UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRANK RIVERA, Petitioner, v. JAMES D. HARTLEY, Warden, Respondent.	1:10-cv—01320-LJO-SMS-HC FINDINGS AND RECOMMENDATIONS TO DISMISS PETITIONER'S DUE PROCESS CLAIM WITHOUT LEAVE TO AMEND (Doc. 1) FINDINGS AND RECOMMENDATIONS TO DENY PETITIONER'S FIRST AMENDMENT CLAIM (Doc. 1) FINDINGS AND RECOMMENDATIONS TO DECLINE TO ISSUE A CERTIFICATE OF APPEALABILITY AND TO DIRECT THE ENTRY OF JUDGMENT FOR RESPONDENT **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 filed on July 22, 2010, Respondent filed an answer to the petition on November 12, 2010, and Petitioner filed a traverse on December 30, 2010.

I. Consideration of Dismissal of the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court...." Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule 2(c) requires that a petition 1) specify all grounds of relief available to the Petitioner; 2) state the facts supporting each ground; and 3) state the relief requested. Notice pleading is not sufficient; rather, the petition must state facts that point to a real possibility of constitutional error. Rule 4, Advisory Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in a petition that are vague, conclusory, or palpably incredible are subject to summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

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

Here, after Respondent and Petitioner filed the answer and traverse, respectively, the United States Supreme Court decided

Swarthout v. Cooke, 562 U.S. –, 131 S.Ct. 859, 861-62 (2011). Because Swarthout appears to apply in the instant case, and because no motion to dismiss any claims in the petition has been filed, the Court proceeds to consider whether the petition states a cognizable claim for relief.

II. Background

Petitioner alleges that he is an inmate of Avenal State Prison who is serving a sentence of fifteen (15) years to life plus five (5) years imposed by the Los Angeles County Superior Court in June 1989 upon Petitioner's conviction for second degree murder with an enhancement for a prior serious felony conviction in violation of Cal. Pen. Code §§ 187 and 667. (Pet. 2.)

Petitioner challenges the decision of California's Board of Parole Hearings (BPH) made after a hearing held on March 25, 2008, finding Petitioner unsuitable for release on parole, which was upheld in the state courts. (Pet. 9-11.) Petitioner raises the following claims in the petition: 1) Petitioner's right to due process of law was violated by the BPH's decision that he was unsuitable for parole because the decision was not supported by some evidence that Petitioner would present a continuing, unreasonable risk of danger to society if released; and 2) the BPH violated Petitioner's rights under the Establishment Clause of the First Amendment by relying on Petitioner's lack of participation in AA or NA programs as a basis for concluding that Petitioner would pose an unreasonable danger to public safety if released.

In connection with the answer, Respondent submitted a transcript of the BPH hearing held on March 25, 2008. (Ans.,

doc. 13-1, 46-80, doc. 13-2, 2-32.) Review of the transcript reflects that Petitioner attended the hearing with counsel, who submitted documents and advocated on Petitioner's behalf. (Doc. 13-1, 46, 48, 58, 61-62; doc. 13-2, 22-23.) Petitioner had an opportunity to speak to the BPH regarding numerous suitability factors (doc. 13-1 at 61-80; doc. 13-2, 2-20) and make a statement personally to the board in support of his application for parole (doc. 13-2, 23-25).

Further, the transcript reflects that Petitioner was present when the BPH stated its reasons for finding Petitioner unsuitable for parole, which included the commitment offense, Petitioner's history of prior convictions and failures on probation, Petitioner's failure to upgrade vocationally or participate in beneficial self-help and therapy programming, an inconclusive psychological evaluation, lack of viable residential and employment plans for parole, and the District Attorney's opposition to parole. Petitioner was commended for having his GED, a long and favorable work record, and only one disciplinary violation. (Doc. 13-2, 26-32.)

III. Failure to State a Cognizable Due Process Claim

The Supreme Court has characterized as reasonable the decision of the Court of Appeals for the Ninth Circuit that California law creates a liberty interest in parole protected by the Fourteenth Amendment Due Process Clause, which in turn requires fair procedures with respect to the liberty interest. Swarthout v. Cooke, 562 U.S. –, 131 S.Ct. 859, 861-62 (2011).

