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

RUDY ZAMORANO,

Petitioner,

No. CIV S-08-3116 GEB DAD (HC)

vs.

MICHAEL MARTEL,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition before this court petitioner challenges a decision by the California Board of Parole Hearings (hereinafter “Board”) to deny him parole for one year at his parole consideration hearing held on October 19, 2007. Upon careful consideration of the record and applicable law, the undersigned will recommend that petitioner’s application for habeas corpus relief be denied.

I. Procedural Background

On January 7, 1981, petitioner entered a plea of guilty to first degree murder in the Los Angeles County Superior Court. (Petition (hereinafter “Pet.”) at 3.) He was sentenced to a state prison term of twenty-five years to life. (Id.) Petitioner began serving his prison term in August 1981 and was first eligible for parole on January 4, 1998. (Id.)

1 On October 19, 2007, following petitioner’s seventh parole hearing, the Board
2 found that petitioner was unsuitable for release and denied parole for one year. (Pet., Ex. A
3 (hereinafter “Board Hearing”) at 125; see id. at 54-55 (noting six prior hearings).) Petitioner
4 appeared at and participated in this hearing. (Id. at 6-114.) The Board’s decision finding
5 petitioner unsuitable for parole, and the reasons therefor, were announced in petitioner’s
6 presence. (Id. at 116-25.)

7 On December 26, 2007, petitioner filed a petition for habeas corpus in the Los
8 Angeles County Superior Court challenging the Board’s October 2007 determination. (Pet., Ex.
9 E.) On April 1, 2008, that court denied the petition in a reasoned decision. (Id.) On May 6,
10 2008, petitioner raised the same challenge in a petition to the California Court of Appeal for the
11 Second Appellate District. (Pet., Ex. F.) On May 3, 2008, the state appellate court denied the
12 petition, finding that the Board’s decision was supported by some evidence as required by
13 California law. (Id.) The California Supreme Court summarily denied a petition for review filed
14 by petitioner. (Pet., Ex. G.)

15 On December 22, 2008, petitioner filed the instant federal habeas petition. (Doc.
16 No. 1.) Therein, petitioner claims that the Board’s October 19, 2007 denial of parole is not
17 supported by “some evidence” that he would pose an unreasonable risk to society if released, and
18 thus violates his constitutional right to due process.

19 II. Scope of Review Applicable to Due Process Challenges to the Denial of Parole

20 The Due Process Clause of the Fourteenth Amendment prohibits state action that
21 deprives a person of life, liberty, or property without due process of law. A litigant alleging a
22 due process violation must first demonstrate that he was deprived of a liberty or property interest
23 protected by the Due Process Clause and then show that the procedures attendant upon the
24 deprivation were not constitutionally sufficient. Kentucky Dep’t of Corrections v. Thompson,
25 490 U.S. 454, 459-60 (1989).

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1 A protected liberty interest may arise from either the Due Process Clause of the
2 United States Constitution “by reason of guarantees implicit in the word ‘liberty,’” or from “an
3 expectation or interest created by state laws or policies.” Wilkinson v. Austin, 545 U.S. 209,
4 221 (2005). See also Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States
5 Constitution does not, of its own force, create a protected liberty interest in a parole date, even
6 one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981); Greenholtz v. Inmates of
7 Neb. Penal, 442 U.S. 1, 7 (1979) (There is “no constitutional or inherent right of a convicted
8 person to be conditionally released before the expiration of a valid sentence.”). However, a
9 state’s statutory scheme, if it uses mandatory language, “creates a presumption that parole release
10 will be granted” when or unless certain designated findings are made, and thereby gives rise to a
11 constitutional liberty interest. Greenholtz, 442 U.S. at 12. See also Allen, 482 U.S. at 376-78.

12 California’s parole scheme gives rise to a liberty interest in parole protected by the
13 federal Due Process Clause. Pirtle v. California Bd. of Prison Terms, 611 F.3d 1015, 1020 (9th
14 Cir. 2010); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002); see also Swarthout v.
15 Cooke, 562 U.S. ___, ___, 131 S. Ct. 859, 861-62 (2011) (finding the Ninth Circuit’s holding in
16 this regard to be a reasonable application of Supreme Court authority); Pearson v. Muntz,
17 ___ F.3d ___, 2011 WL 1238007, at *4 (9th Cir. Apr. 5, 2011) (“[Swarthout v.] Cooke did not
18 disturb our precedent that California law creates a liberty interest in parole.”) In California, a
19 prisoner is entitled to release on parole unless there is “some evidence” of his or her current
20 dangerousness. In re Lawrence, 44 Cal.4th 1181, 1205-06, 1210 (2008); In re Rosenkrantz, 29
21 Cal.4th 616, 651-53 (2002).

22 In Swarthout, the Supreme Court reviewed two cases in which California
23 prisoners were denied parole - in one case by the Board, and in the other by the Governor after
24 the Board had granted parole. Swarthout, 131 S. Ct. at 860-61. The Supreme Court noted that
25 when state law creates a liberty interest, the Due Process Clause of the Fourteenth Amendment
26 requires fair procedures, “and federal courts will review the application of those constitutionally

1 required procedures.” Id. at 862. The Court concluded that in the parole context, however, “the
2 procedures required are minimal” and that the “Constitution does not require more” than “an
3 opportunity to be heard” and being “provided a statement of the reasons why parole was denied.”
4 Id. (citing Greenholtz, 442 U.S. at 16). The Supreme Court therefore rejected Ninth Circuit
5 decisions that went beyond these minimal procedural requirements and “reviewed the state
6 courts’ decisions on the merits and concluded that they had unreasonably determined the facts in
7 light of the evidence.” Swarthout, 131 S. Ct. at 862. In particular, the Supreme Court rejected
8 the application of the “some evidence” standard to parole decisions by the California courts as a
9 component of the federal due process standard. Id. at 862-63.¹ See also Pearson, 2011 WL
10 1238007, at *4.

11 III. Petitioner’s Claims

12 As noted above, petitioner seeks federal habeas relief on the grounds that the
13 Board’s 2007 decision to deny him parole, and the findings upon which that denial was based,
14 were not supported by “some evidence” as required under California law. However, under the
15 Supreme Court’s decision in Swarthout this court may not review whether California’s “some
16 evidence” standard was correctly applied in petitioner’s case.² 131 S. Ct. at 862-63; see also
17 Miller v. Oregon Bd. of Parole and Post-Prison Supervision, ___ F.3d ___, 2011 WL 1533512, at
18

19 ¹ In its per curiam opinion the Supreme Court did not acknowledge that for twenty-four
20 years the Ninth Circuit had consistently held that in order to comport with due process a state
21 parole board’s decision to deny parole had to be supported by “some evidence,” as defined in
22 Superintendent v. Hill, 472 U.S. 445 (1985), that bore some indicia of reliability. See Jancsek v.
Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); McQuillion v. Duncan, 306 F.3d
23 895, 904 (9th Cir. 2002) (“In Jancsek . . . we held that the process that is due in the parole
24 rescission setting is the same as the Supreme Court outlined in Superintendent v. Hill”)

25 ² Here, the state courts’ decisions upholding the Board’s 2007 denial of parole rested
26 solely on petitioner’s 2003 prison disciplinary conviction for engaging in mutual combat under
circumstances where all agreed petitioner had merely attempted to stop two other inmates from
fighting with one another. The state courts’ decisions were arguably based upon an incorrect
application of California’s “some evidence” standard. However, the United States Supreme
Court has now clearly stated that whether California law was correctly applied in this regard “is
no federal concern.” Swarthout v. Cooke, 562 U.S. ___, ___, 131 S. Ct. 859, 863 (2011).

1 *5 (9th Cir. Apr. 25, 2011) (“The Supreme Court held in [Swarthout v.] Cooke that in the
2 context of parole eligibility decisions the due process right is *procedural*, and entitles a prisoner
3 to nothing more than a fair hearing and a statement of reasons for a parole board’s decision[.]”);
4 Roberts v. Hartley, ___ F.3d ___, 2011 WL 1365811, at *3 (9th Cir. Apr. 12, 2011) (under the
5 decision in Swarthout, California’s parole scheme creates no substantive due process rights and
6 any procedural due process requirement is met as long as the state provides an inmate seeking
7 parole with an opportunity to be heard and a statement of the reasons why parole was denied);
8 Pearson, 2011 WL 1238007, at *3 (9th Cir. Apr. 5, 2011) (“While the Court did not define the
9 minimum process required by the Due Process Clause for denial parole under the California
10 system, it made clear that the Clause’s requirements were satisfied where the inmates ‘were
11 allowed to speak at their parole hearings and to contest the evidence against them, were afforded
12 access to their records in advance, and were notified as to the reasons why parole was denied.’”)

13 The federal habeas petition pending before the court in this case reflects that
14 petitioner was represented by counsel at his 2007 parole suitability hearing. (Board Hearing, at
15 6.) As noted above, the record also establishes that at that hearing petitioner was given the
16 opportunity to be heard and received a statement of the reasons why parole was denied by the
17 Board panel. That is all the process that was due petitioner under the Constitution. Swarthout,
18 131 S. Ct. 862; see also Miller, 2011 WL 1533512, at *5; Roberts, 2011 WL 1365811, at *3;
19 Pearson, 2011 WL 1238007, at *3. It now plainly appears that petitioner is not entitled to relief
20 with respect to his due process claims. Accordingly, the pending petition should be denied.

21 IV. Conclusion

22 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s application for
23 a writ of habeas corpus be denied.

24 These findings and recommendations are submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
26 one days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
3 shall be served and filed within fourteen days after service of the objections. Failure to file
4 objections within the specified time may waive the right to appeal the District Court’s order.
5 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
6 1991).

7 In any objections he elects to file, petitioner may address whether a certificate of
8 appealability should issue in the event he files an appeal of the judgment in this case. See Rule
9 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a
10 certificate of appealability when it enters a final order adverse to the applicant); Hayward v.
11 Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc) (prisoners are required to obtain a certificate of
12 appealability to review the denial of a habeas petition challenging an administrative decision
13 such as the denial of parole by the parole board).

14 DATED: May 19, 2011.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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