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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT ESCOBEDO,

Petitioner,

No. 2:09-cv-2204 WBS KJN P

vs.

J. HARTLEY, Warden,

Respondent.

ORDER

_____ /

I. Introduction

Petitioner is a state prisoner proceeding without counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s motion to dismiss the petition pursuant to Rule 4 of the Rules Governing § 2254 Cases. Therein, respondent argues that petitioner has failed to state a cognizable claim for federal habeas relief. Petitioner has opposed the motion. For the reasons stated below, the court orders that respondent’s motion to dismiss is granted, with leave for petitioner to file an amended petition.

In 1996, petitioner was convicted in the Sacramento County Superior Court of second degree murder with the use of a firearm, and was sentenced to an indeterminate term of 19 years to life in state prison.

On August 10, 2009, petitioner filed a petition for writ of habeas corpus, alleging

1 that the retroactive application of “California Penal Code § 3041(a)(2)(3), Proposition 9,”
2 exposes petitioner to a significant risk of prolonged incarceration and a more severe punishment
3 in violation of the Ex Post Facto Clause. (Am. Pet. at 4.) Petitioner also alleges a deprivation of
4 “good-time, work-time and pre and post-confinement” credits. (Am. Pet. at 4.) On August 6,
5 2010, respondent filed the pending motion to dismiss, alleging this action should be dismissed
6 based on petitioner’s failure to allege an actual injury. (*Id.* at 3.) Petitioner filed an opposition to
7 that motion on August 23, 2010, claiming he is not challenging a denial of parole or California
8 Penal Code § 3041.5. (Opp’n at 1.) Petitioner reinforces his challenge to California Penal Code
9 § 3041(a)(2)(3), and states this statute is depriving him of good-time, work-time and conduct
10 credits. (Opp’n at 1.) Respondent filed a reply on August 31, 2010, noting that California Penal
11 Code § 3041(a) does not contain a subpart (2) or (3), and renewing the motion to dismiss on the
12 ground that petitioner has failed to explain “when, how, or how many credits” petitioner
13 allegedly has been denied, thus failing to establish an injury in fact. (*Id.* at 2, citing Lujan v.
14 Defenders of Wildlife, 504 U.S. 555, 540 (1992).)

15 II. Standards

16 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
17 dismiss a petition if it “plainly appears from the petition and any attached exhibits that the
18 petitioner is not entitled to relief in the district court” Rule 4, Rules Governing Section
19 2254 Cases; see also White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (meritorious motions
20 to dismiss permitted under Rule 4); Gutierrez v. Griggs, 695 F.2d 1195, 1198 (9th Cir. 1983)
21 (Rule 4 “explicitly allows a district court to dismiss summarily the petition on the merits when no
22 claim for relief is stated”); Vargas v. Adler, 2010 WL 703211, at *2 (E.D. Cal. 2010) (granting
23 motion to dismiss a habeas claim for failure to state a cognizable federal claim). Moreover, the
24 Advisory Committee Notes to Rule 8 of the Rules Governing Section 2254 Cases indicates that
25 the court may dismiss a petition for writ of habeas corpus either on its own motion under Rule 4,
26 pursuant to the respondent’s motion to dismiss, or after an answer to the petition has been filed.

1 See, e.g., Miles v. Schwarzenegger, 2008 WL 3244143, at *1 (E.D. Cal. Aug. 7, 2008)
2 (dismissing habeas petition pursuant to respondent's motion to dismiss for failure to state a
3 claim). However, a petition for writ of habeas corpus should not be dismissed without leave to
4 amend unless it appears that no tenable claim for relief can be pleaded were such leave granted.
5 Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

6 III. Analysis

7 First, as noted by respondent, Proposition 9, approved by California voters in
8 2008, amended California Penal Code § 3041.5¹ to defer subsequent parole consideration
9 hearings for longer periods of time. Id. Petitioner has confirmed that he is not challenging
10 California Penal Code § 3041.5. (Opp'n. at 1.) Thus, the court need not address California Penal
11 Code § 3041.5 or Proposition 9.

12 _____ Second, the court notes that respondent is correct; there is no subpart (2) or (3) to
13 California Penal Code § 3041(a). Id. The entire portion of Section 3041(a) reads as follows:

14 In the case of any inmate sentenced pursuant to any provision of
15 law, other than Chapter 4.5 (commencing with Section 1170) of
16 Title 7 of Part 2, the Board of Parole Hearings shall meet with each
17 inmate during the third year of incarceration for the purposes of
18 reviewing the inmate's file, making recommendations, and
19 documenting activities and conduct pertinent to granting or
20 withholding postconviction credit. One year prior to the inmate's
21 minimum eligible parole release date a panel of two or more
22 commissioners or deputy commissioners shall again meet with the
23 inmate and shall normally set a parole release date as provided in
24 Section 3041.5. No more than one member of the panel shall be a
25 deputy commissioner. In the event of a tie vote, the matter shall be
26 referred for an en banc review of the record that was before the
panel that rendered the tie vote. Upon en banc review, the board
shall vote to either grant or deny parole and render a statement of
decision. The en banc review shall be conducted pursuant to
subdivision (e). The release date shall be set in a manner that will
provide uniform terms for offenses of similar gravity and
magnitude with respect to their threat to the public, and that will
comply with the sentencing rules that the Judicial Council may

_____ ¹ This statute governs parole hearings, rights of prisoners, written statements by the
parole board, rehearings and requests to advance parole hearings. Id. There is no mention of
good-time or work-time credits in California Penal Code § 3041.5.

