

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  
SOUTHERN DISTRICT OF CALIFORNIA**

PAUL CARILLO,

Petitioner,

vs.

MATTHEW CATE,

Respondent.

CASE NO. 08cv2165-LAB (POR)

**ORDER GRANTING REQUEST  
FOR CERTIFICATE OF  
APPEALABILITY**

On August 17, 2009, the Court issued an order denying Petitioner's request for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Without reaching the merits, the Court granted Respondent's motion to dismiss the Petition as untimely. Petitioner then filed a notice of appeal and request for certificate of appealability ("COA").

Petitioner argues that *Slack* holds that when, as here, a petition is dismissed on procedural grounds without reaching the merits, a COA should issue if reasonable jurists could find the procedural ruling debatable. (Motion for COA at 3:9–11.) This may explain why Petitioner did not brief the merits, and focused solely on procedural issues. He has misread the holding of *Slack*, however. There, the Supreme court said:

We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

1 529 U.S. at 484. The COA cannot issue unless both these requirements are met. The  
2 standard is a modest one, however, *Lambright v. Stewart*, 220 F.3d 1022, 1027 (9<sup>th</sup> Cir.  
3 2000), and can be satisfied merely by a showing that even if the law in this Circuit is clear,  
4 other circuits disagree. *Id.* at 1027–28 (citations omitted).

5         Petitioner’s commitment offense, committed on February 11, 1981, was first degree  
6 murder with the use of firearm, robbery, and unlawful taking of a vehicle. He was convicted  
7 and sentenced to life without the possibility of parole, and he began serving his sentence on  
8 February 25, 1982. At the time he was convicted, section 2817 of the California Code of  
9 Regulations, title 15, provided that certain prisoners serving life without the possibility of  
10 parole would receive a commutation review hearing twelve years after entering prison, and  
11 every three years thereafter. This was later repealed, and he argues this amounted to an  
12 *ex post facto* law.

13         The Court turns first to the procedural ruling, which rested on AEDPA’s one-year  
14 limitations period. Petitioner points out the Seventh Circuit’s holding in *Cox v. McBride*, 279  
15 F.3d 492, 493–94 (7<sup>th</sup> Cir. 2002). While every other circuit that has considered the issue of  
16 whether AEDPA applies to administrative decisions — including the Ninth Circuit, in *Shelby*  
17 *v. Bartlett*, 391 F.3d 1061, 1066 (9<sup>th</sup> Cir. 2004) — the Seventh holds it does not. See *Walker*  
18 *v. O’Brien*, 216 F.3d 626 (7<sup>th</sup> Cir. 2000) (holding that AEDPA’s certificate of appealability  
19 requirements were inapplicable to petitions collaterally attacking administrative action); see  
20 also *Sherrod v. Nebraska*, 2008 WL 2705490 at 3 (D.Neb. July 9, 2008) (surveying cases).  
21 The Seventh Circuit recognizes its holding stands alone, but has not retreated from it. See  
22 *Evans v. Circuit Court of Cook County, Ill.*, 569 F.3d 665, 666–67 (7<sup>th</sup> Cir. 2009); *Moffat v.*  
23 *Broyles*, 288 F.3d 978, 979–80 (7<sup>th</sup> Cir. 2002). Although this Court must follow *Shelby*, the  
24 Ninth Circuit, sitting *en banc*, could reconsider it. Because of this split, jurists of reason  
25 would find this issue debatable. *Lambright*, 220 F.3d at 1025–26 (holding that even if Ninth  
26 Circuit precedent compels a district court’s ruling, the issue should be considered debatable  
27 where another circuit has disagreed).

28 ///

1           If the Ninth Circuit's precedent stands and AEDPA's one-year limitations period  
2 applies to this action, Petitioner will have no arguable basis for his appeal. His Petition is  
3 untimely for reasons set forth in the order denying it. But because it is debatable whether  
4 AEDPA's limitations period applies here, the Court must reach the merits to determine  
5 whether reasonable jurists could find Petitioner's claim at least debatable.

6           In contrast to an interest in a grant of parole, inmates can have no protectible interests  
7 in commutations or pardons. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458,  
8 464–65 (1981). An inmate's expectation that he will be commuted is "simply a unilateral  
9 hope." *Id.* at 465. Other circuits' rulings, examining different state laws, agree that new  
10 procedural rules governing commutation procedures do not constitute *ex post facto* laws.  
11 See, e.g., *Snodgrass v. Robinson*, 512 F.3d 999, 1002–03 (8<sup>th</sup> Cir. 2008); *Nero v. Blanco*,  
12 259 Fed.Appx. 648, 648 (5<sup>th</sup> Cir. 2007). But see *Robinson v. Blanco*, 307 Fed.Appx. 807,  
13 807 (5<sup>th</sup> Cir. 2009) (holding that habeas petition stated a claim, where new laws made  
14 commutation unavailable for five years in spite of favorable recommendation).

15           The Fifth Circuit in *Robinson* equated Supreme Court precedent governing parole  
16 standards with precedent governing commutation. See 307 Fed.Appx. at 807 (citing *Garner*  
17 *v. Jones*, 529 U.S. 244, 255 (2000); *California Dept. of Corr. v. Morales*, 514 U.S. 499  
18 (1995)). In that case, however, the petitioner had been recommended for commutation of  
19 sentence and only a new law establishing a mandatory waiting period stood in his way of  
20 being considered by the governor. *Robinson*, like the other cases, examined the effect of  
21 the state law alleged to be *ex post facto*, and the factual allegations in the petition.

