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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 JAMES DANIEL ALEXANDER,
11 Petitioner,
12 v.
13 RAYMOND MADDEN,
14 Respondent.

Case No.: 3:15-cv-002498-GPC-AGS

**ORDER DENYING PETITIONER'S
MOTION FOR
RECONSIDERATION**

[ECF No. 27.]

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16 Pending before the Court is Petitioner James Daniel Alexander's ("Petitioner")
17 Motion for Reconsideration pursuant to Federal Rules of Civil Procedure 52(b) and Civil
18 Local Rule 7.1. (ECF No. 27.) Petitioner seeks reconsideration of the Court's August
19 16, 2017 order denying his motion for a preliminary injunction. (See ECF No. 24.)
20 Having reviewed Petitioner's motion and the applicable law, for the reasons set forth
21 below, the Court **DENIES** Petitioner's Motion for Reconsideration.

22 **I. BACKGROUND**

23 On September 7, 1995, Petitioner was found guilty of first degree burglary in
24 violation of California Penal Code § 459 and § 460. (ECF No. 1-1 at 4.¹) Having
25 sustained a prior felony conviction pursuant to Penal Code § 667(d)(1) and two prior
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27 ¹ Pagination cited in this ruling references the pagination provided by the CM/ECF system.
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1 strikes under Penal Code § 667(e)(2), Petitioner was sentenced to an indeterminate term
2 of thirty years to life with the possibility of parole. (*Id.*)

3 Pursuant to an order by a panel of three federal judges entered on February 10,
4 2014, California adult correctional institutions were required to implement policies to
5 reduce prison populations. (*See* ECF No. 1-1 at 44-45.) Specifically, the Order required
6 institutions to increase good time credits for non-violent second strike offenders. (*Id.* at
7 45.) In response to the Order, the California Department of Corrections and
8 Rehabilitation (“CDCR”) amended the Good Conduct Credit provisions of the California
9 Code of Regulations (“CCR”) to permit a higher percentage of Good Conduct Credit to
10 qualifying inmates. 15 C.C.R. § 3043.2. The changes relevant to Petitioner’s motion fall
11 under § 3043.2(b)(1)-(3), specifically the provisions allowing non-violent second and
12 third strike offenders to earn between 33.3 to 50 percent of credit.² The changes to
13 § 3043.2 became effective May 1, 2017, and are not retroactive. (ECF No. 24 at 2.)

14 On May 30, 2014, the CDCR issued a memorandum to all CDCR inmates

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16 ² Section 3043.2(b)(1)-(3) provides:

17 (b) Notwithstanding any other authority to award or limit credit, effective May 1, 2017, the award of
18 Good Conduct Credit shall advance an inmate's release date if sentenced to a determinate term or
19 advance an inmate's initial parole hearing date pursuant to subdivision (a)(2) of section 3041 of the
20 Penal Code if sentenced to an indeterminate term with the possibility of parole pursuant to the following
21 schedule:

- 21 (1) No credit shall be awarded to an inmate sentenced to death or a term of life without the
22 possibility of parole;
- 22 (2) One day of credit for every four days of incarceration (20%) shall be awarded to an inmate
23 serving a determinate or indeterminate term for a violent felony as defined in subdivision (c) of
24 section 667.5 of the Penal Code, unless the inmate qualifies under paragraph (4)(B) of this
25 section or is statutorily eligible for greater credit pursuant to the provisions of Article 2.5
26 (commencing with section 2930) of Chapter 7 of Title I of Part 3 of the Penal Code;
- 26 (3) One day of credit for every two days of incarceration (33.3%) shall be awarded to an inmate
27 sentenced under the Three Strikes Law, under subdivision(c) of section 1170.12 of the Penal
28 Code, or under subdivision (c) or (e) of section 667 of the Penal Code, who is not serving a term
for a violent felony as defined in subdivision (c) of section 667.5 of the Penal Code, unless the
inmate is serving a determinate sentence and qualifies under paragraph (5)(B) of this section.

