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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ONESIMO MARIN HARO,
Petitioner,

v.

ROBERT W. FOX,
Respondent.

No. 2: 18-cv-1859 KJN P

ORDER AND FINDINGS &
RECOMMENDATIONS

Petitioner is a state prisoner, proceeding without counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the filing fee. Pending before the court is the first amended petition. (ECF No. 6.) For the reasons stated herein, the undersigned recommends that this action be dismissed.

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the court is required to make a preliminary review of each petition for writ of habeas corpus. “If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief,” the court must dismiss the petition. Rule 4 of the Rules Governing § 2254 Cases.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent’s counsel. 28 U.S.C. § 2254(b)(3). A waiver of exhaustion, thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the

1 highest state court with a full and fair opportunity to consider all claims before presenting them to
2 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d
3 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

4 It appears that the claims raised in the petition are not exhausted. However, without
5 further briefing, the undersigned cannot definitively find the claims not exhausted. A habeas
6 corpus petition may be denied on the merits notwithstanding the failure of the applicant to
7 exhaust state court remedies. 28 U.S.C. § 2254(b)(2). Because the claims are without merit, the
8 undersigned need not reach the issue of exhaustion.

9 Petitioner raises two claims challenging the June 8, 2016 decision by the Board of Parole
10 Hearings (“BPH”) finding him unsuitable for parole. In claim one, petitioner argues that he was
11 denied his right to be heard at the hearing. Petitioner alleges that he, petitioner, speaks only
12 Spanish. Petitioner argues that he could not effectively communicate with the attorney who
13 represented him at the June 8, 2016 hearing because his attorney did not speak Spanish.
14 Petitioner also claims that none of the BPH members attending the hearing spoke Spanish.
15 Petitioner states that while an interpreter attended the hearing, reliance on an interpreter created
16 the possibility of a mix-up between what the interpreter told petitioner and what a BPH member
17 stated, interfering with his right to be heard.

18 In claim two, petitioner alleges that his inability to examine the evidence presented at the
19 hearing in advance of the hearing violated his right to due process. In support of this claim,
20 petitioner argues that while he met with his attorney prior to the hearing, his attorney did not
21 possess the language skills to communicate effectively with him. Petitioner suggests that he did
22 not understand what his attorney told him at their meeting held prior to the hearing.

23 “There is no constitutional or inherent right of a convicted person to be conditionally
24 released before the expiration of a valid sentence.” Greenholtz v. Inmates of Nebraska Penal and
25 Correctional Complex, 442 U.S. 1, 7 (1979) (“Greenholtz”). In some instances, however, state
26 statutes may create liberty interests in parole release entitled to protection under the federal Due
27 Process Clause. See Board of Pardons v. Allen, 482 U.S. 369, 371 (1987); Greenholtz, 442 U.S.
28 at 12. The Ninth Circuit has held that California’s statutory provisions governing parole create

1 such a liberty interest. See Roberts v. Hartley, 640 F.3d 1042, 1045 (9th Cir. 2011); Hayward v.
2 Marshall, 603 F.3d 546, 555 (9th Cir. 2010) (en banc), overruled on other grounds by Swarthout
3 v. Cooke, 562 U.S. 216 (2011).

4 “In the context of parole, ... the procedures required are minimal.” Swarthout v. Cooke,
5 562 U.S. at 220. Due Process requires that the state furnish a parole applicant with an
6 opportunity to be heard and a statement of reasons for a denial of parole. Greenholtz, 442 U.S. at
7 16; see also Swarthout v. Cooke, 562 U.S. at 220. “The Constitution does not require more.”
8 Greenholtz, 442 U.S. at 16; accord Swarthout v. Cooke, 562 U.S. at 220 (citation omitted); see
9 also Roberts v. Hartley, 640 F.3d at 1046 (“there is no substantive due process right created by
10 the California parole scheme”). In the parole context, then, “[d]ue process is satisfied as long as
11 the state provides an inmate seeking parole with ‘an opportunity to be heard and ... a statement of
12 the reasons why parole was denied.’” Roberts v. Hartley, 640 F.3d at 1046 (quoting Swarthout v.
13 Cooke, 562 U.S. at 220).

