IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVESTER PERRY	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-CV-0934
DONALD VAUGHN, ET AL.	:	

SURRICK, J. **MARCH 31, 2005**

MEMORANDUM & ORDER

Presently before the Court is the Petition for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 1) filed by Sylvester Perry pro se ("Petitioner"), Magistrate Judge Thomas J. Rueter's Report and Recommendation recommending denial of the Petition (Doc. No. 6), and Petitioner's Petition in Response to Report and Recommendation, which discusses his objections to the Report and Recommendation. (Doc. No. 7.) For the following reasons, we will dismiss the Petition.

I. BACKGROUND

A. Incarceration and Parole Applications

On February 22, 1990, Petitioner was sentenced to serve not less than seven (7) nor more than fourteen (14) years in state prison on two counts of rape and one count of indecent assault. (Doc. No. 5 Ex. A.) After accounting for time previously served, Petitioner's minimum release date expired on December 21, 1999. His maximum release date will expire on December 21, 2006.[1] (*Id.*)

[1] The effective date of Petitioner's sentence was December 21, 1992. (Doc. No. 5 Ex. A.)

Since his conviction, Petitioner has submitted numerous applications to the Pennsylvania Board of Probation and Parole ("the Board") seeking release on parole. On October 27, 1999, following an interview with Petitioner and a review of his file, the Board denied Petitioner's initial application for parole. (*Id.* Ex. B.) The Board determined that "the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." (*Id.*) The Board ordered that Petitioner be reevaluated on or after October, 2000. The Board determined that at that review it would consider whether Petitioner had successfully completed a treatment program for sex offenders, had received a favorable recommendation for parole from the Department of Corrections, had maintained a clear conduct record, and had completed the Department of Corrections's prescriptive programs. (*Id.*)

On October 16, 2000, following another interview with Petitioner and a review of his file, the Board denied Petitioner's second application for parole, again stating that "the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." (*Id.* Ex. C.) The Board stated that at the next review on or after October, 2001, it would again consider whether Petitioner had participated in and successfully completed a treatment program for sex offenders and substance abuse, had received a favorable recommendation for parole from the Department of Corrections, had a clear conduct record, and had completed the Department of Corrections's prescriptive programs. (*Id.*) It also stated that Petitioner's sex offender program evaluation would be available at that time for review. (*Id.*)

On January 2, 2002, after another interview with Petitioner and review of his file, the Board denied Petitioner's third application for parole, stating that "the fair administration of

justice cannot be achieved through your release on parole." (*Id.* Ex. D.) The denial notice did not state that public safety was a factor in the Board's decision. (*Id.*) The Board ordered that the next review take place on or after December, 2003, and indicated, as with the previous reviews, that it would consider whether Petitioner had participated in and successfully completed a treatment program for sex offenders, had received a favorable recommendation from the Department of Corrections, had received a clear conduct record, and had completed the Department of Corrections's prescriptive programs. (*Id.*)

On August 12, 2003, the Board rescinded its January 2, 2002, decision and issued a new decision denying parole. (*Id.* Ex. E.) The Board gave the following explanation for the denial:

> Following an interview with you and a review of your file, and having considered all matters required pursuant to the Parole Act of 1941, as amended, 61 [Pa. Cons. Stat.] § 331.1 et seq., the Board of Probation and Parole, in the exercise of its discretion, has determined at this time that: your best interests do not justify or require you being paroled/reparoled; and, the interests of the Commonwealth will be injured if you were paroled/reparoled. Therefore, you are refused parole/reparole at this time. The reasons for the Board's decision include the following:
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> Your version of the nature and circumstances of the offense(s) committed.
>
> Your refusal to accept responsibility for the offense(s) committed.
>
> Your lack of remorse for the offense(s) committed.
>
> The recommendation made by the Department of Corrections.
>
> Your prior history of supervision failure(s).
>
> Your unacceptable compliance with prescribed institutional programs.
>
> . . . .
>
> Your interview with the Hearing Examiner and/or Board Member.

> Failure to participate in a doc program of counseling or therapy designed for incarcerated sex offenses as required by 42 Pa. [Cons. Stat.] § 9718.1.

(*Id.*) The Board directed that Petitioner serve out the remainder of his sentence, which expires on December 21, 2006. (*Id.*)

B. State Court Proceedings

On February 4, 2002, Petitioner, acting pro se, filed a Petition For Writ Of Mandamus in the Commonwealth Court of Pennsylvania. (*Id.* Doc. G.) Petitioner requested an "order in mandamus" against the Board, alleging that the denial of his parole applications in 1999 and 2000 violated the "state and federal due process clauses." (*Id.* at unnumbered 1.) Petitioner's due process objection appeared to be that the Board's denial "failed to afford the petitioner a reason for denying him parole" and instead simply restated the guidelines of the Parole Act. (*Id.* ¶¶ 5-8.) Petitioner asserted that he had fully complied with all previous parole requirements prior to the 1999 and 2000 decisions denying parole. (*Id.* ¶ 9.)

