UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ELMOR JACOB DE LEON, Petitioner, v. JAMES HARTLEY, Warden, Respondent.	1:10-cv—02251-SKO-HC ORDER DISMISSING THE PETITION WITHOUT LEAVE TO AMEND FOR PETITIONER'S FAILURE TO ALLEGE A CLAIM ENTITLING PETITIONER TO RELIEF IN A PROCEEDING PURSUANT TO 28 U.S.C. § 2254 (Doc. 1) ORDER DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY AND DIRECTING THE CLERK TO CLOSE THE CASE

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. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on January 31, 2011 (doc. 10). Pending before the Court is Petitioner's petition, which was filed in this Court on November 16, 2010.

I. Screening 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).

II. Background

Petitioner alleges he was an inmate of the Avenal State Prison serving a sentence of fifteen (15) years to life pursuant to a sentence imposed on August 16, 1991, by the Los Angeles Superior Court upon Petitioner's conviction of second degree

murder, attempted murder, and assault with a firearm in violation of Cal. Pen. Code §§ 187, 664, and 245. (Pet. 1-2.) Petitioner challenges a decision of California's Board of Parole Hearings (BPH) made after a hearing held on August 27, 2009, denying Petitioner's application for parole because he was found unsuitable. (Pet. 5, 21.)

Petitioner raises the following claims in the petition: 1) the decision violated Petitioner's right to due process of law because it was not supported by some evidence (pet. 5, 7, 23); 2) the BPH's denial of parole violated Petitioner's right to the equal protection of the laws (pet. 5, 7, 28); 3) Petitioner was subjected to an ex post facto law because the board denied parole for three years "Under The New Marcy's Law, Proposition 9" (pet. 5, 21), which the Court understands to be a reference to California's Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law," a provision that on November 4, 2008, effected an amendment of Cal. Pen. Code § 3041.5(b)(3) that resulted in a lengthening of the period between parole suitability hearings (pet. 5, 7-9, 27, 29, 33, 36-37); 4) Petitioner's rights under the First Amendment were violated (pet. 9, 29); and 5) the board violated state regulatory and statutory law and failed to base its decision on codified suitability criteria (pet. 27, 30, 32). Petitioner contends that the decision reflected impermissible reliance on immutable factors such as the commitment offense, lacked the support of any evidence, and was made without the consideration and weighing of all favorable evidence. (Pet. 7, 19-22, 28, 31.) Petitioner argues that the evidence of Petitioner's parole suitability that

was before the board merited a grant of parole. (Pet. 33-36.)

On December 20, 2010, the Court issued an order to Petitioner to show cause why the petition should not be dismissed for failure to exhaust state court remedies. (Doc. 7.) Petitioner responded on December 20, 2010, by providing a copy of his petition for writ of habeas corpus filed in the California Supreme Court in case no. S181886, which demonstrated that the claims raised in the petition before the Court were raised before the California Supreme Court. (Doc. 8, 12-42.)

Petitioner submitted the transcript of the proceedings held before the BPH on August 27, 2009. (Pet., doc. 1-1, 55-100; doc. 1-2, 1-46.) The transcript reflects that Petitioner received documents before the hearing (doc. 1-1, 61-64); attended the hearing (pet., doc. 1-1, 55, 58); addressed the board concerning numerous factors of parole suitability (doc. 1-1, 64-100; doc. 1-2, 1-24); made a personal statement to the board in favor of parole (doc. 1-2, 28-30); and was represented by counsel, who advocated and made a closing statement on Petitioner's behalf (doc. 1-1, 55, 58, 62-64; doc. 1-2, 10-11, 25-28).

Petitioner was present when the board stated its reasons for the finding of unsuitability for parole and the denial of parole for three years, which was based on the conclusion that there was an unreasonable risk of danger to others if Petitioner were released. The board noted Petitioner's commitment offense and his later conviction of possession of a nail while in custody, Petitioner's history of alcoholism, Petitioner's lack of insight into his offense, and what was considered to be untruthfulness in Petitioner's explanations of his criminal conduct. (Pet., doc.

1-2, 31-45.)

III. Failure to State a Cognizable Due Process Claim

The petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Accordingly, 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]

[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

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 [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

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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.

Process Clause. Id. at 862-63.

Here, 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.

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). The allegations in the petition and the related documentation demonstrate that Petitioner attended the parole suitability hearing, made statements to the BPH, and received a statement of reasons for the decision of the BPH. Because it appears from the face of the petition and the attached exhibits that Petitioner received all process that was due, Petitioner cannot state a tenable due process claim.

