UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| FEASTER FOSTER,<br><br>Petitioner,<br><br>v.<br><br>WARDEN JAMES D. HARLEY,<br><br>Respondent. | 1:10-cv—01683-AWI-SMS-HC<br><br>FINDINGS AND RECOMMENDATIONS RE: RESPONDENT'S MOTION TO DISMISS THE PETITION (DOCS. 12, 1, 2)<br><br>FINDINGS AND RECOMMENDATIONS TO DISMISS THE PETITION WITHOUT LEAVE TO AMEND (DOCS. 1, 2), DISMISS MOTION AS MOOT (DOC. 10), DECLINE TO ISSUE A CERTIFICATE OF APPEALABILITY, AND DIRECT THE CLERK TO CLOSE THE CASE |

Petitioner is a state prisoner proceeding pro se 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 Respondent's motion to dismiss the petition, which was filed on March 23, 2011. Petitioner filed an opposition on April 11, 2011. No reply was filed.

I. Proceeding by a Motion to Dismiss

Because the petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.



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Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997).

A district court may entertain a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court only on the ground that the custody is in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. §§ 2254(a), 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n.7 (2000); Wilson v. Corcoran, 562 U.S. –, -, 131 S.Ct. 13, 16 (2010) (per curiam).

Rule 4 of the Rules Governing Section 2254 Cases in the District Courts (Habeas Rules) allows a district court to dismiss a petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court...."

The Ninth Circuit has allowed respondents to file motions to dismiss pursuant to Rule 4 instead of answers if the motion to dismiss attacks the pleadings by claiming that the petitioner has failed to exhaust state remedies or has violated the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate a motion to dismiss a petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 to review a motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D.Cal. 1982) (same). Thus, a respondent may file a motion to dismiss after the Court orders the respondent to respond, and the Court should use Rule 4 standards to review a motion to dismiss filed before a formal answer. See, Hillery, 533 F. Supp. at 1194 & n.12.

In this case, upon being directed to respond to the petition by way of answer or motion, Respondent filed the motion to dismiss. The material facts pertinent to the motion are to be found in the pleadings and in copies of the official records of state parole and judicial proceedings which have been provided by the parties, and as to which there is no factual dispute.

Because Respondent's motion to dismiss is similar in procedural standing to motions to dismiss on procedural grounds, the Court will review Respondent's motion to dismiss pursuant to its authority under Rule 4.

II. Background

Petitioner alleged in the petition that he was an inmate of the Avenal State Prison at Avenal, California, serving a sentence of fifteen (15) years to life imposed by the Fresno County Superior Court on October 14, 1994, upon Petitioner's conviction of second degree murder in violation of Cal. Pen. Code § 187. (Pet. 1, 7-9.) Petitioner challenges the decision of California's Board of Parole Hearings (BPH) made after a hearing held on March 4, 2009, finding Petitioner unsuitable for release on parole for three years. (Pet. 13.)

Petitioner raises the following claims in the petition: 1) the BPH's decision that Petitioner posed a risk of danger to society was not supported by some evidence and thus violated Petitioner's right to due process of law under the Fourteenth Amendment; 2) application of Proposition 9 to impose a three-year deferral of Petitioner's next parole hearing violated the Ex Post Facto Clause; 3) application of Proposition 9 to Petitioner to impose a three-year deferral of Petitioner's next parole

suitability hearing violated Petitioner's right to due process of law under the Fourteenth Amendment by abrogating the terms of his plea agreement; and 4) state court decisions upholding the BPH's determination failed to apply California's "some evidence" standard and constituted an unreasonable determination of the facts in light of the evidence in the record. (Pet. 12-13.)

Petitioner alleges that at his initial parole consideration hearing held on October 29, 2003, parole was denied for three (3) years. Petitioner's next parole suitability hearing was held on December 19, 2006, and the BPH denied parole for two (2) years. (Pet. 32.) On March 4, 2009, at the hearing which is the subject of this petition, parole was denied for three (3) years under Proposition 9. (Id. at 33.)

The transcript of the hearing held on March 4, 2009 (doc. 2, 134-223), which was submitted by Petitioner with the petition, shows that Petitioner attended the hearing, was given an opportunity to correct or clarify the record and submit documentation, gave sworn testimony to the BPH regarding numerous factors of parole suitability, and made a statement on his own behalf. (Id. at 134, 137, 139, 141-208.) Petitioner's allegations reflect that at the hearing, Petitioner received a statement of the BPH's reasons for finding that Petitioner presented a danger to the public and thus was unsuitable for parole. The reasons included the commitment offense and Petitioner's prior criminality, previous failures on grants of probation and in juvenile hall, gang activity, drug and alcohol use, dropping out of school, minimization of his offense, and lack of insight. (Pet. 34-35; doc. 2, 209-23.)