On April 3, 2002, after the Board had filed preliminary objections to the Petition for Writ of Mandamus (*Id.* Ex. F), Petitioner filed an amended petition for writ of mandamus. (*Id.* Ex. H.) In the amended petition, Petitioner asserted that the Board's retroactive application of the 1996 amendments to the Parole Act, Pub. L. 1077, No. 143, § 1, 1996 Pa. Legis. Serv. 194 (codified at 61 Pa. Cons. Stat. Ann. § 331.1), in the consideration and denial of his parole applications violated the *ex post facto* Clause.[2] (Doc. No. 5 Ex. H ¶¶ 8, 10.) Petitioner also alleged that the Board failed to afford him a reason for the parole denial as required by 61 Pa.

[2] Petitioner does not specify whether he is alleging an *ex post facto* violation under the United States Constitution or Pennsylvania Constitution. Pennsylvania courts have construed the two provisions as "virtually identical." *Commonwealth v. Gaffney*, 733 A.2d 616, 621 (Pa. 1999) (citing *Commonwealth v. Young*, 637 A.2d 1313, 1317 (Pa. 1993)).

Cons. Stat. Ann. § 331.22. (*Id.* ¶ 9.) The amended petition did not include any due process claims. (*Id.*)

On May 6, 2002, the Board filed an Application For Stay Of Proceedings. This Application was denied by the Commonwealth Court on May 20, 2002. (*Id.* Ex. F.) The Board then filed an Answer With New Matter on May 30, 2002. (*Id.*) In the Answer, the Board denied applying an *ex post facto* law in rejecting Petitioner's 1999 and 2000 parole applications. The Board stated that "[t]he 1996 amendment to § 1 of the Probation and Parole Law did not affect the actual criteria employed by [the Board] for determining the grant or denial of parole" for Petitioner in 1999 and 2000. (Resp't Answer to Am. Writ of Mandamus ¶ 10; *see also id.* ¶ 38 ("Although § 1 of the Probation and Parole Law, 61 [Pa. Cons. Stat.] § 331.1, was amended in 1996, [the Board] does not interpret that amendment to affect its parole decision making, and that amendment had no effect on [the Board]'s decisions to refuse Petitioner parole.").) The Board asserted that "after considering all of the factors set out in § 19 of the Probation and Parole Law, 61 [Pa. Cons. Stat.] § 331.19, in the exercise of its discretion . . . [the Board] determined that Petitioner was not sufficiently rehabilitated to warrant his release on parole, and that his release would constitute an unreasonable risk to the public safety." (*Id.* ¶¶ 16, 21.) The Board stated that the same rationale was used in denying Petitioner's 2002 parole applications (*id.* ¶ 26), and denied that its notice of decisions violated Section 22 of the Parole Act, 61 Pa. Cons. Stat. § 331.22, which the Board asserted required only a "brief statement of the reasons" for denying parole. (*Id.* ¶ 29.)

A review of the Commonwealth Court's docket indicates that, nearly three years after its filing, the Commonwealth Court has not ruled on Petitioner's amended petition for mandamus.

PACMS Web Docket Sheet (No. 44 MD 2002), *at* http://ujsportal.pacourts.us/crystal/enterprise9/DSReportsPDF.csp?&ct=3&dktno=44%20MD%202002 (last visited Mar. 31, 2005). In fact, the only subsequent action listed on that court's docket is the entry of a December 30, 2004, order to show cause why the petition should not be dismissed. (*Id.*)

C. Federal Habeas Petition

On March 3, 2004, Petitioner filed a Petition for Writ of Habeas Corpus and supporting brief in this court. (Doc. No. 1.) Petitioner alleges that the Board's application of the 1996 amendments to the Parole Act violates the *ex post facto* clause. (Pet. ¶¶ 12(A), (C)-(D).) Petitioner also asserts that the Board's denial of parole because Petitioner refused to admit guilt or accept responsibility for his crimes violates his Fifth Amendment right against self-incrimination[3] and his Fifth and Fourteenth Amendment rights to equal protection and due process. (*Id.* ¶¶ 12(B)-(C).) The Petition was referred to Magistrate Judge Thomas J. Rueter for a Report and Recommendation.

On May 18, 2004, Magistrate Judge Rueter recommended that the Petition be dismissed without prejudice for failure to exhaust state court remedies on both the *ex post facto* and Fifth and Fourteenth Amendment claims. (Doc. No. 6 at 3-4.) Petitioner then filed a timely objection to the Magistrate Judge's Report and Recommendation. (Doc. No. 7.) Specifically, Petitioner objected to the Magistrate's recommendation that the Petition be dismissed without prejudice, noting that it has been over two years since he filed his amended petition for writ of mandamus

[3] Petitioner also refers to the First Amendment in stating his self-incrimination claim (Pet. ¶ 12(B)), but it is unclear what claim, if any, he is asserting under the First Amendment.

with the Commonwealth Court.[4] (*Id.* ¶¶ 1-3.)

