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2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF CALIFORNIA  
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7 ANDREW R. LOPEZ,  
8 Plaintiff,

9 vs.

10 JEFFREY BEARD, et al.,  
11 Defendants

Case No. 1:13 cv 01556 LJO GSA PC

FINDINGS AND RECOMMENDATION  
THAT THIS ACTION BE DISMISSED FOR  
FAILURE TO STATE A CLAIM

12 OBJECTIONS DUE IN THIRTY DAYS

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14 **I. Screening Requirement**

15 Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights  
16 action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate  
17 Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

18 The Court is required to screen complaints brought by prisoners seeking relief against a  
19 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
20 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
21 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or  
22 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
23 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been  
24 paid, the court shall dismiss the case at any time if the court determines that . . . the action or  
25 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §  
26 1915(e)(2)(B)(ii).

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1 **II. Plaintiff's Claims**

2 Plaintiff, an inmate in the custody of the California Department of Corrections and  
3 Rehabilitation (CDCR) at Corcoran State Prison, brings this civil rights action against defendant  
4 CDCR officials employed by the CDCR and the Board of Parole Hearings (BPH). Plaintiff  
5 names the following individual defendants: Jeffrey Beard, CDCR Secretary; C. Kusaj, Chief  
6 BPH Psychologist; BPH Psychologist S. Walker; BPH Psychologist J. Olson; BPH  
7 Commissioner T. Arbaugh; Deputy BPH Commissioner F. Lopez; Enforcement Analyst J.  
8 Brown; Does 1-50.

9 Plaintiff's central claim is that he has been improperly denied parole. Specifically,  
10 Plaintiff challenges the underlying basis for the decision by the BPH to deny his release on  
11 parole. Plaintiff claims that he has a liberty interest in parole, and Defendants clearly deprived  
12 him of that interest by improperly relying on invalid information.

13 Plaintiff alleges that on April 5, 2001, he was interviewed by a psychiatrist in preparation  
14 for a parole hearing. Plaintiff's minimum eligible parole date (MEPD) was in 2003. The  
15 evaluation indicated that Plaintiff's "level of dangerousness within the structured setting of a  
16 correctional institution is below average as indicated by the absence of violent behavior in this  
17 setting. He has demonstrated his willingness and ability to refrain from physical violence and  
18 appears to have no intention to change this pattern." Plaintiff alleges that a hearing was  
19 conducted on August 1, 2007. Parole was denied. The board recommended a new psychological  
20 evaluation be performed prior to the next hearing.

21 In January of 2009, the BPH made changes to its processes. Plaintiff had a habeas  
22 petition pending at the time, Lopez v. Schwarzenegger, 1:08-cv-1651 OWW SMS HC. The  
23 court ultimately granted the petition, directing respondent to provide Plaintiff with a parole  
24 hearing within 90 days. Plaintiff alleges that the Parole Board had been "ordered" to make  
25 psychological evaluations available to inmates 60 days prior to their parole hearing. On  
26 September 28, 2009, Plaintiff was given notice that a hearing was scheduled for October 12,  
27 2009. Plaintiff advised Defendant Olson that "he would not agree to such unconstitutional

1 attempts,” and reminded Defendant Olson that the court ordered a parole hearing that “comports  
2 to the constitution.” On September 29, 2009, Plaintiff was taken to the visiting area at Corcoran  
3 and told that he would be evaluated by Defendant Olson for a BPH hearing. Plaintiff had no  
4 prior notice of the evaluation.

5 On September 30, 2009, the district court granted an extension of time to December 30,  
6 2009, in which to conduct the parole hearing. On October 14, 2009, Plaintiff received a  
7 Comprehensive Risk Assessment, dated October 5, 2009, that reflected the September 29, 2009,  
8 evaluation. Plaintiff alleges that the 2009 evaluation “contains falsehoods, misrepresentations,  
9 references to plaintiff’s petitioning for redress for no legitimate psychological purpose, and  
10 contains opinions and conclusions of prejudicial nature involving subject matters that are way  
11 outside the expertise of Defendants Olson and Walker.” Plaintiff alleges that Defendants Olson  
12 and Walker falsely indicated that Plaintiff was scheduled for a BPH psychological evaluation by  
13 October 24, 2009 for a hearing scheduled for November 30, 2009. Plaintiff alleges that his 2007  
14 denial of parole included a five year deferral, indicating that Plaintiff would not have been  
15 scheduled until 2012. Plaintiff alleges that these falsehoods by Walker and Olson “permeates  
16 their entire reports and destroys their credibility.”

17 Plaintiff also lists several items in the 2009 evaluation that he characterizes as falsehoods.  
18 As an example, Plaintiff states that the evaluation indicates that Plaintiff stopped attending  
19 school in tenth grade then earned his G.E.D. Plaintiff alleges that he did in fact “graduate when  
20 he was sixteen, i.e. in the 10<sup>th</sup> grade.” Plaintiff alleges that this shows that Defendants relied  
21 upon prison records to evaluate Plaintiff, thus establishing retaliation against Plaintiff for filing a  
22 civil rights lawsuit in 1994. Walker and Olson also allegedly made false references to gang  
23 affiliation and SHU housing.

24 Plaintiff appeared at a scheduled BPH hearing on December 7, 2009. The panel  
25 consisted of Defendants Arbaugh and Lopez. Arbaugh and Lopez “noted the objections to the  
26 2009 psych evaluation, but stated they intended to rely upon it because it was in front of them.  
27 On December 21, 2009, Defendant Kusaj, the Chief BPH Psychologist, “reports that defendants

1 Arbaugh and F. Lopez, as commissioners of the December 7, 2009, BPH, did not report any  
2 errors in the 2009 psych evaluation. Further, defendant Kusaj admitted the existence of a  
3 BPH/FAD policy where only requests received from a BPH panel for new psychological  
4 evaluations will be considered.” Plaintiff alleges that the failure of Defendants Arbaugh and  
5 Lopez to document errors in the 2009 psychological evaluation undermined the validity of the  
6 hearing. Plaintiff was therefore improperly denied parole.

7 In November of 2009, Plaintiff forwarded a complaint to Defendant Brown, “that shows  
8 the errors and violations within the 2009 psych evaluation signed by Olson and Walker.”  
9 Plaintiff was notified by an enforcement technician that his information was being reviewed and  
10 that a thorough analysis would be conducted. On December 29, 2009, Defendant Brown sent to  
11 Plaintiff a “notice of the need for plaintiff to complete and return a consent form authorizing  
12 access to plaintiff’s records, and she included the form.” On January 19, 2010, Plaintiff was  
13 informed by Defendant Brown that she closed his case because she did not receive the consent  
14 form. Plaintiff then provided the forms, explaining that prison officials had delayed delivering  
15 Defendant Brown’s correspondence. Plaintiff alleges that thereafter, Brown “began denying  
16 plaintiff due process and equal protections, and began jeopardizing public safety, by intentionally,  
17 and without any legitimate justification, suppressing plaintiff’s complaints against Julie Olson  
18 and Steven Walker.”

19 On April 19, 2010, Defendant Brown “falsely alleged her office did ‘not have the  
20 authority to obtain or access the records relied upon by Dr. Walker and Dr. Olson in preparing  
21 the 2009 psych evaluation.” Plaintiff was advised that his objection must be raised “through the  
22 complaint and appeals process set forth by the BPH.”

23 **A. Parole**

24 Plaintiff premises his claim on a right to parole. To state a claim under section 1983, a  
25 plaintiff must allege that (1) the defendant acted under color of state law and (2) the defendant  
26 deprived him of rights secured by the Constitution or federal law. Long v. County of Los  
27 Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). “A person deprives another of a constitutional  
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1 right, where that person ‘does an affirmative act, participates in another’s affirmative acts, or  
2 omits to perform an act which [that person] is legally required to do that causes the deprivation  
3 of which complaint is made.’” Hydrick v. Hunter, 500 F.3d 978, 988 (9th Cir. 2007) (quoting  
4 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)).

5         Regarding Plaintiff’s claims against the California Board of Parole Hearings, these claims  
6 are foreclosed by the Supreme Court’s decision in Swarthout v. Cooke, 562 U.S. 216 (2011). In  
7 Swarthout, the Supreme Court held that the federal habeas court’s inquiry into whether a  
8 prisoner who has been denied parole received due process is limited to determining whether the  
9 prisoner “was allowed an opportunity to be heard and was provided a statement of the reasons  
10 why parole was denied.” Id., (citing Greenholtz v. Inmates of Neb. Penal and Correctional  
11 Complex, 442 U.S. 1, 16 (1979)). Plaintiff does not contend he was denied these procedural due  
12 process guarantees, and in any case, the parole hearing transcript reflects that he was present at  
13 his parole hearing, was given an opportunity to be heard, and was provided a statement of reason  
14 for the parole board’s decision. (Compl.) According to the Supreme Court, this is “the  
15 beginning and end of the federal habeas court’s inquiry into whether [the prisoner] received due  
16 process.” Swarthout, 562 U.S. at 219. “The Constitution does not require more.” Greenholtz,  
17 442 U.S. at 16. Plaintiff’s allegations go to the information on which the parole board relied.  
18 Any such challenge should be raised in the procedures set forth for challenging the denial with  
19 the BPH. As noted, Plaintiff has no protected interest in parole itself. Therefore, Plaintiff’s  
20 challenge to the Board’s denial of parole fails to state a cognizable federal claim for relief.

21         Further, when a prisoner challenges the legality or duration of his custody, or raises a  
22 constitutional challenge which could entitle him to an earlier release, his sole federal remedy is a  
23 writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475 (1973); Young v. Kenny, 907 F.2d  
24 874 (9<sup>th</sup> Cir. 1990), cert. denied, 498 U.S. 1126 (1991).

25         Where the complaint states a habeas claim instead of a § 1983 claim, the court should  
26 dismiss the claim without prejudice for failure to exhaust, rather than converting it to a habeas  
27 action and addressing it on the merits. See Blueford v. Prunty, 108 F.3d 251, 255 (9<sup>th</sup> Cir. 1997);

1 Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9<sup>th</sup> Cir. 1995). Where the complaint alleges  
2 claims that sound in habeas and claims that do not, the court should allow the non-habeas claims  
3 to proceed. See Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 681-82 (9<sup>th</sup>  
4 Cir. 1984).

5 **III. Conclusion and Recommendation**

6 The Court has screened Plaintiff's complaint and finds that it does not state any claims  
7 upon which relief may be granted under section 1983. The gravamen of Plaintiff's complaint is  
8 that the parole board denied Plaintiff's release on parole based on incorrect information. The  
9 facts alleged indicate that Plaintiff received all required due process. Because Plaintiff is  
10 challenging the validity of the parole decision, his sole remedy is a petition for writ of habeas  
11 corpus. Because the Court finds that these deficiencies are not capable of being cured by  
12 amendment, the Court HEREBY RECOMMENDS dismissal of this action, without prejudice to  
13 the filing of a petition for writ of habeas corpus. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9<sup>th</sup>  
14 Cir. 1987).

15 These findings and recommendations are submitted to the United States District Judge  
16 assigned to the case, pursuant to the provisions of 28 U.S. C. § 636(b)(1)(B). Within thirty days  
17 after being served with these findings and recommendations, plaintiff may file written objections  
18 with the Court. Such a document should be captioned "Objections to Magistrate Judge's  
19 Findings and Recommendations." The parties are advised that failure to file objections within  
20 the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d  
21 834 (9<sup>th</sup> Cir. 2014)(citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9<sup>th</sup> Cir. 1991)).

22  
23 IT IS SO ORDERED.

24 Dated: March 5, 2015

25 /s/ Gary S. Austin

26 UNITED STATES MAGISTRATE JUDGE