UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL DWAYNE STEVENSON,

Petitioner-Appellant,

v.

JOE A. LIZARRAGA, Warden,

Respondent-Appellee.

No. 23-55429

D.C. No.
2:22-cv-06823-MWF-AFM
Central District of California,
Los Angeles

ORDER

Before: S.R. THOMAS and PAEZ, Circuit Judges.

We have considered appellant's filings submitted in support of the request for a certificate of appealability. 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); *see also Hayward v. Marshall*, 603 F.3d 546, 552-54 (9th Cir. 2010) (en banc) (habeas challenge to parole decision requires a certificate of appealability when underlying conviction and sentence issued from a state court), *overruled on other grounds by Swarthout v. Cooke*, 562 U.S. 216 (2011).

All pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARL D. STEVENSON,

Petitioner,

v.

JOE A. LIZARRAGA, Warden,

Respondent.

Case No. 2:22-cv-06823-MWF (AFM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Michael W. Fitzgerald, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

BACKGROUND

In 1993, Petitioner was convicted of attempted murder and allegations that he personally used a firearm and intentionally inflicted great bodily injury were found true. Petitioner was sentenced to an indeterminate prison term of life plus eight years. (ECF 15-1.)

On April 1, 2021, the California Board of Parole Hearings ("Board") held a second subsequent parole suitability hearing. (ECF 15-2.) At the conclusion of the hearing, the Board found that Petitioner's release would pose an unreasonable risk to

public safety based upon various factors including his commitment offense, an unsupportive psychological assessment, institutional misconduct, a lack of insight, lack of programming, and lack of parole plans and marketable skills. (ECF 1 at 10; ECF 15-2 at 66-71.)

Petitioner challenged the Board's 2021 decision in habeas corpus petitions filed in the California Superior Court and the California Court of Appeal. Those petitions were denied. (ECF 15-3 through 15-8.)[1]

On September 9, 2022, Petitioner filed this petition for a writ of habeas corpus challenging the Board's decision. *See* 28 U.S.C. § 2254. (ECF 1.) He filed a supplement to the petition on October 14, 2022. (ECF 7.) Respondent filed an answer to the petition on January 23, 2023. (ECF 14.) Petitioner's reply was due on February 20, 2023. As of the date of this Report and Recommendation, Petitioner has neither filed a reply nor requested an extension of time within which to do so. For the following reasons, the petition should be denied.

PETITIONER'S CLAIMS

Petitioner alleges the following claims for relief:

1. Petitioner received ineffective assistance of counsel during the parole suitability hearing. (ECF 1 at 5.)
2. The Board acted with "Racial/Political discrimination based on fraud." (ECF 1 at 5.)
3. The Board's denial of parole violates the Ex Post Facto Clause and subjects Petitioner to cruel and unusual punishment. (ECF 1 at 6.)

[1] Petitioner also filed a habeas corpus in the California Supreme Court, but that petition did not purport to challenge the Board's decision. (ECF 15-9.) As best the Court can discern, the petition challenged Petitioner's placement in quarantine after a positive Covid-19 test, an alleged failure of prison authorities to process grievances, and the alleged failure of the lower state courts to address his claims. (ECF 15-9.) On September 21, 2022, the California Supreme Court denied the petition. (ECF 15-10.)

STANDARD OF REVIEW

A federal court may not grant a writ of habeas corpus on behalf of a person in state custody

> 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.

28 U.S.C. § 2254(d).

Section 2254(d) applies to claims that have been adjudicated by the state court. As Respondent points out, Petitioner did not present his claims to the California Supreme Court. (ECF 14 at 13-14.)[2] In addressing the merits of Petitioner's claims, Respondent assumes without discussion that the Court should apply the deferential standard above to the reasoned merits adjudication by the lower state court. (*See* ECF 14 at 16.) As other decisions in this District have observed, however, the correct standard of review for claims that were adjudicated on the merits by the California

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[2] Respondent contends that the petition is subject to dismissal based upon Petitioner's failure to exhaust his state remedies. (ECF 14 at 13-13.) While Respondent's argument appears correct, the Court nevertheless exercises its discretion to dismiss the petition on the merits because it is perfectly clear that Petitioner's claims do not raise a colorable ground for relief. *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."); *Cassett v. Stewart*, 406 F.3d 614, 623-624 (9th Cir. 2005) (district court may dismiss unexhausted ground for relief where it is "perfectly clear" that petitioner has not raised colorable federal ground for relief); *Hess v. Board of Parole and Post-Prison Supervision*, 514 F.3d 909, 913 n.2 (9th Cir. 2008) (denying claim challenging Oregon parole statute on the merits without resolving question of whether the petitioner had properly exhausted his state remedies) (citing 28 U.S.C. § 2254(b) (2); *Walters v. Long*, 2013 WL 375398, at *3 (C.D. Cal. Jan. 7, 2013) (although the petitioner's challenge to parole denial were unexhausted because he failed to present it to the California Supreme Court, the court denied the claim on the merits "because it is clear that this claim is not colorable") (citing 28 U.S.C. § 2254(b) (2)), *report and recommendation adopted*, 2013 WL 375232 (C.D. Cal. Jan. 30, 2013).

Court of Appeal but not presented to the California Supreme Court does not appear to be settled law in this Circuit. *See Duong v. Sherman*, 2022 WL 2905060, at *4 (C.D. Cal. July 22, 2022); *Gonzalez v. Johnson*, 2020 WL 4808939, at *8 (C.D. Cal. July 6, 2020), *report and recommendation adopted*, 2020 WL 4808888 (C.D. Cal. Aug. 18, 2020). The Court need not resolve this issue because, even under a de novo standard of review, the claim fails. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (where it is unclear whether AEDPA deference applies, a court may deny a writ of habeas corpus under § 2254 by engaging in de novo review because a habeas petitioner will not be entitled to relief under § 2254 if the claim can be rejected on de novo review); *Stevens v. Davis*, 25 F.4th 1141, 1165 (9th Cir. 2022) ("In addressing the merits, we need not decide whether a claim 'adjudicated on the merits' by a state [lower] court is subject to AEDPA deference under § 2254(d) if the habeas petitioner failed to exhaust the claim fully in the state courts. Rather, we may 'engag[e] in de novo review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review.'") (quoting *Berghuis*, 560 U.S. at 390); *Duong*, 2022 WL 2905060, at *4.

Under de novo review, the petitioner still bears the burden of establishing that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Johnson v. Zerbst*, 304 U.S. 458, 468-469 (1938). When appropriate, the Court will review such claims with reference to the state court of appeal's decision and the trial court's orders and rulings. *See Frantz v. Hazey*, 533 F.3d 724, 737-739 (9th Cir. 2008) (en banc) (even when a state court does not address a constitutional issue, where the reasoning of the state court is relevant to resolution of the constitutional issue, that reasoning must be part of a federal habeas court's consideration).

DISCUSSION

I. Ineffective assistance of counsel

Prisoners do not have any federally protected right to counsel at parole hearings. *See Nelson v. California Dep't of Corr. & Rehab.*, 2020 WL 8414030, at *3 (C.D. Cal. Dec. 17, 2020) (there is no constitutional right to counsel at parole suitability hearings), *report and recommendation adopted*, 2021 WL 706760 (C.D. Cal. Feb. 22, 2021); *Brooks v. Borders*, 2018 WL 5098858, at *4 (C.D. Cal. Feb. 13, 2018) ("Because there is no federal constitutional right to counsel at parole hearings, there can be no claim that counsel's ineffective assistance at a parole hearing violated Petitioner's federal constitutional rights."), *report and recommendation adopted,* 2018 WL 5095159 (C.D. Cal. Oct. 17, 2018); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (rejecting imposition of "new inflexible constitutional rule" with respect to appointing counsel in probation and parole revocation hearings and leaving the issue up to the states); *Dorado v. Kerr*, 454 F.2d 892, 897 (9th Cir. 1972) (there is no due process right to counsel in parole suitability hearings).[3] Because there is no federal right to counsel, there is also no corresponding right to effective assistance of counsel. Accordingly, Petitioner's allegation does not state a colorable claim for federal habeas corpus relief.

II. Discrimination

Petitioner alleges that his attorney and the Board members acted with racial or "political" discrimination. Such conclusory allegations, "[un]supported by a statement of specific facts" or evidentiary support do not warrant federal habeas corpus relief. *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). *See Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) (holding summary disposition of habeas petition appropriate where allegations are vague and conclusory; "the petition is expected to

[3] Similarly, there does not appear to be a state law right to counsel in parole hearings. In denying Petitioner's claim, the California Court of Appeal cited two California cases which held that there is no right to appointment of counsel in parole hearings. (*See* ECF 15-7, citing *In re Schoengarth*, 66 Cal. 2d 295, 304 (1967), and *In re Minnis*, 7 Cal. 3d 639, 650 (1972)).

state facts that point to a 'real possibility of constitutional error'") (citation omitted). Nothing Petitioner cites constitutes evidence suggesting that racial discrimination, political discrimination or fraud were at play in his parole hearing. Further, this Court's review of the parole hearing transcript reveals none. (*See* ECF 15-2.) Petitioner's conclusory allegations of fraud and discrimination lack any support and fail to state a colorable claim for habeas corpus relief. *See Brooks*, 2018 WL 5098858, at *3 (rejecting petitioner's allegations that parole determination was race-based because allegations were speculative and unsupported).[4]

III. The Ex Post Facto Clause

The contours of Petitioner's assertion that the Board's decision violated the Ex Post Facto Clause are not entirely clear. Liberally construing the petition, it appears that Petitioner challenges the Board's decision to deny parole for a period of seven years.