Accordingly, insofar as Petitioner claims a due process violation because of the application of the "some evidence" rule, the petition will be dismissed without leave to amend.

IV. Alleged Denial of Equal Protection

Petitioner alleges generally that the board's decision violated his right to equal protection of the laws. (Pet. 5, 7.) However, Petitioner does not allege any facts that would support such a generalized claim. After citing In re Rosenkrantz, 29 Cal.4th 616 (2002) and In re Lawrence, 150 Cal. App.4th 1511

(2008), Petitioner argues in pertinent part:

> De Leon request (sic) to this court the same Equal Protection and Due Process rights Because De Leon's crime is far away to compare with those cases Mr. Rosenkrantz, And Mrs. Lawrence. Mr. Rosenkrantz and Mrs. Lawrence are free persons now)....

(Pet. 28:21-24.)

Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race, religion, or membership in a protected class subject to restrictions and limitations necessitated by legitimate penological interests. Wolff v. McDonnell, 418 U.S. 539, 556 (1974); Bell v. Wolfish, 441 U.S. 520, 545-46 (1979). The Equal Protection Clause essentially directs that all persons similarly situated should be treated alike. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Violations of equal protection are shown when a respondent intentionally discriminated against a petitioner based on membership in a protected class, Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001), or when a respondent intentionally treated a member of an identifiable class differently from other similarly situated individuals without a rational basis, or a rational relationship to a legitimate state purpose, for the difference in treatment, Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

Here, Petitioner has neither alleged nor shown that membership in a protected class was the basis of any alleged discrimination. The Court does not find any factual basis for an inference of an intent to discriminate based on an impermissible characteristic.

Further, Petitioner has not shown that he was treated differently from similarly situated individuals. In In re Rosenkratz, the petitioner committed second degree murder after he had been assaulted by his victim, who interrupted a homosexual liaison and reported it to the petitioner's father, whose angry confrontation with the petitioner resulted in dramatic, familial discord and the petitioner's departure from his home. In re Rosenkratz, 29 Cal.4th at 627-29. The petitioner had no criminal or disciplinary history and no involvement with drugs or alcohol. Id.

The other case cited by Petitioner, In re Lawrence, 150 Cal. App.4th 1511 (2007), was superseded by the opinion of the California Supreme Court upon its grant of review. In re Lawrence, 44 Cal.4th 1181 (2008). The petitioner in Lawrence was convicted of first degree murder for killing her lover's wife after her lover had informed the petitioner that he had changed his mind and had decided not to leave his wife after all; the petitioner had an exemplary record of rehabilitation, accepted responsibility for her crime, had no criminal history or disciplinary problems in prison, had insight into her motivation for the crime, and was the subject of five psychologists' opinions that she was no longer a danger to public safety. In re Lawrence, 44 Cal.4th 1181, 1192-95.

The facts relevant to the parole suitability of the petitioners involved in the two cited cases are sufficiently different from those present in this case that the Court concludes that Petitioner has not shown that he was similarly situated with the petitioners in those cases. The Court notes

that "the Fourteenth Amendment guarantees equal laws, not equal results." Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

Petitioner also argues that application of the standards of California's Determinate Sentencing Law (DSL) to Petitioner, who asserts that he is an "ISL" (Indeterminate Sentencing Law) life prisoner, is a violation of equal protection. (Pet. 21.) The DSL was enacted in 1976. 1976 Cal. Stat., ch. 113, § 1. Petitioner alleges that he was convicted in 1990 and sentenced in 1991. (Pet. 2.) Thus, Petitioner has not shown he was entitled to have his parole suitability considered under the ISL.

The Court concludes that the facts alleged by Petitioner in his claim pursuant to the Equal Protection Clause fail to entitle Petitioner to habeas corpus relief.

Petitioner has provided the Court with the record of the proceedings before the BPH. The facts pertinent to Petitioner's parole suitability are already fully set forth in the record. It is not logically possible for Petitioner to demonstrate that he was similarly situated with the petitioners in the cited cases. The Court therefore concludes that Petitioner cannot state a tenable equal protection claim.

Therefore, insofar as Petitioner seeks relief for a violation of the Fourteenth Amendment's Equal Protection Clause, the petition will be dismissed without leave to amend.

V. Alleged Ex Post Facto Violation

Petitioner argues that he was subjected to an ex post facto law by the denial of parole for three years pursuant to the board's application of California's Proposition 9, the "Victims'

Bill of Rights Act of 2008: Marsy's Law," which amended Cal. Pen. Code § 3041.5(b)(3) in 2008 after Petitioner had committed his offense.

