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

HENRY NGO WU,
Petitioner,
v.
BEN CURRY, Warden,
Respondent.

No. C 08-4558 MMC (PR)
**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
DENYING CERTIFICATE OF
APPEALABILITY**

On September 26, 2008, 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. 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 petitioner’s due process claim herein.

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

2 **BACKGROUND**

3 In 1990, in the Superior Court of Los Angeles County (“Superior Court”), petitioner
4 was found guilty of attempted murder, with infliction of great bodily injury and the use of a
5 firearm. He was sentenced to two terms in state prison: a determinate term of five years, and
6 an indeterminate term of seven years to life. The conviction was affirmed on appeal, and the
7 California Supreme Court denied review.

8 Petitioner’s fifth parole suitability hearing, which is the subject of the instant petition,
9 was held on December 21, 2006. At the conclusion of the hearing, the Board, after having
10 reviewed the facts of the commitment offense, petitioner’s social and criminal history, his
11 employment, educational and disciplinary history while incarcerated, and his mental health
12 reports, found petitioner was not yet suitable for parole and would pose an unreasonable risk
13 of danger to society or threat to public safety if released from prison. (Pet. Ex. A (Parole
14 Hearing Transcript) at 75-85.)¹

15 After he was denied parole, petitioner filed a habeas petition in the Superior Court,
16 challenging the Board’s decision. In an opinion issued February 14, 2008, the Superior
17 Court denied relief, finding the Board properly applied state parole statutes and regulations to
18 find petitioner unsuitable for parole, and that some evidence supported the Board’s decision.
19 (Pet. Ex. E.) Petitioner next filed a habeas petition in the California Court of Appeal. The
20 petition was summarily denied on March 11, 2008. (Pet. Ex. F.) Petitioner then filed a
21 petition for review in the California Supreme Court; the petition was summarily denied on
22 May 21, 2008. (Pet. Ex. G.)

23 Petitioner next filed the instant petition, in which he claims the Board did not provide
24 him with a hearing that met the requirements of federal due process. In particular, petitioner
25 claims the Board’s decision to deny parole was not supported by some evidence that
26 petitioner at that time posed a danger to society if released, but, instead, was based solely on

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28 ¹Unless otherwise noted, all references herein to exhibits are to exhibits submitted by
petitioner in support of the petition.

1 the unchanging circumstances of the commitment offense.

2 **DISCUSSION**

3 A. Standard of Review

4 A federal district court may entertain a petition for a writ of habeas corpus “in behalf
5 of a person in custody pursuant to the judgment of a State court only on the ground that he is
6 in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
7 § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on
8 the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a
9 decision that was contrary to, or involved an unreasonable application of, clearly established
10 Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a
11 decision that was based on an unreasonable determination of the facts in light of the evidence
12 presented in the State court proceeding.” 28 U.S.C. § 2254(d); see Williams (Terry) v.
13 Taylor, 529 U.S. 362, 409-13 (2000). Section 2254(d) applies to a habeas petition filed by a
14 state prisoner challenging the denial of parole. Sass v. California Board of Prison Terms, 461
15 F.3d 1123, 1126-27 (9th Cir. 2006).

16 Here, as noted, both the California Court of Appeal and the California Supreme Court
17 summarily denied review of petitioner’s claims. The Superior Court thus was the highest
18 state court to address the merits of petitioner’s claims in a reasoned decision, and it is that
19 decision which this Court reviews under § 2254(d). See Ylst v. Nunnemaker, 501 U.S. 797,
20 803-04 (1991); Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th Cir. 2005).

21 B. Petitioner’s Claim

22 Under California law, prisoners serving indeterminate life sentences, like petitioner
23 here, become eligible for parole after serving minimum terms of confinement required by
24 statute. In re Dannenberg, 34 Cal. 4th 1061, 1078 (2005). Regardless of the length of time
25 served, “a life prisoner shall be found unsuitable for and denied parole if in the judgment of
26 the panel the prisoner will pose an unreasonable risk of danger to society if released from
27 prison.” Cal. Code Regs. tit. 15 (“CCR”), § 2402(a). In making the determination as to
28 whether a prisoner is suitable for parole, the Board must consider various factors specified by

1 state statute and parole regulations. In re Rosenkrantz, 29 Cal. 4th 616, 654 (2002); see CCR
2 § 2402(b)–(d). When a state court reviews a Board’s decision denying parole, the relevant
3 inquiry is whether “some evidence” supports the decision of the Board that the inmate poses
4 a current threat to public safety. In re Lawrence, 44 Cal. 4th 1181, 1212 (2008).

5 As noted, petitioner claims the Board’s decision to deny him a parole date violated his
6 federal constitutional right to due process because the decision was not supported by some
7 evidence that petitioner at such time posed a danger to society if released, but, instead, was
8 based solely on the unchanging circumstances of the commitment offense. Federal habeas
9 corpus relief is unavailable for an error of state law. Swarthout v. Cooke, 131 S. Ct. 859, 861
10 (per curiam) (2011). Under certain circumstances, however, state law may create a liberty or
11 property interest that is entitled to the protections of federal due process. In particular, while
12 there is “no constitutional or inherent right of a convicted person to be conditionally released
13 before the expiration of a valid sentence,” Greenholtz v. Inmates of Nebraska Penal & Corr.
14 Complex, 442 U.S. 1, 7 (1979), a state’s statutory parole scheme, if it uses mandatory
15 language, may create a presumption that parole release will be granted when, or unless,
16 certain designated findings are made, and thereby give rise to a constitutionally protected
17 liberty interest. See id. at 11-12. The Ninth Circuit has determined California law creates
18 such a liberty interest in release on parole. Cooke, 131 S. Ct. at 861-62.

19 When a state creates a liberty interest, the Due Process Clause requires fair procedures
20 for its vindication, and federal courts will review the application of those constitutionally
21 required procedures. Id. at 862. In the context of parole, the procedures necessary to
22 vindicate such interest are minimal: a prisoner receives adequate process when “he [is]
23 allowed an opportunity to be heard and [is] provided a statement of the reasons why parole
24 was denied.” Id. “The Constitution,” [the Supreme Court has held], “does not require
25 more.” Id.; see Pearson v. Muntz, No. 08-55728, --- F.3d ---, 2011 WL 1238007, at *5 (9th
26 Cir. Apr. 5, 2011) (“Cooke was unequivocal in holding that if an inmate seeking parole
27 receives an opportunity to be heard, a notification of the reasons as to denial of parole, and
28 access to their records in advance, that should be the beginning and end of the inquiry into

1 whether the inmate received due process.”) (alterations, internal quotation and citation
2 omitted).

3 Here, the record shows petitioner received at least the process found by the Supreme
4 Court to be adequate in Cooke. Specifically, the record shows the following: petitioner was
5 represented by counsel at the hearing (Pet. Ex. A at 2:7-8); petitioner and his counsel were
6 provided in advance of the hearing with copies of the documents reviewed by the Board and
7 also submitted additional documents for the Board’s review (id. at 10:14-11:7); the Board
8 read into the record a summary of the commitment offense taken from the appellate opinion
9 affirming petitioner’s conviction, and also read into the record statements made by petitioner
10 about the commitment offense (id. at 12:5-16:4); petitioner was provided the opportunity to
11 discuss the commitment offense with the Board, but declined to do so (id. at 11:12-17, 16:6-
12 10); the Board discussed with petitioner his personal background, his post-conviction
13 achievements and disciplinary record, the mental health reports prepared for the hearing, and
14 petitioner’s parole plans (id. at 16:11- 47:4); both petitioner and his counsel made statements
15 advocating petitioner’s release (id. at 55:2-63:5); petitioner received a thorough explanation
16 as to why the Board denied parole (id. at 76–85).

17 Further, because California’s “some evidence” rule is not a substantive federal
18 requirement, whether the Board’s decision to deny parole was supported by some evidence of
19 petitioner’s current dangerousness is not relevant to this Court’s decision on the instant
20 petition for federal habeas corpus relief. Cooke, 131 S. Ct. at 862-63. The Supreme Court
21 has made clear that the only federal right at issue herein is procedural; consequently, “it is no
22 federal concern . . . whether California’s ‘some evidence’ rule of judicial review (a procedure
23 beyond what the Constitution demands) was correctly applied.” Id. at 863.

24 As the record shows petitioner received all the process to which he was
25 constitutionally entitled, the Court finds the Superior Court’s denial of petitioner’s claim did
26 not result in a decision that was contrary to, or involved an unreasonable application of,
27 clearly established federal law, and was not based on an unreasonable determination of the
28 facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

1 Accordingly, the petition for a writ of habeas corpus will be denied.

2 C. Certificate of Appealability

3 A certificate of appealability will be denied with respect to petitioner's claims. See 28
4 U.S.C. § 2253(c)(1)(a); Rules Governing Habeas Corpus Cases Under § 2254, Rule 11
5 (requiring district court to issue or deny certificate of appealability when entering final order
6 adverse to petitioner). Specifically, petitioner has failed to make a substantial showing of the
7 denial of a constitutional right, as he has not demonstrated that reasonable jurists would find
8 the Court's assessment of the constitutional claims debatable or wrong. Slack v. McDaniel,
9 529 U.S. 473, 484 (2000).

10 **CONCLUSION**


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

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

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

15 IT IS SO ORDERED.

16 DATED: April 21, 2011

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18 MAKINE M. CHESNEY
19 United States District Judge
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