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

JESSE PERRY,

Petitioner,

No. 2:11-cv-3449 JAM DAD P

vs.

MATTHEW CATE,

Respondent.

FINDINGS & RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner raises both a due process and an ex post facto challenge to the decision of the California Board of Parole Hearings (hereinafter “Board”) to deny him parole for three years at his parole suitability hearing held on November 29, 2010. The matter has been fully briefed by the parties and is submitted for decision. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner’s application for habeas corpus relief be denied with respect to his due process claim and that his Ex Post Facto claim be dismissed without prejudice.

I. Procedural Background

Petitioner is confined pursuant to a 1980 judgment of conviction entered against him in the Santa Barbara County Superior Court following his conviction on one count of second

1 degree murder with use of a firearm. (Doc. 1 at 1.) Pursuant to that conviction, petitioner was
2 sentenced to fifteen years to life in state prison plus five years. (Id.)

3 The parole suitability hearing that is placed at issue by the instant federal habeas
4 petition was held on November 29, 2010. (Id. at 48.) Petitioner appeared at and participated in
5 that hearing. (Id. at 50, et seq.) Following deliberations held at the conclusion of that hearing,
6 the Board panel announced their decision to deny petitioner parole for three years as well as the
7 reasons for that decision. (Id. at 94-102.)

8 Subsequently, petitioner challenged the Board's November 29, 2010 decision in
9 petition for writ of habeas corpus filed in the Santa Barbara County Superior Court. (Doc. 12
10 (Answer), Ex. 1.) Therein, petitioner claimed that the Board's decision to deny him parole for
11 three years violated the Ex Post Facto Clause of the United States Constitution as well as his
12 right to due process. (Id.) That court denied the petition in a reasoned decision on the merits of
13 petitioner's claims. (Answer, Ex. 2.)

14 Petitioner subsequently challenged the Board's 2010 decision in a petition for writ
15 of habeas corpus filed in the California Court of Appeal for the Second Appellate District.
16 (Answer, Ex. 3.) That petition was summarily denied. (Answer, Ex. 4.) Petitioner then filed a
17 petition for writ of habeas corpus in the California Supreme Court. (Answer, Ex. 5.) That
18 petition was also summarily denied. (Answer, Ex. 6.)

19 On December 28, 2011, petitioner filed his federal application for habeas relief in
20 this court.

21 **II. Standards of Review Applicable to Habeas Corpus Claims**

22 An application for a writ of habeas corpus by a person in custody under a
23 judgment of a state court can be granted only for violations of the Constitution or laws of the
24 United States. 28 U.S.C. § 2254(a). A federal writ is not available for alleged error in the
25 interpretation or application of state law. See Wilson v. Corcoran, 562 U.S. ___, ___, 131 S. Ct.

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1 13, 16 (2010); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146,
2 1149 (9th Cir. 2000).

3 Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal
4 habeas corpus relief:

5 An application for a writ of habeas corpus on behalf of a
6 person in custody pursuant to the judgment of a State court shall
7 not be granted with respect to any claim that was adjudicated on
8 the merits in State court proceedings unless the adjudication of the
9 claim -

10 (1) resulted in a decision that was contrary to, or involved
11 an unreasonable application of, clearly established Federal law, as
12 determined by the Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an unreasonable
14 determination of the facts in light of the evidence presented in the
15 State court proceeding.

16 For purposes of applying § 2254(d)(1), “clearly established federal law” consists
17 of holdings of the United States Supreme Court at the time of the state court decision. Stanley v.
18 Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (citing Williams v. Taylor, 529 U.S. 362, 405-06
19 (2000)). Nonetheless, “circuit court precedent may be persuasive in determining what law is
20 clearly established and whether a state court applied that law unreasonably.” Stanley, 633 F.3d at
21 859 (quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th Cir. 2010)).

