UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RONALD BUZZARD, JR.,

Petitioner,

v.

PATRICK GLEBE,

Respondent.

Case No. C13-2312-RSM

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The Court, having reviewed petitioner's petition for writ of habeas corpus, respondent's answer thereto, the Report and Recommendation of Mary Alice Theiler, United States Magistrate Judge, and the remaining record, does hereby find and ORDER:

(1) The Court adopts the Report and Recommendation;

(2) Petitioner's petition for writ of habeas corpus (Dkt. 6) is DENIED, and petitioner's petition and this action are DISMISSED with prejudice;

(3) In accordance with Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, a certificate of appealability is DENIED with respect to all grounds for relief asserted in this federal habeas action; and

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(4) The Clerk is directed to send copies of this Order to petitioner, to counsel for respondent, and to the Honorable Mary Alice Theiler.

DATED this 19th day of June 2015.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RONALD BUZZARD, JR.,

Petitioner,

v.

PATRICK GLEBE,

Respondent.

Case No. C13-2312-RSM-MAT

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Ronald Buzzard is a Washington prisoner who is under the jurisdiction of the Indeterminate Sentence Review Board ("ISRB"). Petitioner has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging decisions of the ISRB in 2010 and 2012 denying him release. Respondent has filed an answer to the petition together with relevant portions of the state court record, and petitioner has filed a response to respondent's answer. This Court, having reviewed the petition, respondent's answer, and the balance of the record, concludes that petitioner's federal habeas petition should be denied and this action should be dismissed with prejudice.

FACTUAL BACKGROUND

On September 27, 2002, petitioner pled guilty in King County Superior Court to one

count of rape of a child in the first degree. (Dkt. 31, Ex. 1 at 1.) On October 11, 2002, petitioner was sentenced to a minimum term of 123 months confinement and a maximum term of life, plus community custody for the length of the statutory maximum sentence. (*Id*., Ex. 1 at 4.) However, the sentencing court then suspended that sentence pursuant to the Special Sex Offender Sentencing Alternative ("SSOSA") on the condition that petitioner serve 180 days of total confinement and undergo sexual offender treatment for up to three years. (*See id*.) On April 21, 2003, the sentencing court revoked the order suspending imposition of sentence pursuant to SSOSA and directed petitioner to serve his 123 month sentence in the Department of Corrections with credit for confinement time already served. (*Id*., Ex. 2.)

On November 9, 2010, prior to petitioner's completion of his minimum term, the ISRB held a release hearing in accordance with the provisions of RCW 9.95.420. (*Id*., Ex. 6.) The ISRB thereafter found, by a preponderance of the evidence, that petitioner was more likely than not to commit a sex offense if released on conditions. (*Id*.) Petitioner was therefore deemed not releasable and the ISRB added 24 months to petitioner's minimum term. (*Id*.) The reasons offered by the ISRB for denying release were as follows:

> Mr. Buzzard presented an 89 page letter/release plan for consideration. However, his history while on SSOSA is indicative of a sex offender who was engaged in particularly risky behavior. He was terminated for many violations, including traveling outside the County without notifying his CCO, twice failing to live in an approved residence, having contact with criminals/offenders, consuming alcohol, viewing pornography, engaging at least 4 women in sexual activity and being terminated from sex offender treatment. Mr. Buzzard admitted that "I need treatment and … I failed at community treatment miserably." He advised that he was waiting for his "appeal" to be decided before he would consider applying to SOTP in prison. The panel advised him that his infraction for possession of sexually explicit material and SSOSA failure added to our concern for community safety.
>
> The ESRC report updated September 13, 2010 recommends Mr. Buzzard for a Level 1 community notification and rates him in the low to low-moderate range

> for sexual recidivism. The DOC Static Risk Assessment rates him in the low range for general recidivism. The sexual history polygraph that was administered during the SSOSA evaluation in 2003 reported that he was deceptive.
>
> Mr. Buzzard has demonstrated little motivation or ability to comply with rules or treatment, either in prison or the community. He said that he would rethink his decision regarding application to SOTP, admitting that he knew he needed treatment and that he had not done well in the community. Until he improves his behavior and completes treatment the detailed release plan is premature for Board consideration.

