UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN DWAYNE BAILEY,

Petitioner,

v.

STEWARD SHERMAN, Warden,

Respondent.

Case No. EDCV 19-02120-ODW (JEM)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court has accepted the findings and recommendations of the Magistrate Judge, as set forth in the Report and Recommendation filed June 30, 2020, and has ordered the entry of Judgment dismissing this action with prejudice. Pursuant to Rule 11 of the Rules Governing Section 2254 cases, the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

The Court has reviewed Petitioner's contentions and is fully apprised of the relevant facts and law. For the reasons stated in the Magistrate's Report and Recommendation accepted by the Court, the Court concludes that Petitioner has not made a substantial

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showing of the denial of a constitutional right, as is required to support the issuance of a certificate of appealability. See 28 U.S.C. § 2253(c)(2).

Accordingly, the certificate of appealability is DENIED.

Dated: July 30, 2020

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN DWAYNE BAILEY,

Petitioner,

v.

STEWARD SHERMAN, Warden,

Respondent.

Case No. EDCV 19-02120-ODW (JEM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the pleadings, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Petitioner has filed Objections, and the Court has engaged in a de novo review of those portions of the Report and Recommendation to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge.

IT IS ORDERED that: (1) the Petition for Writ of Habeas Corpus is denied; and (2) Judgment shall be entered dismissing the action with prejudice.

DATED: July 30, 2020

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN DWAYNE BAILEY,

Petitioner,

v.

STEWARD SHERMAN, Warden,

Respondent.

Case No. EDCV 19-02120-ODW (JEM)

JUDGMENT

In accordance with the Order Accepting Findings and Recommendations of United States Magistrate Judge filed concurrently herewith,

IT IS HEREBY ADJUDGED that the action is dismissed with prejudice.

DATED: July 30, 2020

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN DWAYNE BAILEY,

Petitioner,

v.

STEWARD SHERMAN, Warden,

Respondent.

Case No. EDCV 19-02120-ODW (JEM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Otis D. Wright, II, United States District Judge, pursuant to 28 U.S.C. Section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On November 5, 2019, Steven Dwayne Bailey ("Petitioner"), a prisoner in state custody, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 ("Petition"). On December 30, 2019, Warden Sherman ("Respondent') filed an Answer. On February 6, 2020, Petitioner filed a Reply. The matter is ready for decision.

PRIOR PROCEEDINGS

On June 8, 2009, a San Bernardino County Superior Court jury found Petitioner guilty of three counts of sodomy with a child ten years of age or younger (Cal. Penal Code § 288.7(a)); two counts of sodomy by use of force (Cal. Penal Code § 286(c)(2)); three counts of lewd acts upon a child (Cal. Penal Code § 288(a)); and one count of attempted lewd act upon a child (Cal. Penal Code §§ 644, 288(a)). The jury found true the special circumstance that there were multiple victims. (Cal. Penal Code § 667.61(b)). (Lodged Document ("LD") 2, 2 Clerk's Transcript ("CT") at 232-46, 282.) On August 18, 2009, the court sentenced Petitioner to state prison for a term of 75 years to life plus one year. (2CT 319-20.)

Petitioner appealed his conviction to the California Court of Appeal. (LD 3.) On September 21, 2010, the Court of Appeal affirmed the judgment in an unpublished opinion. (LD 6.) Petitioner filed a petition for review in the California Supreme Court, which summarily denied review on November 23, 2010. (LD 7, 8.)[1]

In 2019, Petitioner began to seek recall and resentencing under California Assembly Bill 2942, which became effective on January 1, 2019, and modified California Penal Code section 1170(d)(1). On March 20, 2019, the San Bernardino County Superior Court summarily denied his motion for recall and resentencing. (Pet. at 3-4, 15.) Petitioner filed a habeas petition in the California Court of Appeal, which summarily denied it on June 26, 2019. (LD 9, 10.) Petitioner then filed a habeas petition in the California Supreme Court, which summarily denied it on October 16, 2019. (LD 11, 12.)

PETITIONER'S CONTENTIONS

Petitioner contends that he is entitled to recall and resentencing under Assembly Bill 2942. (Pet. at 5.)

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[1] The Court will use the page numbers assigned by its CM/ECF system.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the Court's consideration of Petitioner's cognizable federal claims. 28 U.S.C. § 2254(d), as amended by AEDPA, states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000); see also Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (clearly established federal law is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"). "[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." White v. Woodall, 572 U.S. 415, 426 (2014) (internal quotation marks and citation omitted). If there is no Supreme Court precedent that controls a legal issue raised by a habeas petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam); see also Carey v. Musladin, 549 U.S. 70, 76-77 (2006).

A federal habeas court may grant relief under the "contrary to" clause if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. Williams, 529 U.S. at 405-406. "The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of a particular case." Bell v. Cone, 535 U.S. 685, 694 (2002). An unreasonable application of Supreme Court holdings "must be objectively unreasonable, not merely wrong." White, 572 U.S. at 419 (citing Andrade, 538 U.S. at 75-76; internal quotation marks omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011) (citation omitted). The state court's decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 102. "If this standard is difficult to meet, that is because it was meant to be." Id.

A state court's silent denial of federal claims constitutes a denial "on the merits" for purposes of federal habeas review, and the AEDPA deferential standard of review applies. Richter, 562 U.S. at 98-99. When no reasoned decision is available, as is the case here, the habeas petitioner has the burden of "showing there was no reasonable basis for the state court to deny relief." Id. at 98.