22 A state court decision is “contrary to” clearly established federal law if it applies a
23 rule contradicting a holding of the Supreme Court or reaches a result different from Supreme
24 Court precedent on “materially indistinguishable” facts. Price v. Vincent, 538 U.S. 634, 640
25 (2003). Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may
26 grant the writ if the state court identifies the correct governing legal principle from the Supreme
Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s case.¹

¹ Under § 2254(d)(2), a state court decision based on a factual determination is not to be overturned on factual grounds unless it is “objectively unreasonable in light of the evidence presented in the state court proceeding.” Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (quoting Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)).

1 Lockyer v. Andrade, 538 U.S. 63, 75 (2003); Williams, 529 U.S. at 413; Chia v. Cambra, 360
2 F.3d 997, 1002 (9th Cir. 2004). In this regard, a federal habeas court “may not issue the writ
3 simply because that court concludes in its independent judgment that the relevant state-court
4 decision applied clearly established federal law erroneously or incorrectly. Rather, that
5 application must also be unreasonable.” Williams, 529 U.S. at 412. See also Schriro v.
6 Landrigan, 550 U.S. 465, 473 (2007); Lockyer, 538 U.S. at 75 (it is “not enough that a federal
7 habeas court, in its independent review of the legal question, is left with a ‘firm conviction’ that
8 the state court was ‘erroneous.’”). “A state court’s determination that a claim lacks merit
9 precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of
10 the state court’s decision.” Harrington v. Richter, 562 U.S. ___, ___, 131 S. Ct. 770, 786 (2011)
11 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). Accordingly, “[a]s a condition for
12 obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s
13 ruling on the claim being presented in federal court was so lacking in justification that there was
14 an error well understood and comprehended in existing law beyond any possibility for fairminded
15 disagreement.” Harrington, 131 S. Ct. at 786-87.

16 If the state court’s decision does not meet the criteria set forth in § 2254(d), a
17 reviewing court must conduct a de novo review of a habeas petitioner’s claims. Delgadillo v.
18 Woodford, 527 F.3d 919, 925 (9th Cir. 2008); see also Frantz v. Hazy, 533 F.3d 724, 735 (9th
19 Cir. 2008) (en banc) (“[I]t is now clear both that we may not grant habeas relief simply because
20 of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by
21 considering de novo the constitutional issues raised.”).

22 The court looks to the last reasoned state court decision as the basis for the state
23 court judgment. Stanley, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir.
24 2004). If the last reasoned state court decision adopts or substantially incorporates the reasoning
25 from a previous state court decision, this court may consider both decisions to ascertain the
26 reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en

1 banc). “When a federal claim has been presented to a state court and the state court has denied
2 relief, it may be presumed that the state court adjudicated the claim on the merits in the absence
3 of any indication or state-law procedural principles to the contrary.” Harrington, 131 S. Ct. at
4 784-85. This presumption may be overcome by a showing “there is reason to think some other
5 explanation for the state court’s decision is more likely.” Id. at 785 (citing Ylst v. Nunnemaker,
6 501 U.S. 797, 803 (1991)). Where the state court reaches a decision on the merits but provides
7 no reasoning to support its conclusion, a federal habeas court independently reviews the record to
8 determine whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860;
9 Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). “Independent review of the record is
10 not de novo review of the constitutional issue, but rather, the only method by which we can
11 determine whether a silent state court decision is objectively unreasonable.” Himes, 336 F.3d at
12 853. Where no reasoned decision is available, the habeas petitioner still has the burden of
13 “showing there was no reasonable basis for the state court to deny relief.” Harrington, 131 S. Ct.
14 at 784.

15 When it is clear, however, that a state court has not reached the merits of a
16 petitioner’s claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a
17 federal habeas court must review the claim de novo. Stanley, 633 F.3d at 860; Reynoso v.
18 Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006); Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir.
19 2003).