(Dkt. 31, Ex. 6 at 3.)

On July 17, 2012, the ISRB held a second .420 release hearing for petitioner. (*Id*., Ex. 8.) The ISRB once again found, by a preponderance of the evidence, that petitioner was more likely than not to commit a sex offense if released on conditions. (*Id*.) Petitioner was again deemed not releasable and the ISRB added another 24 months to petitioner's minimum term. (*Id*.) The ISRB explained its reasons for denying release as follows:

> Not much has changed with Mr. Buzzard since the last time the Board met with him in 2010. He continues to refuse to participate in sex offender treatment; although in the past he told the Board he knows he needs treatment. He continues to appeal his case on 'procedural' issues at the state level and on what he sees as a Constitutional infringement at the Federal level. The Board notes that Mr. Buzzard pled guilty to the offense and initially received a SSOSA.
>
> Mr. Buzzard's behavior reflects a lack of motivation to address his deviant behavior to mitigate his risk to reoffend. He told the Board he's reading psychology books and taking classes to enhance his employability and explained these as his efforts at rehabilitation. He also reminded the Board his victim had forgiven him (which he also reported to the psychologist conducting the SSOSA evaluation). The bottom line, as far as the Board is concerned, is that Mr. Buzzard remains an untreated sex offender and is more likely than not to commit another sex offense. The Board urged him, especially if he's as concerned about getting out to help his family as he stated, that he focus his efforts on treatment.

(Dkt. 31, Ex. 8 at 3-4.)

On May 13, 2014, the ISRB held a third .420 release hearing for petitioner. (*Id*., Ex. 9.)

The ISRB once again found, by a preponderance of the evidence, that petitioner was more likely than not to commit a sex offense if released on conditions. (*Id*.) Petitioner was again deemed not releasable and the ISRB added another 24 months to petitioner's minimum term. (*Id*.) The ISRB explained its reasons for denying release as follows:

> Not much has changed with Mr. Buzzard since the Board last met with him. He told the Board he has six appeals in progress at this time, which is interesting since Mr. Buzzard pled guilty to the offense and was initially sentenced under SSOSA. Mr. Buzzard testified that if released, he would work a construction job and at a law firm. Mr. Buzzard was reminded that in the past he told the Board he knows he needs treatment yet continues to refuse to participate in the SOTP. He explained to the Board his reluctance to attend SOTP is because he's heard it's invasive.
>
> The Board confirmed for Mr. Buzzard that the SOTP is a challenging program and requires participants to reveal significant details about their lives, including all sexual behavior. The Board, however, told Mr. Buzzard that as a former Marine, he should be tough enough to manage the SOTP and would likely find it a positive life-changing experience.
>
> In the interim, Mr. Buzzard has done nothing to mitigate his risk to reoffend. Although he was assessed as a low risk to sexually reoffend, the Board believes his risk is higher than reflected in his actuarial assessments. While Mr. Buzzard claimed to want to help his family, his actions to this point in time have done nothing towards that goal. The Board again encouraged him to seek admission to and complete treatment in the SOTP. Until he addresses his specific risk, Mr. Buzzard does not meet the criteria for release.

(*Id*., Ex. 9 at 4.)

PROCEDURAL HISTORY

In April 2011, petitioner filed a personal restraint petition in the Washington Court of Appeals challenging the ISRB's November 2010 decision denying him release. (*Id*., Dkts. 10 and 11.) The single ground asserted in that petition was that the ISRB abused its discretion when it failed to comply with the requirement of RCW 9.95.420 that petitioner be provided a psychological examination. (*See* Dkt. 31, Exs. 10 and 11.) On April 12, 2012, the Court of

Appeals issued an order dismissing the petition. (*Id*., Ex. 4.)

Petitioner thereafter filed a motion for discretionary review in the Washington Supreme Court in which he asserted that the ISRB abused its discretion when it failed to conduct, or allow petitioner to participate in, a psychological examination as required by RCW 9.95.420. (*Id*., Ex. 17.) On November 26, 2012, the Washington Supreme Court Commissioner issued a ruling denying review. (*Id*., Ex. 23.) The Commissioner concluded therein that petitioner's challenge to the November 2010 ISRB decision was moot because it had been superseded by the ISRB's July 2012 decision. (*See id*.) Petitioner moved to modify the Commissioner's ruling but that motion was denied as well. (*Id*., Exs. 24 and 25.) The Court of Appeals issued a certificate of finality in that personal restraint proceeding on April 10, 2013. (*Id*., Ex. 26.)

Petitioner filed a second personal restraint petition challenging the ISRB's November 2010 decision in February 2012. (*Id*., Ex. 27.) In his second petition, petitioner argued that the ISRB violated his First and Fifth Amendment rights by extending his term of incarceration based on his refusal to attend or participate in treatment. (*See id.*, Ex. 27 at 3.) On June 26, 2012, the Court of Appeals issued an order dismissing the petition as successive and barred under RCW 10.73.140. (*Id*., Ex. 28.) Petitioner thereafter filed a motion for discretionary review in the Washington Supreme Court. (*Id*., Ex. 29.) The Supreme Court Commissioner considered that motion for discretionary review together with the motion for discretionary review filed in the first of the two personal restraint petitions challenging the November 2010 ISRB decision, and issued a ruling denying review on November 26, 2012. (*See id*., Ex. 23.) Petitioner's motion to modify the Commissioner's ruling was denied on March 6, 2013, and the Court of Appeals issued a certificate of finality on April 10, 2013. (Dkt. 31, Exs. 30 and 31.)

In October 2012, petitioner filed a third personal restraint petition in the Washington

Court of Appeals, this one challenging the ISRB's July 2012 decision denying him release. (*Id*., Ex. 32.) Petitioner asserted therein that (1) the ISRB "could not prove he was 'more likely than not' to reoffend, and failed to prove 'some evidence' supported their decision," thereby violating his due process rights under the Fifth and Fourteenth Amendments; (2) the ISRB failed to appoint petitioner an attorney for his 2010 and 2012 .420 hearings, thereby violating WAC 381-60-070(3) and the Sixth Amendment; and, (3) the ISRB failed to follow the mandatory language of RCW 9.95.420 which requires that petitioner be allowed to participate in a psychological evaluation or actuarial recidivism testing for his .420 hearing. (*Id*., Exs. 32 and 33.) On October 3, 2013, the Court of Appeals issued an order dismissing petitioner's personal restraint petition challenging the July 2012 ISRB decision denying him release. (*Id*., Ex. 5.)

Petitioner thereafter filed a motion for discretionary review in the Washington Supreme Court in which he stated his claim as follows:

> The Court of Appeals erred in its decision since the Board abused its discretion in denying Buzzard's July 2012 parole release since its decision was not supported by "some evidence" and Buzzard is not "more likely than not" to reoffend, requiring his release to community custody.

(*Id*., Ex. 35 at 1.) The Supreme Court denied petitioner's motion for discretionary review without comment on October 9, 2014. (*Id*., Ex. 36.)

Petitioner filed this federal habeas action in December 2013. (*See* Dkt. 1.) The petition was served on respondent and respondent thereafter moved to stay this action because petitioner's motion for discretionary review related to his challenge to the ISRB's July 2012 decision denying release was then pending in the Washington Supreme Court. (*See* Dkt. 11.) This Court granted the motion to stay, over petitioner's objection, and the matter was stayed until November 2014 when the parties' motions to lift the stay were granted. (*See* Dkts. 20, 21 and

22.) Respondent filed an answer to petitioner's federal habeas petition in February 2015, together with relevant portions of the state court record. (*See* Dkts. 28, 29 and 31.) Petitioner filed a response to respondent's answer in March 2015. (Dkt. 33.) This matter is now ripe for review.

GROUNDS FOR RELIEF

Petitioner identifies the following three grounds for relief in his federal habeas petition:

GROUND ONE: The Board's decision did not meet the "some evidence" test, thus, they abused their discretion in not releasing Buzzard, violating his due process rights under the Fifth and Fourteenth Amendments.

Supporting facts: The ISRB (Parole Board) denied Buzzard parole both in November 2010, and July 2012 based on the fact that he refused to waive his First and Fifth Amendment rights and admit guilt, and complete treatment in order to gain parole. Buzzard lost no good time or earned time, and the Board cannot and did not meet their burden under RCW 9.95.420, or the "some evidence" test to deny Buzzard parole, thus, they abused their discretion, and violated Buzzard's 5th and 14th Amendment Due Process rights.

GROUND TWO: The Board violated Buzzard's Fifth and Fourteenth Amendment rights to due process when they failed to follow RCW 9.95.420's mandatory language.

Supporting facts: The ISRB (Parole Board) denied Buzzard parole both in November 2010, and July 2012 based on the fact that he refused to waive his 1st and 5th Amendment rights, admit guilt, and complete treatment. The Board failed to follow RCW 9.95.420(1)(a) and (3)'s mandatory language "shall" when they failed to "release," and failed to allow him to "participate in" their examination.

GROUND THREE: The Board violated Buzzard's Fifth, Sixth, and Fourteenth Amendment rights when they denied him an attorney to protect his rights at his .420 hearings.

Supporting facts: The ISRB (Parole Board) denied Buzzard parole both in November 2010, and July 2012 based on the fact that he refused to waive his 1st and 5th Amendment rights, admit guilt, and complete treatment. Before his November 2010 .420 hearing Buzzard was told he'd be represented by the DOC contract attorney like the .100 hearing old parole guidelines inmates. Then he was told he doesn't get an attorney to protect his due process rights.

(Dkt. 6 at 5, 6 and 8.)

DISCUSSION

Respondent first argues in his answer to petitioner's federal habeas petition that the petition is moot because this Court can no longer grant him relief on his challenges to the 2010 and 2012 ISRB decisions denying him release. Respondent also argues that petitioner failed to properly exhaust a number of his federal habeas claims (respondent construed the petition as asserting six claims for relief as each of petitioner's three grounds for relief sought to challenge both the 2010 and 2012 ISRB decisions). Respondent next argues that the claims asserted by petitioner in his first and second grounds for relief do not present federal constitutional issues. Finally, respondent argues that the state courts reasonably denied the claims asserted by petitioner in his third ground for relief.

Mootness

Respondent argues that petitioner's claims challenging the ISRB's 2010 and 2012 decisions denying release are moot in light of the ISRB's subsequent decision in 2014 denying release. Article III, § 2 of the United States Constitution requires the existence of a case or controversy through all stages of federal judicial proceedings. This means that, throughout the litigation, the petitioner/plaintiff "must have suffered, or be threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). A case becomes moot when it no longer meets the case or controversy requirement of Article III, § 2 of the United States Constitution. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

The courts have recognized an exception to the general rule of mootness in cases that are "capable of repetition, yet evading review." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

However, "the capable-of-repetition doctrine applies only in exceptional situations, . . . where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again . . . ." *Spencer*, 523 U.S. at 17 (internal quotations and citations omitted). Respondent argues that the exception to the mootness doctrine does not apply in this instance because petitioner fails to meet both prongs of the exception.

As to petitioner's claims that the 2010 and 2012 ISRB decisions were not based on "some evidence," respondent argues that even if petitioner were correct that there was not enough evidence to deny his release in 2010 and 2012, petitioner's subsequent actions or inaction increases the evidence that petitioner is avoiding addressing his risk to reoffend. Respondent maintains that because the evidence supporting denial of release only mounts with the passage of time, the precise claim asserted in this action is not capable of repetition. Respondent further argues that even if the claim were to recur, petitioner would have sufficient time to litigate it given that his minimum terms have thus far all been for two years.

Underlying petitioner's claim that the 2010 and 2012 decisions were not based on "some evidence" was the more precise assertion that the denials were based on the fact that petitioner refused to waive his First and Fifth Amendment rights and admit guilt and complete treatment in order to gain release. While the quantum of evidence very well could change between hearings, the issue of whether denial of release may be based on petitioner's refusal to participate in sexual offender treatment is capable of repetition. Moreover, respondent's assertion that two years is a sufficient amount of time to permit petitioner to litigate this issue should it recur is clearly without merit as evidenced by the fact that petitioner's federal habeas challenge to the ISRB's

2010 and 2012 decisions only recently became ripe for this Court's review. Petitioner's first ground for relief qualifies for the exception to the general rule of mootness.

As to petitioner's claims that the ISRB failed to follow RCW 9.95.420's mandatory language which required he be allowed to participate in an examination in relation to both his 2010 and 2012 ISRB hearings, respondent acknowledges that the claim is capable of repetition but argues that petitioner would have sufficient time to litigate the claim should it recur. As noted above, the fact that petitioner's challenges to the 2010 and 2012 decisions of the ISRB did not become ripe for this Court's review until March 2015 undermines respondent's assertion that two years is sufficient time for petitioner to litigate any recurring claim. Accordingly, petitioner's second ground for relief also qualifies for the exception to the mootness doctrine.

Finally, with respect to the claims asserted in petitioner's third ground for relief, those alleging an unconstitutional denial of counsel at petitioner's 2010 and 2012 ISRB hearings, respondent did not address the mootness issue because he maintains that those claims have not been properly exhausted. As explained below, the Court has elected to address petitioner's claims on the merits and therefore must address the mootness issue with respect to petitioners' claims regarding the denial of counsel. There can be little question that this issue is capable of repetition and, as explained above, the time is likely to be too short to allow petitioner to fully litigate the claim prior to the issuance of another ISRB decision regarding release. Accordingly, this Court concludes that petitioner's third ground for relief also qualifies for the exception to the mootness doctrine.

Exhaustion

Respondent concedes in his answer to the petition that petitioner exhausted his first ground for relief as it pertains to his challenge to the ISRB's 2012 decision, and that he

exhausted his second ground for relief as it pertains to his challenges to both the ISRB's 2010 and 2012 decisions. Respondent argues that petitioner failed to properly exhaust his first ground for relief as it pertains to his challenge to the ISRB's 2010 decision, and that he failed to exhaust his third ground for relief as it pertains to his challenges to both the ISRB's 2010 and 2012 decisions. This Court finds it unnecessary to address respondent's exhaustion arguments as petitioner's federal habeas claims may readily be denied on the merits. *See* 28 U.S.C. § 2254(b)(2).

Due Process

Petitioner asserts in his first ground for relief that his federal due process rights were violated when the ISRB failed to meet the "some evidence" test in denying him parole. Petitioner appears to suggest that there was no reason, aside from his refusal to admit guilty and participate in sex offender treatment, for the ISRB to deny him release. Petitioner asserts in his second ground for relief that his due process rights were violated when the ISRB failed to follow the mandatory language of RCW 9.95.420 requiring that they release him and that he be allowed to participate in their examination. Respondent argues that all claims asserted in petitioner's first two grounds for relief allege only state law issues and therefore are not a proper subject for federal habeas review. Respondent is correct.

The federal habeas statute "unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (quoting 28 U.S.C. § 2254(a)). In addition, the Supreme Court has repeatedly stated that "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). Where, as here, a prisoner alleges a

violation of his due process rights, the analysis proceeds in two steps: the first question to be addressed is whether there exists a liberty or property interest which has been interfered with by the state, and the second question is whether the procedures followed by the state were constitutionally sufficient. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (citing *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989)).

