5381401 (C.D. Cal. Oct. 31, 2012).

10 Ground Two violates general class principles and the Eastern District's
11 court orders certifying and defining the class. "According to the district court in
12 *Gilman*, the members of the class 'may not maintain a separate, individual suit for
13 equitable relief involving the same subject matter of the class action.'"
14 *Bagdasaryan*, 2012 WL 6203113 at *8 (quoting *Gilman v. Governor* (E.D. Cal.)
15 Dkt. No. 296 (Dec. 10, 2010 Order) at 2, and citing *Gilman* Dkt. Nos. 274, 276,
16 and 278 (Sept. 23, 2010 and Sept. 28, 2010 and Oct. 1, 2010 Orders)).

17 The preclusive effect of the pending class action does not turn on the
18 presentation of proof that Petitioner actually received notice of class certification.
19 "The preclusive effect of a class action depends upon the adequacy of the entire
20 notice scheme and not upon a determination of whether [a] member of the class
21 to be precluded actually received notice." *Frank v. United Airlines, Inc.*, 216 F.3d
22 845, 861 n.4 (9th Cir. 2000).

23 "In light of the ongoing *Gilman* action, the Court recommends that
24 petitioner's ex post facto challenge to Marsy's law [must] be dismissed without
25 prejudice." *Sims*, 2012 WL 5381408 at *7; *cf. Griffin v. Gomez*, No. 95-16684,
26 139 F.3d 905, 1998 WL 81336, *1 (9th Cir. Feb. 24, 1998) ("[T]he district court
27 held that . . . as a member of the then-pending Madrid class action, Griffin was
28 precluded from challenging on due process grounds the gang-member

1 segregation and debriefing policies.”). “Individual members of the class, like
2 [petitioner], ‘may assert any equitable or declaratory claims they have, but they
3 must do so by urging further actions through the class representative and
4 attorney . . . or by intervention in the class action.’” *Diaz v. Diaz*, 2012 WL
5 5949094, *6 (E.D. Cal. Nov. 28, 2012) (quoting *Webb v. Schwarzenegger*, 2012
6 WL 163012 (N.D. Cal. Jan. 19, 2012)).

7 **C. GROUND THREE: Cruel and Unusual Punishment**

8 Petitioner alleges that his many denials of parole violated the Eighth
9 Amendment prohibition against cruel and unusual punishment.

10 “[C]ourts in this Circuit have rejected attempts to attack unsuitability
11 findings pursuant to the Eighth Amendment.” *Lopez*, 2014 WL 994927 at *6
12 (collecting cases). “The Court is unaware of any Supreme Court or Ninth Circuit
13 decision finding that the denial of parole and continued confinement of a prisoner
14 pursuant to an indeterminate life sentence constitutes cruel and unusual
15 punishment in violation of the Eighth Amendment.” *Id.*

16 **IV.**

17 **ORDER TO SHOW CAUSE**

18 IT IS THEREFORE ORDERED that on or before **April 9, 2015**, Petitioner
19 shall show cause why the court should not recommend dismissal of the petition.

20 **Petitioner is also advised that if he fails to respond to this order to**
21 **show cause by April 9, 2015, the court will recommend that the petition be**
22 **dismissed.**

23
24 DATED: March 9, 2015

25 
26 ALICIA G. ROSENBERG
27 United States Magistrate Judge
28