20 **III. Scope of Review Applicable to Due Process Challenges to the Denial of Parole**

21 The Due Process Clause of the Fourteenth Amendment prohibits state action that
22 deprives a person of life, liberty, or property without due process of law. A litigant alleging a
23 due process violation must first demonstrate that he was deprived of a liberty or property interest
24 protected by the Due Process Clause and then show that the procedures attendant upon the
25 deprivation were not constitutionally sufficient. Kentucky Dep’t of Corrections v. Thompson,
26 490 U.S. 454, 459-60 (1989).

1 A protected liberty interest may arise from either the Due Process Clause of the
2 United States Constitution “by reason of guarantees implicit in the word ‘liberty,’” or from “an
3 expectation or interest created by state laws or policies.” Wilkinson v. Austin, 545 U.S. 209,
4 221 (2005). See also Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States
5 Constitution does not, of its own force, create a protected liberty interest in a parole date, even
6 one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981); Greenholtz v. Inmates of
7 Neb. Penal, 442 U.S. 1, 7 (1979) (There is “no constitutional or inherent right of a convicted
8 person to be conditionally released before the expiration of a valid sentence.”). However, a
9 state’s statutory scheme, if it uses mandatory language, “creates a presumption that parole release
10 will be granted” when or unless certain designated findings are made, and thereby gives rise to a
11 constitutional liberty interest. Greenholtz, 442 U.S. at 12. See also Allen, 482 U.S. at 376-78.

12 California’s parole scheme gives rise to a liberty interest in parole protected by the
13 federal Due Process Clause. Pirtle v. California Bd. of Prison Terms, 611 F.3d 1015, 1020 (9th
14 Cir. 2010); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002); see also Swarthout v.
15 Cooke, 562 U.S. ___, ___, 131 S. Ct. 859, 861-62 (2011) (finding the Ninth Circuit’s holding in
16 this regard to be a reasonable application of Supreme Court authority); Pearson v. Muntz, 639
17 F.3d 1185, 1191 (9th Cir. 2011) (“[Swarthout v. Cooke did not disturb our precedent that
18 California law creates a liberty interest in parole.”) In California, a prisoner is entitled to release
19 on parole unless there is “some evidence” of his or her current dangerousness. In re Lawrence,
20 44 Cal.4th 1181, 1205-06, 1210 (2008); In re Rosenkrantz, 29 Cal.4th 616, 651-53 (2002).

21 In Swarthout, the Supreme Court reviewed two cases in which California
22 prisoners were denied parole - in one case by the Board, and in the other by the Governor after
23 the Board had granted parole. Swarthout, 131 S. Ct. at 860-61. The Supreme Court noted that
24 when state law creates a liberty interest, the Due Process Clause of the Fourteenth Amendment
25 requires fair procedures, “and federal courts will review the application of those constitutionally
26 required procedures.” Id. at 862. The Court concluded that in the parole context, however, “the

1 procedures required are minimal” and that the “Constitution does not require more” than “an
2 opportunity to be heard” and being “provided a statement of the reasons why parole was denied.”
3 Id. (citing Greenholtz, 442 U.S. at 16). The Supreme Court therefore rejected Ninth Circuit
4 decisions that went beyond these minimal procedural requirements and “reviewed the state
5 courts’ decisions on the merits and concluded that they had unreasonably determined the facts in
6 light of the evidence.” Swarthout, 131 S. Ct. at 862. In particular, the Supreme Court rejected
7 the application of the “some evidence” standard to parole decisions by the California courts as a
8 component of the federal due process standard. Id. at 862-63. See also Pearson, 639 F.3d at
9 1191.²

