

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL P. ANSELMO,
Appellant,
vs.
NEVADA BOARD OF PAROLE
COMMISSIONERS, AND DORLA M.
SALLING,
Respondents.

No. 53520

FILED

JAN 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a petition for a writ of habeas corpus. First Judicial District Court, Carson City; James Todd Russell, Judge.

Having reviewed the record on appeal, we conclude that substantial evidence supports the decision of the district court to deny relief and that the district court did not err as a matter of law. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). We therefore affirm the denial of the petition for the reasons stated in the attached district court order. Briefing and oral argument are not warranted in this

case. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. James Todd Russell, District Judge
Michael P. Anselmo
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk

1 Case No. 08 EW 00071

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6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

7 **IN AND FOR CARSON CITY**

8 MICHAEL ANSELMO,

9 Petitioner,

10 vs.

11 NEVADA BOARD OF PAROLE,
12 DORLA M. SALLING, *et al.*,

13 Respondents.

ORDER DENYING
WRIT OF HABEAS CORPUS

14 This Court has considered Michael Anselmo's petition for writ of habeas corpus and the
15 Respondent's answer in response to the writ and having reviewed the documents and being fully
16 advised of the premises makes the following findings of fact, conclusions of law and enters the
17 following order:

18 Anselmo's petition fails to state a claim for which relief can be granted as his prayer for relief is
19 outside the scope of NRS 34.720. Anselmo neither challenges his judgment of conviction or sentence,
20 nor does he challenge the computation of time served pursuant to a judgment of conviction. Anselmo
21 merely challenges the Nevada Board of Parole's decision to deny him parole. Therefore, Anselmo does
22 not state a cognizable claim.

23 Even assuming Anselmo states a cognizable claim, the claims raised in his petition lack merit.
24 In Ground 1, Anselmo alleges a violation of the Due Process Clause of the Fourteenth Amendment
25 because the Nevada Parole Board denied him parole.

26 The guarantees of the Fourteenth Amendment Due Process Clause apply only when a
27 constitutionally protected liberty interest is at stake. *Tellis v. Godinez*, 5 F.3d 1314, 1316 (9th Cir.
28 1995). Liberty interests can arise both under the United States Constitution and from state law. *Wolff*

1 v. *McDonnell*, 418 U.S. 539, 557-58 (1974). A state may not deprive an inmate of life, liberty, or
2 property without due process of law. *Id.* However, an inmate does not have a liberty interest protected
3 by the Due Process Clause of the United States Constitution absent a showing of a legitimate claim of
4 entitlement. *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 462 (1989).

5 NRS 213.10705 states:

6 The Legislature finds and declares that the release or continuation of a
7 person on parole or probation is an act of grace of the State. No person
8 has a right to parole or probation, or to be placed in residential
9 confinement, and it is not intended that the establishment of standards
10 relating thereto create any such right or interest in liberty or property or
11 establish a basis for any cause of action against the State, its political
12 subdivisions, agencies, boards, commissions, departments, officers or
13 employees.

14 Based upon the plain reading of NRS 213.10705, Anselmo is not entitled to relief for the parole
15 board's denial of parole as he has no liberty interest in parole. Further, the United States Supreme
16 Court has held that "[t]here is no constitutional or inherent right of a convicted person to be
17 conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of the Nebraska*
18 *Penal and Correctional Complex*, 442 U.S. 1 (1979). *See also Jago v. Van Curen*, 454 U.S. 14 (1981).

19 The Nevada Supreme Court has likewise concluded that prisoners have no liberty interest in
20 parole. In *Severance v. Armstrong*, the Nevada Supreme Court found a parole statute "does not confer
21 a legitimate expectation of parole release and therefore does not create a constitutionally cognizable
22 liberty interest sufficient to invoke due process." 96 Nev. 836, 839, 620 P.2d 369, 370 (1990), citing
23 *Greenholtz*. Inmates with unexpired sentences simply enjoy no liberty interest to trigger due process.
24 It is a fundamental and insurmountable premise that a "discretionary decision to deny parole is not
25 subject to the constraints of due process." *Weakland v. Board of Parole Commissioners and the State*
26 *of Nevada*, 100 Nev. 218, 220, 687 P.2d 1158 (1984). Here, Anselmo's sentence has not expired, so he
27 has no liberty interest entitling him to relief.

