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

RICHARD A. BARKER,
Petitioner,

No. 2:16-CV-0165-GEB-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

BOARD OF PAROLE HEARINGS,
et al.,
Respondents.

_____ /

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court are: (1) respondents' motion to dismiss (Doc. 11); (2) petitioner's motion for discovery (Doc. 9); and (3) petitioner's motion for leave to amend (Doc. 19).

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1 **I. BACKGROUND**

2 Petitioner is serving a life sentence with the possibility of parole following his
3 1975 conviction. Petitioner challenges the denial of parole on February 5, 2014. Petitioner
4 raises two claims. First, petitioner argues that the denial of parole resulted in a violation of the
5 Ex Post Facto Clause of the United States Constitution because the 2014 parole hearing was held
6 pursuant to California’s determinate sentencing law enacted following his conviction instead of
7 the indeterminate sentencing law which was in effect at the time of his conviction. Second,
8 petitioner argues that application of the determinate sentencing law at the 2014 parole hearing
9 violated his right to equal protection. In the proposed amended petition submitted with
10 petitioner’s motion for leave to amend, petitioner seeks to add a third claim: that application of
11 the determinate sentencing law in 2014 resulted in “disproportionate punishment” in violation of
12 the Eighth Amendment.

13 Petitioner raised two of these claims in prior petitions before this court and the
14 United States District Court for the Central District of California.¹ Specifically, in Barker v.
15 Lewis, E. Dist. Cal. No. 1:03-CV-6100-AWI-LJO, the court rejected on the merits petitioner’s
16 arguments that the denial of parole in May 2001 violated the Ex Post Facto Clause and Eighth
17 Amendment. In Barker v. Marshall, C. Dist. Cal. No. CV-09-6179-ABC, the court rejected on
18 the merits the same claims raised following the denial of parole in January 2008.

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25 ¹ Respondent argues in the current motion to dismiss that petitioner’s equal
26 protection claim was also raised in prior petitions. The cases cited by respondent, however, do
not reflect that the equal protection claim was ever addressed on the merits.

1 **II. DISCUSSION**

2 In its motion to dismiss, respondent argues that petitioner’s claims must be
3 dismissed as successive and that petitioner’s claims are not cognizable.

4 Under 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive
5 habeas corpus application . . . that was presented in a prior application shall be dismissed.” Such
6 is the case here with respect to petitioner’s claims that the denial of parole in 2014 violated the
7 Ex Post Facto Clause or the Eighth Amendment. As with the instant petition, the petitions
8 addressed by the courts in Barker v. Lewis and Barker v. Marshall challenged parole denials
9 under the determinate sentencing law. In both prior petitions, the courts rejected petitioner’s
10 claims on the merits. The same Ex Post Facto Clause claim presented in the current petition is
11 successive.² As to petitioner’s request to amend the current petition to add the Eighth
12 Amendment claim, because the claim would be successive, the amendment would be futile and
13 should be denied.

14 Respondent also argues that none of petitioner’s claims is cognizable. The court
15 does not agree. As demonstrated by the prior court decisions cited by respondent, petitioner’s Ex
16 Post Facto Clause and Eighth Amendment claims are cognizable for consideration, but do not
17 merit relief. Similarly, petitioner’s equal protection claim is cognizable in that it is based on an
18 alleged violation of petitioner’s constitutional rights. The claim, however, lacks merit. As
19 respondent correctly notes, application of the determinate sentencing law instead of the
20 indeterminate sentencing law cannot result in an equal protection violation because the two
21 schemes “. . . apply identical criteria in determining parole suitability.” Conner v. Estelle, 981
22 F.2d 1032, 1033 (9th Cir. 1992). Petitioner’s equal protection claim should be dismissed
23 pursuant to Rule 4 of the Federal Rules Governing Section 2254 Cases which provides for
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25 ² Because respondent has not established that petitioner’s equal protection claim
26 was ever addressed on the merits in a prior petition, the court does not find that such claim as
presented in the current petition is successive.

1 summary dismissal “[i]f it plainly appears from the face of the petition and any exhibits annexed
2 to it that the petitioner is not entitled to relief in the district court.” In the instant case, it is plain
3 that petitioner is not entitled to federal habeas relief on his equal protection claim.
4

5 **III. CONCLUSION**

6 Based on the foregoing, the undersigned recommends that:

- 7 1. Petitioner’s motion for leave to amend to add the Eighth Amendment
8 claim (Doc. 19) be denied;
9 2. Respondent’s motion to dismiss (Doc. 11) be granted;
10 3. Petitioner’s Ex Post Facto Clause be dismissed as successive; and
11 4. Petitioner’s equal protection claim be summarily dismissed.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court. Responses to objections shall be filed within 14 days after service of
16 objections. Failure to file objections within the specified time may waive the right to appeal.

17 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).
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19 DATED: February 16, 2017

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21 **CRAIG M. KELLISON**
22 UNITED STATES MAGISTRATE JUDGE
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