The Fresno County Superior Court denied Petitioner's petition for writ of habeas corpus on September 8, 2009, reasoning that there was some evidence to support the BPH's findings concerning the commitment offense, Petitioner's lack of insight and remorse, and his minimization of the crime. Further, application of Proposition 9 had not increased Petitioner's sentence. Finally, Petitioner had failed to allege facts showing that his plea bargain contained any terms stating that he would be entitled to a parole hearing every year; Petitioner had not shown any effect of Proposition 9 on his plea bargain because under previous law (Cal. Pen. Code § 3041.5), the BPH had the discretion to deny parole for as much as five years. (Pet. 51-54.)

The California Court of Appeal, Fifth Appellate District denied Petitioner's petition for writ of habeas corpus on February 3, 2010, with citations to state court authority concerning the application of the "some evidence" standard. (Pet. 56.) The California Supreme Court denied a petition for review on March 24, 2010. (Pet. 58.)

III. Failure to State a Cognizable Due Process Claim

Because the petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

A district court may entertain a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court only on the ground that the custody is in violation

of the Constitution, laws, or treaties of the United States. 28 U.S.C. §§ 2254(a), 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n.7 (2000); Wilson v. Corcoran, 562 U.S. –, -, 131 S.Ct. 13, 16 (2010) (per curiam).

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

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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.

> 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 [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, in seeking review of the application of California's "some evidence" standard, 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 consideration of

parole suitability factors and the application of the "some evidence" standard. 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).

Accordingly, it is concluded that Petitioner's due process claim concerning the evidence should be dismissed because it is not cognizable in a proceeding pursuant to 28 U.S.C. § 2254.

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, Petitioner did not allege that at the parole hearing, he lacked an opportunity to be heard or a statement of reasons. Further, his own allegations and supporting documentation reflect that Petitioner attended the parole suitability hearing, made statements to the BPH, and received a statement of reasons for the decision of the BPH. Thus, Petitioner's own allegations establish that he had an opportunity to be heard and a statement of reasons for the decision in question. It therefore does not appear that Petitioner could state a tenable due process claim.

Accordingly, it will be recommended that Petitioner's due process claim concerning the evidence be dismissed without leave

to amend.

Likewise, because Petitioner has not established a violation by the parole authorities of his rights under the Fourteenth Amendment, the decisions of the state courts upholding the BPH's decision could not have resulted in either 1) 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) a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Further, insofar as Petitioner argues that the BPH or state courts made an unreasonable determination of the facts in light of the evidence presented at the parole hearing, Petitioner is challenging the application of the "some evidence" standard and thus does not state a cognizable claim for relief.

The Court concludes that Petitioner has failed to state facts concerning the state court decisions that would entitle him to relief. See, 28 U.S.C. § 2254(d). Therefore, Petitioner's due process claim with respect to the state court decisions should likewise be dismissed without leave to amend.

IV. Ex Post Facto Claim

Petitioner was sentenced in 1994. Petitioner raises an ex post facto claim because the BPH applied to Petitioner's case California's Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law," which on November 4, 2008, effected an amendment of Cal. Pen. Code § 3041.5(b)(3) that resulted in lengthening the periods between parole suitability hearings.

The Constitution provides, "No State shall... pass any... ex

post facto Law." U.S. Const. art I, § 10. The Ex Post Facto Clause prohibits any law which: 1) makes an act done before the passing of the law, which was innocent when done, criminal; 2) aggravates a crime and makes it greater than it was when it was committed; 3) changes the punishment and inflicts a greater punishment for the crime than when it was committed; or 4) alters the legal rules of evidence and requires less or different testimony to convict the defendant than was required at the time the crime was committed. Carmell v. Texas, 529 U.S. 513, 522 (2000). Application of a state regulation retroactively to a defendant violates the Ex Post Facto Clause if the new regulations create a "sufficient risk" of increasing the punishment for the defendant's crimes. Himes v. Thompson, 336 F.3d 848, 854 (9th Cir. 2003) (citing Cal. Department of Corrections v. Morales, 514 U.S. 499, 509 (1995)). When the rule or statute does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule. Garner v. Jones, 529 U.S. 244, 250, 255 (2000).

Previous amendments to Cal. Pen. Code § 3041.5, which initiated longer periods of time between parole suitability hearings, have been upheld against challenges that they violated the Ex Post Facto Clause. See, e.g., California Department of Corrections v. Morales, 514 U.S. 499, 509 (1995); Watson v. Estelle, 886 F.2d 1093, 1097-98 (9th Cir. 1989). Similarly, it has been held that a state law permitting the extension of

intervals between parole consideration hearings for all prisoners serving life sentences from three to eight years did not violate the Ex Post Facto Clause where expedited parole review was available upon a change of circumstances or receipt of new information warranting an earlier review, and where there was no showing of increased punishment. Under such circumstances, there was no significant risk of extending a prisoner's incarceration. Garner v. Jones, 529 U.S. at 249.

