

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GREGORY McCLELLAN,  
Petitioner,  
v.  
BEN CURRY,  
Respondent.

No. C 09-085 SI (pr)  
**ORDER TO SHOW CAUSE**

\_\_\_\_\_ /

**INTRODUCTION**

Gregory McClellan, an inmate at the Correctional Training Facility in Soledad, filed this pro se action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court reviewed his petition and dismissed it with leave to amend. His amended petition is now before the court for review pursuant to 28 U.S.C. §2243 and Rule 4 of the Rules Governing Section 2254 Cases. His motion for a stay also is before the court for consideration.

**BACKGROUND**

McClellan provides the following information: He was convicted of shoplifting, see Cal. Penal Code § 666 (petty theft with a prior theft-related conviction), and apparently received a sentence that included a parole term. His parole makes him subject to seventeen special conditions of parole that he contends have no connection to his commitment offense of shoplifting. He particularly objects to Special Condition # 11, which precludes him from being in places where minors congregate. His parole was revoked based on his attendance at a high school football game on November 3, 2006. He was arrested on November 9, 2006, had a parole

United States District Court  
For the Northern District of California

1 revocation hearing on December 13, 2006, and was given a 12-month parole revocation term for  
2 the football game attendance. The particular decision challenged in the amended petition is the  
3 December 13, 2006 parole revocation decision. McClellan alleges that he filed unsuccessful  
4 habeas petitions in state court before filing this action.

## 6 DISCUSSION

### 7 A. Review of Amended Petition

8 This court may entertain a petition for writ of habeas corpus "in behalf of a person in  
9 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
10 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A  
11 district court considering an application for a writ of habeas corpus shall "award the writ or issue  
12 an order directing the respondent to show cause why the writ should not be granted, unless it  
13 appears from the application that the applicant or person detained is not entitled thereto." 28  
14 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are  
15 vague or conclusory, palpably incredible, or patently frivolous or false. See Hendricks v.  
16 Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

17 McClellan alleges several claims in his amended petition. First, he contends that parole  
18 officials have punished him in violation of his rights under the Double Jeopardy Clause and Ex  
19 Post Facto Clause of the U.S. Constitution. His argument is far from clear but appears to be that  
20 his shoplifting "offense does not carry these retroactive and unconstitutional restrictions," and  
21 the parole terms impermissibly increase his punishment for shoplifting. Amended Memo. of  
22 Points & Authorities, p. 2.

23 Second, he alleges that special parole condition number 11 is "vague and thus  
24 unconstitutional" under the First, Fifth and Fourteenth Amendments of the U.S. Constitution.  
25 Amended Petition, p. 4. In the "supporting facts" for this claim, he states "[t]here are simply  
26 innumerable (sic) circumstances where petitioner could be in prohibited areas and be in  
27 technical violation of this special parole condition and not be engaged in any criminal activity."  
28

1 Id.

2 Third, McClellan claims that the "Due Process and Equal Protection Clauses require that  
3 petitioner be granted an evidentiary hearing on this cause of action." Amended Petition, p. 5.  
4 This is not a ground upon which habeas relief may be granted and therefore is dismissed. To the  
5 extent he is arguing that he should have an evidentiary hearing in this court, the argument does  
6 not show a violation of his rights to due process or equal protection. To the extent he is arguing  
7 that he was improperly denied an evidentiary hearing in his state habeas proceedings, the claim  
8 fails because errors in the state post-conviction review process are not addressable through  
9 federal habeas corpus proceedings. See Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998).

10 Fourth, he contends that seventeen "parole conditions unrelated to petitioner's  
11 commitment offense are excessive and unconstitutional" under the First and Fourteenth  
12 Amendments of the U.S. Constitution. Amended Petition, p. 5. He contends that they are  
13 unconstitutional because they are unrelated to his shoplifting offense and no rehabilitative  
14 purpose is served by them.

15 Giving the pro se amended petition the liberal construction to which it is entitled, the  
16 court concludes that summary dismissal is not appropriate, except for the third claim.  
17 Respondent must file a response to the amended petition. The court earlier cautioned McClellan  
18 that a challenge to the 2006 parole revocation might be moot. At this point, the record is not  
19 sufficiently developed to allow a determination one way or another (i.e., the court cannot  
20 determine whether the petition is moot or is not moot), so the court will leave it to respondent  
21 to raise mootness or any other procedural challenge he thinks appropriate in his response to the  
22 petition.

23 / / /

24 / / /

25

26

27

28

1 B. Motion For Stay

2 McClellan has moved for an injunction prohibiting state officials from enforcing the  
3 special conditions of parole.<sup>1</sup> He urges the court to enjoin enforcement not only of his particular  
4 special parole conditions that pertain to access to children but also enforcement of California  
5 Penal Code § 3003.5(b), which puts certain restrictions on sex offender registrant parolees.  
6 Section 3003.5 apparently applies to him because he is required to register as a sex offender.  
7 See Docket # 12, p. 2.

