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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JEFFRY IAN COOK,
Petitioner,
v.
D.K. SISTO, Warden,
Respondent.

NO. CV-07-387-RHW

**ORDER DENYING HABEAS
PETITION; ISSUING COA**

Before the Court is Petitioner’s Amended Petition for Writ of Habeas Corpus, 28 U.S.C. Section 2254 (Ct. Rec. 7). Petitioner is a state prisoner currently confined at the California State Prison, Solano, in Vacaville, California, and is proceeding *pro se*.

Petitioner plead guilty to first degree murder (Cal. Penal Code § 187) and was sentenced to an indeterminate term of twenty-five years to life imprisonment.

Petitioner filed a Writ of Habeas Corpus with Sacramento County Superior Court, asserting that the state of California had violated the plea agreement when it failed to provide Petitioner with a timely parole hearing. This petition was denied. He then filed a Petition with the California Court of Appeal and the California Supreme Court. These petitions were summarily denied.

On February 26, 2007, Petitioner filed a Petition for Writ of Habeas Corpus in the Eastern District of California and asserted four grounds for relief: (1) the state failed to comply with state law in violation of Petitioner’s due process rights; (2)

1 Petitioner has a constitutional right to have the state comply with their part of the
2 plea agreement; (3) Petitioner must be permitted to withdraw his plea; and (4) plea
3 agreements are contracts requiring the state to live up to their part of the contract.
4 Petitioner asserted that the state of California failed to provide him with a timely
5 parole consideration hearing; he has a right to have a panel made up of a cross-
6 section of society; and his sentence has been illegally increased beyond that
7 allowed by law. Petitioner asserted that had he known that the state would violate
8 the terms of the plea agreement, he would have never waived his constitutional
9 rights and plead guilty.

10 On April 11, 2007, Magistrate Judge Gregory Hollows dismissed the petition
11 with leave to amend (Ct. Rec. 6). Judge Hollows noted that Petitioner did not
12 allege that an actual term of his plea agreement was that the parole suitability
13 panels would be composed of members of the public who were not ex-law
14 enforcement officers and victims rights advocates, and that Petitioner did not
15 identify any particular parole suitability hearing panel of his own that included
16 biased members or cite to an example of bias shown by a panel member at one of
17 his hearings. Finally, Judge Hollows noted that Petitioner did not allege that a
18 specific term of his plea agreement provided that he receive timely parole hearings,
19 or describe any of the untimely parole hearings he allegedly received.

20 On May 5, 2007, Petitioner filed an Amended Petition for Writ of Habeas
21 Corpus (Ct. Rec. 7). In his amended petition, Petitioner argued that his plea
22 agreement was violated because he did not receive timely parole hearings and
23 because the members of the parole hearing panels were biased. He also asserted
24 that his due process rights were violated based on an untimely parole suitability
25 hearing. He stated that on August 11, 2004, he was denied parole for one year, but
26 did not receive his next suitability hearing until February 16, 2006—six months late.

27 Judge Hollows issued a Report and Recommendations recommending that
28 the action be dismissed (Ct. Rec. 8). Judge Lawrence Karlton declined to adopt the

1 Report and Recommendation (Ct. Rec. 9). Judge Karlton liberally construed
2 Petitioner’s Amended Petition and concluded that Petitioner stated a cognizable
3 claim that the state violated his due process rights by failing to comply with state
4 law in the timing of his suitability hearings. Specifically, Judge Karlton found that
5 an individual’s federal due process rights may be implicated when a state
6 erroneously applies state law, and this failure can be a basis for habeas relief under
7 AEDPA. Judge Karlton, relying on *In re Jackson*, found that an inmate has a
8 procedural due process interest in the state’s compliance with the parole statutes.