However, the procedures required for a parole determination are the minimal requirements set forth in Greenholtz v. Inmates

of Neb. Penal and Correctional Complex, 442 U.S. 1, 12 (1979).[1] Swarthout v. Cooke, 131 S.Ct. 859, 862. In Swarthout, the Court rejected inmates' claims that they were denied a liberty interest because there was an absence of "some evidence" to support the decision to deny parole. The Court stated:

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

Swarthout, 131 S.Ct. 859, 862. The Court concluded that the petitioners had received the process that was due as follows:

> They were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied....
>
> That should have been the beginning and the end of the federal habeas courts' inquiry into whether

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[1] In Greenholtz, the Court held that a formal hearing is not required 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 16. The decision maker is not required to state the evidence relied upon in coming to the decision. Id. at 15-16. The Court reasoned that because there is no constitutional or inherent right of a convicted person to be released conditionally before expiration of a valid sentence, the liberty interest in discretionary parole is only conditional and thus differs from the liberty interest of a parolee. Id. at 9. Further, the discretionary decision to release one on parole does not involve restrospective 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.

[the petitioners] received due process.

Swarthout, 131 S.Ct. at 862. The Court in Swarthout expressly noted that California's "some evidence" rule is not a substantive federal requirement, and correct application of California's "some evidence" standard is not required by the Federal Due Process Clause. Id. at 862-63.

Here, Petitioner challenges the application of California's "some evidence" standard in his first claim. Petitioner complains of the board's weighing of various items of evidence concerning Petitioner's parole suitability, and he asserts that the board improperly relied upon his commitment offense. Petitioner also argues that the board erroneously applied applicable state law concerning parole suitability.

Petitioner's contentions concerning his due process claim boil down to arguments that the board improperly applied the "some evidence" standard or that there was an absence of some evidence to support the finding that Petitioner was not suitable. In this respect, Petitioner asks this Court to engage in the very type of analysis foreclosed by Swarthout. Petitioner does not state facts that point to a real possibility of constitutional error or that otherwise would entitle Petitioner to habeas relief because California's "some evidence" requirement is not a substantive federal requirement. Review of the record for "some evidence" to support the denial of parole is not within the scope of this Court's habeas review under 28 U.S.C. § 2254.

Petitioner cites state law concerning procedures and factors of parole suitability and the appropriate weight to be given to evidence. To the extent that Petitioner's claim or claims rest

on state law, they are not cognizable on federal habeas corpus. Federal habeas relief is not available to retry a state issue that does not rise to the level of a federal constitutional violation. Wilson v. Corcoran, 562 U.S. — , 131 S.Ct. 13, 16 (2010); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Alleged errors in the application of state law are not cognizable in federal habeas corpus. Souch v. Schiavo, 289 F.3d 616, 623 (9th Cir. 2002).

A petition for habeas corpus should not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

Here, it is clear from the allegations in the petition that Petitioner attended the parole suitability hearing, made statements to the BPH, and received a statement of reasons for the decisions of the BPH. Thus, the undisputed facts of record establish that Petitioner had an opportunity to be heard and received a statement of reasons for the decisions in question. It therefore does not appear that Petitioner could state a tenable due process claim.

Accordingly, it will be recommended that with respect to Petitioner's first claim that the unsuitability finding violated his right under the Fourteenth Amendment to due process of law, the petition be dismissed without leave to amend.

IV. First Amendment

Petitioner argues that his rights under the First and Fourteenth Amendments were violated by the board's coercive requirement that he participate in religious-based, self-help

programs to qualify for parole release, and by the board's having punished him by finding him unsuitable for parole because he failed to attend NA or AA. (Pet. 17-19.)

