

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

EUGENE EVERETT WELCH,

Petitioner, No. CIV S-09-3120 GEB DAD P

vs.

BOARD OF PRISON TERMS, et al.,

Respondents. FINDINGS & RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Therein, petitioner raises a due process challenge to the decision of the California Board of Parole Hearings (hereinafter “Board”) to deny him parole at his April 30, 2008 parole consideration hearing. The matter has been fully briefed by the parties and is submitted for decision. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner’s application for habeas corpus relief be denied.

I. Procedural Background

Petitioner is confined pursuant to a 1994 judgment of conviction entered against him in the San Bernardino County Superior Court following his conviction on a charge of second degree murder. (Doc. 108 at 8.) Pursuant to that conviction, petitioner was sentenced to fifteen

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1 years to life in state prison plus a consecutive four year enhancement term for use of a firearm,
2 for a total aggregate sentence of nineteen years to life in state prison.

3 The parole consideration hearing that is placed at issue by the instant federal
4 habeas petition was held on April 30, 2008. (Id.)¹ Petitioner appeared at and participated in the
5 hearing. (Id. at 9, et seq.) Following deliberations held at the conclusion of the hearing, the
6 Board panel announced their decision to deny petitioner parole for three years as well as the
7 reasons for that decision. (Doc. 1-10 at 31-36.)

8 Petitioner first challenged the Board's 2008 decision denying him parole in a
9 petition for writ of habeas corpus filed in the San Bernardino County Superior Court. (Answer,
10 Ex. 1.) That court denied the petition in a decision on the merits. (Id.) Petitioner subsequently
11 challenged the Board's 2008 decision in a petition for writ of habeas corpus filed in the
12 California Court of Appeal for the Fourth Appellate District. (Answer, Ex. 2.) The California
13 Court of Appeal summarily denied that petition. (Id.) Petitioner subsequently filed a petition for
14 writ of habeas corpus in the California Supreme Court. (Answer, Ex. 3.) That petition was also
15 summarily denied. (Id.)

16 On August 13, 2009, petitioner filed his federal application for habeas relief in
17 this court. Therein, petitioner contends that: (1) the Board relied on false and incorrect
18 information contained in a "Board Report" to find him unsuitable for parole; (2) the Board mis-
19 characterized the evidence of his crime of conviction and his prior criminal record; (3) his prison
20 counselor improperly expressed his own opinion in the Board Report that petitioner was
21 unsuitable for parole; (4) the Board incorrectly stated that petitioner had not participated in
22 sufficient programming and self-help in prison and that he did not have adequate parole plans;
23 and (5) there was no evidence before the Board in 2008 that petitioner would pose a current
24 danger to society if released from prison. (Doc. No. 1 at 5-6, 16-24.) Although petitioner alleges
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26 ¹ Page number citations such as these are to the page number reflected on the court's CM/ECF system and not to page numbers assigned by the parties.

1 that the Board's 2008 decision violated his "1st, 5th, 6th, 8th, 14th Amendment rights," his
2 allegations essentially constitute a claim that the Board's 2008 decision to deny him parole for
3 three years was not supported by "some evidence" that he posed a current danger to society if
4 released from prison, as required under California law and in violation of his right to due
5 process.²

6 **II. Scope of Review Applicable to Due Process Challenges to the Denial of Parole**

7 The Due Process Clause of the Fourteenth Amendment prohibits state action that
8 deprives a person of life, liberty, or property without due process of law. A litigant alleging a
9 due process violation must first demonstrate that he was deprived of a liberty or property interest
10 protected by the Due Process Clause and then show that the procedures attendant upon the
11 deprivation were not constitutionally sufficient. Kentucky Dep't of Corrections v. Thompson,
12 490 U.S. 454, 459-60 (1989).

13 A protected liberty interest may arise from either the Due Process Clause of the
14 United States Constitution "by reason of guarantees implicit in the word 'liberty,'" or from "an
15 expectation or interest created by state laws or policies." Wilkinson v. Austin, 545 U.S. 209,
16 221 (2005). See also Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States
17 Constitution does not, of its own force, create a protected liberty interest in a parole date, even
18 one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981); Greenholtz v. Inmates of
19 Neb. Penal, 442 U.S. 1, 7 (1979) (There is "no constitutional or inherent right of a convicted
20 person to be conditionally released before the expiration of a valid sentence."). However, a

22 ² For instance, petitioner's arguments that the Board relied on false or incorrect
23 information, mis-characterized his crime of conviction and prior criminal record and incorrectly
24 found that he had not participated in sufficient programming in prison and did not have adequate
25 parole plans, all constitute attacks on the sufficiency of the evidence relied upon by the Board.
26 Petitioner's argument that his counselor improperly expressed his own opinion that petitioner
was unsuitable for parole is, if anything, a claim that state law was violated and is not cognizable
in these federal habeas proceedings. See Wilson v. Corcoran, 562 U.S. ___, ___, 131 S. Ct. 13,
16 (2010); Rivera v. Illinois, 556 U.S. 148, ___, 129 S. Ct. 1446, 1454 (2009) ("[A] mere error
of state law . . . is not a denial of due process.") (quoting Engle v. Isaac, 456 U.S. 107, 121, n. 21
(1982) and Estelle v. McGuire, 502 U.S. 62, 67, 72-73 (1991)).

1 state's statutory scheme, if it uses mandatory language, "creates a presumption that parole release
2 will be granted" when or unless certain designated findings are made, and thereby gives rise to a
3 constitutional liberty interest. Greenholtz, 442 U.S. at 12. See also Allen, 482 U.S. at 376-78.