10 **IV. Petitioner’s Claims**

11 **A. Due Process**

12 As noted above, petitioner seeks federal habeas relief on the grounds that the
13 Board’s 2010 decision to deny him parole, and the findings upon which that denial was based,
14 were not supported by “some evidence” as required under California law. However, under the
15 Supreme Court’s decision in Swarthout this court may not review whether California’s “some
16 evidence” standard was correctly applied in petitioner’s case. 131 S. Ct. at 862-63; see also
17 Miller v. Oregon Bd. of Parole and Post-Prison Supervision, 642 F.3d 711, 716 (9th Cir. 2011)
18 (“The Supreme Court held in [Swarthout v.] Cooke that in the context of parole eligibility
19 decisions the due process right is *procedural*, and entitles a prisoner to nothing more than a fair
20 hearing and a statement of reasons for a parole board’s decision[.]”); Roberts v. Hartley, 640
21 F.3d 1042, 1045-46 (9th Cir. 2011) (under the decision in Swarthout, California’s parole scheme
22

23 ² In its per curiam opinion the Supreme Court did not acknowledge that for twenty-four
24 years the Ninth Circuit had consistently held that in order to comport with due process a state
25 parole board’s decision to deny parole had to be supported by “some evidence,” as defined in
26 Superintendent v. Hill, 472 U.S. 445 (1985), that bore some indicia of reliability. See Jancsek v.
Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); McQuillion v. Duncan, 306 F.3d
895, 904 (9th Cir. 2002) (“In Jancsek . . . we held that the process that is due in the parole
rescission setting is the same as the Supreme Court outlined in Superintendent v. Hill”)

1 creates no substantive due process rights and any procedural due process requirement is met as
2 long as the state provides an inmate seeking parole with an opportunity to be heard and a
3 statement of the reasons why parole was denied); Pearson, 639 F.3d at 1191 (“While the Court
4 did not define the minimum process required by the Due Process Clause for denial parole under
5 the California system, it made clear that the Clause’s requirements were satisfied where the
6 inmates ‘were allowed to speak at their parole hearings and to contest the evidence against them,
7 were afforded access to their records in advance, and were notified as to the reasons why parole
8 was denied.’”)

9 The federal habeas petition pending before the court in this case reflects that
10 petitioner was represented by counsel at his 2010 parole suitability hearing. (Doc. 1 at 51.) As
11 set forth above, the record also establishes that at that hearing petitioner was given the
12 opportunity to be heard and received a statement of the reasons why parole was denied by the
13 Board panel. That is all the process that was due petitioner under the Constitution. Swarthout,
14 131 S. Ct. 862; see also Miller, 642 F.3d at 716; Roberts, 640 F.3d at 1045-46; Pearson, 639 F.3d
15 at 1191. It now plainly appears that petitioner is not entitled to relief with respect to his due
16 process claims. Accordingly, petitioner is not entitled to federal habeas relief on those claims.

17 **B. Ex Post Facto**

18 Petitioner’s next claim for relief is based upon his contention that application of
19 the provisions of California Proposition 9, also known as Marsy’s Law, at his 2010 parole
20 hearing violated the Ex Post Facto Clause of the United States Constitution because it lengthened
21 the deferral period for his next parole suitability hearing and resulted in his serving a longer
22 prison sentence. (Doc. 1 at 20-23.) As discussed below, the undersigned finds this claim must
23 be dismissed because petitioner is a member of the class in Gilman v. Fisher, No. CIV S-05-830
24 LKK GGH (Gilman), a class action lawsuit which addresses the issue he attempts to raise here.

25 The Constitution provides that “No State shall . . . pass any . . . ex post facto
26 Law.” U.S. Const. art. I, § 10. A law violates the Ex Post Facto Clause of the United States

1 Constitution if it: (1) punishes as criminal an act that was not criminal when it was committed;
2 (2) makes a crime’s punishment greater than when the crime was committed; or (3) deprives a
3 person of a defense available at the time the crime was committed. Collins v. Youngblood, 497
4 U.S. 37, 52 (1990). The Ex Post Facto Clause “is aimed at laws that retroactively alter the
5 definition of crimes or increase the punishment for criminal acts.” Himes v. Thompson, 336
6 F.3d 848, 854 (9th Cir. 2003) (quoting Souch v. Schaivo, 289 F.3d 616, 620 (9th Cir. 2002)).
7 See also Cal. Dep’t of Corr. v. Morales, 514 U.S. 499, 504 (1995). The Ex Post Facto Clause is
8 also violated if: (1) state regulations have been applied retroactively; and (2) the new regulations
9 have created a “sufficient risk” of increasing the punishment attached to the crimes. Himes, 336
10 F.3d at 854. The retroactive application of a change in state parole procedures violates ex post
11 facto only if there exists a “significant risk” that such application will increase the punishment
12 for the crime. See Garner v. Jones, 529 U.S. 244, 259 (2000).

