

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

G. W. RENNELS,

Petitioner,

No. CIV S-10-0755 LKK GGH (TEMP) P

vs.

G. SWARTHOUT, et al.,

Respondents.

FINDINGS & RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the September 10, 2008 decision by the California Board of Parole Hearings (BPH) finding him unsuitable for parole.

On February 2, 2011, the undersigned ordered both parties to provide briefing regarding the recent United States Supreme Court decision that found that the Ninth Circuit erred in commanding a federal review of the state’s application of state law in applying the “some evidence” standard in the parole eligibility habeas context. Swarthout v. Cooke, 131 S. Ct. 859, 862-63 (2011) (per curiam).

The parties have timely filed briefing, yet for the reasons set forth in the prior order, it appears there is no federal due process requirement for a “some evidence” review, thus

////

1 the federal courts are precluded from a review of the state court's application of its "some
2 evidence" standard.¹

3 In certain respects, petitioner does not directly claim that the evidence relied upon
4 by the BPH, and later the state courts, was not sufficiently "some evidence" on which to base the
5 finding of future dangerousness. Rather, he points to certain factors set forth in the regulations
6 ostensibly guiding the parole commissioners in arriving at that determination with respect to
7 dangerousness, and declares those factors "unconstitutionally vague." See 15 CCR 2402(c), (d).
8 For example, petitioner claims that the factors regarding realistic parole plans, or psychological
9 problems, or institutional behavior and programming, do not give the commissioners sufficient
10 direction to arrive at an appropriate ultimate determination on dangerousness if released on
11 parole. The undersigned views these assertions as but a backdoor attack on the lack of "some
12 [probative/reliable] evidence." If a petitioner does not have the right to have the future
13 dangerousness issue gauged by "some evidence," *a fortiori*, he does not have a right to have
14 reviewed for vagueness the subsidiary standards used to acquire or organize that evidence. The
15 Supreme Court was quite explicit regarding the federal due process rights afforded California
16 parole suitability applicants, and those rights were procedural only. Swarthout directed the
17 substance of the decision, and how the substance was determined, to be off limits.

18 Indeed, petitioner's argument would lead to circular, indeed, absurd results. In the
19 situation where no standards were set forth in the regulations guiding the determination of future
20 dangerousness, the probative value and reliability of the evidence leading to the ultimate
21 determination of dangerousness would be unreviewable under Swarthout; however, if unclear

22
23 ¹ The court notes some perversity in the result here. Loss of good-time credits, even for a
24 day, pursuant to decision at a prison disciplinary hearing, must be supported by "some evidence."
25 Superintendent v. Hill, 472 U.S. 445, 455, 105 S. Ct. 2768 (1985). Assignment to administrative
26 segregation requires the same "some evidence" before such an assignment can be justified.
Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003). However, a denial of parole eligibility after
sometimes decades in prison, and where another opportunity for parole can be delayed for as
long as fifteen more years, requires no such protection from the federal due process standpoint.
Nevertheless, such is the state of the law.

1 standards were utilized to acquire or collect the “deficient” evidence relied upon, petitioner could
2 obtain a new hearing. Thus, petitioner would have this court strike the standards used under
3 California regulations as unclear, and return petitioner to the BPH for a hearing where no
4 regulatory standards guiding dangerousness evidence are applicable (or have to be) – a certain
5 defeat for petitioner, and certainly an ultimate outcome unreviewable by this court under
6 Swarthout. In other words, the BPH could rely on precisely the same “some evidence” of
7 dangerousness utilized previously uncabined by any regulatory factors. A fool’s errand indeed.

8 A review of the petition in this case demonstrates that the claims presented therein
9 are all based, either directly or indirectly, on the assumption that the “some evidence”
10 requirement is enforceable in this court. Therefore, the petition should be denied.

11 Accordingly, IT IS HEREBY RECOMMENDED that the petition be denied.

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

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

23 ////

24 ////

25 ////

26 ////

1 advised that failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: March 3, 2011

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

/s/ Gregory G. Hollows

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

kc
renn0755.157