In Gilman v. Schwarzenegger, - F.3d -, No. 10-15471, 2011 WL 198435, at *2 (9th Cir. Jan. 24, 2011), the Ninth Circuit reversed a grant of injunctive relief to plaintiffs in a class action seeking to prevent the board from enforcing Proposition 9's amendments that defer parole consideration. The court noted that the changes wrought by Proposition 9 were noted to be more extensive than those before the Court in Morales and Garner; however, advanced hearings, which would remove any possibility of harm, were available upon a change in circumstances or new information. Id. at *6. The Court concluded that in the absence of facts in the record from which it might be inferred that Proposition 9 created a significant risk of prolonging Plaintiffs' incarceration, the plaintiffs had not established a likelihood of success on the merits on the ex post facto claim. Id. at *8.

This Court may take judicial notice of court records. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir. 1981).

The Court takes judicial notice of the docket and specified

orders in the class action pending in this district, Gilman v. Fisher, 2:05-cv-00830-LKK-GGH, including the order granting motion for class certification filed on March 4, 2009 (Doc. 182, 9:7-15), which indicates that the Gilman class is made up of California state prisoners who 1) have been sentenced to a term that includes life, 2) are serving sentences that include the possibility of parole, 3) are eligible for parole, and 4) have been denied parole on one or more occasions. The docket further reflects that the Ninth Circuit affirmed the order certifying the class. (Docs. 257, 258.) The Court also takes judicial notice of the order of March 4, 2009, in which the court described the case as including challenges to Proposition 9's amendments to Cal. Pen. Code § 3041.5 based on the Ex Post Facto Clause, and a request for injunctive and declaratory relief against implementation of the changes. (Doc. 182, 5-6.)

Here, resolution of Petitioner's claim might well involve the scheduling of Petitioner's next suitability hearing and the invalidation of state procedures used to deny parole suitability, matters removed from the fact or duration of confinement. Such types of claims have been held to be cognizable under 42 U.S.C. § 1983 as claims concerning conditions of confinement. Wilkinson v. Dotson, 544 U.S. 74, 82 (2005). Thus, they may fall outside the core of habeas corpus relief. See, Preiser v. Rodriguez, 411 U.S. 475, 485-86 (1973); Nelson v. Campbell, 541 U.S. 637, 643 (2004); Muhammad v. Close, 540 U.S. 749, 750 (2004).

Further, the relief Petitioner requests overlaps with the relief requested in the Gilman class action. It is established that a plaintiff who is a member of a class action for equitable

relief from prison conditions may not maintain an individual suit for equitable relief concerning the same subject matter. Crawford v. Bell, 599 F.2d 890, 891-92 (9th Cir. 1979). This is because it is contrary to the efficient and orderly administration of justice for a court to proceed with an action that would possibly conflict with or interfere with the determination of relief in another pending action, which is proceeding and in which the class has been certified.

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

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). In view of the allegations of the petition and the pendency of the Gilman class action, amendment of the petition with respect to the ex post facto claim would be futile.

Accordingly, it will be recommended that Petitioner's ex post facto claim be dismissed without leave to amend.

V. Due Process Claim concerning Petitioner's Plea Bargain

Petitioner argues that the application of Proposition 9 violated his plea bargain because with respect to his plea, he understood from a conversation with his counsel in the presence of the prosecutor that he would be considered for parole every year or every three (3) years. Petitioner declared that in the presence of the prosecutor, he was informed by his defense attorney that he would go to prison, would be going before the parole board every one (1) or three (3) years, and would be paroled after service of the minimum term, provided he did not get into any trouble, and he educated himself. (Pet. 45-46.) Petitioner alleged that he had been charged with felony murder, and counsel's "articulation" induced him to accept a plea to second degree murder. (Id. at 46-47, 49.) If it had not been for the statement, he would not have "entered such a deal...." (Pet., doc. 2, 228.) Minutes of the change of plea hearing held on September 16, 1994, reflect that a second count was dismissed, and an enhancement was stricken. (Pet., doc. 2, 6.)

A criminal defendant has a due process right to enforce the terms of his plea agreement. Promises from the prosecution in a plea agreement must be fulfilled if they are significant inducements to enter into a plea. Santobello v. New York, 404 U.S. 257, 262 (1971); Buckley v. Terhune, 441 F.3d 688, 694 (9th Cir. 2006). Plea agreements are contractual in nature and are measured by contract law standards. United States v. De la Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993). In construing a plea

agreement, a court must determine what the defendant reasonably believed to be the terms of the plea agreement at the time of the plea. United States v. Franco-Lopez, 312 F.3d 984, 989 (9th Cir. 2002).