II. DISCUSSION

A. Exhaustion of Remedies

Under ordinary circumstances, a state prisoner is required to exhaust all avenues of state review of his claims prior to filing a petition for federal habeas review. 28 U.S.C. § 2254(b)(1) (2000); *O'Sullivan v. Boerkel*, 526 U.S. 838, 839 (1999); *see also Toulson v. Beyer*, 987 F.2d 984, 986 (3d Cir. 1993) ("A state prisoner may initiate a federal habeas petition only after state courts have had the first opportunity to hear the claim sought to be vindicated."). To satisfy the exhaustion requirement, the claims included in a federal habeas petition must first have been "fairly presented" to the state courts. *Toulson*, 987 F.2d at 987. The burden is on the habeas petitioner to prove exhaustion. *Id.*

Exhaustion is a matter of comity, however, not a jurisdictional requirement. *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Story v. Kindt*, 26 F.3d 402, 405 (3d Cir. 1994). The Third Circuit has stated that "[f]ederal courts need not defer to the state judicial process when there is

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[4] Petitioner also appears to assert that because he has filed a pending action under 42 U.S.C. § 1983 that has been accepted, filed, and docketed by the Third Circuit, we should determine the merits of the habeas Petition in this case. (Doc. No. 7 ¶¶ 1, 4.) A review of the docket indicates that Petitioner does not have an action pending with the Third Circuit, but has filed a § 1983 claim in this court against Kathleen Zwierzyna, the Secretary of the Board. *Perry v. Zwierzyna*, No. 03-CV-6918 (E.D. Pa. filed Dec. 30, 2003). On June 9, 2004, the Honorable Eduardo C. Robreno dismissed Plaintiff's § 1983 claim, which "involve[d] a challenge to certain determinations made by the Pennsylvania Board of Probation and Parole," without prejudice, holding that § 1983 was not an appropriate method to challenge the Board's procedures under *Heck v. Humphrey*, 512 U.S. 477 (1994). *Perry v. Zwierzyna*, No. 03-CV-6918, at unnumbered 1 n.1 (E.D. Pa. June 9, 2004).

We note that on March 7, 2005, the United States Supreme Court held that inmates may bring a § 1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures, so long as a successful challenge "*would not necessarily* spell immediate or speedier release for the prisoner." *Wilkinson v. Dotson*, 125 S.Ct. 1242, 1247 (2005).

no appropriate remedy at the state level or when the state process would frustrate the use of an available remedy." *Lee v. Stickman*, 357 F.3d 388, 341 (3d Cir. 2004). The federal habeas statute for prisoners in state custody, 28 U.S.C. § 2254, provides that exhaustion is not required when "there is an absence of available state corrective process[,] or . . . circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254(b)(1)(B)(i)-(ii) (2000). An "'inexcusable or inordinate delay by the state in processing claims for relief may render the state remedy effectively unavailable.'" *Lee*, 357 F.3d at 341 (quoting *Wojtczak v. Fulcomer*, 800 F.2d 353, 354 (3d Cir. 1986)); *see also Jackson v. Duckworth*, 112 F.3d 878, 881 (7th Cir. 1996) ("Inordinate, unjustifiable delay in a state-court collateral proceeding excuses the requirement of petitioners to exhaust their state court remedies before seeking federal habeas corpus relief."). "The existence of an inordinate delay does not automatically excuse the exhaustion requirement, but it does shift the burden to the state to demonstrate why exhaustion should still be required." *Lee*, 357 F.3d at 341; *see also Story v. Kindt*, 26 F.3d 402, 405 (3d Cir. 1994) (holding that this burden is "difficult to meet").

In this case, Petitioner's amended mandamus petition asserts that the Board's application of the 1996 amendments to his parole decision violated the *ex post facto* clause. (Doc. No. 5 Ex. H ¶¶ 8-10.) In response to a certified question from the Third Circuit, *Coady v. Vaughn*, 251 F.3d 480, 489 (3d Cir. 2001), the Pennsylvania Supreme Court held that "an action for mandamus [is] viable as a means for examining whether statutory requirements have been altered in such a manner that violates the *ex post facto* clause." *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa. 2001); *see also Cimaszewski v. Bd. of Prob. & Parole*, No. 22 EAP 2002, 2005 Pa. LEXIS 349, at *9-10 (Pa. Feb. 24, 2005) ("While potential parolees are not entitled to appellate review

of a Board decision, they may be entitled to pursue allegations of constitutional violations against the Board through a writ of mandamus." (quoting *Rogers v. Pa. Bd. of Prob. & Parole*, 724 A.2d 319, 322 n.5 (Pa. 1999) (brackets omitted))). Plaintiff's *ex post facto* claim has therefore been fairly presented to the state courts for decision.

