

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 13 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARK DELAPLANE,

Petitioner - Appellee,

v.

JOHN MARSHALL, Warden,

Respondent - Appellant.

No. 09-56910

D.C. No. 2:08-cv-02306-JFW-
MAN

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted December 8, 2010
Pasadena, California

Before: PREGERSON, CLIFTON, and M. SMITH, Circuit Judges.

Warden John Marshall appeals from the district court's grant of the petition for habeas corpus of Mark Delaplane. In light of the Supreme Court's recent decision in *Swarthout v. Cooke*, 131 S.Ct. 859 (2011), we hold that Delaplane's federal right to due process was not violated. Delaplane "was allowed an

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

opportunity to be heard and was provided a statement of the reasons why parole was denied.” *Id.* at 862. Thus, Delaplane is not entitled to a writ of habeas corpus.

Delaplane argues that *Cooke* did not address whether the Constitution requires a showing of some evidence of future danger before states can deny parole. This argument has been rejected by our precedent. *See Pearson v. Muntz*, --- F.3d ----, 2011 WL 1238007, at *5 (9th Cir. 2011). Delaplane also argues that the Governor violated his due process rights by not granting Delaplane a hearing before reversing his grant of parole. This argument was raised for the first time in a letter filed pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. It was thus made too late, and is not properly before us. *See id.* at *5 n.5.

REVERSED.