UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARK JAMES LYON, Petitioner, v. R. NDOH, Warden, Respondent.	NO. CV 17-1963-SVW(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner, a state prisoner seeking parole, filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on March 13, 2017. Among the attachments to the Petition is a transcript ("TR.") of Petitioner's December 10, 2015 hearing before the Board of Parole

Hearings ("Board").[1] The Board found Petitioner unsuitable for parole (TR. at 101-13).

Respondent filed a "Motion to Dismiss" on June 12, 2017. The Motion to Dismiss asserts that Petitioner's claims "are not cognizable for federal habeas corpus relief."

Petitioner filed a "Traverse, etc." on June 28, 2017.

BACKGROUND

In 1987, a jury found Petitioner guilty of first degree murder (Petition at 2). Petitioner received a prison sentence of 25 years to life plus two years for a firearm enhancement (id.).

The basic outline of Petitioner's crime is not in dispute. Before walking to the door of his neighbor's house, Petitioner armed himself with a .44 caliber revolver, a knife, brass knuckles, and a ski mask (TR. at 40-42, 49-56, 89, 91-92). When the neighbor came outside the house, Petitioner shot the neighbor twice in the chest, stabbed the neighbor multiple times and then stuffed the neighbor's lifeless body into one of the neighbor's garbage cans (id.).

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[1] Although one of the Board members stated that the date of the hearing was December 11, 2015, the transcript indicates that the date of the hearing was December 10, 2015. This minor date discrepancy is immaterial.

In 2010, the Board found Petitioner unsuitable for parole. See Lyon v. De La Jour, CV 12-7671-ABC(E). Petitioner then sought habeas relief from this Court, arguing, inter alia, Petitioner had been denied a fair hearing by an unbiased tribunal. See id. By Judgment entered January 10, 2013, this Court rejected all of Petitioner's arguments on the merits.

In 2015, the Board conducted another parole hearing, at which Petitioner appeared with counsel (TR.). During the hearing, Petitioner answered the Board's questions, discussed the crime and other relevant factors, discussed the evidence (including evidence Petitioner had presented), and made arguments in favor of parole, both through counsel and on his own behalf (TR. 1-99). The Board again decided Petitioner was unsuitable for parole, and the Board explained its reasons for the decision (TR. 100-13).

In the present case, Petitioner again alleges a host of challenges to the fairness of the proceeding before the Board. See Petition; "Traverse, etc."

APPLICABLE LAW

Federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); see Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc) (in conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of,

applying the standard of review set forth in section 2254(d)).

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979) ("Greenholtz"). In some instances, however, state statutes may create liberty interests in parole release entitled to protection under the federal Due Process Clause. See Bd. of Pardons v. Allen, 482 U.S. 369, 371 (1987); Greenholtz, 442 U.S. at 12. The Ninth Circuit has held that California's statutory provisions governing parole create such a liberty interest. Roberts v. Hartley, 640 F.3d 1042, 1045 (9th Cir. 2011).[2]

The California Supreme Court has held, as a matter of state law, that "some evidence" must exist to support a parole denial. See In re Lawrence, 44 Cal. 4th 1181, 1212, 82 Cal. Rptr. 3d 169, 190 P.3d 535 (2008). In Swarthout v. Cooke, however, the United States Supreme Court rejected the contention that the federal Due Process Clause contains a guarantee of evidentiary sufficiency with respect to a parole determination. Swarthout v. Cooke, 562 U.S. at 220 ("No opinion of ours supports converting California's 'some evidence' rule into a substantive federal requirement."); see also Miller v. Oregon Bd. of Parole and Post-Prison Supervision, 642 F.3d 711, 717 (9th Cir.

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[2] In Swarthout v. Cooke, 562 U.S. 216, 220-21 (2011), the United States Supreme Court did not reach the question of whether California law creates a liberty interest in parole, but observed that the Ninth Circuit's affirmative answer to this question "is a reasonable application of our cases" (citations omitted).

2011) (issue is not whether Board's parole denial was "substantively reasonable," or whether the Board correctly applied state parole standards, but simply was "whether the state provided Miller with the minimum procedural due process outlined in [Swarthout v.] Cooke").

"In the context of parole, . . . the procedures required are minimal." Swarthout v. Cooke, 562 U.S. at 220. Due Process requires that the State furnish a parole applicant with an opportunity to be heard and a statement of reasons for a denial of parole. Greenholtz, 442 U.S. at 16; see Swarthout v. Cooke, 562 U.S. at 220. "The Constitution does not require more." Greenholtz, 442 U.S. at 16; accord Swarthout v. Cooke, 562 U.S. at 220 (citation omitted); see also Roberts v. Hartley, 640 F.3d at 1046 ("there is no substantive due process right created by the California parole scheme"). In the parole context, then, "[d]ue process is satisfied as long as the state provides an inmate seeking parole with 'an opportunity to be heard and . . . a statement of the reasons why parole was denied.'" Roberts v. Hartley, 640 F.3d at 1046 (quoting Swarthout v. Cooke, 562 U.S. at 220).

DISCUSSION

Contrary to Petitioner's arguments, Petitioner plainly received all the process that was due during the 2015 hearing before the Board. He was afforded the opportunity to be heard, and he extensively availed himself of that opportunity. He argued the matter through counsel and on his own behalf. After the Board made its decision, the Board explained the reasons for that decision. Such procedures are

clearly "sufficient to satisfy the Due Process Clause." Roberts v. Hartley, 640 F.3d at 1046 (citing Swarthout v. Cooke, 562 U.S. at 220). The transcript appended to the Petition amply refutes Petitioner's conclusory allegations that he supposedly was "denied the right to speak and present documents." Petitioner spoke at length, and the Board expressly considered numerous documents presented by Petitioner. The Board frustrated Petitioner's efforts to speak further only when Petitioner attempted to continue to speak after the Board already had made and explained its decision (TR. at 112-13).

Petitioner alleges that the Board mischaracterized evidence, misplaced emphases and erroneously disbelieved certain aspects of Petitioner's testimony. Notwithstanding Petitioner's efforts to characterize these allegations as implicating federal due process, the allegations implicate only the sufficiency of the evidence to support the decision of the Board. Again, federal due process does not guarantee evidentiary sufficiency with respect to the decision of the Board. See Swarthout v. Cooke, 562 U.S. at 220-22. Regardless of whether the Board erred in its characterizations, emphases or factual findings (including credibility findings), federal habeas relief is unavailable. See id.

As Petitioner previously argued in Lyon v. De La Jour, CV 12-7671-ABC(E), Petitioner appears to argue that the Board was not impartial. As in the prior case, Petitioner's argument is meritless. While a prisoner is entitled to have his or her parole application considered by a "neutral and detached body" that is "free from bias or prejudice," O'Bremski v. Maass, 915 F.2d 418, 422 (9th Cir. 1990),

cert. denied, 498 U.S. 1096 (1991), administrative adjudicators are presumed to act with honesty and integrity. See Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 496-97 (1976); Withrow v. Larkin, 421 U.S. 35, 47 (1975). To overcome this presumption, a petitioner alleging bias "must show that the adjudicator has prejudged or reasonably appears to have prejudged, an issue." Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995) (internal quotations omitted). A petitioner may make this showing in two ways. First, "the proceedings and surrounding circumstances may demonstrate actual bias on the part of the adjudicator." Id. Second, a petitioner may show that "the adjudicator's pecuniary or personal interest in the outcome of the proceedings . . . create[d] an appearance of partiality that violates due process. . . ." Id. Petitioner has not made either showing. The record demonstrates that the Board reviewed the evidence, listened to the presentations of Petitioner and his counsel, and rendered an individualized determination of Petitioner's unsuitability for parole.

Petitioner suggests that Respondent's asserted failure to contest facts alleged in the Petition should compel the Court to accept the truth of the facts alleged ("Traverse, etc." at 2). Petitioner's suggestion must be rejected. Any failure by the Respondent to address an allegation in the Petition does not compel the Court to accept the truth of that allegation. See Gordon v. Duran, 895 F.2d 610, 612 (9th Cir. 1990). Moreover, the Court need not accept as true any pleaded allegation that is conclusory or contradicted by a document attached to the pleading. See Ashcroft v. Iqbal, 556 U.S. 662, 678, 686 (2009) (court does not presume the truth of conclusory allegations; pleading

must contain sufficient factual allegations "to state a claim to relief that is plausible on its face"); Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.), amended, 275 F.3d 1187 (9th Cir. 2001) (court need not accept as true factual allegations contradicted by documents attached to the pleading). Petitioner's allegations that he was deprived of procedural due process are conclusory and are contradicted by the transcript attached to the Petition. For the latter reason, a grant of leave to amend the Petition would be an idle act.

RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and Recommendation (2) granting Respondent's Motion to Dismiss; and (3) denying and dismissing the Petition with prejudice.[3]

DATED: July 21, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[3] Petitioner's request for the appointment of counsel is denied. See Knaubert v. Goldsmith, 791 F.2d 722, 728-30 (9th Cir.), cert. denied, 479 U.S. 867 (1986).

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.