22           Not all laws with some conceivable effect on the length of a sentence are *ex post*  
23 *facto* laws. *Morales*, 514 U.S. at 508. Here, Petitioner has merely alleged that he has not  
24 had a commutation review. There is no particular *ex post facto* concern arising from the  
25 unavailability of a hearing unless doing so would increase a prisoner's term of confinement.  
26 *Id.* at 509 n.4 ("If a delay in parole hearings raises *ex post facto* concerns, it is because that  
27 delay effectively increases a prisoner's term of confinement, and not because the hearing  
28 itself has independent constitutional significance.") Here, § 2817's requirement that

1 commutation reviews take place twelve years into incarceration, and every three years  
2 thereafter, was replaced with a provision permitting the Board of Prison terms to recommend  
3 inmates for commutation “from time to time.” See *Allen v. Davis*, 2007 WL 1971946 (giving  
4 legislative history) (citing Cal. Penal Code § 4801(a)). As before, the final decision belongs  
5 to the Governor. Cal. Penal Code § 4800.

6 Unlike the petitioner in *Robinson*, Petitioner here has shown nothing but a conceivable  
7 effect on the length of his sentence. Even if he were entitled to regular periodic review  
8 instead of *ad hoc review*, commutation in his case is something he hopes for but cannot  
9 compel. And unlike the petitioner in *Robinson*, whose commutation had already been  
10 recommended but was held up by the new rule, Petitioner can show no particular likelihood  
11 the procedural change at issue here would affect the length of his sentence.

12 The only relevant opinion in this Circuit that provides any support for Petitioner’s  
13 argument is *Karstetter v. Tucker*, 981 F.2d 1258 (9<sup>th</sup> Cir. 1992) (Table), an unpublished pre-  
14 *Morales* decision.<sup>1</sup> There, the panel considered a habeas petitioner’s argument that an  
15 Arizona statute that increased the permissible interval between commutation applications  
16 and limited the availability of commutation hearings. The court cited *Watson v. Estelle*, 859  
17 F.2d 105, 109–10 (9<sup>th</sup> Cir. 1998), *vacated on other grounds*, 886 F.2d 1093 (9<sup>th</sup> Cir. 1989),  
18 which addressed parole hearings, and equated commutation hearings with parole rights.  
19 The order merely asks the question, however; it does not answer it. Other courts showed  
20 some willingness to apply *Watson*’s reasoning to commutation review and hearings. See  
21 *Alston v. Robinson*, 791 F. Supp. 569, 590 (D.Md. 1992), but apparently none after 1992.

22 This line of cases therefore does not take into account *Morales*’ distinction between  
23 commutation and parole, although as noted in the discussion of *Robinson*, *supra*, the  
24 distinction is not observed in all cases.

25 Ordinarily, Petitioner would be required to plead specific facts showing the new law  
26 changing the process for obtaining a commutation “created a significant risk of increasing

---

28 <sup>1</sup> The Court cites this unpublished decision for purposes of showing whether the  
matters at issue here were ever considered debatable. See 9<sup>th</sup> Circuit Rule 36-3(c)(ii).

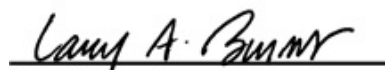
1 his punishment,” *Mason v. Blanco*, 269 Fed.Appx. 521, 522 (5<sup>th</sup> Cir. 2008) (citing *Garner v.*  
2 *Jones*, 529 U.S. 244, 255 (2000), but here he has had no opportunity to do so. The remedy,  
3 therefore, would be to permit Petitioner additional discovery, *Garner*, 529 U.S. 257, but only  
4 if he could show the Petition was timely; if it is untimely, there is no reason to do so.

5 In view of these precedents, the Court believes it is improbable Petitioner would  
6 succeed on his *ex post facto* claim even if the Ninth Circuit were to reach the merits.  
7 Nevertheless, the issue does not appear to be clearly settled. The Court has been unable  
8 to locate any decisions examining whether the repeal of California’s § 2817 presents an *ex*  
9 *post facto* problem. The only relevant order appears to be a report and recommendation,  
10 whose conclusions that the retroactive application of the repeal of § 2817 did not violate the  
11 prohibition on *ex post facto* laws are not supported by citation to any direct authority. See  
12 *Ross v. Schwarzenegger*, 2008 WL 4937599 at 2–3 (E.D.Cal. Nov. 17, 2008).<sup>2</sup> At least one  
13 other circuit recently presented with a similar question has expressed doubts about the  
14 petition’s success but avoided reaching the issue. See *Farnham v. Wyoming Dept. of Corr.*,  
15 2009 WL 2096298 at n.3 (10<sup>th</sup> Cir. July 17, 2009) (declining to reach *ex post facto* question,  
16 in spite of “serious doubts as to the viability of [the petitioner’s] *ex post facto* challenges” to  
17 changes in commutation procedures).

18 The Court therefore concludes this question is unsettled, and holds the “modest  
19 standard” for issuance of a COA is met. The COA is therefore **GRANTED**.

20 **IT IS SO ORDERED.**

21 DATED: September 21, 2009

22 

23 **HONORABLE LARRY ALAN BURNS**  
24 United States District Judge

25  
26  
27  
28 

---

<sup>2</sup> The petitioner filed objections to that report and recommendation, but it has yet to  
be accepted, rejected, or modified as provided under 28 U.S.C. § 636(b)(1)(C).