IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| HAROLD PHILLIPS, C-20212,<br><br>Petitioner,<br><br>v.<br><br>RON DAVIS, Warden,<br><br>Respondent. | No. C 16-3943 CRB (PR)<br><br>ORDER GRANTING MOTION TO DISMISS AND DENYING CERTIFICATE OF APPEALABILITY<br><br>(ECF No. 9) |

I.

Petitioner, a state prisoner incarcerated at San Quentin State Prison, seeks a writ of habeas corpus under 28 U.S.C. § 2254 invalidating the California Board of Parole Hearings' (BPH) continued refusal to grant him parole. Per order filed on August 16, 2016, the court (Kim, M.J.) found that, liberally construed, the petition states an arguably cognizable due process claim for relief under § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be granted. Respondent instead moves to dismiss the petition under Rule 4 of the Rules Governing Section 2254 Cases. Petitioner has filed an opposition and respondent has filed a reply.

The case was reassigned to the undersigned after respondent declined magistrate judge jurisdiction.

II.

Petitioner was convicted by a Los Angeles County Superior Court jury of kidnapping for the purpose of robbery, three counts of rape by force or violence, and three counts of oral copulation in concert with another. The jury also found

true allegations that he personally used a firearm in the commission of a felony. On August 1, 1980, petitioner was sentenced to a life term, plus 15 years and eight months, with the possibility of parole. BPH or its predecessor has found petitioner not suitable for parole each time he has appeared for review.

On May 31, 2016, petitioner filed a federal petition for a writ of habeas corpus challenging BPH's continued refusal to grant him parole. See Phillips v. Davis, No. C 16-2648 CRB (PR) (N.D. Cal. filed May 31, 2016). On October 11, 2016, the court granted respondent's motion to dismiss on the grounds that the petition failed to state a federal habeas claim and was untimely.

On July 13, 2016, petitioner filed the instant federal petition for a writ of habeas corpus also challenging BPH's continued refusal to grant him parole, and asserting a new, arguably cognizable due process claim. Specifically, petitioner claims that BPH's October 31, 2014 decision to deny him parole did not comport with due process because BHP did not properly consider his most recent psychological examination conducted by Dr. Paul Good.

III.

Respondent moves to dismiss the instant petition on the grounds that it is a second or successive petition, unexhausted, and procedurally defaulted. The court finds that the petition is not a second or successive petition; but it need not reach the other grounds because the underlying claim is clearly without merit.

A.

A second or successive petition may not be filed in this court unless the petitioner first obtains from the Ninth Circuit an order authorizing this court to consider the petition. See 28 U.S.C. § 2244(b)(3)(A). Respondent argues that because the instant petition is a second or successive petition, and petitioner has not obtained the requisite order authorizing this court to consider the petition, this

court is without jurisdiction. See Burton v. Stewart, 549 U.S. 147, 153 (2007) (noting that district court is without jurisdiction to consider second or successive petition if petitioner does not first receive authorization from court of appeals). The instant petition, however, is not a second or successive petition within the meaning of § 2244(b) because it was filed while the first petition was still pending in this court. See Woods v. Carey, 525 F.3d 886, 890 (9th Cir. 2008) (when pro se petitioner files new petition under § 2254 while previous petition is still pending, district court should construe new petition "as a motion to amend [the] previous habeas petition," and not as "a successive petition under the terms of § 2244"). Therefore, this court is not without jurisdiction to consider the arguably cognizable due process claim in the instant petition.

B.

The court need not address respondent's additional grounds for dismissal—nonexhaustion and procedural default—because it is clear from the record that petitioner does not raise a colorable federal habeas claim under § 2254. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); see also Cassett v. Stewart, 406 F.3d 614, 623–25 (9th Cir. 2005) (where petition fails to raise a colorable federal claim, it may be denied on the merits without reaching the issue of exhaustion).

It is well established "that a federal court may issue a writ of habeas corpus to a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Swarthout v. Cooke, 562 U.S. 216, 219 (2011). Federal habeas relief is unavailable "for errors of state law." Id. (quoting Estelle v. McGuire, 502 U.S. 62, 67 (1991)).

In the context of parole, the Supreme Court has made clear that a state prisoner subject to a parole statute similar to California's receives adequate due process when he is allowed an opportunity to be heard and is provided with a statement of the reasons why parole was denied. Swarthout, 562 U.S. at 220. The Constitution does not require more. Id.

Here, petitioner does not claim that BPH did not allow him an opportunity to be heard, or that it did not provide him with a statement of the reasons why parole was denied. The record shows that petitioner was afforded a full parole consideration hearing on October 31, 2014, during which he presented testimony regarding the psychological evaluation conducted by Dr. Paul Good and was afforded the opportunity to respond to the board's questions. See ECF No. 9-1 at 119- 147 (Oct. 31, 2014 Parole Consideration Hearing). The record also shows that BPH provided petitioner with a decision explaining the reasons it denied him parole, in which BPH specifically referenced Dr. Good's psychological evaluation. See id. at 148–62. Simply put, petitioner was afforded the due process to which he is constitutionally entitled—an opportunity to be heard and a statement detailing why he was denied. See Swarthout, 562 U.S. at 220. Because petitioner does not question whether those procedures were provided, and the record shows that they were indeed provided, this court's inquiry "is at its end." Pearson v. Muntz, 639 F.3d 1185, 1191 (9th Cir. 2011) (quoting Swarthout, 562 U.S. at 220).

Petitioner's attempt to challenge the probative weight BPH afforded his most recent psychological is of "no federal concern" because it goes "beyond what the Constitution demands." Swarthout, 562 U.S. at 221. As the Supreme Court has made clear, "the responsibility for assuring that the constitutionally adequate procedures governing California's parole system are properly applied

rests with the California courts." Swarthout, 562 U.S. at 222. Petitioner is not entitled to federal habeas relief on his claim that BPH did not properly consider his most recent psychological evaluation in denying him parole after its October 31, 2014 hearing.

**IV.**

For the foregoing reasons, respondent's motion to dismiss the petition (ECF No. 9) is GRANTED.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, a certificate of appealability (COA) under 28 U.S.C. § 2253(c) is DENIED because it cannot be said that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

IT IS SO ORDERED.

DATED: April 6, 2017

CHARLES R. BREYER
United States District Judge