At the time of Petitioner's conviction and sentencing (and prior to 2008), when the BPH found a prisoner unsuitable for parole, it was required that a date be set for the next parole hearing based upon the deferral periods specified in California Penal Code § 3041.5(b)(2) as it then existed: The Board scheduled hearings annually with an exception for deferrals of up to five years. In 2008, California voters adopted Proposition 9 ("Marsy's Law"), which modified the availability and frequency of parole hearings. Under California Penal Code § 3041.5(b)(3) as amended, the minimum deferral period was increased to three years, the maximum deferral period was increased to 15 years, and the default deferral period was changed to 15 years. *See Gilman v. Schwarzenegger*, 638 F.3d 1101, 1103-1104 (9th Cir. 2011) (discussing the changes effected by Marsy's Law); *Alarcon v. Bd. of Parole Hearings*, 2015 WL 9165719, at *5 (C.D. Cal. Nov. 3, 2015) (same), *report and recommendation adopted*, 2015 WL 9093622 (C.D. Cal. Dec. 16, 2015).

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[4] In rejecting this claim, the Superior Court found that there "is no evidence, other than Petitioner's self-serving statements, that the Board and attorney were racially prejudiced." (ECF 15-4 at 14.)

Petitioner's claim is not cognizable in a federal habeas corpus petition. Habeas corpus "is the exclusive remedy ... for the prisoner who seeks 'immediate or speedier release' from confinement." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (citation omitted). A challenge to the fact or duration of confinement which, if successful, would result in immediate or speedier release falls within the "core" of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 487-489 (1973); *Nettles v. Grounds*, 830 F.3d 922, 927-929 (9th Cir. 2016) (en banc). "[I]f a state prisoner's claim does not lie at 'the core of habeas corpus [citation], it may not be brought in habeas corpus...." *Nettles*, 830 F.3d at 931 (citation omitted). A claim that the Board should have applied the deferral period predating Marsy's Law, if successful, would not result in Petitioner's immediate or speedier release. Instead, at most, success on this claim would advance the date of Petitioner's next parole suitability hearing. Accordingly, the Court lacks jurisdiction to consider this claim. *See Borstad v. Hartley*, 668 F. App'x 696, 697 (9th Cir. 2016) (district court lacked habeas jurisdiction over claim that Marsy's Law violates Ex Post Facto law by impermissibly deferring parole hearing dates); *see also Carter v. Davis*, 683 F. App'x 563, 564 (9th Cir. 2017) (court of appeal lacked jurisdiction to hear habeas appeal asserting Ex Post Facto challenge to Marsy's Law); *Due v. Bd. of Parole Hearings*, 2018 WL 3740520, at *6 (C.D. Cal. May 18, 2018) (ex post facto challenge to Marsy's Law is not cognizable in federal habeas corpus proceeding), *report and recommendation adopted*, 2018 WL 3738958 (C.D. Cal. Aug. 3, 2018).

Furthermore, this claim is precluded by the Ninth Circuit's decision in *Gilman v. Brown*, 814 F.3d 1007 (9th Cir. 2016). "A change in law violates the Ex Post Facto Clause of the Federal Constitution when it 'inflicts a greater punishment[ ] than the law annexed to the crime, when committed.'" *Gilman*, 814 F.3d at 1014 (quoting *Peugh v. United States*, 569 U.S. 530, 532-533 (2013)). The retroactive application of a change in state parole procedures violates the Ex Post Facto Clause only if there exists a "significant risk" that such application will increase the punishment for the

crime. *See Garner v. Jones*, 529 U.S. 244, 259 (2000). In *Gilman*, the Ninth Circuit held that Marsy's Law does not create significant risk of lengthened incarceration for inmates who were sentenced to life with possibility of parole for murders committed before initiative's passage and, thus, does not violate the Ex Post Facto Clause. *Gilman*, 814 F.3d at 1016-1021. Accordingly, Petitioner has not stated a colorable claim for relief.

IV. Cruel and unusual punishment

As noted above, Petitioner was sentenced to an indeterminate life sentence based upon attempted murder. According to the Superior Court, Petitioner's conviction was based upon the following:

> After a verbal dispute, Petitioner shot his pregnant ex-girlfriend. Petitioner asserts that the victim attempted to stab him with a knife and that he thereafter went to a vehicle, procured a firearm, returned to the victim's location, and shot the victim in the back. Petitioner then fled the scene. As a result of the shooting, she was rendered a paraplegic and lost her unborn child.

