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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

TONY GOMEZ,

Petitioner,

No. C 09-6055 PJH (PR)

vs.

**ORDER DENYING PETITION
AND DENYING CERTIFICATE
OF APPEALABILITY**

RANDY GROUNDS, Warden,

Respondent.

Petitioner, a California prisoner currently incarcerated at the Correctional Training Facility in Soledad, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition attacks denial of parole, so venue is proper in this district, which is where petitioner is confined. See 28 U.S.C. § 2241(d).

BACKGROUND

In 1985 a Kern County jury found petitioner guilty of second degree murder. He was sentenced to prison for fifteen years to life. This court issued an order to show cause and respondent filed an answer on January 10, 2011, and petitioner filed a traverse.

DISCUSSION

As grounds for federal habeas relief, petitioner asserts that: (1) the Board of Parole Hearings' decision was not supported by "some evidence;" (2) his equal protection rights were violated; (3) the Board has violated his rights by repeatedly denying parole based on the facts of an offense that occurred twenty-three years before the hearing; and (4) he has served longer than the time provided by the Board's regulations.

As noted above, respondent filed an answer on January 10, 2011. However, on January 24, 2011, the United States Supreme Court issued *Swarthout v. Cooke*, 131 S. Ct.

1 859 (2011). The Supreme Court held that “[i]n the context of parole . . . the procedures
2 required [by the due process clause] are minimal . . . an opportunity to be heard and . . . a
3 statement of the reasons why parole was denied . . . [t]he Constitution . . . does not require
4 more.” *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011). As long as the petitioner received
5 at least that much process, the federal court's habeas review is at an end. *Id.* at 862. That
6 is, there is no constitutional right to “individual consideration.” Thus, petitioner’s claims that
7 there was not “some evidence” or that the Board relied on his commitment offense are not
8 cognizable on federal habeas review.

9 Petitioner next contends that the denial of parole violated his right to equal
10 protection because he is being treated differently than another inmate named Mikael
11 Schiold. According to petitioner, Schiold was a California prisoner and Swedish citizen who
12 obtained a "settlement agreement" with the State of California under which he was
13 "transferred to" Sweden where he was to be held in custody until January 1, 2007.¹
14 Petitioner complains that he is being discriminated against because, unlike Schiold,
15 petitioner is not being transferred to another country and has not been given a date for his
16 release from custody.

17 "The Equal Protection Clause of the Fourteenth Amendment commands that no
18 State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which
19 is essentially a direction that all persons similarly situated should be treated alike." *City of*
20 *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457
21 U.S. 202, 216 (1982)). The allegations in the petition establish that petitioner is not
22 "similarly situated" to Schiold, in that Schiold was granted parole by the Board and
23 petitioner was not. Moreover, Schiold is a foreign national and petitioner is not. There is
24 no indication or allegation that any foreign country has any interest in receiving petitioner
25 into its custody and then releasing him at any particular date, as was the case with Schiold.
26 Petitioner’s equal protection rights thus were not violated when he was not treated the

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28 ¹ Though, according to petitioner the governor reversed this agreement.

1 same as Schiold.

2 Finally, petitioner argues that the Board has failed to follow its own regulations as
3 petitioner has been incarcerated longer than the regulations provide. However, even
4 assuming the Board has failed to follow state regulations, this cannot be the basis for
5 federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (federal habeas
6 unavailable for violations of state law or for alleged error in the interpretation or application
7 of state law). Moreover, petitioner is serving an indeterminate term of fifteen years to life in
8 prison, so there is no guarantee of parole.

9 Petitioner has raised no arguments concerning the basic procedures he is entitled to
10 as described in *Swarthout*, and the court cannot review the evidence relied upon by the
11 Board. The petition is denied.

12 **CONCLUSION**

13 For the reasons discussed above, the petition is **DENIED**. Furthermore, because
14 reasonable jurists would not find the result here debatable given the clear controlling
15 Supreme Court authority, a certificate of appealability (“COA”) is **DENIED**. See *Slack v.*
16 *McDaniel*, 529 U.S. 473, 484-85 (2000) (standard for COA). The clerk shall close the file.

17 **IT IS SO ORDERED.**

18 Dated: January 3, 2013.



PHYLLIS J. HAMILTON
United States District Judge

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