13 Petitioner was convicted and sentenced to twenty years to life in prison in 1980,
14 twenty-eight years prior to the passage of Marsy’s Law in November 2008. Marsy’s Law
15 amended California law governing parole deferral periods. See Gilman v. Davis, 690 F. Supp.2d
16 1105, 1109–13 (E.D. Cal. 2010) (granting plaintiffs’ motion for a preliminary injunction
17 enjoining enforcement of Marsy’s Law, to the extent it amended former California Penal Code §
18 3041.5(b)(2)(A)), rev’d sub nom. Gilman v. Schwarzenegger, 638 F.3d 1101 (9th Cir. 2011).
19 Prior to the enactment of Marsy’s Law, the Board deferred subsequent parole suitability hearings
20 with respect to indeterminately-sentenced inmates for one year unless the Board determined it
21 was unreasonable to expect that parole could be granted the following year. If that determination
22 was made, the Board could then defer the inmate’s subsequent parole suitability hearing for up to
23 five years. See Cal. Pen. Code § 3041.5(b)(2) (2008). Marsy’s Law, which applied to petitioner
24 at the time of his 2010 parole suitability hearing, amended § 3041.5(b)(2) to impose a minimum
25 deferral period for subsequent parole suitability hearings of three years, and to authorize the

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1 Board's deferral of a subsequent parole suitability hearing for up to seven, ten, or fifteen years.

2 Id. § 3041.5(b)(3) (2010).

3 One of the claims presented by the plaintiffs in the class action Gilman case is that
4 the amendments to § 3041.5(b)(2) regarding parole deferral periods imposed under Marsy's Law
5 violates the Ex Post Facto Clause because "when applied retroactively, [they] create a significant
6 risk of increasing the measure of punishment attached to the original crime." (Gilman, Doc. No.
7 154–1 at 13 (Fourth Amended/Supplemental Complaint), Doc. No. 183 (Mar. 4, 2009 Order
8 granting plaintiffs' motion for leave to file a Fourth Amended/Supplemental Complaint.)) With
9 respect to this Ex Post Facto claim, the class in Gilman is comprised of "all California state
10 prisoners who have been sentenced to a life term with possibility of parole for an offense that
11 occurred before November 4, 2008." (Gilman, Doc. No. 340 (Apr. 25, 2011 Order amending
12 definition of class.)) The Gilman plaintiffs seek declaratory and injunctive relief, including a
13 permanent injunction enjoining the Board from enforcing the amendments to § 3041.5(b) enacted
14 by Marsy's Law and requiring that the Board conduct a new parole consideration hearing for
15 each member of the class. (Gilman, Doc. No. 154–1 (Fourth Amended/Supplemental Complaint)
16 at 14.)

17 In a class action for injunctive relief certified under Rule 23(b)(2) of the Federal
18 Rules of Civil Procedure a court may, but is not required to, permit members to opt-out of the
19 suit. Crawford v. Honig, 37 F.3d 485, 487 n.2 (9th Cir. 1994). In certifying the Gilman class,
20 the district court found that the plaintiffs satisfied the requirement of Rules 23(a) and 23(b)(2)
21 that "the party opposing the class has acted or refused to act on grounds that apply generally to
22 the class, so that final injunctive relief or corresponding declaratory relief is appropriate
23 respecting the class as a whole." (See Gilman, Doc. No. 182 (Mar. 4, 2009 Order certifying class
24 pursuant to Fed. R. Civ. P. 23(b)(2), Doc. No. 257 (June 3, 2010 Ninth Circuit Court of Appeals
25 Memorandum affirming district court's order certifying class.)) According to the district court in
26 Gilman, the members of the class "may not maintain a separate, individual suit for equitable