However, after being fairly presented for adjudication, the petition has laid dormant in the Commonwealth Court for nearly three years. In deciding whether a delay is excessive, we must consider the degree of progress made in state court since the Petitioner's filing. *Lee*, 357 F.3d at 342; *Cristin v. Brennan*, 281 F.3d 404, 411 (3d Cir. 2002). Since the filing of the amended petition on April 3, 2002, it appears that the only action taken by the Commonwealth Court was to dismiss the Board's application for a stay of proceedings on May 20, 2002. (Doc. No 5 Ex. F.) Since that time over two years have elapsed without further action. (*Id.*) On December 20, 2004, the court entered an order for the petitioner to show cause why the petition should not be dismissed. PACMS Web Docket Sheet (No. 44 MD 2002), *at* http://ujsportal.pacourts.us/crystal/enterprise9/DSReportsPDF.csp?&ct=3&dktno=44%20MD%202002 (last visited Mar. 31, 2005). This order is somewhat puzzling, however, because Petitioner has already fully presented the merits of his claims to the Commonwealth Court and is simply awaiting their adjudication. In any event, the show cause order, which is the only action taken by that court since May, 2002, does not indicate that a decision on the merits of Petitioner's *ex post facto* claim is likely to occur any time soon. Delays of almost three years or more, when no meaningful action toward resolution has been taken by the state court, have been held sufficient to excuse the exhaustion requirement. *See, e.g.*, *Moore v. Deputy Comm'rs of SCI-Huntingdon*, 946 F.2d 236, 242 (3d Cir. 1991) (excusing exhaustion because petition for post-conviction relief had been pending for

three years); *Wojtczak*, 800 F.2d at 356 (holding that a thirty-three (33) month delay in deciding a post-conviction proceeding was sufficient to excuse exhaustion); *United States ex rel. Senk v. Brierley*, 471 F.2d 657, 660 (3d Cir. 1973) (holding that a three-year delay in deciding a PHRA petition excused exhaustion). The extended delay in state court strongly weighs in favor of excusing exhaustion and determining this Petition on the merits.

In addition, there may be significant prejudice to Petitioner if a decision on the merits of his *ex post facto* claim is not reached swiftly. "[F]ederal courts have found state remedies to be inadequate or futile [when] . . . . [r]equiring exhaustion would cause irreparable injury to the petitioner's rights for some other reason, including that undue delay in the state courts risks mooting the petitioner's federal rights . . . ." 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 23.4a at 987, 991-92 (2001). Petitioner's maximum sentence will be completed in December, 2006. (Doc. No. 5 Ex. A.) Delay in determining the merits of Petitioner's claim may render his claim for parole moot. *See, e.g., Spencer v. Kemna*, 523 U.S. 1 (1998) (holding that a prisoner's habeas petition challenging the revocation of parole was moot because the prisoner had completed the entire term of imprisonment prior to the district court's decision on the merits of his habeas claims and there was no evidence of collateral consequences after the end of his conviction). The possibility of prejudice to Petitioner by further delay also weighs in favor of excusing the exhaustion requirement. Under the circumstances, we are satisfied that Petitioner has already encountered enough delay in the resolution of this matter.[5] The exhaustion requirement for Petitioner's *ex post facto* claims is

[5] In Judge Cudahy's words, we will not require Petitioner to "continue to wait for Godot." *Lee*, 357 F.3d at 343.

therefore excused.

The Board also asserts that Petitioner's Fifth and Fourteenth Amendment self-incrimination, equal protection, and due process claims are unexhausted because they have not been presented to any state court. (Doc. No. 5 at 6.) We conclude that Petitioner's Fifth and Fourteenth Amendment claims are exhausted because their assertion in state court would be futile. We may "excuse" a failure to exhaust state remedies if "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii) (2000). A return to state court has been deemed futile when the "state's highest court has ruled unfavorably on a claim involving facts and issues materially identical to those undergirding a federal habeas petition and there is no plausible reason to believe that a replay will persuade the court to reverse its field . . . ." *Whitney v. Horn*, 280 F.3d 240, 250 (3d Cir. 2002) (quoting *Lines v. Larkins*, 208 F.3d 153, 162-63 (3d Cir. 2000)). "If it appears that the prisoner's rights have become an 'empty shell' or that the state process is a 'procedural morass' offering no hope of relief, then the federal courts may excuse the prisoner from exhausting state remedies and may directly consider the prisoner's constitutional claims." *Lines*, 208 F.3d at 163 (quoting *Hankins v. Fulcomer*, 941 F.2d 246, 249-50 (3d Cir. 1999)). In a recent decision, *DeFoy v. McCullough*, 393 F.3d 439 (3d Cir. 2005), a 2-1 panel of the Third Circuit held that a state prisoner's challenge to the denial of his parole application on constitutional grounds other than a violation of the *ex post facto* clause need not seek a writ of mandamus before pursuing federal habeas review.[6] The petitioner in *DeFoy* filed a § 2254 habeas petition, alleging that the Board violated