The construction of a state court plea agreement is a matter of state law, and federal courts will defer to a state court's reasonable construction of a plea agreement. Ricketts v. Adamson, 483 U.S. 1, 6 n.3 (1987); Buckley v. Terhune, 441 F.3d 688, 695 (9th Cir. 2006). In California, a negotiated plea agreement is a form of contract and is interpreted according to general contract principles and according to the same rules as other contracts. Buckley v. Terhune, 441 F.3d 688, 695 (citing People v. Shelton, 37 Cal.4th 759, 767 (2006) and People v. Toscano, 124 Cal.App.4th 340, 344 (2004)).

In California, the plain meaning of an agreement's language must first be considered. If the language is ambiguous, it must be interpreted by ascertaining the objectively reasonable expectations of the promisee at the time the contract was made. Buckley v. Terhune, 441 F.3d 688, 695 (9th Cir. 2006). If ambiguity remains after a court considers the objective manifestations of the parties' intent, then the language of the contract should be interpreted most strongly against the party who caused the uncertainty to exist, or in favor of the defendant. Id. at 695-96.

Respondent argues that Petitioner has failed to provide proof or documentation of the terms of his plea agreement; thus, he has not stated a claim for relief. In addition to a lack of documentation, Petitioner does not set forth specific allegations

that the plea agreement itself contained a term conditioning the change of plea on consideration of parole suitability at stated periods or intervals.

Notice pleading is not sufficient for petitions for habeas corpus; rather, the petition must state facts that point to a real possibility of constitutional error. Habeas Rule 4, Advisory Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in a petition that are vague, conclusional, or palpably incredible, and that are unsupported by a statement of specific facts, are insufficient to warrant relief and are subject to summary dismissal. Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

Here, an understanding based on a conversation with counsel is not necessarily objectively reasonable in light of advisements and colloquies that normally occur at later, formal proceedings upon the change of plea. Mere predictions or speculation concerning the likelihood of discretionary release on parole in the future do not amount to specific promises that will be enforced.

More fundamentally, with respect to Petitioner's several parole suitability hearings, the Court notes that according to Petitioner's own allegations, Petitioner received denials of parole for three, two, and three years, respectively. (Pet. 32-33.) The allegation concerning Petitioner's understanding at the time the plea was entered is that Petitioner understood that he would be considered for parole every one or three years.

A habeas petitioner must allege facts that show that he was prejudiced by an alleged constitutional violation. Wacht v. Cardwell, 604 F.2d 1245, 1247 (9th Cir. 1979); cf., Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (determining that habeas relief is warranted when an error resulted in actual prejudice, or had a substantial and injurious effect or influence in determining the jury's verdict). Here, even if it were assumed that Petitioner's understanding that he would receive parole suitability consideration every three years was predicated on the express terms of a plea agreement, Petitioner has not shown that he suffered any prejudice from the application of Proposition 9 to his case at the parole proceedings in 2009. The time between parole hearings did not exceed three years. Further, as the state trial court noted, even before Petitioner was sentenced in 1994, Cal. Pen. Code § 3041.5(b)(2) permitted deferring consideration of parole suitability for two, three, or five years under various circumstances. 1990 Cal. Stat. ch. 1053, § 1.

In view of the foregoing analysis, it is not logically possible that Petitioner could allege facts showing that the BPH's denial of parole for three years constituted a prejudicial denial of due process of law in violation of his plea agreement.

Accordingly, it will be recommended that insofar as Petitioner alleges a due process claim in connection with his plea agreement, the petition be dismissed without leave to amend.

VI. Petitioner's Motion for an Order to Show Cause

On January 24, 2011, Petitioner filed a document entitled, "MOTION FOR ORDER TO SHOW CAUSE," in which he requested that the Court require the Respondent to answer the petition. However, on

that date the Court directed Respondent to file a response to the petition by way of answer or motion. (Doc. 7.)

Accordingly, it will be recommended that Petitioner's motion be dismissed as moot.

VII. 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.

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

VII. Recommendations

Accordingly, it is RECOMMENDED that:

1) Respondent's motion to dismiss the petition be GRANTED; and

2) The petition for writ of habeas corpus be DISMISSED without leave to amend; and

3) Petitioner's motion for an order to show cause be DISMISSED as moot; and

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

5) The clerk be DIRECTED to close the case because an order of dismissal would terminate the proceeding in its entirety.

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: June 17, 2011** **/s/ Sandra M. Snyder**
UNITED STATES MAGISTRATE JUDGE