8 Federal Rule of Civil Procedure 65 sets forth the procedure for issuance of a preliminary  
9 injunction or temporary restraining order ("TRO"). Prior to granting a preliminary injunction,  
10 notice to the adverse party is required. See Fed. R. Civ. P. 65(a)(1). Therefore, a motion for  
11 preliminary injunction cannot be decided until the parties to the action are served. See Zepeda  
12 v. INS, 753 F.2d 719, 727 (9th Cir. 1983). A TRO may be granted without written or oral notice  
13 to the adverse party or that party's attorney only if: (1) it clearly appears from specific facts  
14 shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or  
15 damage will result to the applicant before the adverse party or the party's attorney can be heard  
16 in opposition, and (2) the applicant's attorney certifies in writing the efforts, if any, which have  
17 been made to give notice and the reasons supporting the claim that notice should not be required.  
18 See Fed. R. Civ. P. 65(b). "A plaintiff seeking a preliminary injunction must establish that he  
19 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
20 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
21 public interest." Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 374 (2008).

22 McClellan has fallen far short of making the necessary showing for interim relief.  
23 McClellan has been less than forthcoming in his presentation of the facts as he has not described  
24 in any detail the sex offense that is in his criminal history and only vaguely describes it as "a  
25 prior misconduct." Amended Memorandum Of Points And Authorities In Support of Writ And

---

26  
27 <sup>1</sup>Although McClellan captioned his motion as a motion for a stay, the substance of the  
28 motion is a request for injunctive relief and not a stay of this action. The motion will be  
analyzed under the standards for granting interim relief.

1 Stay, p. 2.<sup>2</sup> In addition to his very poor factual showing, he does not appear to have the law on  
2 his side. Although McClellan argues otherwise, the case law does not require that parole  
3 conditions be directly tied to only the current commitment offense. Both state and federal law  
4 allow consideration of a parolee's history and character, as well as the current offense. See e.g.,  
5 People v. Lent, 15 Cal. 3d 481, 486 (Cal. 1975) ("A condition of probation will not be held  
6 invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2)  
7 relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not  
8 reasonable related to future criminality."); United States v. T.M., 330 F.3d 1235, 1240 (9th Cir.  
9 2003) ("The district court has wide discretion to impose conditions of supervised release. . . .  
10 That discretion is not unfettered, however; the conditions imposed are permissible only if they  
11 are reasonably related to the goal of deterrence, protection of the public, or rehabilitation of the  
12 offender" and cannot involve any greater deprivation of liberty than is reasonably necessary for  
13 the purposes of supervised release) id. ("supervised release conditions need not relate to the  
14 offense for which [the defendant] was convicted as long as they satisfy any of the conditions set  
15 forth above"); 18 U.S.C. § 4209(a)(1-2) (repealed) (U.S. Parole Commission may impose  
16 conditions of parole reasonably related to the "nature and circumstances of the offense" and the  
17 "history and characteristics of the parolee"). In short, neither state law nor federal law requires  
18 the direct tie between parole condition and current offense that McClellan contends exists.  
19 McClellan's history may be considered in choosing parole conditions within certain limits, but  
20 since his factual presentation is so woefully incomplete as to his sex offense history, the court  
21 cannot say that he has any chance of success on the merits, or that the balance of equities tips  
22 in his favor, or that an injunction prohibiting enforcement of restrictions on McClellan's access  
23 to children is in the public interest. The motion for a stay is DENIED. (Docket # 12.)

---

26 <sup>2</sup>The form that lists parole conditions states that the reasons for imposing the special  
27 conditions are McClellan's history of drug use, history of alcohol abuse, "[h]istory of predatory  
28 sexual history," and relationship of the conditions to the commitment offense and previous  
offense(s). Amended Petition, Exh. A, p. 4

1 **CONCLUSION**

2 For the foregoing reasons,

3 1. The amended petition warrants a response from respondent. The third claim in the  
4 amended petition is dismissed.

5 2. The clerk shall serve by certified mail a copy of this order and all the documents  
6 in the case file on respondent and respondent's counsel, the Attorney General of the State of  
7 California. The clerk shall also serve a copy of this order on petitioner.

8 3. Respondent must file and serve upon petitioner, on or before **December 24, 2009**,  
9 an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases,  
10 showing cause why a writ of habeas corpus should not be issued. Respondent must file with the  
11 answer a copy of all portions of the court proceedings or parole revocation proceedings that have  
12 been previously transcribed and that are relevant to a determination of the issues presented by  
13 the amended petition.

14 4. If petitioner wishes to respond to the answer, he must do so by filing a traverse  
15 with the court and serving it on respondent on or before **January 29, 2010**.

16 5. Petitioner's motion for a stay or injunction is DENIED. (Docket # 12.)

17 IT IS SO ORDERED.

18 DATED: November 13, 2009

19   
20 \_\_\_\_\_  
21 SUSAN ILLSTON  
22 United States District Judge  
23  
24  
25  
26  
27  
28