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

ROBIN LYNN BAILEY,

Petitioner,

No. 2: 10-cv-2454 KJM GGH

vs.

GARY SWARTHOUT,

Respondent.

ORDER

Petitioner is a state prisoner proceeding pro se on his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2008 prison disciplinary finding that he was guilty of the specific act of escape, for which he was assessed a 150-day credit loss. See Doc. No. 30, Ex. 2 at 2. Petitioner alleges that there was insufficient evidence to support the finding that he committed the act of escape and that such a finding was arbitrary and capricious, in violation of his constitutional due process rights. See Doc. No. 1 at 4.

Petitioner was additionally prosecuted in state court, and was convicted in 2009 of escape. On August 26, 2010, the California Court of Appeals found insufficient evidence of escape and reversed the conviction. See Doc. No. 33 at 36-37. The Court of Appeals also found that “the evidence was more than ample to establish an attempt to escape from prison.” Id. at 37. However, the Court of Appeals determined that, because the trial court failed to instruct the jury

1 regarding an attempt to escape from prison, it could not reduce the conviction. Id. at 37-38. The
2 Attorney General petitioned for review on the modification issue only, and on July 12, 2012, the
3 California Supreme Court affirmed the Appellate Court, again noting that the Attorney General
4 did not challenge the Court of Appeal's conclusion regarding the sufficiency of the evidence on
5 the escape conviction. See Doc. No. 34 at 12.

6 On July 31, 2012, petitioner filed with the court Supplemental Authority in
7 support of his petition. According to petitioner, under California regulations, he is entitled to
8 dismissal of the disciplinary charge underlying this petition because the state courts have
9 determined that there was insufficient evidence to support the escape conviction. See Cal. Code
10 Reg., title 15, § 3316(c)(3) ("If a court finds the inmate not guilty after a finding of guilty in a
11 disciplinary hearing, the rule violation charges shall be dismissed.").

12 Accordingly, IT IS ORDERED that:

13 1. Within 21 days of the filing date of this order, respondent shall show cause
14 why California Code of Regulations, title 15, § 3316 would not direct disposition of this petition.

15 2. Petitioner may file an optional response within 7 days after service of
16 respondent's response.

17 DATED: August 23, 2012

18
19 /s/ Gregory G. Hollows
20 UNITED STATES MAGISTRATE JUDGE

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