

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILBUR LYNN McCLURE,

Petitioner,

vs.

R. GROUNDS, Warden,

Respondent.

No. C 10-01350 JF (PR)

ORDER OF DISMISSAL; DENYING
CERTIFICATE OF APPEALABILITY

Petitioner, a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the denial of parole by the Board of Parole Hearings (“Board”) in 2009. Petitioner’s amended petition, (Docket No. 5) is now before the Court for initial review.

DISCUSSION

A. Standard of Review

This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

1 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

2 A district court shall “award the writ or issue an order directing the respondent
3 to show cause why the writ should not be granted, unless it appears from the
4 application that the applicant or person detained is not entitled thereto.” 28 U.S.C. §
5 2243.

6 **B. Petitioner’s Claims**

7 Petitioner claims that the Board’s decision finding him unsuitable for parole
8 violates due process because there is no evidence that he is a current threat to society.
9 Petitioner relies on the en banc decision by the United States Court of Appeals for the
10 Ninth Circuit in Hayward v. Marshall, No. 603 F.3d 546, 562-63 (9th Cir. 2010). (Pet.
11 at 3.) However, the United States Supreme Court has recently determined that for the
12 purposes of habeas federal habeas review, a California prisoner is entitled to only
13 “minimal” procedural protections in connection with a parole suitability determination.
14 Swarthout v. Cooke, No. 10-333, slip op. 4-5 (U.S. Jan. 24, 2011). The procedural
15 protections to which the prisoner is entitled under the Due Process Clause of the
16 Fourteenth Amendment are limited to an opportunity to be heard and a statement of the
17 reasons why parole was denied. Id. The attachments to the petition show that
18 petitioner received at least this amount of process. The Constitution does not require
19 more. Id. at 5.

20 Whether the Board’s decision was supported by some reliable evidence of
21 current dangerousness is irrelevant in federal habeas. The Supreme Court has made
22 clear that “it is no federal concern... whether California’s ‘some evidence’ rule of
23 judicial review (a procedure beyond what the Constitution demands) was correctly
24 applied.” Id. at 6. In light of the Supreme Court’s determination that due process does
25 not require that there be any amount of evidence to support the parole denial, the
26 petitions fails to state a cognizable claim for relief.

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is
DISMISSED for failure to state a cognizable claim for relief.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, a certificate of
appealability (“COA”) under 28 U.S.C. § 2253(c) is DENIED because it cannot be said
that “reasonable jurists” would find the district court’s assessment of the constitution
claims debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

IT IS SO ORDERED.

DATED: 3/31/11



JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WILBUR LYNN MCCLURE,
Petitioner,

Case Number: CV10-01350 JF

CERTIFICATE OF SERVICE

v.

R GROUNDS, Warden,
Respondent.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 4/4/11, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Wilbur Lynn McClure C50493
Correctional Training Facility
P.O. Box 689
Soledad, CA 93960-0689

Dated: 4/4/11

Richard W. Wieking, Clerk