4 California's parole scheme gives rise to a liberty interest in parole protected by the
5 federal Due Process Clause. Pirtle v. California Bd. of Prison Terms, 611 F.3d 1015, 1020 (9th
6 Cir. 2010); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002); see also Swarthout v.
7 Cooke, 562 U.S. ___, ___, 131 S. Ct. 859, 861-62 (2011) (finding the Ninth Circuit's holding in
8 this regard to be a reasonable application of Supreme Court authority); Pearson v. Muntz, 639
9 F.3d 1185, 1191 (9th Cir. 2011) ("[Swarthout v.] Cooke did not disturb our precedent that
10 California law creates a liberty interest in parole.") In California, a prisoner is entitled to release
11 on parole unless there is "some evidence" of his or her current dangerousness. In re Lawrence,
12 44 Cal.4th 1181, 1205-06, 1210 (2008); In re Rosenkrantz, 29 Cal.4th 616, 651-53 (2002).

13 In Swarthout, the Supreme Court reviewed two cases in which California
14 prisoners were denied parole - in one case by the Board, and in the other by the Governor after
15 the Board had granted parole. Swarthout, 131 S. Ct. at 860-61. The Supreme Court noted that
16 when state law creates a liberty interest, the Due Process Clause of the Fourteenth Amendment
17 requires fair procedures, "and federal courts will review the application of those constitutionally
18 required procedures." Id. at 862. The Court concluded that in the parole context, however, "the
19 procedures required are minimal" and that the "Constitution does not require more" than "an
20 opportunity to be heard" and being "provided a statement of the reasons why parole was denied."
21 Id. (citing Greenholtz, 442 U.S. at 16). The Supreme Court therefore rejected Ninth Circuit
22 decisions that went beyond these minimal procedural requirements and "reviewed the state
23 courts' decisions on the merits and concluded that they had unreasonably determined the facts in
24 light of the evidence." Swarthout, 131 S. Ct. at 862. In particular, the Supreme Court rejected
25 the application of the "some evidence" standard to parole decisions by the California courts as a
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1 component of the federal due process standard. Id. at 862-63.³ See also Pearson, 639 F.3d at
2 1191.

3 III. Petitioner's Due Process Claim

4 As noted above, petitioner seeks federal habeas relief on the grounds that the
5 Board's 2008 decision to deny him parole, and the findings upon which that denial was based,
6 were not supported by "some evidence" as required under California law. However, under the
7 Supreme Court's decision in Swarthout this court may not review whether California's "some
8 evidence" standard was correctly applied in petitioner's case. 131 S. Ct. at 862-63; see also
9 Miller v. Oregon Bd. of Parole and Post-Prison Supervision, 642 F.3d 711, 716 (9th Cir. 2011)
10 ("The Supreme Court held in Swarthout v. Cooke that in the context of parole eligibility
11 decisions the due process right is *procedural*, and entitles a prisoner to nothing more than a fair
12 hearing and a statement of reasons for a parole board's decision[.]"); Roberts v. Hartley, 640
13 F.3d 1042, 1045-46 (9th Cir. 2011) (under the decision in Swarthout, California's parole scheme
14 creates no substantive due process rights and any procedural due process requirement is met as
15 long as the state provides an inmate seeking parole with an opportunity to be heard and a
16 statement of the reasons why parole was denied); Pearson, 639 F.3d at 1191 ("While the Court
17 did not define the minimum process required by the Due Process Clause for denial parole under
18 the California system, it made clear that the Clause's requirements were satisfied where the
19 inmates 'were allowed to speak at their parole hearings and to contest the evidence against them,
20 were afforded access to their records in advance, and were notified as to the reasons why parole
21 was denied.'"))

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³ In its per curiam opinion the Supreme Court did not acknowledge that for twenty-four years the Ninth Circuit had consistently held that in order to comport with due process a state parole board's decision to deny parole had to be supported by "some evidence," as defined in Superintendent v. Hill, 472 U.S. 445 (1985), that bore some indicia of reliability. See Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); McQuillion v. Duncan, 306 F.3d 895, 904 (9th Cir. 2002) ("In Jancsek . . . we held that the process that is due in the parole rescission setting is the same as the Supreme Court outlined in Superintendent v. Hill")

The federal habeas petition pending before the court in this case reflects that petitioner was represented by counsel at his 2008 parole suitability hearing. (Doc. No. 1-8 at 9.) As set forth above, the record also establishes that at that hearing petitioner was given the opportunity to be heard and received a statement of the reasons why parole was denied by the Board panel. That is all the process that was due petitioner under the Constitution. Swarthout, 131 S. Ct. 862; see also Miller, 642 F.3d at 716; Roberts, 640 F.3d at 1045-46; Pearson, 639 F.3d at 1191. It now plainly appears that petitioner is not entitled to federal habeas relief with respect to his due process claims. Accordingly, the pending petition should be denied.

CONCLUSION

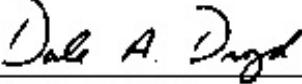
For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served and filed within fourteen days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

In any objections he elects to file, petitioner may address whether a certificate of appealability should issue in the event he files an appeal of the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant); Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc) (prisoners are required to obtain a certificate of appealability to review the denial of a habeas petition challenging an administrative decision

1 such as the denial of parole by the parole board), overruled in part by Swarthout, 131 S. Ct. 859
2 (2011).

3 DATED: August 21, 2011.

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6 DALE A. DROZD
7 UNITED STATES MAGISTRATE JUDGE

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