

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

JAMES ALEXANDER,

Petitioner,

No. CIV S-10-0643 MCE DAD P

vs.

D. K. SISTO, Warden,

Respondent.

FINDINGS & RECOMMENDATIONS

_____ /

Petitioner is a former state prisoner proceeding with counsel with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.¹ Therein, petitioner raises a due process challenge to former Governor Arnold Schwarzenegger’s May 16, 2007 reversal of the January 9, 2007 decision by the California Board of Parole Hearings (“Board”) to grant him parole. 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.

////

////

¹ Respondent has notified the court, and provided evidence, that petitioner was released from prison on parole on April 13, 2011. See Doc. Nos. 36 and 37.

1 I. Procedural Background

2 Petitioner is confined pursuant to a 1984 judgment of conviction entered against
3 him in the San Diego County Superior Court following his conviction on charges of second
4 degree murder with use of a firearm. Pursuant to that conviction, petitioner was sentenced to
5 seventeen years to life in state prison. (Doc. No. 1 at 2.)²

6 On January 9, 2007, the Board conducted a parole suitability hearing to determine
7 whether petitioner should be granted a parole date. (Doc. No. 22, Ex. 1.) Petitioner appeared at
8 and participated in this hearing. (Id. at 4, et seq.) At the conclusion of the hearing, the Board
9 panel announced their decision to grant parole to petitioner as well as the reasons for that
10 decision. (Id. at 86-102.) However, on May 16, 2007, the Governor reversed the Board's
11 decision. (Doc. No. 22, Ex. 4 at 2-5.)

12 Petitioner challenged the Governor's reversal in a petition for writ of habeas
13 corpus filed in the Solano County Superior Court. (Answer, Ex. 1.) The Solano County Superior
14 Court transferred the petition to the San Diego County Superior Court by order dated October 19,
15 2007. (Answer, Ex. 2.) On November 10, 2008, the San Diego County Superior Court granted
16 petitioner's petition in a reasoned decision on the merits of petitioner's claims. (Answer, Ex. 9.)

17 On November 20, 2008, respondent filed an appeal of the San Diego County
18 Superior Court's order in the California Court of Appeal for the Fourth Appellate District.
19 (Answer, Ex. 10.) By order dated June 11, 2009, the state appellate court reversed the San Diego
20 County Superior Court's ruling in a decision on the merits. (Answer, Ex. 20.) Subsequently,
21 petitioner filed a petition for review in the California Supreme Court. (Answer, Ex. 22.) That
22 petition was summarily denied by order dated September 23, 2009. (Answer, Ex. 23.)

23 On March 18, 2010, petitioner filed his federal application for habeas relief in this
24 court. Therein, petitioner contends that the Governor's 2007 reversal of the Board's decision to

25
26 ² 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 grant him parole violated his right to due process because it was not supported by “some
2 evidence” that he posed a current danger to society if released from prison, as required under
3 California law. (Doc. No. 1 at 5-34.)

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

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

11 A protected liberty interest may arise from either the Due Process Clause of the
12 United States Constitution “by reason of guarantees implicit in the word ‘liberty,’” or from “an
13 expectation or interest created by state laws or policies.” Wilkinson v. Austin, 545 U.S. 209,
14 221 (2005). See also Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States
15 Constitution does not, of its own force, create a protected liberty interest in a parole date, even
16 one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981); Greenholtz v. Inmates of
17 Neb. Penal, 442 U.S. 1, 7 (1979) (There is “no constitutional or inherent right of a convicted
18 person to be conditionally released before the expiration of a valid sentence.”). However, a
19 state’s statutory scheme, if it uses mandatory language, “creates a presumption that parole release
20 will be granted” when or unless certain designated findings are made, and thereby gives rise to a
21 constitutional liberty interest. Greenholtz, 442 U.S. at 12. See also Allen, 482 U.S. at 376-78.

22 California’s parole scheme gives rise to a liberty interest in parole protected by the
23 federal Due Process Clause. Pirtle v. California Bd. of Prison Terms, 611 F.3d 1015, 1020 (9th
24 Cir. 2010); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002); see also Swarthout v.
25 Cooke, 562 U.S. ___, ___, 131 S. Ct. 859, 861-62 (2011) (finding the Ninth Circuit’s holding in
26 this regard to be a reasonable application of Supreme Court authority); Pearson v. Muntz,

1 ____ F.3d ____, 2011 WL 1238007, at *4 (9th Cir. Apr. 5, 2011) (“[Swarthout v.] Cooke did not
2 disturb our precedent that California law creates a liberty interest in parole.”) In California, a
3 prisoner is entitled to release on parole unless there is “some evidence” of his or her current
4 dangerousness. In re Lawrence, 44 Cal.4th 1181, 1205-06, 1210 (2008); In re Rosenkrantz, 29
5 Cal.4th 616, 651-53 (2002).

6 In Swarthout, the Supreme Court reviewed two cases in which California
7 prisoners were denied parole - in one case by the Board, and in the other by the Governor after
8 the Board had granted parole. Swarthout, 131 S. Ct. at 860-61. The Supreme Court noted that
9 when state law creates a liberty interest, the Due Process Clause of the Fourteenth Amendment
10 requires fair procedures, “and federal courts will review the application of those constitutionally
11 required procedures.” Id. at 862. The Court concluded that in the parole context, however, “the
12 procedures required are minimal” and that the “Constitution does not require more” than “an
13 opportunity to be heard” and being “provided a statement of the reasons why parole was denied.”
14 Id. (citing Greenholtz, 442 U.S. at 16). The Supreme Court therefore rejected Ninth Circuit
15 decisions that went beyond these minimal procedural requirements and “reviewed the state
16 courts’ decisions on the merits and concluded that they had unreasonably determined the facts in
17 light of the evidence.” Swarthout, 131 S. Ct. at 862. In particular, the Supreme Court rejected
18 the application of the “some evidence” standard to parole decisions by the California courts as a
19 component of the federal due process standard. Id. at 862-63. See also Pearson, 2011 WL
20 1238007, at *4.³

21 ////

23 ³ In its per curiam opinion the Supreme Court did not acknowledge that for twenty-four
24 years the Ninth Circuit had consistently held that in order to comport with due process a state
25 parole board’s decision to deny parole had to be supported by “some evidence,” as defined in
26 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 . . .”)

1 III. Petitioner's Claim

2 As noted above, petitioner seeks federal habeas relief on the grounds that the
3 Governor's 2007 reversal of the Board's decision granting him parole, and the findings upon
4 which that reversal was based, were not supported by "some evidence" as required under
5 California law. However, under the Supreme Court's decision in Swarthout this court may not
6 review whether California's "some evidence" standard was correctly applied in petitioner's case.
7 131 S. Ct. at 862-63; see also Miller v. Oregon Bd. of Parole and Post-Prison Supervision,
8 ___ F.3d ___, 2011 WL 1533512, at *5 (9th Cir. Apr. 25, 2011) ("The Supreme Court held in
9 [Swarthout v.] Cooke that in the context of parole eligibility decisions the due process right is
10 *procedural*, and entitles a prisoner to nothing more than a fair hearing and a statement of reasons
11 for a parole board's decision[.]"); Roberts v. Hartley, ___ F.3d ___, 2011 WL 1365811, at *3 (9th
12 Cir. Apr. 12, 2011) (under the decision in Swarthout, California's parole scheme creates no
13 substantive due process rights and any procedural due process requirement is met as long as the
14 state provides an inmate seeking parole with an opportunity to be heard and a statement of the
15 reasons why parole was denied); Pearson, 2011 WL 1238007, at *3 (9th Cir. Apr. 5, 2011)
16 ("While the Court did not define the minimum process required by the Due Process Clause for
17 denial parole under the California system, it made clear that the Clause's requirements were
18 satisfied where the inmates 'were allowed to speak at their parole hearings and to contest the
19 evidence against them, were afforded access to their records in advance, and were notified as to
20 the reasons why parole was denied.'")

21 The federal habeas petition pending before the court in this case reflects that
22 petitioner was represented by counsel at his 2007 parole suitability hearing at which he was
23 granted parole. (Doc. No. 22, Ex. 1 at 4.) As noted above, the record also establishes that at that
24 hearing petitioner was given the opportunity to be heard and received a statement of the reasons
25 for the Board's decision granting him parole. Most importantly, petitioner received a document
26 from the Governor's office explaining the reasons for the Governor's reversal of the Board's

1 2007 decision. (Doc. No. 22, Ex. 4 at 2-5.) That is all the process that was due petitioner under
2 the Constitution. Swarthout, 131 S. Ct. 862; see also Miller, 2011 WL 1533512, at *5;
3 Roberts, 2011 WL 1365811, at *3; Pearson, 2011 WL 1238007, at *3. This is true even though
4 petitioner is challenging the Governor’s reversal of the Board panel’s grant of parole, and not a
5 decision by the Board. Swarthout, 131 S. Ct. at 860-61. It now plainly appears that petitioner is
6 not entitled to relief with respect to his due process claims. Therefore, the pending petition
7 should be denied.

8 IV. Conclusion

9 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s application for
10 a writ of habeas corpus be denied.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
13 one days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
16 shall be served and filed within fourteen days after service of the objections. Failure to file
17 objections within the specified time may waive the right to appeal the District Court’s order.
18 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
19 1991).

20 In any objections he elects to file, petitioner may address whether a certificate of
21 appealability should issue in the event he files an appeal of the judgment in this case. See Rule
22 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a
23 certificate of appealability when it enters a final order adverse to the applicant); Hayward v.
24 Marshall, 603 F.3d 546, 554 (9th Cir. 2010) (en banc) (prisoners are required to obtain a
25 certificate of appealability to review the denial of a habeas petition challenging an administrative

26 ////

1 decision such as the denial of parole by the parole board), abrogated on other grounds in
2 Swarthout v. Cooke, 562 U.S. ___, 131 S. Ct. 859 (2011) .

3 DATED: June 3, 2011.

4
5 
6 _____
7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

7 DAD:8:
8 alexander643.hc

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26