Before Proposition 9 was enacted, Cal. Pen. Code § 3041.5(b)(2) provided that parole suitability hearings would generally occur every year, but could occur every two years in cases in which the board found that it was not reasonable to expect parole would be granted in a year and stated the bases for the finding, or every five years if the prisoner had been convicted of murder and the board found that it was not reasonable to expect parole to be granted during the following years and stated the bases for the finding in writing. Cal. Pen. Code § 3041.5(b)(2) (2008); Gilman v. Schwarzenegger, - F.3d -, No. 10-15471, 2011 WL 198435, at *2 (9th Cir. Jan. 24, 2011). Proposition 9 amended Cal. Pen. Code § 3041.5(b)(3) to provide that future parole suitability hearings should be scheduled in fifteen years, ten years, or intervals of three, five, or seven years unless the board finds by clear and convincing evidence that statutory criteria relevant to release and the safety of the victim and public do not require the greater period of continued imprisonment. Cal. Pen. Code § 3041.5(b)(3) (2010); Gilman v. Schwarzenegger, 2011 WL 198435 at *2.

In addition, Proposition 9 amended the law concerning parole deferral periods by authorizing the Board to advance a hearing date in its discretion either sua sponte or at the request of the Petitioner. Cal. Pen. Code § 3041.5(b), (d); Gilman v. Schwarzenegger, 2011 WL 198435, at *6.

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 prisoner 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) (where the great majority of prisoners were found unsuitable, a 1982 increase of

the maximum period for deferring hearings to five years for offenders who had committed multiple homicides only altered the method of setting a parole release date and did not result in a sufficient risk of increasing the punishment or measure of punishment for the crime in the absence of modification of punishment or of the standards for determining either the initial date for parole eligibility or an inmate's suitability for parole); Watson v. Estelle, 886 F.2d 1093, 1097-98 (9th Cir. 1989) (finding no ex post facto violation in applying amended Cal. Pen. Code § 3041.5(b)(2)(A), permitting delay of suitability hearings for several years, to prisoners who were sentenced to a life term before California's Determinate Sentencing Law was implemented in 1977 and who otherwise would have been entitled to periodic review of suitability).

Similarly, a state law permitting the extension of intervals between parole consideration hearings for all prisoners serving life sentences from three to eight years does 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. Garner v. Jones, 529 U.S. 244, 249 (2000). Under such circumstances, there was no significant risk of extending a prisoner's incarceration. Id.

The Court in Garner recognized that state parole authorities retain broad discretion concerning release and must have flexibility in formulating parole procedures and addressing problems associated with confinement and release. Garner v. Jones, 529 U.S. 244, 252-53. Inherent in the discretionary

nature of a grant of parole is the need to permit changes in the manner in which the discretion is "informed and then exercised." Garner v. Jones, 529 U.S. at 253. Further, the timing of the hearings in Garner depended in part on the parole authority's determination of the likelihood of a future grant of parole; thus, the result was that parole resources were put to better use, which in turn increased the likelihood of release. Id. at 254. In Garner, the matter was remanded for further proceedings to determine the risk of increased punishment.

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 BPH from enforcing retroactively Proposition 9's amendments that defer parole consideration. The court concluded that the plaintiffs were not likely to succeed on their claim on the merits. Id. at *1, *3-*8. In Gilman, there was no evidence concerning whether or not more frequent parole hearings would result in more frequent grants of parole, as distinct from denials. Id. at *3. Although the changes wrought by Proposition 9 were noted to be more extensive than those before the Court in Morales and Garner, advanced hearings, which would remove any possibility of harm, were available upon a change in circumstances or new information. Id. at *6. In the absence of record facts from which it might be inferred that Proposition 9 created a significant risk of prolonging the plaintiffs' incarceration, the plaintiffs had not established a likelihood of success on the merits on the ex post facto claim. Id. at *8.

Here, Petitioner has not alleged facts warranting a different conclusion. The board concluded that Petitioner posed an unreasonable risk of danger if released, and that denial was for three years, the minimum they could give under Proposition 9; to be suitable for parole, Petitioner would have to develop insight into his offense, which involved a sudden confrontation in which Petitioner chased and shot an unarmed victim who had kicked Petitioner but then had retreated. Petitioner then resisted the efforts of third parties to disarm Petitioner and to avoid further confrontation. Petitioner demonstrated limited remorse, and he needed to develop insight into his behavior and to provide valid explanations of his criminal conduct. (Doc. 1-2, 32-45.)

The 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 Gilman v. Fisher, 2:05-cv-00830-LKK-GGH, which is pending in this Court, 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.)