A. Background

At the hearing, Petitioner explained that it was God and not Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) that had helped him stay out of trouble in prison. (Ans., doc. 13-2, 4.) Presiding Commissioner Davis questioned Petitioner concerning his compliance with the recommendation of the BPH made at a preceding parole hearing that Petitioner avail himself of self-help programs. (Id. at 18.) Petitioner responded that the institution had AA and NA but did not have the type of self-help he needed; further, it was illegal to force an inmate to participate in AA or NA. (Id. at 18-19.) A deputy district attorney present then noted that at the previous hearing the board had recommended that Petitioner read some books and write up some book reports, and the prosecutor asked if Petitioner had done that. (Id. at 19.) Petitioner responded that the book reports were not mandated by the board's rules, which were not otherwise identified by Petitioner. (Id.)

In explaining why it found Petitioner unsuitable for release on parole, the board mentioned that Petitioner had not "sufficiently participated in beneficial self-help." (Ans., doc. 13-2, 27.) In explaining why parole would be denied for two years, the following was stated in pertinent part by Presiding Commissioner Davis with respect to Petitioner's self-help programming:

You have not sufficiently participated in beneficial

> self-help.
> ....
> [It is recommended] [a]s available, that you participate in self-help, and certainly independent reading is an option for you. Read self-help books that applies (sic) to you and your situation. Prepare a short report, two or three paragraphs, indicating an understanding of what you read and how it applies to you, and the Panel will certainly look at that as part of your programming.

(Doc. 13-2, 30-31.)

On February 20, 2009, the Los Angeles Superior Court denied petitioner's petition for writ of habeas corpus, concluding that the board's reliance on the commitment offense and Petitioner's violent criminal history was supported by some evidence, and that the board's reliance on Petitioner's failure to participate in any self-help programs, including any substance abuse programs, was proper and based on relevant concerns. (Ans., Ex. 2, doc. 13-3, 3-4.) The California Court of Appeal, Second Appellate District and the California Supreme Court denied petitions for habeas corpus summarily on April 28, 2009, and December 2, 2009, respectively. (Ans., Exs. 4, 6, docs. 3-6 and 3-9.)

B. Legal Standards

1. Habeas Corpus Review

Title 28 U.S.C. § 2254 provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
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> (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.
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> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption or correctness by clear and convincing evidence.

The petitioner bears the burden of establishing that the decision of the state court was contrary to, or involved an unreasonable application of, the precedents of the United States Supreme Court. Lambert v. Blodgett, 393 F.3d 943, 970 n.16 (9th Cir. 2004); Baylor v.Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996).

A state court's decision contravenes clearly established Supreme Court precedent if it reaches a legal conclusion opposite to the Supreme Court's or concludes differently on an indistinguishable set of facts. Williams v. Taylor, 529 U.S. 362, 405-06 (2000). The state court need not have cited Supreme Court precedent or have been aware of it, "so long as neither the reasoning nor the result of the state-court decision contradicts [it]." Early v. Packer, 537 U.S. 3, 8 (2002). The state court unreasonably applies clearly established federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir.2002); see, Williams, 529 U.S. at 408-09. An application of law is unreasonable if it is objectively unreasonable; an incorrect or inaccurate application of federal law is not

necessarily unreasonable. Williams, 529 U.S. at 410.

Respondent correctly assumes that there is clearly established precedent from the United States Supreme Court governing Petitioner's claim as is required by 28 U.S.C. § 2254(d)(1) in order for Petitioner to be entitled to relief. Inouye v. Kemna, 504 F.3d 705, 713 (9th Cir. 2007) (holding that a state official's requiring attendance as a condition of parole in drug treatment programs (AA and NA) rooted in a regard for a higher power was not protected by qualified immunity because the law was clearly established based on consistent articulation of the principle that the government may not coerce anyone to support or participate in religion or its exercise, or punish anyone for not so participating, and citing Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947) and Lee v. Weisman, 505 U.S. 577, 587 (1992)). The court in Inouye further noted that the basic test for Establishment Clause violations remains that stated in Lemon v. Kurtzman, 403 U.S. 602, 613 (1971), namely, that the government acts 1) have a secular legislative purpose, 2) not have a principal or primary effect which either advances or inhibits religion, and 3) not foster an excessive government entanglement with religion. Id. at 713 n.7. The court concluded that recommending revocation of parole for a parolee's failure to attend the programs after an order to participate was given was unconstitutionally coercive. Id. at 713-14. In finding the law clear, the court in Inouye relied not only on lower court decisions but also in part on the decisions of the United States Supreme Court and the absence of any Supreme Court case upholding government-mandated participation in

religious activity in any context. Id. at 715.

