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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSE OLMEDO,

1:10-cv-406 AWI DLB (HC)

Petitioner,

ORDER DECLINING TO ADOPT FINDINGS
AND RECOMMENDATION, DISMISSING
PETITION FOR WRIT OF HABEAS CORPUS,
AND DECLINING TO ISSUE A
CERTIFICATE OF APPEALABILITY

v.

J.D. HARTLEY,

[Doc. 18]

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Specifically, Petitioner claims there was no evidence to support the Board of Parole Hearings’ August 13, 2008 decision finding him unsuitable for release.

On December 9, 2010, the Magistrate Judge issued [Findings and Recommendations](#) to deny the instant petition.

On January 18, 2011, Petitioner filed [objections](#) to the Findings and Recommendations.

On January 24, 2011, the Supreme Court held that the liberty interest at issue in these parole cases is the interest in receiving parole when the California standards for parole have been met, and the “minimum procedures adequate for due process protection of that interest are those set forth in [\[Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 16 \(1979\)\]](#).” [Swarthout v. Cooke](#), ___ U.S. ___, ___ S. Ct. ___, 2011 U.S. LEXIS 1067, *7 (Jan. 24, 2011). *Swarthout* explained that no Supreme Court opinion “supports converting California’s ‘some evidence’ rule into a substantive federal requirement.” *Id.* “Because the only

1 federal right at issue is procedural, the relevant inquiry is what process [the Petitioner] received,
2 not whether the state court decided the case correctly.” Id. at *9; Smiley v. Hernandez, 2011
3 U.S. App. LEXIS 1943 (January 28, 2011). If a petitioner receives the minimal procedural
4 requirements of *Greenholtz*, i.e. an opportunity to be heard and a statement of the reasons why
5 parole was denied, then the federal Due Process Clause will have been satisfied and federal
6 review ends. See Swarthout, 2011 U.S. LEXIS 1067 at *6-*7; Kutylo v. Vaughan, 2011 U.S.
7 App. LEXIS 2503 (9th Cir. Feb. 8, 2011); Smiley, 2011 U.S. App. LEXIS 1943.

8 Here, Petitioner challenges only whether there exists in the record “some evidence” of his
9 current dangerousness. As explained above, the Court cannot review such a claim. Swarthout,
10 2011 U.S. LEXIS 1067 at *7-*10. Because the petition does not present cognizable claims for
11 relief, it will be summarily dismissed and the Court will decline to adopt the Findings and
12 Recommendation.

13 14 Certificate of Appealability

15 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
16 district court’s denial of his petition, and an appeal is only allowed in certain circumstances.
17 Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute in determining
18 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

19 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
20 district judge, the final order shall be subject to review, on appeal, by the court
of appeals for the circuit in which the proceeding is held.

21 (b) There shall be no right of appeal from a final order in a proceeding to test the
22 validity of a warrant to remove to another district or place for commitment or trial
a person charged with a criminal offense against the United States, or to test the
23 validity of such person’s detention pending removal proceedings.

24 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
appeal may not be taken to the court of appeals from—

25 (A) the final order in a habeas corpus proceeding in which the
26 detention complained of arises out of process issued by a State
court; or

27 (B) the final order in a proceeding under section 2255.

28 (2) A certificate of appealability may issue under paragraph (1) only if the

1 applicant has made a substantial showing of the denial of a constitutional right.

2 (3) The certificate of appealability under paragraph (1) shall indicate which
3 specific issue or issues satisfy the showing required by paragraph (2).

4 If a court denies a petitioner’s petition, the court may only issue a certificate of
5 appealability “if jurists of reason could disagree with the district court’s resolution of his
6 constitutional claims or that jurists could conclude the issues presented are adequate to deserve
7 encouragement to proceed further.” Miller-El, 537 U.S. at 327; Slack v. McDaniel, 529 U.S. 473,
8 484 (2000). While the petitioner is not required to prove the merits of his case, he must
9 demonstrate “something more than the absence of frivolity or the existence of mere good faith on
10 his . . . part.” Miller-El, 537 U.S. at 338.

11 In the present case, the Court finds that reasonable jurists would not find the Court’s
12 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or
13 deserving of encouragement to proceed further. Petitioner has not made the required substantial
14 showing of the denial of a constitutional right. Accordingly, the Court hereby **DECLINES** to
15 issue a certificate of appealability.

16 Accordingly, IT IS HEREBY ORDERED:

- 17 1) The Court declines to adopt the Findings and Recommendations;
- 18 2) The petition for writ of habeas corpus is **SUMMARILY DISMISSED** with prejudice;
- 19 3) The Clerk of Court is **DIRECTED** to enter judgment and close the case; and
- 20 4) The Court **DECLINES** to issue a certificate of appealability.

21
22 IT IS SO ORDERED.

23
24 Dated: February 15, 2011


25 _____
26 CHIEF UNITED STATES DISTRICT JUDGE
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