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

EDWARD GOZY,

Petitioner,

No. CIV S-08-1368 GGH P

vs.

D.K. SISTO,

Respondent.

ORDER &
FINDINGS AND RECOMMENDATIONS

_____/

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the 2006 decision by the Governor, reversing the grant of parole by the Board of Parole Hearings (BPH). On November 2, 2010, respondent filed a motion to dismiss the petition as moot, as the Governor’s 2007 decision finding petitioner unsuitable for parole was successfully challenged in a state habeas petition in the Los Angeles County Superior Court and petitioner was released on parole on June 18, 2009.

Petitioner was ordered to respond to respondent’s motion to dismiss, on November 4, 2010, but he never filed a response. On January 11, 2011, petitioner was ordered to show cause within 21 days why the motion to dismiss should not be granted. Petitioner has not responded to the order to show cause or otherwise communicated with the court since August 15, 2008.

1 In addition, on January 24, 2011, the United States Supreme Court in a per curiam
2 decision found that the Ninth Circuit erred in commanding a federal review of the state's
3 application of state law in applying the "some evidence" standard in the parole eligibility habeas
4 context. Swarthout v. Cooke, 502 U.S. ___, ___ S. Ct. ___, 2011 WL 197627 *2 (Jan. 24,
5 2011). Quoting, inter alia, Estelle v. McGuire, 502 U.S. 62, 67 (1991), the Supreme Court re-
6 affirmed that "'federal habeas corpus relief does not lie for errors of state law.'" Id. While the
7 high court found that the Ninth Circuit's holding that California law does create a liberty interest
8 in parole was "a reasonable application of our cases" (while explicitly not reviewing that
9 holding),¹ the Supreme Court stated:

10 When, however, a State creates a liberty interest, the Due Process
11 Clause requires fair procedures for its vindication-and federal
12 courts will review the application of those constitutionally required
13 procedures. In the context of parole, we have held that the
14 procedures required are minimal.

15 Swarthout v. Cooke, at *2.

16 Citing Greenholtz,² the Supreme Court noted it had found under another state's
17 similar parole statute that a prisoner had "received adequate process" when "allowed an
18 opportunity to be heard" and "provided a statement of the reasons why parole was denied."
19 Swarthout, at *2. Noting their holding therein that "[t]he Constitution [] does not require more,"
20 the justices in the instances before them, found the prisoners had "received at least this amount of

21 ¹ While not specifically overruling Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en
22 banc), the Supreme Court instead referenced Pearson v. Muntz, 606 F.3d 606 (9th Cir. 2010),
23 which further explained Hayward. Thus, the Supreme Court's decision in Swarthout, essentially
24 overruled the general premise of Hayward. When circuit authority is overruled by the Supreme
25 Court, a district court is no longer bound by that authority, and need not wait until the authority is
26 also expressly overruled. See Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en
banc). Furthermore, "circuit precedent, authoritative at the time it was issued, can be effectively
overruled by subsequent Supreme Court decisions that 'are closely on point,' even though those
decisions do not expressly overrule the prior circuit precedent." Miller, 335 F.3d at 899 (quoting
Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002)). Therefore, this court
is not bound by Hayward.

² Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 16 (1979).

1 process: They were allowed to speak at their parole hearings and to contest the evidence against
2 them, were afforded access to their records in advance, and were notified as to the reasons why
3 parole was denied.” Id.

4 The Supreme Court was emphatic in asserting “[t]hat should have been the
5 beginning and the end of the federal habeas courts’ inquiry....” Swarthout, at *3. “It will not do
6 to pronounce California’s ‘some evidence’ rule to be ‘a component’ of the liberty interest....” Id.
7 “No opinion of ours supports converting California’s “some evidence” rule into a substantive
8 federal requirement.” Id. Thus, it appears there is no federal due process requirement for a
9 “some evidence” review and it also appears that federal courts are precluded from review of the
10 state court’s application of its “some evidence” standard.

11 A review of the petition in this case demonstrates that it is entirely based on
12 alleged violation of California’s “some evidence” requirement.

13 For all the reasons stated above, this case should be dismissed.

14 Accordingly, IT IS HEREBY ORDERED that a district judge be assigned to this
15 case.

16 IT IS HEREBY RECOMMENDED that this petition be dismissed.

17 If petitioner files objections, he shall also address if a certificate of appealability
18 should issue and, if so, as to which issues. A certificate of appealability may issue under 28
19 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a
20 constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of appealability must “indicate
21 which specific issue or issues satisfy” the requirement. 28 U.S.C. § 2253(c)(3).

22 These findings and recommendations are submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
24 days after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections

1 shall be served and filed within fourteen days after service of the objections. The parties are
2 advised that failure to file objections within the specified time may waive the right to appeal the
3 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: February 14, 2011

/s/ Gregory G. Hollows

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6 GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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