28 Anselmo next claims the parole board arbitrarily and capriciously applied parole guidelines in
denying him parole. This claim is not supported by law or the record. An inmate has no liberty interest
in the guidelines established by the parole board. *Smith v. United State Parole Commission*, 875 F.2d
1361 (9th Cir. 1989). The decision to grant or deny parole lies within the discretion of the parole board.

1 NRS 213.1099(2). Further, NAC 213.560(1) states that the guidelines do not restrict the parole board's
2 discretion to grant or deny parole. Therefore, no matter how the parole board applies guidelines, the
3 decision of release is discretionary. Therefore, Anselmo has no liberty interest in the guidelines used
4 by the board to determine release from parole. Therefore, Anselmo is not entitled to relief.

5 Finally, Anselmo also claims the parole board violated the Ex Post Facto Clause when it applied
6 2008's parole guidelines in determining his eligibility for parole on his 1972 conviction.

7 The parole board's application of revised parole guidelines to Anselmo did not violate the Ex
8 Post Facto Clause. There is a two-step analysis to determine if a law constitutes retroactive punishment
9 forbidden by the Ex Post Facto Clause. U.S. Const. art. I, § 9, cl. 3; *Smith v. Doe*, 538 U.S. 84, 92
10 (2003). First, it must be determined whether the legislature enacted the statute to impose punishment.
11 *Id.* If yes, then the statute would constitute an ex post facto violation. *Id.* at 92-93 (considerable
12 deference must be accorded to the intent of the legislature, since concluding the legislature intended to
13 punish satisfies ex post facto challenges). However, if the intent was to enact a non-punitive and civil
14 regulatory regime, the second step of the analysis is to decide whether the statute is "so punitive either
15 in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* at 92 (citation and internal
16 quotation marks omitted). "Only the clearest proof will suffice to override legislative intent and
17 transform what has been denominated a civil remedy into a criminal penalty" under this second step.
18 *Id.*

19 The Ninth Circuit Court of Appeals held that federal parole guidelines were not laws for ex post
20 facto purposes, or any other constitutional provision. *Vermouth v. Corrothers*, 827 F.2d 599 (9th Cir.
21 1987). Further, offenders do not have a right to be considered for parole under any previously existing
22 set of parole standards. *Smith v. United States Parole Commission*, 875 F. 2d 1361 (9th Cir. 1989).
23 Parole guidelines are not "sentencing guidelines" having the "force and effect of law." *Flemming v.*
24 *Oregon Board of Parole*, 998 F. 2d 721, 725 (9th Cir. 1993). Further, the United States Supreme Court
25 rejected the argument by a petitioner who raised the issue that the ex-post facto clause forbids any
26 legislative change that has any conceivable risk of affecting a prisoner's punishment. *California*
27 *Department of Corrections v. Morales*, 514 U.S. 499, 506 115 S.Ct. 1597, 131 L. Ed. 2d 588 (1995).
28 The Seventh Circuit Court of Appeals held that the power to exercise discretion indicates that the

1 [parole] guidelines are merely guides, and not law: guides may be discarded when circumstances
2 require; laws may not. *Inglese v. United State Parole Commission*, 768 F.2d 932, 936 (7th Cir. 1985).

3 In Nevada, NRS 213.10885(1) provides the parole board shall adopt specific standards or
4 guidelines to assist the board in determining whether to grant or deny parole. NRS 213.10885(5)
5 further requires the parole board to conduct a comprehensive review of the standards every second year
6 and to adopt revised standards if any are determined to be ineffective. The decision to grant or deny
7 parole lies within the discretion of the parole board. NRS 213.1099(2). Further, NAC 213.560(1)
8 provides that the standards do not restrict the parole board's discretion to grant or deny parole. The
9 Nevada Parole Guidelines are discretionary and may be discarded. Therefore, the guidelines are not
10 laws for the purpose of ex-post facto. The parole board did not violate the Ex-Post Facto clause in
11 applying today's parole standards to Anselmo's 1972 murder conviction. Anselmo is not entitled to
12 relief.

13 Based on the above:

14 **IT IS HEREBY ORDERED** that the petition for a writ of habeas corpus filed in this case is
15 denied.

16 DATED: MARCH 18, 2009

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20 DISTRICT COURT JUDGE
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