UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL DUE, Petitioner, v. BOARD OF PAROLE HEARINGS, Respondent.	NO. CV 17-2982-JAK(E) REVISED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Revised Report and Recommendation is submitted to the Honorable John A. Kronstadt, 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 April 20, 2017. The Petition challenges a denial of parole. Respondent filed a "Motion to Dismiss, etc." on May 31, 2017. Petitioner filed "Petitioner's Opposition, etc." on

July 3, 2017.

BACKGROUND

In 1996, a jury found Petitioner guilty of "Attempted murder and corporal injury to a Spouse/Cohabitant with prior" (Petition at 2). In 1997, Petitioner received a prison sentence of "Seven years to life, plus seven years and four months" (id.).

In 2015, Petitioner appeared for a "subsequent parole consideration hearing" before the Board of Parole Hearings ("Board") ("Petitioner's Lodgment of Documents in support of Petition for Writ of Habeas Corpus" ("Petitioner's Lodgment") at 126-264). The Board considered documentary evidence and heard testimony from Petitioner (id.). The Board also heard argument from Petitioner, Petitioner's attorney and a deputy district attorney (id. at 238-51).

The evidence received and discussed at the hearing included evidence concerning the circumstances of the commitment offense, Petitioner's prior record for violent crimes, Petitioner's social history, evidence of Petitioner's prison programming and educational efforts and a report from an examining psychologist (id. at 134-281, 291-352). In opining that Petitioner would present a "moderate risk for violence" if paroled, the examining psychologist emphasized that Petitioner "has not addressed the level of violence he perpetrated on the women he abused over the years," "has a sense of entitlement that others should behave in a way he considers reasonable," and "does not have a realistic view of the stressors he will face if returned to the

community" (id. at 273-81).

The Board found Petitioner unsuitable for parole based on Petitioner's "current dangerousness" to "public safety" (id. at 254). The Board explained that the factors weighing in favor of parole were "outweighed by other circumstances tending to show unsuitability" (id. at 255). These circumstances included the brutality of the commitment offense, Petitioner's previous record of violence, his unstable social history and the information contained in the examining psychologist's report (id. at 255-60).

Petitioner challenged the Board's determination in a habeas corpus petition filed in Superior Court (Petition at 3-4). The Superior Court denied this petition in a brief but reasoned decision (Petitioner's Lodgment at 353-54). Subsequently, the California Court of Appeal and the California Supreme Court summarily denied habeas petitions filed in those courts (id. at 356-57).

The present Petition seeks to challenge the legality of California's parole system under a host of legal theories. Although much of the Petition and Opposition appear to relate to the California parole system generally, Petitioner also specifically challenges the Board's finding of Petitioner's unsuitabilty for parole:

> In Petitioner's case, the evidence in the record was clear. Petitioner successfully addressed the causative factors of his commitment offense and criminal history, acquiring the social skills needed to deal with life's difficulties in a

> constructive and lawful fashion . . . there was no current evidence that Petitioner failed to reform. . . .

(Opposition at 7-8).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially

indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under §

2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards to Petitioner's exhausted claims, the Court usually looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). The Court generally presumes that a reasoned state court decision adjudicated all of the petitioner's federal claims, even if the decision did not specifically address all such claims. See Johnson v. Williams, 568 U.S. 289, 133 S. Ct. 1088, 1096 (2013). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §

2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION

For the reasons discussed below, the Petition should be denied and dismissed with prejudice.[1]

Petitioner cannot properly seek relief for harm allegedly suffered by parole applicants other than himself. Petitioner "has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972). A pro se litigant may not represent anyone other than himself or herself. See Campbell v. Burt, 141 F.3d 927, 931 (9th Cir. 1998); Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997); C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987). Thus, Petitioner cannot properly challenge "the Board's 30 year refusal to set uniform ISL terms . . ." or the "Board's and California Courts[']' 30 year arbitrary application of PC 3041(a) and PC 3041(b) . . ." (Petition at 5-6). Petitioner properly can challenge only his own continuing incarceration. As discussed below, Petitioner's myriad challenges to his own continuing incarceration do not merit federal habeas relief.

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[1] The Court has read, considered and rejected on the merits all of Petitioner's arguments. The Court discusses Petitioner's principal arguments herein.

Federal habeas relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) ("it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (original emphasis); Hendricks v. Vasquez, 974 F.2d 1099, 1105 (9th Cir. 1992) ("Federal habeas will not lie for errors of state law").

"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); 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

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other grounds, Swarthout v. Cooke, 562 U.S. 216 (2011).[2]

"In the context of parole, . . . the procedures required are minimal." Swarthout v. Cooke, 562 U.S. at 220. 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; see Swarthout v. Cooke, 562 U.S. at 220 (citation omitted). "The Constitution does not require more." Greenholtz, 442 U.S. at 16; accord Swarthout v. Cooke, 562 U.S. at 220 (citation omitted). Petitioner does not contend, and the record does not show, that Petitioner was denied these required procedural safeguards. See Swarthout v. Cooke, 562 U.S. at 220.

