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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 EUGENIO PEREIDA,) Case No.: 1:10-cv-00860-AWI-JLT
12)
13 Petitioner,) ORDER TO SHOW CAUSE WHY THE PETITION
14) SHOULD NOT BE DISMISSED FOR LACK OF
15 v.) JURISDICTION
16 JAMES D. HARTLEY,)
17) ORDER FOR PETITIONER TO FILE A
18) RESPONSE WITHIN THIRTY DAYS
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29 Petitioner is a state prisoner proceeding through retained counsel with a petition for writ of
30 habeas corpus pursuant to 28 U.S.C. § 2254.

31 **PROCEDURAL HISTORY**

32 Petitioner filed the instant federal petition on May 14, 2010, challenging a March 12, 2008
33 decision of the California Board of Parole Hearings (“BPH”) finding Petitioner unsuitable for parole.
34 (Doc. 1). On June 11, 2010, the Court ordered Respondent to file a response to the petition. (Doc. 7).
35 On August 10, 2010, Respondent filed the instant motion to dismiss, contending that the petition was
36 not exhausted because Petitioner’s state petition to the California Supreme Court raised only state law
37 issues. (Doc. 11). On August 11, 2010, Petitioner’s counsel filed an opposition to Respondent’s
38 motion to dismiss. (Doc. 12). Subsequently, Respondent filed a reply (Doc. 13), and Petitioner’s
39 counsel filed a response to the reply. (Doc. 14). On November 4, 2010, the Court issued Findings
40 and Recommendations to deny the motion to dismiss. (Doc. 15). On December 15, 2010, the Court

1 adopted those Findings and Recommendations, denied the motion to dismiss, and referred the case to
2 the Magistrate Judge for further proceedings. (Doc. 18).

3 Under normal circumstances, the Court would now order Respondent to file an Answer to the
4 petition. However, upon further review, and in light of intervening case law that, in the Court's
5 opinion, may be dispositive of this case, the Court will order Petitioner to show cause why the petition
6 should not be dismissed for lack of habeas jurisdiction.

7 **DISCUSSION**

8 I. Preliminary Screening of the Petition.

9 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition
10 if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is
11 not entitled to relief in the district court...." Rule 4 of the Rules governing Section 2254 Cases. The
12 Court must summarily dismiss a petition "[i]f it plainly appears from the petition and any attached
13 exhibits that the petitioner is not entitled to relief in the district court...." Habeas Rule 4; O'Bremski
14 v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.
15 1990). Habeas Rule 2(c) requires that a petition (1) specify all grounds of relief available to the
16 Petitioner; (2) state the facts supporting each ground; and (3) state the relief requested. Notice
17 pleading is not sufficient; rather, the petition must state facts that point to a real possibility of
18 constitutional error. Rule 4, Advisory Committee Notes, 1976 Adoption; O'Bremski, 915 F.2d at 420.
19 Allegations in a petition that are vague, conclusory, or palpably incredible are subject to summary
20 dismissal. Hendricks, 908 F.2d at 491.

21 Further, the Advisory Committee Notes to Rule 8 indicate that the Court may dismiss a petition
22 for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion
23 to dismiss, or after an answer to the petition has been filed. Advisory Committee Notes to Habeas
24 Rule 8, 1976 Adoption; see Herbst v. Cook, 260 F.3d 1039 (9th Cir. 2001).

25 II. Failure To State A Cognizable Claim Under Federal Habeas Corpus Law.

26 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
27 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus
28 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);

1 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).

2 The instant petition was filed on May 14, 2010, and thus, it is subject to the provisions of the AEDPA.

3 Here, Petitioner alleges that he is an inmate of the California Department of Corrections and
4 Rehabilitation who is serving an indeterminate sentence of fifteen years-to-life plus a consecutive
5 determinate sentence of five years, imposed in the Los Angeles County Superior Court after
6 Petitioner's 1992 conviction for second degree murder. (Doc. 1, Ex. A). Petitioner does not challenge
7 either his conviction or sentence; rather, Petitioner challenges the March 12, 2008 decision of the
8 Board of Parole Hearings ("BPH") finding him unsuitable for parole.