1 notifying them of the changes to the Good Conduct Credit provisions. (ECF No. 1-1 at
2 40.) In response to the memorandum issued by CDCR, Petitioner filed an administrative
3 appeal with CDCR complaining about his ineligibility to receive the 33.3 percent conduct
4 credits awarded to qualifying second strike inmates. (See ECF No. 1-2 at 1.) Petitioner
5 argued such decision was a violation of his equal protection rights. (*Id.*) Petitioner’s
6 administrative appeal was denied at the third and final level of review on January 9,
7 2014. (*Id.* at 2.)

8 Following Petitioner’s administrative denial, Petitioner filed a petition of writ of
9 habeas corpus with the Orange County Superior Court. (ECF No. 1-1 at 11–14.)
10 Petitioner’s habeas petition was denied on August 18, 2015. (*Id.* at 4.) Petitioner
11 appealed to the California Supreme Court, which denied the petition on October 14,
12 2015. (*Id.* at 3.)

13 On November 3, 2015, Petitioner filed a petition for writ of habeas corpus pursuant
14 28 U.S.C. § 2254. (ECF No. 1.) In his petition, Petitioner raises the following
15 arguments. First, he argues he is being “denied commensurate good conduct credit
16 benefits that have been afforded to similarly situated prisoners.” (*Id.* at 6.) Next, he
17 argues California Penal Code § 667(e)(2) “does not prevent CDCR [California
18 Department of Corrections and Rehabilitation] from granting [him] prison credit
19 conducts.” (*Id.*) Petitioner further argues that his “fundamental right of
20 physical/personal liberty” is at issue and that he is a “class of one” for purpose of his
21 equal protection claim. (*Id.*) Finally, Petitioner argues there is “no legitimate
22 governmental interest in denying [him] prison conduct credits.” (*Id.*)

23 Petitioner filed a Motion for a Preliminary Injunction and/or a Temporary
24 Restraining Order. (ECF No. 24.)³ In his motion, Petitioner alleged equal protection
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26 ³ The standard for issuing a temporary restraining order is that same as that for a preliminary injunction.
27 See *Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977); see also *Koller v.*

1 violations by CDCR. (*Id.* at 1-2.) Petitioner argued that CDCR is refusing to apply to the
2 new Good Conduct Credit provisions retroactively, which is resulting in a violation of his
3 equal protection rights. (*Id.* at 2.) In his motion for a preliminary injunction, Petitioner
4 asked the Court to do the following:

5 (1) require[] CDCR to retroactively apply the newly implemented good
6 conduct credit provision of CCR, Title 15, Section, 3043.2(b)(3); and (2) to
7 require[] CDCR to repeal the language contained within CCR, Title 15,
8 Sections 2449.1(a)(1) and 3940(a)(1)—that excludes NVTs [Non-Violent
9 Third Strike] prisoners from early parole considerations, and that are
guaranteed to ‘any person convicted of a non-violent felony offense’ under
California Constitution, Article 1, Section 32(a)(1).

10 (*Id.* at 4.) After a careful consideration of Petitioner’s motion, the Court denied it. The
11 Court’s basis for denial was based upon Petitioner’s failure to satisfy the four elements
12 that must be demonstrated by a party seeking the issuance of a preliminary injunction:

13 (1) likelihood of success on the merits, (2) likelihood that the movant will suffer
14 irreparable harm absent an injunction, (3) that the balance of equities tips in the movant’s
15 favor, and (4) that an injunction is in the public interest. (*See* ECF No. 25 at 3 (citing
16 *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).) The Court stated:

17 Even construing Petitioner’s motion liberally, it does not satisfy the four
18 elements of this test. Petitioner states that he will suffer irreparable harm in
19 the form of ‘continued incarceration,’ but irreparable injury is just one of the
20 four elements that must be satisfied in order to obtain a preliminary
21 injunction or restraining order. Petitioner makes no argument about why he
22 is likely to succeed on the merits of his claims, why the balance of equities
tips in his favor, or why the injunction is in the public interest. Accordingly,
Petitioner’s motion must be denied.

23 (*Id.* at 3 (citations omitted).) The Court also noted that even if Petitioner would have met
24 the *Winter* test, his motion would have still been denied because his requests were not
25 grounded in claims raised in Petitioner’s original habeas petition. (*Id.*)

26 *Brown*, 224 F. Supp. 3d 871, 875 (N.D. Cal. 2016). Petitioner’s motion is analyzed under the *Winter*
27 test. *See Winter v. Natural Resources Defense Counsel*, 555 U.S. 7, 24 (2008).