In In re Lawrence, 44 Cal. 4th 1181, 1212, 82 Cal. Rptr. 3d 169, 190 P.3d 535 (2008), the California Supreme Court held, as a matter of state law, that "some evidence" must exist to support a parole denial. In Swarthout v. Cooke, however, 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, 562 U.S. at 220-22 ("No opinion of ours supports converting California's 'some evidence' rule into a substantive federal requirement."). Accordingly, Swarthout v. Cooke

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[2] 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, 562 U.S. at 219-20 (citations omitted). The Ninth Circuit has held that Swarthout v. Cooke "did not disturb our conclusion that California law creates a liberty interest in parole." Roberts v. Hartley, 640 F.3d 1042, 1045 (9th Cir. 2011) (citation omitted).

bars Petitioner's challenge to the sufficiency of the evidence to support the Board's decision. See id. at 222 ("The Ninth Circuit's questionable finding that there was no evidence in the record supporting parole denial is irrelevant unless there is a federal right at stake") (emphasis original); see also Madrid v. Mendoza-Powers, 424 Fed. App'x 671, 672 (9th Cir. 2011) (Swarthout v. Cooke foreclosed claim that Board denied parole based on allegedly immutable factors); Claborn v. Swarthout, 2013 WL 6799059, at *2-3 (E.D. Cal. Dec. 20, 2013) (under Swarthout v. Cooke, claim that Board could not continue to deny petitioner parole based on allegedly immutable factors did not state a claim for federal habeas relief); Kun Shan Peng v. Tilton, 2012 WL 5350266, at *1 (N.D. Cal. Oct. 29, 2012) (same). Thus, no federal claim is stated by Petitioner's assertion that "the evidence in the record was [so] clear" that Petitioner should have been found suitable for parole.

Petitioner's claims that the Board and the California courts allegedly have violated California state law (deliberately or otherwise) also fail to provide any basis for federal habeas relief. The interpretation and application of state statutes and state regulations regarding California's parole system present only matters of state law not cognizable in this federal habeas proceeding. See Swarthout v. Cooke, 562 U.S. at 221 ("[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."); Roberts v. Hartley, 640 F.3d at 1047 (federal habeas court is not authorized "to reevaluate California's application of its rules for determining

parole eligibility") (citation omitted); Chan v. Kane, 272 Fed. App'x 632, 633-34 (9th Cir. 2008) ("Chan's contentions that the Board's decision violated California parole law are questions of state law that we will not review here") (citations omitted); see generally Estelle v. McGuire, 502 U.S. at 67-68.

Petitioner argues that the California authorities have converted his indeterminate sentence of life with the possibility of parole into a sentence of life without the possibility of parole. This argument must be rejected. The denial of current parole suitability does not equate to the denial of all future possibility of parole, and so does not convert Petitioner's sentence into a sentence of life without the possibility of parole. See, e.g., Jenkins v. Hill, 2012 WL 2571205, at *3 (E.D. Cal. July 2, 2012) ("Petitioner is incorrect that his sentence has been changed to one of life without the possibility of parole or a death sentence. Petitioner will continue to receive parole suitability hearings and will be released if he demonstrates he is suitable for parole"); accord Jackson v. Carey, 244 Fed. App'x 133 (9th Cir. 2007).

Although some of Petitioner's arguments are unclear, Petitioner also appears to argue that the application of California Penal Code section 3041 to determine Petitioner's suitability for parole violates the ex post facto clause. The Ninth Circuit, district courts within the Ninth Circuit, and California states courts have all rejected arguments that the application of the relevant criteria for determining the parole suitability of prisoners such as Petitioner violates the ex post facto clause. See Connor v. Estelle, 981 F.2d

1032, 1033-34 (9th Cir. 1992); see also Barker v. Board of Prison Terms, 2010 WL 2961266, at *1 (9th Cir. July 23, 2010); O'Connor v. Fisher, 2016 WL 8737453, at *2 (C.D. Cal. Sept. 15, 2016), adopted, 2016 WL 8738202 (C.D. Cal. Oct. 14, 2016); In re Duarte, 143 Cal. App. 3d 943, 951, 193 Cal. Rptr. 176 (1983); In re Seabock, 140 Cal. App. 3d 29, 40, 189 Cal. Rptr. 310 (1983).