9 Petitioner raises the following grounds for relief: (1) Petitioner was denied his federal due
10 process rights by the BPH in denying parole suitability at Petitioner's 2008 parole hearing because no
11 rational nexus existed between the BPH's finding that Petitioner was an "unreasonable risk of danger"
12 and the factors relied upon by the BPH; and (2) the BPH's decision denying parole suitability was not
13 objectively reasonable. (Doc. 1, p. 10).

14 A. Substantive Due Process Claims and California's "Some Evidence" Standard

15 The basic scope of habeas corpus is prescribed by statute. Subsection (c) of Section 2241 of
16 Title 28 of the United States Code provides that habeas corpus shall not extend to a prisoner unless he
17 is "in custody in violation of the Constitution." 28 U.S.C. § 2254(a) states that the federal courts shall
18 entertain a petition for writ of habeas corpus only on the ground that the petitioner "is in custody in
19 violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §§ 2254(a)(1), 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n. 7, 120 S.Ct. 1495 (2000); Wilson v. Corcoran, 562
20 U.S. ___, 131 S.Ct. 13, 16 (2010); see also, Rule 1 to the Rules Governing Section 2254 Cases in the
21 United States District Court. The Supreme Court has held that "the essence of habeas corpus is an
22 attack by a person in custody upon the legality of that custody . . ." Preiser v. Rodriguez, 411 U.S. 475,
23 484 (1973). Furthermore, in order to succeed in a petition pursuant to 28 U.S.C. § 2254, Petitioner
24 must demonstrate that the adjudication of his claim in state court resulted in a decision that was
25 contrary to, or involved an unreasonable application of, clearly established Federal law, as determined
26 by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable
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1 determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. §
2 2254(d)(1), (2).

3 Because California's statutory parole scheme guarantees that prisoners will not be denied
4 parole absent some evidence of present dangerousness, the Ninth Circuit Court of Appeals has held
5 that California law creates a liberty interest in parole that may be enforced under the Due Process
6 Clause. Hayward v. Marshall, 602 F.3d 546, 561-563 (9th Cir.2010); Pearson v. Muntz, 606 F.3d 606,
7 608-609 (9th Cir. 2010); Cooke v. Solis, 606 F.3d 1206, 1213 (9th Cir. 2010), *rev'd*, Swarthout v.
8 Cooke, ___ U.S.___, 131 S.Ct. 859, 2011 WL 197627 (Jan. 24, 2011). The Ninth Circuit instructed
9 reviewing federal district courts to determine whether California's application of California's "some
10 evidence" rule was unreasonable or was based on an unreasonable determination of the facts in light of
11 the evidence. Hayward v. Marshall. 603 F.3d at 563; Pearson v. Muntz, 606 F.3d at 608.

12 On January 24, 2011, the Supreme Court issued a *per curiam* opinion in Swarthout v. Cooke,
13 562 U.S.___, 131 S.Ct. 859, 2011 WL 197627 (Jan. 24, 2011). In that decision, the United States
14 Supreme Court characterized as reasonable the decision of the Court of Appeals for the Ninth Circuit
15 that California law creates a liberty interest in parole protected by the Fourteenth Amendment's Due
16 Process Clause, which in turn requires fair procedures with respect to the liberty interest. Swarthout,
17 131 S.Ct. at 861-2.

18 However, the procedures required for a parole determination are the minimal requirements set
19 forth in Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 12, 99 S.Ct. 2100
20 (1979).¹ Id. at 862. In Swarthout, the Court rejected inmates' claims that they were denied a liberty
21 interest because there was an absence of "some evidence" to support the decision to deny parole. In
22 doing so, the High Court stated as follows:

23 There is no right under the Federal Constitution to be conditionally released before the
24 expiration of a valid sentence, and the States are under no duty to offer parole to their
25 prisoners. (Citation omitted.) When, however, a State creates a liberty interest, the
Due Process Clause requires fair procedures for its vindication—and federal courts will

26 ¹In Greenholtz, the Court held that a formal hearing is not required with respect to a decision concerning granting or
27 denying discretionary parole and that due process is sufficient to permit the inmate to have an opportunity to be heard and
28 to be given a statement of reasons for the decision made. Id. at 15-16. The decision maker is not required to state the
evidence relied upon in coming to the decision. Id.

1 review the application of those constitutionally required procedures. In the context of
2 parole, we have held that the procedures requires are minimal. In Greenholtz, we found
3 that a prisoner subject to a parole statute similar to California’s received adequate
4 process when he was allowed an opportunity to be heard and was provided a statement
5 of the reasons why parole was denied. (Citation omitted.)

6 Id.

7 The Court concluded that the petitioners had received the due process to which they
8 were due:

9 They were allowed to speak at their parole hearings and to contest the evidence against
10 them, were afforded access to their records in advance, and were notified as to the
11 reasons why parole was denied...

12 That should have been the beginning and the end of the federal habeas courts’ inquiry
13 into whether [the petitioners] received due process.

14 Id. The Court went on to expressly point out that California’s “some evidence” rule is not a
15 substantive federal requirement, and correct application of the State’s “some evidence” standard is not
16 required by the federal Due Process Clause. Id. The Supreme Court emphasized that “the
17 responsibility for assuring that the constitutionally adequate procedures governing California’s parole
18 system are properly applied rests with California courts, and is no part of the Ninth Circuit’s
19 business.” Id. at 863.

20 Swarthout thus forecloses any claim premised upon California’s “some evidence” rule because
21 this Court cannot entertain substantive due process claims related to a state’s application of its own
22 laws. Here, the two claims in the petition sound exclusively in substantive due process and, therefore,
23 appear to be foreclosed by Swarthout. Review of the record for “some evidence,” or for a “nexus”
24 between present dangerousness and certain indicia, or for reliance exclusively upon the circumstances
25 of the commitment offense to support denial of parole, or for the “objective reasonableness” of the
26 BPH’s decision, are issues that simply are not within the scope of this Court’s habeas review under 28
27 U.S.C. § 2254, as that jurisdiction has been construed by the United States Supreme Court in
28 Swarthout. Accordingly, it appears that the petition should be summarily dismissed.

Moreover, to the extent that the claims in the instant petition rest solely on state law, they are
not cognizable on federal habeas corpus. Federal habeas relief is not available to retry a state issue
that does not rise to the level of a federal constitutional violation. Wilson v. Corcoran, 562 U.S. ___,

1 131 S.Ct. 13, 16 (2010); Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475 (1991). Alleged errors
2 in the application of state law are not cognizable in federal habeas corpus. Souch v. Schiavo, 289 F.3d
3 616, 623 (9th Cir. 2002). Indeed, federal courts are bound by state court rulings on questions of state
4 law. Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.), *cert. denied*, 493 U.S. 942 (1989).

5 B. Procedural Due Process.

6 Petitioner has neither claimed nor established a violation of his federal right to procedural due
7 process. Petitioner has included a transcript of the BPH hearing. (Doc. 1, Ex. B). From that transcript,
8 it is clear that Petitioner was present at the BPH hearing (id., p. 4), that he had an opportunity to be
9 heard (e.g., id., p. 21 et seq.), that he was represented by counsel who also attended the hearing and
10 argued on Petitioner's behalf (e.g., id., p. 2), and that Petitioner received a statement of the Board's
11 reasons for denying parole. (Doc. 1, Ex. B, pp.103-112).

12 According to the Supreme Court, this is "the beginning and the end of the federal habeas
13 courts' inquiry into whether [the prisoner] received due process." Swarthout, 131 S.Ct. 862. "The
14 Constitution does not require more [process]." Greenholtz, 442 U.S. at 16. Therefore, the instant
15 petition does not appear to present cognizable claims for relief and should be summarily dismissed.

16 **ORDER**

17 For the foregoing reasons, the Court HEREBY ORDERS as follows:

- 18 1. Petitioner is ORDERED TO SHOW CAUSE within thirty (30) days of the date of service
19 of this order why the Petition should not be summarily dismissed for lack of habeas
20 jurisdiction.

21 Petitioner is forewarned that his failure to comply with this order may result in a
22 Recommendation that the Petitioner be dismissed pursuant to Local Rule 110.

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25 IT IS SO ORDERED.

26 Dated: April 11, 2012

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE