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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID DWAYNE DUGAN,

Petitioner-Appellant,

v.

GARY SWARTHOUT, Warden,

Respondent-Appellee.

No. 11-16043

D.C. No. 2:11-cv-00193-GEB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, Jr., District Judge, Presiding

Submitted March 8, 2017**

Before: LEAVY, W. FLETCHER, and OWENS, Circuit Judges.

David Dwayne Dugan appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition challenging a 2009 decision by the Board of Parole Hearings denying parole and deferring his next parole hearing for five years in accordance with California Penal Code § 3041.5 ("Marsy's Law"). We dismiss.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

This court issued a certificate of appealability (“COA”) on whether application of Marsy’s Law to delay Dugan’s next parole hearing for five years violates the Ex Post Facto Clause, and whether Dugan’s membership in a class action precludes his individual litigation of this claim in habeas. We vacate the COA as improvidently granted and dismiss this appeal for lack of jurisdiction. *See 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), *cert. denied*, 580 U.S. ___ (U.S. Jan. 9, 2017) (No. 16-6556); *Phelps v. Alameda*, 366 F.3d 722, 727-28, 730 (9th Cir. 2004) (merits panel has the power to rule on the propriety of a COA).

The dismissal of this appeal does not preclude Dugan from pursuing conditions of confinement claims in a properly filed civil rights action under 42 U.S.C. § 1983.

All pending motions are denied as moot.

DISMISSED.