[6] Judge Weis concurred in the result, concluding that the inmates' claims were exhausted as futile because Pennsylvania courts had repeatedly rejected similar claims. *DeFoy*, 393 F.3d at 448 (Weis, J., concurring). Judge Weis disagreed with the majority, however, on the issue of

his Fifth Amendment right against self-incrimination by denying parole on the grounds that he did not participate in sex offender treatment.[7] *Id.* at 441. In determining that the petitioner did not need to exhaust his Fifth Amendment claim prior to filing a habeas petition because its assertion in state court would have been futile, the panel majority relied on *Weaver v. Pennsylvania Board of Probation & Parole*, 688 A.2d 766, 769 (Pa. Commw. Ct. 1997), where the Commonwealth Court held that a prisoner had no right to a direct appeal for constitutional violations occurring during the parole process. *DeFoy*, 393 F.3d at 443. The Third Circuit panel majority found that its holding was reinforced by the Pennsylvania Supreme Court's decision in *Rogers v. Pennsylvania Board of Probation & Parole*, 724 A.2d 319 (Pa. 1999), which held that a direct appeal is not generally available to challenge the denial of parole. *DeFoy*, 393 F.3d at 443. The court reasoned that *Coady v. Vaughn*, 770 A.2d 287 (Pa. 2001), which held that a writ of mandamus was available to challenge the denial of parole under the *ex post facto* clause, was distinguishable because *Coady* applied only to *ex post facto* claims. *DeFoy*, 393 F.3d at 443-44. It noted that in *Coady*, the Pennsylvania Supreme Court had reiterated its earlier holding that "'parole denial claims are not normally suited to review by way of mandamus.'" *DeFoy*, 393 F.3d at 443-44 (quoting *Coady*, 770 A.2d at 290)). Consequently, the panel majority concluded that "mandamus is not available for Pennsylvania state prisoners seeking to challenge the denial of their parole on constitutional grounds other than the *ex post facto* clause," and that "claims of constitutional violations in the denial of parole in Pennsylvania need not be presented to the state

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exhaustion, concluding that the Pennsylvania courts "would not deny jurisdiction over claims of constitutional violations" "that infect parole denial proceedings." *Id.*

[7] An admission of guilt was a prerequisite for participation in the prison's treatment program. *DeFoy*, 393 F.3d at 441.

courts via a petition for writ of mandamus in order to satisfy the requirement of exhaustion." *Id.* at 445. Based on the *DeFoy* decision, we conclude that Petitioner's Fifth and Fourteenth Amendment claims are exhausted as futile because the Pennsylvania courts would not exercise jurisdiction over them. Accordingly, we proceed to determine the merits of Petitioner's claims.[8]

B. Ex Post Facto Claim

The *ex post facto* clause of the United States Constitution, U.S. Const. art. I, § 10, "forbids the enactment of any law which imposes a punishment for an act 'which was not punishable at the time it was committed; or imposes additional punishment to that then described.'" *Coady*, 251 F.3d at 487 (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)); *see also Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995) (holding that the *ex post facto* clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990))). A law that "alters the definition of criminal conduct or increases the penalty by which a crime is punishable" may violate the clause. *Morales*, 514 U.S. at 506 n.3. Retroactive changes to the standards used in determining parole may, under some circumstances, violate the Constitution's prohibition on *ex post facto* laws. *See, e.g.*, *Gardner v. State Bd. of Pardons & Paroles of Ga.*, 529 U.S. 244, 250 (2000); *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 383-84 (3d Cir. 2003).

Not every retroactive procedural change to parole decisions runs afoul of the *ex post facto* clause, however. *Gardner*, 529 U.S. at 250. A new law or policy violates the *ex post facto* clause only when: (1) "it is retrospective, i.e., when it 'applies to events occurring before its

[8] Because "there is no state court decision on the merits of [Petitioner's] claim[s] to which we owe deference under AEDPA," we analyze the issues raised by Petitioner *de novo*. *Slutzker v. Johnson*, 393 F.3d 373, 386 (3d Cir. 2004).

enactment,'" and (2) "when it 'disadvantage[s] the offender affected by it.'" *Mickens-Thomas*, 321 F.3d at 384 (quoting *Weaver*, 450 U.S. at 29). We must follow a two-step inquiry to determine whether a retroactive change in parole standards violates the *ex post facto* clause. First, we must determine whether the legislative changes were retroactively applied in the prisoner's parole determination. *Miller v. Florida*, 482 U.S. 423, 430 (1987). Second, we must assess whether the legislative changes "produce[d] a sufficient risk of increasing the measure of punishment attached to the covered crimes" with respect to the prospective parolee. *Morales*, 514 U.S. at 509 (emphasis added). The latter question is necessarily "'a matter of degree,'" *Gardner*, 529 U.S. at 250 (quoting *Morales*, 514 U.S. at 509), but it is clear that changes that have only a "speculative," "attenuated," or "conjectural" possibility of increasing a prisoner's sentence do not violate the *ex post facto* clause. *Morales*, 514 U.S. at 509. If a petitioner "demonstrates, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule," an *ex post facto* violation exists. *Garner*, 529 U.S. at 255 (emphasis added). Petitioner bears the burden of proof on these issues. *Morales*, 514 U.S. at 510 n.6.

