IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM COFFIN,

Petitioner, No. CIV S-09-1556 FCD EFB

vs.

GARY SWARTHOUT[1], FINDINGS AND RECOMMENDATIONS

Respondent.

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Petitioner is a state prisoner proceeding without counsel on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent moves to dismiss on the grounds that the petition fails to state a cognizable claim. For the reasons that follow, the court concludes that the motion to dismiss must be denied.

I. Background

Petitioner is currently serving a sentence of 25 years-to-life in California State prison. Pet. at 1. He challenges the November 28, 2007 decision by the California Board of Parole Hearings ("the Board") to deny him parole. *Id.* at 4-18. He argues that the decision was unsupported by "some evidence" that petitioner poses a current risk of danger to society and thus

[1] Gary Swarthout is substituted as respondent. *See* Rule 2(a), Rules Governing § 2254 Proceedings; Fed. R. Civ. P. 25(d).

deprived him of due process and that the decision constituted a breach of his plea agreement. *Id.*

II. Respondent's Motion to Dismiss

Respondent has filed a motion to dismiss containing a two-paragraph legal argument which asserts that, under *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), petitioner lacks a right to "some evidence" of current dangerousness protected by the federal Constitution. Thus, respondent argues, the petition fails to state a claim cognizable in a federal petition for writ of habeas corpus because the issue is purely one of state law, citing *Estelle v. McGuire*, 502 U.S. 52 (1991). Respondent does not address petitioner's additional claim that the parole denial constituted a breach of his plea agreement.

In *Hayward*, the Ninth Circuit held that the Due Process Clause of the Fourteenth Amendment "does not, *by itself*, entitle a prisoner to parole in the absence of some evidence of future dangerousness." 603 F.3d at 561 (italics added). The court quickly noted, however, that state statutes can create liberty interests that are protected under the Due Process Clause. *Id.*; *see generally Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' [citation], or it may arise from an expectation or interest created by state laws or policies [citation]."). Finding that California's parole statue gives rise to such an interest, the court then expressly held that, in cases challenging denials of parole in California, the relevant question for the court is "whether the California judicial decision approving the [parole denial] was an 'unreasonable application' [citation] of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence' [citation]." *Hayward*, 603 F.3d at 562-63; *see also Pearson v. Muntz*, 606 F.3d 606, 608 (9th Cir. 2010); *Cooke v. Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010).

As the Ninth Circuit has subsequently noted, in concluding that federal habeas courts must determine whether a California court's approval of a parole denial was an unreasonable application of the "some evidence" requirement or was based on an unreasonable determination

of the facts, "*Hayward* necessarily held that compliance with the state requirement is mandated by federal law, specifically the Due Process Clause." *Pearson*, 606 F.3d at 609. Thus, the Ninth Circuit has made it clear that California state court determinations upholding parole denials are cognizable via federal petitions for writs of habeas corpus, because California state law provides California prisoners with a liberty interest in parole absent "some evidence" of current dangerousness. *Id.*; *see also Cooke*, 606 F.3d at 1213; *Hayward*, 603 F.3d at 561-64. Respondent advances no other argument for dismissal of the petition, in whole or in part.

III. Conclusion

Respondent's motion to dismiss is based on the erroneous premise that petitioner lacks a right protected by the federal Constitution to a determination of parole suitability based on "some evidence." As the caselaw relied on by petitioner holds the opposite, the motion to dismiss must be denied.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's May 10, 2010 motion to dismiss, Dckt. No. 13, 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)(l). Within fourteen 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 ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: January 7, 2011.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE