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

PHILLIP W. PHILLIPS,

Petitioner,

No. CIV S-09-3554 LKK GGH P

vs.

S. SALINAS,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action is proceeding on the original petition filed December 23, 2009. Petitioner challenges the Board of Parole Hearings' July 21, 2008 denial of parole on the grounds that (1) the Board's decision violated due process, and (2) the passage and/or application of Proposition 9, permitting the Board to defer subsequent parole consideration hearings for longer periods than previously provided, violated petitioner's right to be free from ex post facto application of the laws. Pending before the court is respondent's March 18, 2010 motion to dismiss petitioner's ex post facto claim on grounds that petitioner lacks standing to bring this claim and has not alleged a cognizable claim for federal habeas relief. After carefully reviewing the record, the undersigned recommends that respondent's motion be granted.

1 BACKGROUND

2 On June 3, 1986, the Fresno County Superior Court entered a judgment of
3 conviction against petitioner for second degree murder with use of a weapon. (Petition (Ptn.) at
4 1.) He was sentenced to a state prison term of 17 years to life. (Id.)

5 On July 21, 2008, the Board of Parole Hearings denied petitioner’s request for
6 parole. (Ptn., Ex. C at 110.) However, the Board noted that the denial was only “for one year”
7 and encouraged petitioner to prepare for his 2009 hearing, stating: “We think you’re getting very
8 close.” (Id. at 112.) The Board also offered “guidelines” about what petitioner would be
9 required to show at the 2009 hearing to gain a favorable ruling at that time. (Id. at 112-115.)

10 On February 18, 2009, petitioner filed a petition for writ of habeas corpus in the
11 Fresno County Superior Court challenging the Board’s 2008 decision to deny him parole. (Ptn.,
12 Ex. D at 122.) As in the instant petition, petitioner challenged the 2008 decision on due process
13 grounds and ex post facto grounds related to the passage of Proposition 9. (Id.) On March 26,
14 2009, in a reasoned decision, the Superior Court denied petitioner’s claims. (Id. at 122-126.)

15 On April 29, 2009, petitioner filed a petition for writ of habeas corpus in the
16 California Court of Appeal, Fifth Appellate District. (Ptn., Ex. E at 129.) The record does not
17 indicate what grounds petitioner raised in this petition, which the Court of Appeal summarily
18 denied on June 19, 2009. (Id.) On November 19, 2009, the California Supreme Court summarily
19 denied a habeas petition filed by petitioner, which too was brought on grounds not indicated in
20 the record before this court. (Ptn, Ex. F at 131.)

21 Petitioner filed the instant federal habeas petition on December 23, 2009. (Doc.
22 #1.) On March 18, 2010, respondent filed a motion to dismiss the ex post facto claim.¹ (Doc.
23 #11.) On April 6, 2010, petitioner filed an objection to the motion to dismiss. (Doc. #12.) In it,
24 petitioner stated that, in a September 2009 Board hearing, he had “received a Proposition 9 [five-

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¹ Respondent did not concede exhaustion of that claim.

1 year] denial.” (Id. at 3.) On April 21, 2010, respondent filed a reply to the opposition to the
2 motion to dismiss. (Doc. #13.)

3 ANALYSIS

4 Petitioner claims that the implementation of Proposition 9, passed in November
5 2008, violates the Ex Post Facto Clause because it significantly increases his risk of longer
6 incarceration. (Ptn. at 15.) On November 4, 2008, the California voters approved Proposition 9
7 (entitled Victims’ Rights in Parole Proceedings, also known as Marsy’s Law), which amends
8 California Penal Code section 3041.5 to permit the Board to defer subsequent parole
9 consideration hearings for longer periods than those provided in the former statute. See Cal.
10 Penal Code § 3041.5.

11 Petitioner has not demonstrated any injury resulting from Proposition 9. As
12 respondent points out, the parole determination from which petitioner seeks habeas relief
13 occurred in July 2008, nearly four months prior to the passage of Proposition 9. (Ptn., Ex. C at
14 51, 110.) At that time, California Penal Code section 3041.5 permitted parole officials to defer
15 an inmate’s subsequent parole suitability for a maximum of five years, if it was determined there
16 was no reasonable probability the inmate would be deemed suitable for parole in the interim
17 period. Cal. Penal Code § 3041.5(b)(2)(B). At the 2008 hearing, the Board determined that
18 petitioner’s next suitability hearing should take place in one year. (Id. at 112, 114, 118.)

19 Therefore, the amendment to the statute has not been applied to petitioner and he
20 has not suffered any concrete and particularized injury. See Iron Arrow Honor Soc’y v. Heckler,
21 464 U.S. 67, 70, 104 S.Ct. 373 (1983) (in order to satisfy Article III of the Constitution and
22 thereby bring a claim in federal court, litigant “must have suffered some actual injury that can be
23 redressed by a favorable judicial decision.”) Nor has the passage of Proposition 9 adversely
24 implicated the fact or duration of his sentence. See Preiser v. Rodriguez, 411 U.S. 475, 485-486,
25 93 S.Ct. 1827 (writ of habeas corpus not available unless claims implicate the fact or duration of
26 confinement); Wilkinson v. Dobson, 544 U.S. 74, 78-79, 125 S.C. 1242 (2005) (same); Nelson v.