Here, Petitioner appears to base his *ex post facto* claim on the decision of the Third Circuit in *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2002). (Pet. ¶¶ 12(A), (C); Brief in Support of Pet. at unnumbered 4-5, 7.) In *Mickens-Thomas*, the Third Circuit assessed whether the Board's reliance on the 1996 amendments to the Parole Act in denying parole to a prisoner convicted prior to 1996 violated the *ex post facto* clause. 321 F.3d at 377. The Third Circuit described Pennsylvania's pre-1996 parole statute as follows:

The 1941-1996 statute, in effect at the time of Thomas's conviction, made no specific mention of public safety. It provided:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment, and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

Id. at 377-78. The *Mickens-Thomas* court stated that, in contrast to this multi-factor analysis, the 1996 amendments appeared to place a predominant emphasis on public safety considerations in making parole decisions.[9] *Id.* 376-77. The Third Circuit observed that:

> In December 1996 the Pennsylvania legislature modified the law governing parole in Pennsylvania. The new language, inserted into the aspirational introductory provision of the Pennsylvania parole statutes, provides that the public safety must be considered "first and foremost" in the Board's execution of its mission. The relevant statute, in its post-1996 form, provides as follows:
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> > The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison. In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Id. at 377 (quoting 61 Pa. Cons. Stat. § 331.1) (footnote omitted). The Third Circuit also

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[9] Part of the rationale for the change to the parole statute, the court explained, was the widely-publicized arrest of a parolee from Pennsylvania's prison system in 1995 for a murder committed in New Jersey. *Mickens-Thomas*, 321 F.3d at 377.

discussed the Board's 1997 self-assessment report, which stressed that public safety should be central to parole decisions:

> The Board's self-assessment report, entitled "Fiscal Years 1995-1997 Biennial Report," stated that "in recent years, the Governor and General Assembly have mandated through statute that the foremost concern for the Board must be the protection of the safety of the public . . . ." The Report went on to note recent "heightened awareness and concern for public safety," which prompted it to institute more careful review procedures for cases involving "violent offenders." Thus, both the Judiciary Committee Report of February 1996 and the contemporaneous Biennial Report gave public notice that henceforth the "foremost concern" of the Board would be the safety of the public.

Id. at 380. Considering these changes, the Third Circuit concluded that "[t]he record is convincing that after 1996, the Board applied to the public safety interest [factor] far greater weight." *Id.* at 385. It stated:

> [P]rior to 1996, the Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated into its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines. Moreover, the Board had to weigh all factors, militating for and against parole, and make its decision on the totality of the factors pertinent to parole, and give appropriate weight to the interests of the inmate. Heavy foot application on one factor could not have been the basis of granting or rejecting parole. Policy declarations in and after 1996 demonstrate that Board stance shifted and that, indeed, post-1996 considerations of public safety became the dominant concern of the Board.

Id. at 386.

Based on this evidence, the Third Circuit concluded that the Board had retroactively applied the 1996 amendments to the parole statute to the petitioner in that case, Louis Mickens-Thomas.[10] *Id.* 387-88. It noted that the Board's decisions to deny parole to Mickens-Thomas

[10] Louis Mickens-Thomas was a seventy-four (74) year old male at the time of the Third Circuit's decision in 2003. He had been convicted of rape and murder in 1969 and sentenced to life in prison without possibility of parole. *Mickens-Thomas*, 321 F.3d at 376. In 1996,

relied "almost exclusively" on the Board's determination that he posed a potential risk to the public. *Id.* at 390;*see also id.* at 389 (stating that "the Board appeared to rely exclusively on the nature of the underlying offense and the potential danger to the public if Thomas were released" in denying his parole application). The court determined that the Board had ignored or refused to consider the numerous factors weighing in favor of Mickens-Thomas's release, such as his clear conduct record, a unanimous recommendation for release from the Department of Corrections, positive psychological evaluations, prescriptive programming, and sex offender therapy, and instead relied almost exclusively on public safety criteria. *Id.* at 388-89.

In the instant case, we are compelled to conclude that Petitioner's reliance on *Mickens-Thomas*, without more, does not establish that the Board applied the 1996 parole amendments in an unconstitutional manner. Assuming *arguendo* that the Board retroactively applied the 1996 amendments in considering and denying Petitioner's 1999 and 2000 parole applications, Petitioner must still establish that "but for the application of the 1996 change in parole policy, he would have been paroled." *VanHook v. Tennis*, No. 03-CV-6155, 2005 U.S. Dist. LEXIS 3431, at *30 (E.D. Pa. Feb. 24, 2005) (Wells, M.J.), *approved and adopted*, Doc. No. 11, No. 03-CV-6155 (E.D. Pa. Mar. 18, 2005). As the Supreme Court has noted, "[t]he focus of the *ex post facto* inquiry is not on whether a legislative change produces some sort of 'disadvantage' . . . but on whether any such change . . . increases the penalty by which a crime is punishable." *Morales*, 514 U.S. at 506-07; *see also Lynce v. Mathis*, 519 U.S. 433, 444 (1997) (stating that an *ex post facto* analysis should focus on "the effect of the law on the inmate's sentence"). Here, Petitioner

