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

GERALD COLLINS

Petitioner,

No. CIV S-08-0441 GEB GGH (TEMP) P

vs.

S.R. MOORE

Respondent.

FINDINGS & RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding through counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges two decisions: (1) the Governor’s September 5, 2006, reversal of the California Board of Parole Hearings’ (BPH) finding that he was suitable for parole and (2) BPH’s April 19, 2007, finding that he was not suitable for parole. He claims that on each occasion the Governor’s and BPH’s application of California’s “some evidence” standard violated his federal right to due process. He also claims the Governor’s decision violated the ex post facto clause.

On February 2, 2011, the undersigned ordered both parties to provide briefing regarding the recent United States Supreme Court decision that found that the Ninth Circuit erred in commanding a federal review of the state’s application of state law in applying the “some evidence” standard in the parole eligibility habeas context. Swarthout v. Cooke, 502 U.S. ____,

1 ___ S. Ct. ___, 2011 WL 197627 *2 (Jan. 24, 2011).

2 Only respondent has filed timely briefing. For the reasons set forth in the prior
3 order, it appears there is no federal due process requirement for a “some evidence” review. Thus
4 the federal courts are precluded from a review of the state court’s application of its “some
5 evidence” standard.¹

6 Two of petitioner’s three claims allege violations of California’s “some evidence”
7 requirement. Therefore, those claims should be denied under Cooke. Furthermore, respondent
8 informs the court that, since the order for briefing on Cooke issued, petitioner has been granted
9 parole and released from prison. See Notice of Petitioner’s Release, Exhibit A (Docket No. 47).
10 Hearing nothing further on any issue from petitioner since his release, the court recommends his
11 ex post facto claim should be denied as moot. The court expresses no finding or
12 recommendation based on the merit of the ex post facto claim.

13 Accordingly, IT IS HEREBY RECOMMENDED that the motion to dismiss
14 (Docket No. 31) be granted and the petition be denied.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
17 days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
20 shall be served and filed within fourteen days after service of the objections. The parties are
21 advised that failure to file objections within the specified time may waive the right to appeal the

22
23 ¹ The court notes some perversity in the result here. Loss of good-time credits, even for a
24 day, pursuant to decision at a prison disciplinary hearing, must be supported by “some evidence.”
25 Superintendent v. Hill, 472 U.S. 445, 455, 105 S.Ct. 2768 (1985). Assignment to administrative
26 segregation requires the same “some evidence” before such an assignment can be justified.
Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir.2003). However, a denial of parole eligibility after
sometimes decades in prison, and where another opportunity for parole can be delayed for as
long as fifteen more years, requires no such protection from the federal due process standpoint.
Nevertheless, such is the state of the law.

1 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

2 If petitioner files objections, he shall also address if a certificate of appealability
3 should issue and, if so, as to which issues. A certificate of appealability may issue under 28
4 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a
5 constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of appealability must “indicate
6 which specific issue or issues satisfy” the requirement. 28 U.S.C. § 2253(c)(3).

7 DATED: March 2, 2011

8 /s/ Gregory G. Hollows

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10 GREGORY G. HOLLOWES
11 UNITED STATES MAGISTRATE JUDGE
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