Further, in Turner v. Hickman, 342 F.Supp.2d 887 (E.D.Cal. 2004), a Christian inmate alleged that parole authorities expressly conditioned the plaintiff's eligibility for release on parole in part upon participation in NA. Id. at 890. This Court concluded that by repeated application of the "coercion" test set forth in Lee v. Weisman, 505 U.S. 577, 587 (1992), the Supreme Court had made the law clear. Turner, 342 F.Supp.2d at 894. By expressly telling the plaintiff he needed to participate in NA in order to be eligible for parole, the state had acted coercively to require participation in a program in which the evidence showed that belief in "God" was a fundamental requirement of participation. Id. at 895-96. Accordingly, the First Amendment prohibited the requirement. Id. at 896-99.

However, even if the Court proceeds on an understanding that there is clearly established federal law as determined by the Supreme Court of the United States that prohibits punishing an inmate for failing to participate in AA or NA, or coercing an inmate to participate in NA or AA religious activities, it nevertheless does not appear that Petitioner is entitled to relief.

Review of the transcript of the parole hearing supports a conclusion that at the hearing, the board considered not Petitioner's failure to attend NA or AA, but rather Petitioner's failure to engage in an alternative regimen of reading pertinent self-help books and reporting on them and their applicability to Petitioner's situation. It appears that the board had previously considered and accepted Petitioner's assertion that it would be

improper to punish Petitioner for failing to participate in programs such as NA or AA, which involve reliance on a higher power. Further, the record shows that the board had previously recommended that Petitioner engage in the specific, alternative form of self-help of independently reading pertinent self-help resources and reporting on them. However, Petitioner had failed to do so because he perceived that it was not required in the board's own rules. Thus, the record establishes that Petitioner was not coerced into attending such programs, and he was not punished for failure to attend such programs. Instead, when the board had recommended an alternate form of programming, Petitioner declined to participate because he felt is was not "required." Because the board neither required attendance at any faith-based program nor punished Petitioner for not having attended such a program, Petitioner has not established that he suffered any improper coercion, punishment, or other violation of his First and Fourteenth Amendment rights.

In light of these facts, and considering Petitioner's failure to engage in any self-help programming despite a lengthy history of criminal behavior and abuse of drugs and alcohol, a state court determination that Petitioner had not shown that he had suffered a violation of the Establishment Clause would not have constituted 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. Further, such a decision would not have been based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Therefore, the Court concludes that Petitioner did not show entitlement to relief with respect to his claim of a violation of the Establishment Clause.

Accordingly, it will be recommended that Petitioner's second claim concerning the Establishment Clause be denied.

V. Certificate of Appealability

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

In determining this issue, a court conducts an overview of the claims in the habeas petition, generally assesses their merits, and determines whether the resolution was debatable among

jurists of reason or wrong. Id. It is necessary for an applicant to show more than an absence of frivolity or the existence of mere good faith; however, it is not necessary for an applicant to show that the appeal will succeed. Miller-El v. Cockrell, 537 U.S. at 338.

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

Here, it does not appear that reasonable jurists could debate whether the petition should have been resolved in a different manner. Petitioner has not made a substantial showing of the denial of a constitutional right.

Therefore, it will be recommended that the Court decline to issue a certificate of appealability.

VI. Recommendations

Accordingly, it is RECOMMENDED that:

1) Petitioner's first claim concerning a denial of due process caused by the absence of some evidence to support a finding of unsuitability for parole be DISMISSED without leave to amend for failure to state a claim entitling Petitioner to relief pursuant to 28 U.S.C. § 2254; and

2) Petitioner's second claim concerning a denial of Petitioner's First and Fourteenth Amendment rights be DENIED; and

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

4) Judgment be ENTERED for the Respondent.

These findings and recommendations are submitted to the United States District Court Judge assigned to the case, pursuant

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

IT IS SO ORDERED.

Dated: May 9, 2011 **/s/ Sandra M. Snyder**
UNITED STATES MAGISTRATE JUDGE