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Mickens-Thomas received a commutation from former Governor Robert Casey, making him eligible for parole. *Id.* at 377.

has offered no evidence that his sentence would have been different if the 1996 parole amendments had not been applied. Unlike Mickens-Thomas, Petitioner has not asserted that he has received a favorable recommendation for parole from the Department of Corrections, had a positive psychological evaluation, participated in sex offender therapy, or maintained a clean conduct record during his incarceration.[11] *Mickens-Thomas*, 321 F.3d at 388-89. In fact, Petitioner states in his habeas Petition that he believes his parole applications were denied for reasons other than public safety, such as his refusal to admit guilt, to accept responsibility for his criminal actions, and to participate in sex offender therapy. (Pet. ¶¶ 12(B), (C).) The Board's 1999 and 2000 denial notices state that the Board's parole determinations would take into account these factors. (Doc. No. 5, Exs. B, C.) Petitioner's bald assertion that, based solely on the statistical evidence presented in *Mickens-Thomas*, he would have been released under the pre-1996 parole standards is not sufficient to establish that retroactive application of the parole amendments created a significant risk of increased punishment. *See Cimaszewski*, 2005 Pa. LEXIS 349, at *28-29 ("[Petitioner] merely cites to the same statistical evidence presented to the United States District Court in *Mickens-Thomas* . . . . We hold that it is insufficient to discuss the statistics from *Mickens-Thomas*, *id.*, for the basis of the contention that one would have been released but for the 1996 amendment."); *see also Fripp v. Superintendent Myers*, No. 03-CV-4942, 2004 U.S. Dist. LEXIS 25435, at *23-24 (E.D. Pa. Dec. 13, 2004) (concluding that there was not a significant risk of increased punishment where inmate had not received a favorable recommendation for parole, had not participated in a treatment program for sex offenders, and

[11] The only favorable factor Petitioner alleges is that he completed several prescriptive programs between 1997 and 2003. (Pet. Ex. A.)

had not maintained a clear conduct record). Plaintiff's claim that he was subjected to additional punishment as a result of the 1996 amendments is thus purely speculative and conjectural.

The Board's denial of Petitioner's 2003 parole application lends further support to the conclusion that the retroactive application of the 1996 amendments did not create a significant risk of increased punishment. On January 2, 2002, the Board denied Petitioner's third parole application on the grounds that "the fair administration of justice cannot be achieved through your release on parole."[12] (Doc. No. 5 Ex. D.) In 2003, the Board rescinded its 2002 decision and issued a new parole determination. Following an interview and review of Petitioner's file, the Board denied his parole request. (*Id.* Ex. E.) The Board explained that "in the exercise of its discretion, [the Board] has determined at this time that: [Petitioner's] best interests do not justify or require you being paroled/reparoled; and, the interests of the Commonwealth will be injured if you were paroled/reparoled." (*Id.*) In support of its decision, the Board stated that it relied on the following factors: (1) Petitioner's refusal to accept responsibility for the offense; (2) Petitioner's lack of remorse for the offense committed; (3) the recommendation of the Department of Corrections; (4) Petitioner's prior history of supervision failures; (5) Petitioner's unacceptable compliance with prescribed institutional programs, including his failure to participate in a sex offender therapy program; and (6) Petitioner's interview with the hearing examiner and/or Board member. (*Id.*) The Board's consideration of these factors, most of which relate to Petitioner's rehabilitation and readiness for proper societal functioning rather than public safety, indicates that even under the multi-factor pre-1996 parole standard, Petitioner

[12] The Board did not mention that public safety was a consideration in the denial, as it had in 1999 and 2000. (Doc. No. 5 Ex. D.)

likely would have been denied parole. *See Mickens-Thomas*, 321 F.3d at 377-78 (stating that the pre-1996 parole standards included consideration of the nature and circumstances of the offense, recommendations by corrections officials, the character and background of the prisoner, and institutional behavior); *see also Jackson v. Wynder*, No. 04-CV-4223, 2005 U.S. Dist. LEXIS 453, at *8 (E.D. Pa. Jan. 6, 2005) (same). In other words, the Board's 2003 decision indicates that Petitioner likely would have been denied parole in 1999 and 2000 even if the Board did not retroactively apply the 1996 changes. We must therefore dismiss Petitioner's *ex post facto* claim.