DISCUSSION

California Assembly Bill 2942 "revised California Penal Code Section 1170(d)(1) to give state prosecutors the ability to reevaluate past sentences and recommend sentence reductions." Housh v. Rackley, No. 17-cv-4222-HSG (PR), 2019 WL 1117530, at *2 (N.D. Cal. Mar. 11, 2019). As modified, Section 1170(d)(1) provides that the sentencing court may recall the sentence and resentence a defendant to a reduced term "at any time upon

the recommendation" of the secretary of the California Department of Corrections and Rehabilitation ("CDCR"), the Board of Parole Hearings, or the district attorney for the county where the defendant was sentenced .[2] Cal. Pen. Code § 1170(d)(1). The resentencing court may consider postconviction factors such as the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence indicating whether the inmate's age and diminished physical condition (if any) have reduced his risk for future violence, and evidence indicating that circumstances have changed so that the inmate's continued incarceration is no longer in the interests of justice. Id.

Petitioner's claim seeking recall and resentencing under Section 1170(d)(1) is not cognizable on federal habeas review. A state prisoner has two avenues for relief under federal law: a petition for writ of habeas corpus and a complaint under 42 U.S.C. § 1983. See Hill v. McDonough, 547 U.S. 573, 579 (2006). "[I]f a state prisoner's claim does not lie at 'the core of habeas corpus,' it may not be brought in habeas corpus but must be brought, 'if at all,' under § 1983." Nettles v. Grounds, 830 F.3d 922, 931 (9th Cir. 2016) (en banc) (citations omitted), cert. denied, 137 S. Ct. 645 (2017). A claim does not lie at the core of habeas corpus if success on that claim would not "necessarily spell speedier release" from prison. Skinner v. Switzer, 562 U.S. 521, 535 n.13 (2011) (citation omitted). Petitioner's success in this action would not necessarily result in a shorter sentence; if he were to prevail, the appropriate relief would be a state court resentencing hearing, which might or might not result in a reduced sentence. See Long v. Jaime, No. 2:20-cv-01133-FMO-KES, 2020 WL 1318356, at *3-4 (C.D. Cal. Feb. 13, 2020) (under Nettles, petitioner's claim for resentencing under Assembly Bill 2942 was not properly brought in habeas action), accepted by 2020 WL 1318345 (C.D. Cal. Mar. 19, 2020); see generally Douglas v. Jacquez, 626 F.3d 501, 504 (9th Cir. 2010) ("habeas court has the power to release a prisoner" but it "cannot revise the

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[2] The sentencing court may also resentence the defendant on its own motion, but only within 120 days of commitment. Cal. Pen. Code § 1170(d)(1).

state court judgment" (internal quotation marks and citations omitted)). Because Petitioner's claim would not necessarily lead to speedier release from imprisonment, it does not lie at the core of habeas corpus and cannot be adjudicated in a federal habeas action. See Nettles, 830 F.3d at 934-35.

Furthermore, federal habeas relief is only available for "a violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief." Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994). Petitioner has not shown a misapplication of California sentencing laws, much less fundamental unfairness. He argues that his sentence should be reduced because he has a good prison disciplinary record, is permanently confined to a wheelchair, is almost 60 years old, and does not present a danger. (Reply at 2-3.) These are matters for the resentencing court to consider at a resentencing hearing under Section 1170(d)(1). See Cal. Penal Code §1170(d)(1). Whether Petitioner is entitled to a resentencing hearing under Section 1170(d)(1) absent a recommendation by the district attorney, the CDCR, or the Parole Board is purely a matter of state law. The state courts' refusal to resentence him does not present a basis for federal habeas relief.[3] See Housh, 2019 WL 1117530, at *2 (denying habeas petitioner's motion for resentencing under Assembly Bill 2942 because federal habeas relief is available only for violations of federal Constitution or laws, and petitioner could seek relief only in state court); see also Mills v. Marsh, No. 2:19-cv-05237-DDP-MAA, 2020 WL 1180433, at *3 (C.D. Cal. Jan. 9, 2020) (petitioner's request for resentencing under Section 1170(d)(1) as modified by Assembly Bill 1812 was not cognizable on federal habeas review).

Accordingly, Petitioner is not entitled to federal habeas relief.

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[3] For the same reasons, it is doubtful that Petitioner could allege a federal constitutional violation in a Section 1983 action. None is apparent on the face of the Petition. Petitioner cannot "transform a state-law issue into a federal one merely by asserting a violation of due process." Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996).

RECOMMENDATION

THE COURT, THEREFORE, RECOMMENDS that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: June 30, 2020

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 14 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEVEN DWAYNE BAILEY, Petitioner-Appellant, v. STUART SHERMAN, Warden, Respondent-Appellee.	No. 20-55847 D.C. No. 5:19-cv-02120-ODW-JEM Central District of California, Riverside ORDER

Before: RAWLINSON and BRESS, Circuit Judges.

The request for a certificate of appealability is denied because appellant's 28 U.S.C. § 2254 petition fails to state any cognizable habeas claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Nettles v. Grounds*, 830 F.3d 922, 934-35 (9th Cir. 2016) (en banc) (holding that claims fall outside "the core of habeas corpus" if success will not necessarily lead to immediate or earlier release from confinement), *cert. denied*, 137 S. Ct. 645 (2017); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Any pending motions are denied as moot.

DENIED.

Additional material from this filing is available in the Clerk's Office.