9 Under California Penal Code section 3041.5(b)(2), if an inmate is found
10 unsuitable for parole, “[t]he board shall hear [the] case annually thereafter,” unless
11 an exception applies. An exception applies if the board determines that it is not
12 reasonable to expect that parole would be granted the following year and states its
13 basis for this determination. Cal. Penal Code § 3041.5(b)(2)(A)-(B). In that case,
14 the board may hold the next suitability hearing two years later or up to five years
15 later for an inmate who has been convicted of murder. *Id.*

16 In a subsequent Order, the state was ordered to address whether it violated
17 Petitioner’s due process rights by not providing a written basis for its determination
18 that Petitioner’s suitability hearings should be held less frequently than annually
19 (Ct. Rec. 10).

20 STANDARD OF REVIEW

21 In order to succeed with his § 2254 petition, Petitioner must establish that he
22 is in custody in violation of the Constitution or laws or treaties of the United States.
23 28 U.S.C. § 2254(a). Petitioner must also establish that his claims were adjudicated
24 on the merits in state court proceedings and that the adjudication of the claim
25 “resulted in a decision that was contrary to, or involved an unreasonable application
26 of, clearly established Federal law, as determined by the Supreme Court of the
27 United States; or resulted in a decision that was based on an unreasonable
28 determination of the facts in light of the evidence presented in the State court

1 proceeding.” § 2254(d). A determination of a factual issue made by the State court
2 shall be presumed to be correct. § 2254(e). Petitioner has the burden of rebutting
3 the presumption of correctness by clear and convincing evidence. *Id.*

4 A state court's decision is “contrary to” clearly established federal law only
5 where “the state court arrives at a conclusion opposite to that reached by [the
6 Supreme] Court on a question of law or if the state court decides a case differently
7 than [the Supreme] Court has on a set of materially indistinguishable facts.”
8 *Williams v. Taylor*, 529 U.S. 362, 412-24 (2000). There is an “unreasonable
9 application” of clearly established federal law when a state court “correctly
10 identifies the governing legal rule but applies it unreasonably to the facts of a
11 particular prisoner’s case.” *Id.* at 407-08. A state court decision can also involve an
12 unreasonable application of clearly established precedent “if the state court either
13 unreasonably extends a legal principle from [the Supreme Court’s] precedent to a
14 new context where it should not apply or unreasonably refuses to extend that
15 principle to a new context where it should apply.” *Id.* at 407. The state court’s
16 error must be one that the habeas court concludes is objectively unreasonable, not
17 merely erroneous or incorrect. *Id.* at 409-11.

18 ANALYSIS

19 The Sacramento County Superior Court issued a written opinion, addressing
20 Petitioner’s challenges to the Board of Parole Hearings itself and to the alleged
21 delay in his parole suitability hearing (Ct. 15-2, Ex. 2). The court noted that it had
22 previously dismissed Petitioner’s challenge to the make-up of the Board. It noted
23 that Petitioner was afforded his parole consideration when he obtained a hearing on
24 February 15, 2006, and therefore, his claim was moot. The court denied the
25 petition.

26 In his federal proceedings, Judge Karlton read Petitioner to be alleging that
27 because the parole hearing did not take place within the one-year period, the Board
28 implicitly determined that the exception applied and implicitly determined that the

1 parole eligibility hearing would be in two years. The record relies on this
2 conclusion.

3 The Board of Prison Terms State Prisoner Hearing Decision Face Sheet (Ct.
4 Rec. 15-2, Ex. B) explicitly indicates that parole was denied by one year. In
5 addition, the Board recommended that Petitioner get self-help when available, stay
6 discipline free, and continue positive programming. Under the California statute,
7 no written findings were required, since parole was denied for one year. If the
8 Board had determined it would hold the hearing in two years, the hearing date
9 would have been in August, 2006. Yet, the hearing was held in February, 2006.
10 Moreover, the document clearly states that parole is denied for one year. The Court
11 finds that no written documentation was required to set forth the reasons for
12 applying the exception to the one-year rule because at the time parole was denied,
13 there was no indication that the Board intended anything other than to deny parole
14 for one year. Moreover, Petitioner has not shown that even if he was entitled to a
15 written explanation because the Board issued a multi-year denial, this is anything
16 but a violation of state law. As such, even if the state statute was violated, such a
17 violation would not entitle Petitioner to habeas relief.