(ECF 15-4 at 3.)

There is no question that Petitioner's indeterminate life sentence does not constitute cruel and unusual punishment in violation of the Eighth Amendment. *See, e.g., Ewing v. California,* 538 U.S. 11, 30-31 (2003) (upholding a sentence of 25 years to life for felony grand theft); *Harmelin v. Michigan*, 501 U.S. 957, 994-995 (1991) (holding that a sentence of life without the possibility of parole imposed upon a first-time offender convicted of possessing 672 grams of cocaine did not amount to cruel and unusual punishment); *Ochoa v. Harrington*, 2011 WL 5520378, at *19-20 (C.D. Cal. Aug. 4, 2011) (the imposition of two consecutive indeterminate life sentences for two attempted murder convictions did not violate the Eighth Amendment), *report and recommendation adopted*, 2011 WL 5526101 (C.D. Cal. Nov. 8, 2011).

As the United States Supreme Court has held, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979)). Under California law, Petitioner's indeterminate life sentence is "in legal effect a sentence for the maximum [life] term,' subject only to the ameliorative power of the [parole authority] to set a lesser term." *Due*, 2018 WL 3740520, at *5 (quoting *People v. Wingo*, 14 Cal.3d 169, 182 (1975) (citations omitted). In denying parole, the Board did not increase Petitioner's sentence beyond the legally valid, statutory maximum of life imprisonment for his crime. Accordingly, as numerous decisions in this District have held, denial of parole from an underlying valid sentence fails to implicate the Eighth Amendment. *See Navarro v. Gipson,* 2021 WL 4263171, at *2 (C.D. Cal. Sept. 20, 2021) ("on federal habeas review, if an indeterminate life sentence is constitutional when it was imposed, it cannot be found to be unconstitutional simply on the basis that the petitioner is forced to remain incarcerated until the expiration of the term of imprisonment"); *Tatum v. Chappell*, 2015 WL 1383516, at *3 (C.D. Cal. Mar. 24, 2015) (same); *Molina v. Valenzuela*, 2014 WL 4748308, at *3 (C.D. Cal. Sept. 23, 2014) (same).

V. Due Process

Although the petition does not clearly do so, Petitioner's allegations might be liberally construed to raise a due process challenge to the Board's decision. To the extent that such a claim is presented, it fails to state a colorable claim for relief.

Although there is no federal constitutional right to parole, a state may create liberty interests in parole release entitled to protection under the federal Due Process Clause. *See Bd. of Pardons v. Allen*, 482 U.S. 369, 371 (1987); *Greenholtz*, 442 U.S. at 12. California has created such a liberty interest in parole release. *See Roberts v. Hartley*, 640 F.3d 1042, 1045 (9th Cir. 2011). Nevertheless, the procedural requirements of Due Process in the parole context are "minimal." *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam). Specifically, due process requires that

the state furnish an inmate seeking parole with an opportunity to be heard and a statement of reasons for the denial of parole. *Id.* (citing *Greenholtz*, 442 U.S. at 16); *Roberts*, 640 F.3d at 1046. Consideration of whether a prisoner was provided these minimal procedural protections is "the beginning and the end of the federal habeas courts' inquiry into whether [petitioner] received due process." *Id.*; *see also Miller v. Or. Bd. of Parole and Post-Prison Supervision*, 642 F.3d 711, 716 (9th Cir. 2011) ("The Supreme Court held in *Cooke* that in the context of parole eligibility decisions the due process right is procedural, and entitles a prisoner to nothing more than a fair hearing and a statement of reasons for a parole board's decision[.]").

The record here reveals that Petitioner was provided with all that the Constitution requires. Petitioner was present at the hearing, he was provided the opportunity to be heard, he was provided with the evidence that the Board relied upon, and he was given a statement of the reasons for the Board's decision. (ECF 15-2.)

RECOMMENDATION

For the foregoing reasons, it is recommended that the District Judge issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the petition and dismissing this action with prejudice.

DATED: 3/15/2023

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARL D. STEVENSON,

Petitioner,

v.

JOE A. LIZARRAGA, Warden,

Respondent.

Case No. 2:22-cv-06823-MWF (AFM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus, records on file and the Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected. Mr. Stevenson's objections do nothing to undermine the Report and Recommendation (at 5-9) as to the validity of either his sentence or his hearing before the California Board of Parole Hearings (the "Board"). Specifically, Mr. Stevenson has no constitutional right to counsel at the hearing; his views that the Board's decisions are racist or political are unsupported; and the Magistrate Judge's ruling on the ex post facto clause is correct.

Accordingly, the Court accepts the findings and recommendation of the Magistrate Judge.

IT THEREFORE IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: April 18, 2023

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

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