1 Petitioner has now filed a motion for reconsideration of the order denying his
2 motion for a preliminary injunction. (ECF No. 27.) Petitioner argues “the Court
3 mistakenly concluded that a request in Petitioner’s motion for a preliminary
4 injunction/temporary restraining order was not raised in the original habeas petition.” (*Id.*
5 at 1.) Petitioner seeks reconsideration only of the portion of the order denying his request
6 to have CDCR retroactively apply good conduct credits at the rate of 33.3 or 50 percent.
7 (*Id.* at 2.)⁴

8 **II. LEGAL STANDARD**

9 A motion for reconsideration may be brought under either Federal Rule of Civil
10 Procedure 59(e) or 60(b). *In re Arrowhead Estates Dev. Co.*, 42 F.3d 1306, 1311 (9th
11 Cir. 1994) (citing *Sch. Dist. No. 1J, Multnomah County, Or. v. Acands, Inc.*, 5 F.3d 1255,
12 1262 (9th Cir. 1993)); *see also* S.D. Cal. L. Civ. R. 7.1(i). The Court has discretion in
13 granting or denying a motion for reconsideration. *Fuller v. M.G. Jewelry*, 950 F.2d 1437,
14 1441 (9th Cir. 1991). A motion for reconsideration should not be granted absent highly
15 unusual circumstances. *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.
16 1999). “Reconsideration is appropriate if the district court (1) is presented with newly
17 discovered evidence; (2) clear error or the initial decision was manifestly unjust, or (3) if
18 there is an intervening change in controlling law.” *Sch. Dist. No. 1J, Multnomah Cty.*, 5
19 F.3d at 1263. “Clear error occurs when ‘the reviewing court on the entire record is left
20 with the definite and firm conviction that a mistake has been committed.’” *Smith v.*
21 *Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013).

22 **III. DISCUSSION**

23 Petitioner does not suggest that there is any new evidence or that the order was
24 manifestly unjust; he argues only the Court committed clear error by mistakenly denying
25 the motion for preliminary injunction. (*See* ECF No. 27 at 1.)

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27 ⁴ Petitioner concedes that other his second request in his motion for a preliminary injunction—seeking a
28 repeal of regulatory language—was not properly raised. (ECF No. 27 at 2.)

1 “A preliminary injunction is an extraordinary remedy and never awarded as of
2 right.” *Winter*, 555 U.S. at 24. As discussed above, to obtain a preliminary injunction,
3 the moving party must demonstrate (1) a likelihood of success on the merits; (2) a
4 likelihood of irreparable harm to the moving party in the absence of preliminary relief;
5 (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction
6 is in the public interest. *Id.* at 20.

7 Injunctions come in two forms: prohibitory and mandatory. *Arizona Dream Act*
8 *Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir.2014). “A mandatory injunction orders a
9 responsible party to take action, while a prohibitory injunction prohibits a party from
10 taking action and preserves the status quo pending a final resolution on the merits.” *Id.*
11 (internal citations and quotations omitted). A mandatory injunction goes well beyond
12 simply maintaining the status quo and is “particularly” disfavored. *Anderson v. United*
13 *States*, 612 F.2d 1112, 1114 (9th Cir. 1979). Mandatory preliminary relief “should not be
14 issued unless the facts and law clearly favor the moving party.” *Id.* In his motion
15 Petitioner sought an injunction requiring CDCR to retroactively apply Good Conduct
16 Credits, which would alter the status quo. As a result, the requested injunctive is
17 mandatory in nature, and is subject to a heightened burden of proof.

18 In his motion for reconsideration, Petitioner argues “the district court mistakenly
19 concluded that a request in the motion for a preliminary injunction/temporary restraining
20 order was not raised in the original habeas petition.” (ECF No. 27 at 3.) Even assuming
21 Petitioner is correct on this point, he still has not offered any argument suggesting that the
22 *Winter* elements are satisfied in this case.

