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United States District Court
For the Northern District of California

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

JESSE HERNANDEZ,)	No. C 07-5455 MMC (PR)
)	
Petitioner,)	ORDER DENYING PETITION FOR
)	WRIT OF HABEAS CORPUS;
v.)	DENYING CERTIFICATE OF
)	APPEALABILITY
BEN CURRY, Warden,)	
)	
Respondent.)	
_____)	

On November 19, 2007, petitioner, a California prisoner incarcerated at the Correctional Training Facility, Soledad, and proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging a 2006 decision by the California Board of Prison Hearings (“Board”) to deny petitioner parole. Thereafter, respondent filed an answer to the petition and petitioner filed a traverse.

Subsequently, the Ninth Circuit issued its decision in Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc), which addressed important issues relating to federal habeas review of Board decisions denying parole to California state prisoners. After the parties filed supplemental briefs explaining their views of how the Hayward en banc decision applies to the facts presented in the instant petition, the United States Supreme Court filed its opinion in Swarthout v. Cooke, 131 S. Ct. 859 (2011) (per curiam), which opinion clarifies the constitutionally required standard of review applicable to the claims raised herein.

1 For the reasons discussed below, the petition will be denied.

2 **BACKGROUND**

3 In 1996, in the Superior Court of San Diego County (“Superior Court”), petitioner was
4 convicted of attempted first degree murder with a weapon enhancement, being in possession
5 of a destructive device, attempted arson, two counts of vandalism, and stalking. The jury
6 also found, in connection with the attempted murder charge, that petitioner had personally
7 used a deadly and dangerous weapon. Petitioner was sentenced to a term of life in prison
8 with the possibility of parole. The judgment of conviction was affirmed on appeal, and the
9 California Supreme Court denied review.

10 Petitioner’s first parole suitability hearing, which is the subject of the instant petition,
11 was held on March 26, 2006. At the conclusion of the hearing, the Board, after having
12 reviewed the facts of the commitment offense, petitioner’s social and criminal history, his
13 educational progress and work record while incarcerated, and his mental health reports,
14 found petitioner was not yet suitable for parole and would pose an unreasonable risk of
15 danger to society or threat to public safety if released from prison. (Resp’t Answer to Order
16 to Show Cause (“Answer”) Ex. 2 (Super. Ct. Pet.) Ex. A (“Parole Hearing Transcript”) at 65-
17 72).)¹

18 After he was denied parole, petitioner filed a petition for a writ of habeas corpus in the
19 Superior Court, challenging the Board’s decision. In an opinion issued February 20, 2007,
20 the Superior Court denied relief, finding the Board properly applied state parole statutes and
21 regulations to reach its decision. (Ex. 1.) Petitioner then filed a petition for a writ of habeas
22 corpus in the California Court of Appeal. In in an opinion issued July 17, 2007, the appellate
23 court denied the petition, finding the Board properly applied state law to find petitioner
24 unsuitable for parole, and that some evidence supported the Board’s decision. (Ex. 5.)
25 Petitioner then filed a petition for review in the California Supreme Court; the petition was
26 summarily denied on October 10, 2007. (Ex. 6.)

27 _____
28 ¹Unless otherwise noted, all references herein to exhibits are to exhibits submitted by
respondent in support of the Answer.

1 B. Petitioner's Claims

2 Under California law, prisoners serving indeterminate life sentences, like petitioner
3 here, become eligible for parole after serving minimum terms of confinement required by
4 statute. In re Dannenberg, 34 Cal. 4th 1061, 1078 (2005). Regardless of the length of time
5 served, “a life prisoner shall be found unsuitable for and denied parole if in the judgment of
6 the panel the prisoner will pose an unreasonable risk of danger to society if released from
7 prison.” Cal. Code Regs. tit. 15 (“CCR”), § 2402(a). In making the determination as to
8 whether a prisoner is suitable for parole, the Board must consider various factors specified by
9 state statute and parole regulations. In re Rosenkrantz, 29 Cal. 4th 616, 654 (2002); see CCR
10 § 2402(b)–(d). When a state court reviews a Board’s decision denying parole, the relevant
11 inquiry is whether “some evidence” supports the decision of the Board that the inmate poses
12 a current threat to public safety. In re Lawrence, 44 Cal. 4th 1181, 1212 (2008).

13 As noted, petitioner alleges the Board was not impartial and acted arbitrarily by
14 denying parole, the decision to deny parole was not supported by some evidence that
15 petitioner at that time posed a current danger to society if released, and the decision to give
16 petitioner a two-year parole denial was unsupported. All of these arguments constitute a
17 single claim that petitioner’s federal constitutional right to due process was violated by the
18 Board’s decision to deny him a parole date.