18 This does not mean that Petitioner could not allege that the delay in the
19 subsequent parole hearing was a violation of his due process rights. He did make
20 such a claim to the California Court of Appeals and the Supreme Court. Indeed, he
21 presented these claims as a breach of contract claim and sought to withdraw from
22 his plea agreement. The California courts' denial of this claim was not contrary to
23 or an unreasonable application of federal law. Petitioner ultimately received his
24 hearing and thus already received the only remedy to which he would be entitled.
25 See *Burnett v. Lampert*, 432 F.3d 996, 999 (9th Cir. 2005) (discussing mootness);
26 *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 989-90 (9th Cir. 2002) (holding that
27 remedy for federal prisoner entitled to parole termination hearing was mandamus
28 petition ordering hearing). Moreover, Petitioner has not shown that the six-month

1 delay in his receipt of his parole hearing violated due process. He has not shown
2 that the delay was unreasonable or prejudicial. See *Hopper v. United States Parole*
3 *Comm'n.*, 702 F.2d 842, 847 (9th Cir. 1983). Moreover, even if Petitioner's due
4 process rights were violated by the six-month delay, this would not be grounds for
5 habeas relief—rather, the proper course of action would be a § 1983 action for
6 damages.

7 For the reasons stated in Magistrate Judge Hollow's Report and
8 Recommendations, the Court dismisses Petitioner's claim that his due process
9 rights were violated because panel members of his suitability hearings were biased.

10 CERTIFICATE OF APPEALABILITY

11 Because this is the Court's final order in this matter, the December 1, 2009
12 amendments to Rule 11(a) of the Federal Rules Governing Section 2254 Cases
13 require the Court to determine in this Order whether a certificate of appealability
14 should issue. The Court finds additional briefing on this issue unnecessary.

15 The Antiterrorism and Effective Death Penalty Act of 1996 requires a habeas
16 petitioner appealing the denial of a 28 U.S.C. § 2254 to obtain a certificate of
17 appealability. 28 U.S.C. § 2253(c). A court may issue a certificate of appealability
18 only if the “applicant has made a substantial showing of the denial of a
19 constitutional right.” 28 U.S.C. § 2253(c)(2). A petitioner must show that
20 “reasonable jurists could debate whether . . . the petition should have been resolved
21 in a different manner or that the issues presented were adequate to deserve
22 encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
23 (internal quotations omitted). The decision to issue a certificate of appealability
24 turns not on the court's assessment of the applicant's chances for success on appeal,
25 but whether the appeal would raise material and debatable questions. See *Miller-El*
26 *v. Cockrell*, 537 U.S. 322, 342 (2003).

27 Here, Judge Karlton concluded that Petitioner stated a claim for relief. This
28 court disagreed. Therefore, Petitioner has made a showing that reasonable jurists

1 could debate whether Petitioner should be afforded habeas relief.

2 Accordingly, **IT IS HEREBY ORDERED:**

3 1. Petition under 28 U.S.C. 2254 for Writ of Habeas Corpus by a Person in
4 State Custody (Ct. Rec. 1) is **DENIED**.

5 2. The Court issues a Certificate of Appealability on the issue of whether
6 Petitioner has shown that he is entitled to habeas relief on his claim that the state
7 violated his due process rights by not providing a written basis for its determination
8 that Petitioner's suitability hearings should be held less frequently than annually.

9 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
10 Order, forward copies to counsel and petitioner, and **close the file**.

11 **DATED** this 14th day of May, 2010.

12
13 *s/Robert H. Whaley*

14 ROBERT H. WHALEY
15 United States District Judge

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