Petitioner also appears to argue that operative terms in California state parole law, particularly the term "gravity," are unconstitutionally vague. Petitioner's arguments must be rejected. Unconstitutional vagueness may exist where the wording "fails to give a person of ordinary intelligence fair notice that his conduct is forbidden." United States v. Batchelder, 442 U.S. 114, 123 (1979) (citations and quotations omitted); see also United States v. Johnson, 130 F.3d 1352, 1354 (9th Cir. 1997); United States v. Gallagher, 99 F.3d 329, 334 (9th Cir. 1996), cert. denied, 520 U.S. 1129 (1997). Alleged vagueness should be judged in light of the conduct involved. See, e.g., United States v. Powell, 423 U.S. 87, 92-93 (1975). Petitioner must show that the standards are vague as applied to him, for "[u]nless First Amendment freedoms are implicated, a vagueness challenge may not rest on arguments that the law is vague in its hypothetical applications, but must show that the law is vague as applied to the facts of the case at hand." United States v. Johnson, 130 F.3d at 1354 (citing Chapman v. United States, 500 U.S. 453, 467 (1991)); see also United States v. Gallagher, 99 F.3d at 334. Significantly, "[t]he Due Process Clause does not require the same precision in the drafting of parole release statutes as is required in the drafting of penal laws." Hess v. Board of Parole and Post-Prison

Supervision, 514 F.3d 909, 914 (9th Cir.), cert. denied, 554 U.S. 924 (2008).

Contrary to Petitioner's suggestion, the operative standards under the California law of parole have always given fair notice to a person of ordinary intelligence. See Arave v. Creech, 507 U.S. 463, 471-73 (1993) (upholding against vagueness challenge the phrase "cold-blooded, pitiless"); Greenholtz, 442 U.S. at 8 (upholding state parole scheme requiring analysis of "the gravity of the offense"); Glauner v. Miller, 184 F.3d 1053, 1055 (9th Cir. 1999) (Nevada statute requiring hearing panel to certify prisoner was not a "menace to the health, safety or morals of other" before deeming prisoner eligible for parole not unconstitutionally vague); Ortiz v. Ayers, 2008 WL 2051051, at *5 (N.D. Cal. May 13, 2008) (rejecting vagueness challenge to California parole standards); accord Clark v. Kane, 2010 WL 668029, at *6 (N.D. Cal. Feb. 19, 2010); Wagoner v. Sisto, 2009 WL 2712051, at *6 (C.D. Cal. Aug. 26, 2009); Grewal v. Mendoza-Powers, 2008 WL 1734700, at *7-8 (E.D. Cal. Apr. 11, 2008), adopted, 2008 WL 3470234 (E.D. Cal. Aug. 12, 2008); McCottrell v. Ayers, 2007 WL 4557786, at *9-11 (N.D. Cal. Dec. 21, 2007), aff'd, 435 Fed. App'x 673 (2011).

Petitioner's invocation of Johnson v. United States, 135 S. Ct. 2551 (2015) ("Johnson") is unavailing. In Johnson, the United States Supreme Court held that imposing an increased sentence under the "residual clause" of the federal Armed Career Criminal Act ("ACCA"), 18 U.S.C. section 924(e), violates due process because that clause is unconstitutionally vague. See Johnson, 135 S. Ct. at 2555-57. The "residual clause" in the ACCA defined a "violent felony" to include

"conduct that presents a serious potential risk of physical injury to another." Johnson did not purport to address California law.

Petitioner suggests a comparison between the vagueness of the terms at issue in Johnson and the alleged vagueness of the term "gravity" in California Penal Code section 3041. The suggestion is inapt. As previously indicated, the United States Supreme Court has upheld a state's use of the term "gravity" in the context of parole. See Greenholtz, 442 U.S. at 8. In any event, "no U.S. Supreme Court decision has extended the reasoning of Johnson outside the context of that specific case, much less extended it to state parole statutes." Casados v. Board of Parole Hearings, 2017 WL 2541397, at *3 (C.D. Cal. June 12, 2017). Thus, the California Superior Court's rejection of Petitioner's Johnson-related claim cannot have been contrary to, or an unreasonable application of, clearly established United States Supreme Court law. See id. (citing White v. Woodall, 134 S. Ct. 1697, 1706 (2014) (if a rationale needs to be extended to apply to the facts at hand, then the rationale was not "clearly established" at the time the state court ruled).

Finally, Petitioner appears to argue that to deny him his desired relief would violate his constitutional right to petition the government for redress of grievances. As this Court has explained:

> Although the First Amendment protects a petitioner's right to freedom of expression and to petition the government for redress of grievances, it does not guarantee that there will be any government response to such a petition or that the

> government or federal courts will take any action regarding the relief demanded by petitioner. The First Amendment does not impose an affirmative obligation on the government to consider, respond to, or grant any relief on a citizen's petition for redress of grievances.

Souza v. United States, 2011 WL 5570308, at *6 (C.D. Cal. Aug. 31, 2011), adopted, 2011 WL 5570219 (C.D. Cal. Nov. 15, 2011) (citing Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464-65 (1979)).

CONCLUSION AND RECOMMENDATION

It necessarily follows from the above discussion that the Superior Court's rejection of Petitioner's claims was not contrary to, or an objectively unreasonable application of, any clearly established federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Accordingly, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Revised Report and

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Recommendation; and (2) denying and dismissing the Petition with prejudice.[3]

DATED: July 27, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[3] The transcript submitted with the Petition reflects that Petitioner received all the process that was due. Therefore, the granting of leave to amend the Petition would be an idle act. Cf. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.), amended, 275 F.3d 1187 (9th Cir. 2001) (court need not accept allegations contradicted by documents submitted with a pleading).

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 Revised Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.