C. Self-Incrimination

Petitioner's second claim is that the Board penalized him by denying parole because of his refusal to admit guilt and accept responsibility for his crimes. (Pet. ¶ 12(B).) He asserts that these actions violate his Fifth Amendment right against self-incrimination. (*Id.*)

The Fifth Amendment's prohibition against self-incrimination, which applies to the States through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964), states that no person "shall be compelled in any *criminal case* to be a witness against himself." U.S. Const. amend. V (emphasis added); *see also Renda v. King*, 347 F.3d 550, 559 (3d Cir. 2003) (stating that "it is the use of coerced statements during a criminal trial . . . that violates the Constitution"). The Supreme Court has expressly rejected claims similar to Petitioner's, holding that the adverse consequences faced by a state prisoner for refusing to admit guilt before participating in a sex offender treatment program "does not compel prisoners to incriminate themselves in violation of the Constitution." *McKune v. Lile*, 536 U.S. 24, 35 (2002). In *Thorpe v. Grillo*, No. 00-3141, 80 Fed. Appx. 215 (3d Cir. Oct. 31, 2003), the Third Circuit relied on *McKune* to conclude that even if an inmate's refusal to admit guilt has a negative impact on his parole decision, it does not

violate his Fifth Amendment rights unless it "extend[s] his term of his incarceration or automatically deprive[s] him of consideration for parole." *Id.* at 219. Here, Petitioner has not demonstrated that his refusal to admit guilt has extended his term of incarceration or automatically precluded him from parole consideration. Accordingly, we dismiss Plaintiff's self-incrimination claim.

D. Due Process

Plaintiff also claims that the Board violated his Fifth and Fourteenth Amendment due process rights in denying his parole applications. (Pet. ¶ 12(C).) Again, we disagree. The Due Process Clause applies only when government action deprives a person of liberty or property. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979). The Constitution, however, does not give a prisoner a general liberty interest in parole protected by the Fourteenth Amendment.[13] *See id.* ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."); *see also Rauso v. Vaughn*, 79 F. Supp. 2d 550, 551 (E.D. Pa. 2000). States may create liberty interests protected by the Fourteenth Amendment's due process clause. *Sandin v. Connor*, 515 U.S. 472, 483-84 (1995). Pennsylvania courts, however, have held that there is no liberty interest in the Board's decision to grant or deny parole under Pennsylvania law. *Rogers*, 724 A.2d at 323; *id.* at 322-23 ("[P]arole is a matter of grace and mercy shown to a prisoner who has demonstrated to the Parole Board's satisfaction his future ability to function as a law-abiding member of society upon

[13] A parole denial can give rise to a due process deprivation if it is based on constitutionally impermissible reasons. *Burkett v. Love*, 89 F.3d 135, 139-40 (3d Cir. 1996). Here, however, we have rejected Petitioner's contentions that the Board based its denial of parole on unconstitutional grounds.

release before the expiration of the prisoner's maximum sentence." (citing *Commonwealth ex rel. Sparks v. Russell*, 169 A.2d 884 (Pa. 1961))); *see also Burkett v. Love*, 89 F.3d 135, 139 (3d Cir. 1996) ("[Under Pennsylvania law, a prisoner ha[s] 'no constitutionally protected liberty interest in the expectation of being [paroled].'" (quoting *Reider v. Pa. Bd. of Prob. & Parole*, 514 A.2d 967, 971 (Pa. Commw. Ct. 1986))). Because the decision to deny Petitioner's parole did not deprive him of a liberty interest, his due process rights have not been violated. This claim will be dismissed.

E. Equal Protection

Finally, Petitioner appears to claim that the Board's denial of his parole application violates his equal protection rights. (Pet. ¶ 12(C).) An equal protection claim arises when an individual alleges that he has intentionally been treated differently from others similarly situated. *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Where no fundamental right is impinged and where no suspect classification is used, the difference in treatment need only be rationally related to a legitimate state interest. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Because there is no constitutionally protected liberty interest in parole, *Greenholtz*, 442 U.S. at 7, and Petitioner has not asserted that the Board used a suspect classification in its decision-making process, the denial of Petitioner's parole applications are subject to rational basis review. *McGinnis v. Royster*, 410 U.S. 263, 270 (1973); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995).

"To bring a successful claim . . . for a denial of equal protection, [a plaintiff] must prove the existence of purposeful discrimination." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) (citing *Batson v. Kentucky*, 476 U.S. 79, 93 (1986)). Specifically, a party

must demonstrate that he "'received different treatment from that received by other individuals similarly situated'" in order to pursue an equal protection claim. *Andrews*, 895 F.2d at 1478 (quoting *Kuhar v. Greensburg-Salem Sch. Dist.*, 616 F.2d 676, 677 n.1 (3d Cir. 1980)). Here, however, Petitioner has not identified any other similarly-situated individuals who the Board treated more favorably without a rational basis. With no averments of fact alleging the different treatment of similarly-situated persons, Petitioner cannot state a violation of equal protection. Consequently, we must dismiss Petitioner's equal protection claim as well.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVESTER PERRY	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-CV-0934
DONALD VAUGHN, ET AL.	:	

ORDER

AND NOW, this 31st day of March, 2005, upon consideration of the Petition for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 1) filed by Sylvester Perry, it is ORDERED that the Petition is DISMISSED. No Certificate of Appealability shall issue.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge