

JUL 22 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHEL L. BROWN,

Petitioner - Appellant,

v.

MIKE MAHONEY, Warden; et al.,

Respondents - Appellees.

No. 06-35318

D.C. No. CV-04-00066-DWM

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Montana  
Donald W. Molloy, District Judge, Presiding

Submitted July 14, 2009\*\*

Before: SCHROEDER, THOMAS, and WARDLAW, Circuit Judges.

Montana state prisoner Anthel L. Brown appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition challenging the Montana

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Board of Pardons and Parole's ("Board") 2003 decision finding him unsuitable for parole. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Brown contends that his Due Process rights and the Ex Post Facto Clause were violated by the Board's requirement that he complete sex offender treatment to become eligible for parole. As Brown acknowledges, this contention is foreclosed by *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997).

Brown also contends that prison officials retaliated against him by making it impossible for him to receive the sex offender treatment needed to obtain parole. The district court did not err in concluding that, because Brown had not yet been denied parole for failure to complete sex offender treatment, his retaliation claim was not cognizable in the instant habeas petition. *See Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997); *cf. Docken v. Chase*, 393 F.3d 1024, 1031 (9th Cir. 2004).

Because Brown is represented by counsel, no action will be taken regarding his pro se letter dated May 28, 2009.

**AFFIRMED.**