1 relief involving the same subject matter of the class action.” (Gilman, Doc. No. 296 (Dec.10,
2 2010 Order) at 2. See also Doc. No. 278 (Oct. 1, 2010 Order), Doc. No. 276 (Sept. 28, 2010
3 Order), Doc. No. 274 (Sept. 23, 2010 Order.)) There is no evidence before the court in this
4 habeas action suggesting that petitioner has requested permission to opt out of the Gilman class
5 action lawsuit.

6 Rather, petitioner alleges he is a California state prisoner who was sentenced to a
7 life term in state prison with the possibility of parole for an offense that occurred before
8 November 4, 2008. (Doc. 1 at 1.) Accepting petitioner’s allegations as true, he is a member of
9 the Gilman class. Similar to the plaintiffs in Gilman, petitioner in this habeas action alleges that
10 Marsy’s Law violates the Ex Post Facto Clause because, when applied retroactively, it creates a
11 risk of increasing the length of his punishment. Petitioner asks this court to issue a writ of
12 habeas corpus. However, even if the court found that the Board’s decision in 2010 to defer
13 petitioner’s next parole suitability hearing for three-years violated the Ex Post Facto Clause, it
14 would not entitle petitioner to release on parole. Because his Ex Post Facto claim concerns only
15 the timing of petitioner’s next parole suitability hearing, success on that claim would not
16 necessarily result in determinations that petitioner is suitable for release from custody on parole.
17 Rather, petitioner’s equitable relief would be limited to an order directing the Board to conduct a
18 new parole suitability hearing and enjoining the Board from enforcing against petitioner any
19 provisions of Marsy’s Law found to be unconstitutional. This is the same relief petitioner would
20 be entitled to as a member of the pending Gilman class action. (See Gilman, Doc. No. 154–1
21 (Fourth Amended/Supplemental Complaint) at 14.)

22 Therefore, it appears clear that petitioner’s rights will be fully protected by his
23 participation as a class member in the Gilman case. Accordingly, the court recommends that
24 petitioner’s Ex Post Facto claim presented by him in this federal habeas action be dismissed
25 without prejudice to any relief that may be available to petitioner as a member of the Gilman
26 class. See Crawford v. Bell, 599 F.2d 890, 892 (9th Cir. 1979) (“A court may choose not to

1 exercise its jurisdiction when another court having jurisdiction over the same matter has
2 entertained it and can achieve the same result.”); see also McNeil v. Guthrie, 945 F.2d 1163,
3 1165 (10th Cir. 1991) (“Individual suits for injunctive and equitable relief from alleged
4 unconstitutional prison conditions cannot be brought where there is an existing class action.”);
5 Gillespie v. Crawford, 858 F.2d 1101, 1103 (5th Cir.1988) (“To allow individual suits would
6 interfere with the orderly administration of the class action and risk inconsistent adjudications.”);
7 Johnson v. Parole Board, No. CV 12–3756–GHK (CW), 2012 WL 3104867, at *2 (C.D. Cal.
8 June 26, 2012) (recommending dismissal of petitioner’s Ex Post Facto challenge to Proposition 9
9 “without prejudice in light of the ongoing Gilman class action.”) (and cases cited therein), report
10 and recommendation adopted by 2012 WL 3104863 (C.D. Cal. July 25, 2012).

11 **V. Evidentiary Hearing**

12 Petitioner also requests that an evidentiary hearing be held on his claims for
13 federal habeas relief. (Doc. 1 at 9.)