1 issue and any sentencing information relevant to the setting of
2 parole release dates. The board shall establish criteria for the
3 setting of parole release dates and in doing so shall consider the
4 number of victims of the crime for which the inmate was sentenced
5 and other factors in mitigation or aggravation of the crime. At
6 least one commissioner of the panel shall have been present at the
7 last preceding meeting, unless it is not feasible to do so or where
8 the last preceding meeting was the initial meeting. Any person on
9 the hearing panel may request review of any decision regarding
10 parole for an en banc hearing by the board. In case of a review, a
11 majority vote in favor of parole by the board members participating
12 in an en banc review is required to grant parole to any inmate.

13 Cal. Penal Code § 3041(a). Although petitioner contends he is challenging California Penal
14 Code § 3041(a)(2)(3), no such subparts exist, so this court need not address this statute.

15 Third, petitioner insists he is not challenging parole hearings or denials of parole.
16 (Opp'n at 1.) This denial is made despite his reliance on Hayward v. Marshall, 603 F.3d 546 (9th
17 Cir. 2010). (Opp'n at 2-3.) It does not appear petitioner claims an increase in duration between
18 parole hearings violates the Ex Post Facto Clause. See Gilman v. Davis, 690 F.Supp.2d 1105
19 (E.D. Cal. 2010). Rather, petitioner appears to argue that he is being exposed to a significant risk
20 of prolonged incarceration by virtue of a deprivation of good-time and/or work-time conduct
21 credits in violation of the Ex Post Facto Clause. (Opp'n at 2.)

22 The United States Constitution prohibits states from passing any "ex post facto
23 Law." U.S. Const., Art. I, § 10. A law is an ex post facto law if it meets two conditions. First,
24 "it must apply to events occurring before its enactment." Weaver v. Graham, 450 U.S. 24, 29
25 (1981). "In other words, it must be retrospective." Hunter v. Ayers, 336 F.3d 1007, 1011 (9th
26 Cir. 2003). It must also disadvantage the person affected by either altering the definition of
criminal conduct or increasing the punishment for the crime. Id. The ex post facto prohibition
applies in the context of prison time credits. Weaver, 450 U.S. at 29 (ex post facto prohibition
applied to state statute reducing the amount of good time credits which could be earned by
prisoners); Hunter, 336 F.3d at 1011 (ex post facto prohibition applied to regulations that
eliminated restoration of forfeited good time credits for serious infractions). In the context of

1 prison time credits, “the core question for ex post facto purposes is whether the changed law
2 imposes ‘punishment more severe than the punishment assigned by law when the act to be
3 punished occurred.’” Hunter, 336 F.3d at 1011 (quoting Weaver, 450 U.S. at 30.)

4 Here, however, as noted by respondent, petitioner has failed to articulate a specific
5 deprivation of credits, but references only a theoretical deprivation of such credits. Petitioner is
6 correct that under California law, “good time” credits are a right, rather than a discretionary
7 award, and therefore he has a liberty interest in good time credits for purposes of determining
8 whether his due process rights are violated. See Hayward, supra. However, in order to bring this
9 claim in federal court, petitioner must demonstrate that he has suffered an injury-in-fact or that
10 the alleged deprivation is (a) concrete and particularized and (b) actual or imminent, not just
11 speculative or hypothetical. Lujan, 504 U.S. at 560; see also Matter of Extradition of Lang, 905
12 F.Supp. 1385, 1397 (C.D.Cal. 1995) (mere unconstitutionality of statute does not create standing
13 as plaintiff must claim some particularized injury resulting from application of statute). A
14 “speculative and attenuated possibility” of increasing an inmate's punishment is “insufficient to
15 violate the ex post facto clause.” Hunter, 6 F.3d at 1012 (quoting California Department of
16 Corrections v. Morales, 514 U.S. 499, 509 (1995)).

17 In addition, petitioner has failed to accurately identify the changed law petitioner
18 believes has deprived him of good time or work time credits.

19 Accordingly, respondent’s motion to dismiss the amended petition for failure to
20 state a cognizable claim for federal habeas relief must be granted. However, in an abundance of
21 caution, petitioner will be granted leave to file a second amended petition. If petitioner chooses
22 to file a second amended petition, he must accurately identify the statute or regulation he claims
23 has worked a deprivation of his good time or work time credits. He must also include facts
24 supporting his claim.

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1 IV. Conclusion

2 For all of the above reasons, IT IS HEREBY ORDERED that:

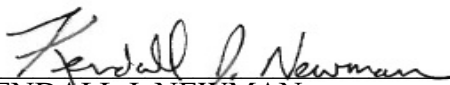
- 3 1. Respondent's August 6, 2010 motion to dismiss (dkt. no. 14) is granted;
4 2. The amended petition for writ of habeas corpus is dismissed; and
5 3. Within thirty days from the date of this order, petitioner shall complete the

6 attached Notice of Amendment and submit the following documents to the court:

- 7 a. The completed Notice of Amendment; and
8 b. An original and one copy of the Second Amended Petition.

9 Plaintiff's second amended petition must bear the docket number assigned this case and must be
10 labeled "Second Amended Petition"; failure to file a second amended petition in accordance with
11 this order may result in the dismissal of this action.

12 DATED: September 8, 2010

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16 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT ESCOBEDO,

Petitioner,

No. 2:09-cv-2204 WBS KJN P

vs.

J. HARTLEY, Warden,

Respondent.

NOTICE OF AMENDMENT

_____ /

Petitioner hereby submits the following document in compliance with the court's
order filed _____:

Second Amended Petition

DATED:

Petitioner