In *In re McCarthy*, 161 Wn.2d 234, 241 (2007), the Washington Supreme Court addressed the question of what, if any, procedural protections were due an individual in the context of a .420 hearing before the ISRB. The Washington Supreme Court analyzed RCW 9.95.420(3) in light of the United States Supreme Court's decision in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), and concluded that the statute "create[d] a limited liberty interest by restricting the Board's discretion and establishing a presumption that offenders will be released to community custody upon the expiration of their minimum sentence." *See In re McCarthy*, 161 Wn.2d at 241. This decision by the Washington Supreme Court provides a definitive interpretation of Washington state law that is binding on the federal courts. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

The United States Supreme Court, in *Swarthout*, explained that when "a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures." *Swarthout*, 562 U.S. at 220. The Court went on to explain that, in the context of parole, the procedures required are minimal, including only an opportunity to be heard and a statement of reasons as to why parole was denied. *Swarthout*, 562 U.S. at 220 (citing *Greenholtz*, 442 U.S. at 1600). The manner in which state-prescribed procedures are applied in any given case is beyond the scope of the federal habeas inquiry as a mere error of state law does not constitute a denial of due process.

Id. at 221-222 (citing *Engel v. Isaac*, 456 U.S. 107, 121, n. 21 (1982)). The only relevant inquiry for the federal habeas court is whether the minimum procedures adequate for due process protection; *i.e.*, those set forth in *Greenholtz*, have been provided. *See id*.

The record before this Court demonstrates that petitioner was provided with an opportunity to speak at his hearings before the ISRB and that he was provided a written decision explained why release was denied. (*See* Dkt. 31, Exs. 6, 7, and 8.) Petitioner thus received all the process he was due in his 2010 and 2012 hearings before the ISRB and his due process claims therefore fail.

To the extent petitioner alleges that the ISRB's refusal to grant him release absent an admission of guilt and completion of sex offender treatment violates his privilege against compelled self-incrimination, his claim is frivolous. The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const Amend V. It is well settled that the privilege against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

In this instance, petitioner pled guilty to the offense for which he is currently incarcerated and, thus, he has already admitted guilt. Petitioner does not suggest that participation in sex offender treatment will compel him to make statements that could potentially implicate him in future criminal proceedings, he appears to base his claim only on an objection to admitting guilt in the criminal case which underlies his current incarceration. While petitioner apparently

continues to pursue appeals related to his conviction, which is certainly is prerogative, he cites no authority to support the proposition that the privilege against self-incrimination may be validly asserted in the face of a presumptively valid guilty plea.

Right to Counsel

Petitioner asserts in his third ground for relief that the ISRB violated his Fifth, Sixth and Fourteenth Amendment rights when they denied him counsel at his .420 hearings. Respondent argues in his answer to the petition that the state court reasonably denied these claims. The Washington Court of Appeals concluded as follows with respect to petitioner's right to counsel claim:

> Buzzard also claims that he had the right to be represented by counsel at the .420 hearing and was denied that right. However, while offenders have a liberty interest in .420 hearings and are entitled to minimal due process, this right does not include the right to counsel. In re McCarthy, 161 Wn.2d 234, 245, 164 P.3d 1283 (2007).

(Dkt. 31, Ex. 5 at 3.)

The Court's discussion above with respect to petitioner's due process claims make clear that counsel was not among the rights to which petitioner was entitled at his .420 hearings. The state court's rejection of this claim was therefore neither contrary to, nor did it constitute an unreasonable application of, clearly established federal law. Accordingly, petitioner is not entitled to relief with respect to his right to counsel claims. *See* 28 U.S.C. § 2254(d)(1).

Certificate of Appealability

A petitioner seeking post-conviction relief under § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A certificate of appealability may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §

2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that petitioner is not entitled to a certificate of appealability in this matter.

CONCLUSION

For the reasons set forth above, this Court recommends that petitioner's federal habeas petition be denied and that this action be dismissed with prejudice. This Court further recommends that a certificate of appealability be denied. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **June 12, 2015**.

DATED this 15th day of May, 2015.

Mary Alice Theiler
United States Magistrate Judge