14 In claim one, petitioner argues that having an interpreter did not satisfy his right to be
15 heard at his parole suitability hearing. Petitioner argues that he should have been provided with a
16 Spanish speaking attorney to represent him at the hearing, and that the BPH members attending
17 the hearing should have spoken Spanish.

18 The undersigned has reviewed the transcript from the June 8, 2016 suitability hearing
19 attached to the amended petition. (ECF No. 1 at 11-254.) The transcript reflects that petitioner
20 communicated with the BPH members, through the interpreter, throughout the hearing. Petitioner
21 made a lengthy statement at the hearing regarding his responsibility for his crime. (Id. at 130-31.)

22 The transcript from the suitability hearing reflects that petitioner, through the interpreter,
23 had an opportunity to be heard. The failure to provide petitioner with a Spanish speaking attorney
24 and the failure of the BPH members to speak Spanish did not violate petitioner’s right to be
25 heard. Petitioner has failed to establish that he was unable to participate in the 2016 parole
26 suitability hearing because of his inability to speak or understand English. Petitioner has pointed
27 to nothing in the record which would indicate or suggest that he did not understand the
28 translation, that the interpreter did not translate any part of the hearing, or that any part of the

1 translation was incorrect. For these reasons, the undersigned finds that petitioner's claim that he
2 was denied his right to be heard at his suitability hearing is without merit.

3 As discussed above, in claim two, petitioner alleges that his inability to examine the
4 evidence presented at the suitability hearing in advance of the hearing violated his right to due
5 process. Petitioner also argues that while he met with his attorney prior to the hearing, his
6 attorney did not possess the language skills to communicate effectively with him.

7 In the context of parole, petitioner does not have a constitutional right to examine the
8 evidence presented at the suitability hearing in advance of the hearing. Rather, in the parole
9 context, due process is satisfied as long as the state provides the inmate with an opportunity to be
10 heard and a statement of the reasons why parole was denied. See Swarthout v. Cooke, 562 U.S.
11 at 220). Accordingly, petitioner's claim that he was denied his right to examine the evidence
12 presented at the hearing prior to the hearing is without merit.

13 Petitioner may also be arguing that the counsel who represented him at the suitability
14 hearing was ineffective because he (counsel) did not speak Spanish. However, there is no
15 constitutional right to counsel at parole consideration hearings. See Dorado v. Kerr, 454 F.2d
16 892, 896-97 (9th Cir.), cert. denied, 409 U.S. 934 (1972); see also Pennsylvania v. Finley, 481
17 U.S. 551, 555 (1987) (“[T]he right to appointed counsel extends to the first appeal of right, and no
18 further.”); Villagrana v. Diaz, 2012 WL 4210308, at *4 (E.D. Cal. Sept. 19, 2012) (“there is no
19 clearly established right to counsel at parole suitability hearings”), certificate of appealability
20 denied, No. 12-17220 (9th Cir. Oct. 28, 2016). Because petitioner had no federal constitutional
21 right to counsel at his parole hearing, he can claim no Sixth Amendment right to effective
22 assistance of counsel at the hearing. See Coleman v. Thompson, 501 U.S. 722, 752 (1991)
23 (petitioner cannot claim constitutionally ineffective assistance of counsel where there is no
24 underlying constitutional right to counsel); but see Lopez v. Warden, 388 Fed. Appx. 711, 712 n.1
25 (9th Cir. 2010) (certifying for appeal petitioner's claim that he received ineffective assistance of
26 counsel at parole hearing, but rejecting claim because record did not indicate that counsel's
27 performance was deficient and petitioner could not establish prejudice).


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1 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court shall appoint a
2 district judge to this action; and

3 IT IS HEREBY RECOMMENDED that this action be dismissed.

4 These findings and recommendations are submitted to the United States District Judge
5 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
6 after being served with these findings and recommendations, petitioner may file written
7 objections with the court and serve a copy on all parties. Such a document should be captioned
8 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
9 he shall also address whether a certificate of appealability should issue and, if so, why and as to
10 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
11 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
12 2253(c)(3). Petitioner is advised that failure to file objections within the specified time may
13 waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
14 1991).

15 Dated: October 4, 2018

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18 KENDALL J. NEWMAN
19 UNITED STATES MAGISTRATE JUDGE

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