23 As indicated above, a party seeking a preliminary injunction must demonstrate
24 they he is likely to succeed on the merits of their challenge to a particular law. *See*
25 *Winter*, 555 U.S. at 7, 20. Petitioner argues that CDCR’s failure to apply good conduct
26 credits retroactively is a violation of his equal protection rights. (ECF No. 24 at 1.)
27 Since Petitioner formulates his claim as a “class of one” claim (*see* ECF No. 1-1 at 6), to
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1 prevail he must show that (i) he has been intentionally treated differently from others
2 similarly situated and (ii) that there is no rational basis for the difference in treatment.
3 *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). “A similarly situated offender
4 is one outside the protected class who has committed roughly the same crime under
5 roughly the same circumstances but against whom the law has [or has] not been
6 enforced.” *United States v. Lewis*, 517 F.3d 20, 27 (1st Cir.2008) (citing *United States v.*
7 *Armstrong*, 517 U.S. 456, 465 (1996)).

8 First, Petitioner argues that “similarly situated ‘Non-Violent Second Strike’
9 (NVSS) prisoners . . . have been afforded a retroactive application of their good conduct
10 credits.” (ECF No. 24 at 2.) However, Petitioner is a non-violent *third* strike offender.
11 (*Id.* at 6.) Rather than showing how he is similarly situated to such second strike
12 offenders, Petitioner offers only conclusory assertions that some inmates that have been
13 convicted of the same crime—or even of worse crimes—are being afforded the benefit of
14 the new good conduct credit provision. (*See* ECF No. 24 at 6.) But it is clear that
15 Petitioner is differently situated from NVSS prisoners because he has been convicted of
16 more qualifying offenses than NVSS prisoners.

17 Next, because the CCR regulations are not retroactive, Petitioner argues “any and
18 all identically situated ‘Non-Violent Third Strike’ (NVTs) prisoners—who have been
19 received into CDCR after May 1, 2017—will serve only 20 years before they become
20 eligible for a parole suitability hearing” as opposed to Petitioner, who will have to wait
21 28. (*Id.* at 2.) Even assuming Petitioner is similarly situated to NVTs prisoners
22 “received into CDCR” after May 1, 2017, it was likely not irrational for CDCR to choose
23 against applying its new policy retroactively. Retroactivity would have caused every
24 third-strike prisoner in the California system to apply for a sentence reduction, which
25 would have drained considerable resources and created significant administrative delays.
26 As the CDCR explained:

27 A number of reasons support the department’s determination that new and
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1 revised credit earning programs should be implemented prospectively. First,
2 implementation of all the new and revised credit earning programs will
3 likely affect the credit calculations of more than 80,000 inmates. To do so
4 prospectively represents a major task for almost all of the divisions and
5 branches of the department, but especially for the staff responsible for
6 updating information technology systems, auditing release date calculations,
7 and developing credit earning programs. To apply the credits retroactively
8 would require significantly more time, staff, and resources.

9 Cal. Dep't of Corr. & Rehab., *Notice of Change to Regulations*, 2017 CA REG TEXT
10 462644 (NS), *available at*
11 [https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/NCDR/2017NCR/17-](https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/NCDR/2017NCR/17-05/17-05.pdf)
12 05/17-05.pdf, at 10. This was a rational choice.

13 Even if there was a reason to believe Petitioner is likely to succeed on the merits of
14 his claims, he offers no argument in his original memorandum or motion for
15 reconsideration showing why the balances of equities tip in his favor or that an injunction
16 is in the public interest. *Winter*, 555 U.S. at 20 (explaining that both must be shown for a
17 preliminary injunction to be proper).

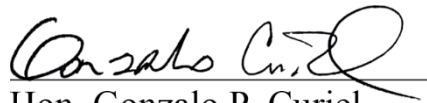
18 In sum, the Court correctly denied the motion for preliminary injunction because
19 Petitioner has failed to satisfy the *Winter* factors.

20 CONCLUSION

21 For the foregoing reasons, the Court finds that Petitioner failed to demonstrate the
22 Court committed clear error in denying his motion for a preliminary injunction.
23 Accordingly, the Court **DENIES** Petitioner's Motion for Reconsideration.

24 **IT IS SO ORDERED.**

25 Dated: June 26, 2018

26 
27 Hon. Gonzalo P. Curiel
28 United States District Judge