The relief sought by Petitioner concerns in part the future scheduling of Petitioner's next suitability hearing and necessarily implies the invalidation of state procedures used to deny parole suitability (pet. 9, 40-41), 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. 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). 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).

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 and unproductive.

The Court notes that Petitioner also alleges that he suffered an ex post facto violation when DSL standards were applied to him because he was an "ISL Life Prisoner." (Pet. 21.) However, as previously noted, Petitioner's conviction and sentence occurred after the DSL was enacted. Thus, Petitioner has not stated facts that would entitle him to relief because he has not alleged facts showing any ex post facto application of DSL standards for parole suitability. Further, because Petitioner was convicted after the DSL was enacted, Petitioner could not state a tenable ex post facto claim if leave to amend were granted.

Accordingly, Petitioner's ex post facto claim will be

dismissed without leave to amend.

VI. First Amendment Claim

Petitioner argues that his rights under the First Amendment were violated. (Pet. 9, 29.) However, the petition is devoid of factual allegations concerning this claim; Petitioner only concludes that his rights were violated, and cites Turner v. Hickman, 342 F.Supp.2d 887 (E.D.Cal. 2004).[2] (Pet. 9, 29.)

In Turner v. Hickman, 342 F.Supp.2d 887, a Christian inmate alleged that parole authorities expressly conditioned in part the plaintiff's eligibility for release on parole upon participation in Narcotics Anonymous (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 applicable 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.

In Inouye v. Kemna, 504 F.3d 705 (9th Cir. 2007), the court considered whether state parole authorities had qualified immunity in a § 1983 suit by a plaintiff who alleged that as a condition of parole, they required his attendance in drug treatment programs (AA and NA) rooted in a regard for a higher

[2] Because Petitioner cites to Turner v. Hickman, the Court understands Petitioner's claim to relate to having been coerced to participate in a program which required belief in a higher power.

power. In response to the argument of a defendant supervisory parole officer that the law was not clearly established at the time, the court held that the law "was and is very clear, precluding qualified immunity...." Inouye, 504 F.3d at 711-12. The court found that there had been 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. Id. at 713 (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 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.

Here, Petitioner's self-help programming for alcoholism, which was discussed at the parole hearing, included significant participation in Catholic services, reading sixteen self-help books that included substance abuse recovery, and an independent

study project in relapse prevention. (Pet., doc. 1-1, 99-100; doc. 1-2, 1-2.) His letters of support reflected that Petitioner had written to AA in New York to obtain an AA contact address in the United States and his native country of Guatemala for use upon release. (Pet., doc. 1-2, 11.) In his personal statement to the board, Petitioner said that if released he wanted to open an AA group so that he could help himself and others to stay sober. (Doc. 1-2, 29.) When explaining the decision to deny parole, a board member stated that a prior parole panel convened in the previous year had asked Petitioner to work on his "substance abuse availability" in Guatemala, and that this had been provided to the present panel on the day of the hearing. (Doc. 1-2, 41.) Petitioner had not had any alcohol or controlled substance disciplinary violations during his entire period of incarceration, and Petitioner's participation in self-study in relapse prevention was commendable. (Id. at 42-43.) It was recommended that Petitioner continue with his self-help. (Id. at 44.)

In sum, the record of the proceedings before the board shows that Petitioner was not required to attend AA or any specific programing that involved belief in a higher power. The record does not contain facts supporting a finding of violation of Petitioner's First Amendment rights at the proceedings of the parole board held on August 27, 2009, that are before the Court[3]. As the complete transcript of the proceedings is already before the Court, it is not logically possible that Petitioner could

[3] Although Petitioner mentions previous parole hearings, it is the hearing held on August 27, 2009, that is the subject of the present petition.

state a tenable claim under the Establishment Clause of the First Amendment.

Therefore, Petitioner's claim concerning a First Amendment violation will be dismissed without leave to amend.

VII. Allegations Concerning State Law

Petitioner argues that the board's decision violated state regulatory and statutory law, and that the board failed to base its decision on codified suitability criteria. 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).

Thus, Petitioner's claim or claims concerning the board's alleged violations of state law will be dismissed without leave to amend.

VIII. 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, the Court will decline to issue a certificate of appealability.

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IX. Disposition

Accordingly, it is ORDERED that:

1) The petition is DISMISSED without leave to amend because Petitioner has failed to state a claim entitling him to habeas corpus relief in a proceeding pursuant to 28 U.S.C. § 2254; and

2) The Court DECLINES to issue a certificate of appealability; and

3) The Clerk is DIRECTED to close the case because this order terminates the action in its entirety.

IT IS SO ORDERED.

Dated: May 27, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE