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

FRANCISCO H. LOPEZ,

Petitioner,

No. 2:10-cv-3422 MCE KJN P

vs.

STATE OF CALIFORNIA, BOARD
OF PRISON TERMS,

Respondents.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding without counsel, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

Examination of the request to proceed in forma pauperis reveals petitioner is unable to afford the costs of this action. Accordingly, leave to proceed in forma pauperis is granted. 28 U.S.C. § 1915(a).

Under Rule 4 of the Rules Governing Section 2254 Cases, the court must conduct a preliminary review of § 2254 habeas petitions and dismiss any petition where it plainly appears that petitioner is not entitled to relief in this court.

Petitioner challenges the fact that he was denied parole in 2009. He asserts the

1 evidence presented at his parole hearing is not sufficient under the Due Process Clause of the
2 Fourteenth Amendment to sustain his being denied parole.

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

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

21 California’s parole statutes give rise to a liberty interest in parole protected by the
22 federal due process clause. Swarthout v. Cooke, 562 U.S. ____ (2011), No. 10-333, 2011 WL
23 197627, at *2 (Jan. 24, 2011). In California, a prisoner is entitled to release on parole unless there
24 is “some evidence” of his or her current dangerousness. In re Lawrence, 44 Cal.4th 1181, 1205-
25 06, 1210 (2008); In re Rosenkrantz, 29 Cal.4th 616, 651-53 (2002). However, in Swarthout the
26 United States Supreme Court held that “[n]o opinion of [theirs] supports converting California’s

1 ‘some evidence’ rule into a substantive federal requirement.” Swarthout, 2011 WL 197627, at *3.
2 In other words, the Court specifically rejected the notion that there can be a valid claim under the
3 Fourteenth Amendment for insufficiency of evidence presented at a parole proceeding. Id. at *3.
4 Rather, the protection afforded by the federal due process clause to California parole decisions
5 consists solely of the “minimal” procedural requirements set forth in Greenholtz, specifically “an
6 opportunity to be heard and . . . a statement of the reasons why parole was denied.” Swarthout, at
7 *2-3.

8 Because petitioner fails to allege that he was denied any of the process due under
9 the Fourteenth Amendment at his 2009 parole hearing, his petition for writ of habeas corpus must
10 be denied.

11 In accordance with the above, IT IS HEREBY ORDERED that petitioner’s request
12 to proceed in forma pauperis is granted; and

13 IT IS HEREBY RECOMMENDED that:

- 14 1. Petitioner’s application for writ of habeas corpus be denied; and
- 15 2. This case be closed.

16 These findings and recommendations are submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
18 one days after being served with these findings and recommendations, petitioner may file written
19 objections with the court. Such a document should be captioned “Objections to Magistrate
20 Judge’s Findings and Recommendations.” If petitioner files objections, he shall also address
21 whether a certificate of appealability should issue and, if so, why and as to which issues. A
22 certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a
23 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). Petitioner is

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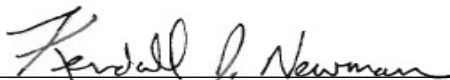
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1 advised that failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: January 31, 2011

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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