19 Federal habeas corpus relief is unavailable for an error of state law. Swarthout v.
20 Cooke, 131 S. Ct. 859, 861 (per curiam) (2011). Under certain circumstances, however, state
21 law may create a liberty or property interest that is entitled to the protections of federal due
22 process. In particular, while there is “no constitutional or inherent right of a convicted
23 person to be conditionally released before the expiration of a valid sentence,” Greenholtz v.
24 Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 7 (1979), a state’s statutory parole
25 scheme, if it uses mandatory language, may create a presumption that parole release will be
26 granted when, or unless, certain designated findings are made, and thereby give rise to a
27 constitutionally protected liberty interest. See id. at 11-12. The Ninth Circuit has determined
28 California law creates such a liberty interest in release on parole. Cooke, 131 S. Ct. at 861-

1 62.

2 When a state creates a liberty interest, the Due Process Clause requires fair procedures
3 for its vindication, and federal courts will review the application of those constitutionally
4 required procedures. Id. at 862. In the context of parole, the procedures necessary to
5 vindicate such interest are minimal: a prisoner receives adequate process when “he [is]
6 allowed an opportunity to be heard and [is] provided a statement of the reasons why parole
7 was denied.” Id. “The Constitution,” [the Supreme Court has held], “does not require
8 more.” Id.

9 Here, the record shows petitioner received at least the process found by the Supreme
10 Court to be adequate in Cooke. See id. (finding process adequate where petitioners “were
11 allowed to speak at their parole hearings and to contest the evidence against them, were
12 afforded access to their records in advance, and were notified as to the reasons why parole
13 was denied”). Specifically, the record shows the following: petitioner was represented by
14 counsel at the hearing (Ex. 2 Ex. A at 2:10-12); petitioner and his attorney were provided
15 with copies of the documents reviewed by the Board at the hearing (id. at 9:4-11, 10:15-
16 12:2); the Board read into the record the facts of the commitment offenses as described by
17 the California Court of Appeal in affirming petitioner’s convictions (id. at 16:8-23:20);
18 petitioner expressly declined to discuss any aspect of the crimes or his convictions with the
19 Board (id. at 23:25); the Board discussed with petitioner his personal background, his parole
20 plans, his achievements while incarcerated, and the mental health reports prepared for the
21 hearing (id. at 24:6-43:20), and heard objections from petitioner’s counsel about the mental
22 health reports (43:21-48:8); petitioner’s counsel questioned petitioner, and both petitioner
23 and his counsel made statements advocating petitioner’s release (id. at 52:24-54:26, 57:9-
24 60:19, 61:12-64:13); and petitioner received a thorough explanation as to why the Board
25 denied parole (id. at 65-73).

26 Further, because California’s “some evidence” rule is not a substantive federal
27 requirement, whether the Board’s decision to deny parole was supported by some evidence of
28 petitioner’s current dangerousness is not relevant to this Court’s decision on the instant

1 petition for federal habeas corpus relief. Cooke, 131 S. Ct. at 862-63. The Supreme Court
2 has made clear that the only federal right at issue herein is procedural; consequently, “it is no
3 federal concern . . . whether California’s ‘some evidence’ rule of judicial review (a procedure
4 beyond what the Constitution demands) was correctly applied.” Id. at 863.

5 Similarly, no federal concern is implicated by the Board’s decision to deny petitioner
6 parole for two years, rather than one year. Such decision is purely a matter of the Board’s
7 application of state law; consequently, federal habeas corpus relief is unavailable for any
8 alleged error by the Board in its decision. Id. at 861.

9 In sum, as the record shows petitioner received all the process to which he was
10 constitutionally entitled, the Court finds no federal due process violation occurred, and
11 accordingly, the petition for a writ of habeas corpus will be denied.

12 C. Certificate of Appealability

13 A certificate of appealability will be denied with respect to petitioner’s claims. See 28
14 U.S.C. § 2253(c)(1)(a); Rules Governing Habeas Corpus Cases Under § 2254, Rule 11
15 (requiring district court to issue or deny certificate of appealability when entering final order
16 adverse to petitioner). Specifically, petitioner has neither made “a substantial showing of the
17 denial of a constitutional right,” Hayward v. Marshall, 603 F.3d 546, 554-55 (9th Cir. 2010)
18 (en banc) (citing 28 U.S.C. § 2253(c)(2)), nor demonstrated that his claims are “debatable
19 among reasonable jurists.” Id. at 555.

20 **CONCLUSION**


21 For the reasons stated above, the Court orders as follows:

- 22 1. The petition for a writ of habeas corpus is hereby DENIED.
23 2. A certificate of appealability is hereby DENIED.

24 The Clerk shall enter judgment in favor of respondent and close the file.

25 IT IS SO ORDERED.

26 DATED: March 4, 2011

27 
28 MAXINE M. CHESNEY
United States District Judge