14 Pursuant to 28 U.S.C. § 2254, an evidentiary hearing is appropriate under the
15 following circumstances:

16 (e)(2) If the applicant has failed to develop the factual basis of a
17 claim in State court proceedings, the court shall not hold an
evidentiary hearing on the claim unless the applicant shows that-

18 (A) the claim relies on-

19 (i) a new rule of constitutional law, made retroactive to cases on
20 collateral review by the Supreme Court, that was previously
unavailable; or

21 (ii) a factual predicate that could not have been previously
22 discovered through the exercise of due diligence; and

23 (B) the facts underlying the claim would be sufficient to establish
24 by clear and convincing evidence that but for constitutional error,
no reasonable fact finder would have found the applicant guilty of
the underlying offense[.]

25 Under this statutory scheme, a district court presented with a request for an
26 evidentiary hearing must first determine whether a factual basis exists in the record to support a

1 petitioner’s claims and, if not, whether an evidentiary hearing “might be appropriate.” Baja v.
2 Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999). See also Earp v. Ornoski, 431 F.3d 1158, 1166
3 (9th Cir. 2005); Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir. 2005). A petitioner
4 requesting an evidentiary hearing must also demonstrate that he has presented a “colorable claim
5 for relief.” Earp, 431 F.3d at 1167 (citing Insyxiengmay, 403 F.3d at 670, Stankewitz v.
6 Woodford, 365 F.3d 706, 708 (9th Cir. 2004) and Phillips v. Woodford, 267 F.3d 966, 973 (9th
7 Cir. 2001)). To show that a claim is “colorable,” a petitioner is “required to allege specific facts
8 which, if true, would entitle him to relief.” Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998)
9 (internal quotation marks and citation omitted).³

10 It does not appear from the record that the California courts made any independent
11 evidentiary findings with respect to the claims raised in the pending federal habeas petition.
12 Therefore, review in this case is based upon the findings of the Board, which held a full
13 suitability hearing in 2010, at which time it developed the facts. The court concludes that no
14 additional factual supplementation is necessary in this case and that an evidentiary hearing is not
15 appropriate with respect to the claims raised in the instant petition. The facts alleged in support
16 of these claims, even if established at a hearing, would not entitle petitioner to federal habeas
17 relief. Further, petitioner has not identified any factual conflict that would require this court to
18 hold an evidentiary hearing in order to resolve. Therefore, petitioner’s request for an evidentiary
19 hearing should be denied as well.

20 **Conclusion**

21 Accordingly, IT IS HEREBY RECOMMENDED that:

- 22 1. Federal habeas relief be denied as to petitioner’s due process claim; and

23 ////

24 _____
25 ³ In addition, the Supreme Court has recently held that federal habeas review under 28
26 U.S.C. § 2254(d)(1) “is limited to the record that was before the state court that adjudicated the
claim on the merits” and “that evidence introduced in federal court has no bearing on” such
review. Cullen v. Pinholster, 563 U.S. ___, ___, 131 S. Ct. 1388, 1398, 1400 (2011).

1 2. Petitioner’s claim that his rights under the Ex Post Facto Clause were violated
2 by the Board’s 2010 decision to defer his next parole consideration hearing for a period of three
3 years be dismissed without prejudice to any relief that may be available to petitioner as a member
4 of the class in Gilman v. Fisher, 05-0830 LKK GGH P.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
7 days after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
10 shall be served and filed within fourteen days after service of the objections. Failure to file
11 objections within the specified time may waive the right to appeal the District Court’s order.
12 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
13 1991).

14 In any objections he elects to file, petitioner may address whether a certificate of
15 appealability should issue in the event he files an appeal of the judgment in this case. See Rule
16 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a
17 certificate of appealability when it enters a final order adverse to the applicant); Hayward v.
18 Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc) (prisoners are required to obtain a certificate of
19 appealability to review the denial of a habeas petition challenging an administrative decision
20 such as the denial of parole by the parole board).

21 DATED: December 10, 2012.

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23 
24 _____
25 DALE A. DROZD
26 UNITED STATES MAGISTRATE JUDGE

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