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

DANNY SAUL ROSALES,

Petitioner,

No. CIV S-03-0230 JAM DAD (TEMP) P

vs.

THOMAS L. CAREY, Warden, et al.,

FINDINGS AND RECOMMENDATIONS

Respondents.

_____ /

Petitioner is a state prisoner proceeding with counsel on a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He challenges the California Board of Parole Hearings’ (“the Board”) decision to deny him parole in 2000. Petitioner raises the following claims: (1) his right to due process was violated because there is no evidentiary support for or rational connection between the Board’s findings and conclusions; (2) his right to due process was violated because the Board found him unsuitable for parole as a result of his failure to meet conditions which he had already met; (3) his right to due process was violated because the Board did not engage in individualized decision-making and instead implemented an unwritten policy to deny parole to all murderers; (4) his Eighth Amendment right to be free of cruel and unusual punishment was violated when the Board conducted a pro forma hearing that did not allow him

1 to demonstrate his suitability for parole; and (5) his due process and Eighth Amendment rights
2 were violated by the Board's de facto sentence of life without parole, depriving petitioner of the
3 benefit of his plea bargain.

4 I. Procedural Background

5 The original federal habeas petition was filed in this case on February 5, 2003, by
6 petitioner proceeding without counsel. (Doc. No. 1.) The then-assigned Magistrate Judge
7 appointed counsel for petitioner and directed the parties to file a joint scheduling statement.
8 (Doc. No. 4 & 6.) Based upon representations made in that joint scheduling statement, the court
9 directed petitioner's counsel to inform the court whether petitioner would be seeking a stay of
10 this action in order to permit his exhaustion of additional claims in state court. (Doc. No. 8.) On
11 November 20, 2003, the court granted petitioner's unopposed request for a stay pending
12 exhaustion of his additional claims. (Doc. No. 15.) On December 10, 2004, petitioner filed a
13 request to lift the stay and submitted his amended petition and, on July 1, 2005, respondent
14 answered the amended petition. (Doc. Nos. 21 and 25.) Petitioner filed a traverse on September
15 16, 2005. (Doc. No. 30.)

16 On October 22, 2008, the assigned district judge stayed this case pending the
17 Ninth Circuit's en banc decision in Hayward v. Marshall. (Doc. No. 34.) On May 21, 2010, the
18 district court lifted the stay and asked the parties for letter briefs on the impact of the Ninth
19 Circuit's en banc decision in Hayward. (Doc. No. 35.) However, on January 24, 2011, the
20 United States Supreme Court issued its decision in Swarthout v. Cooke, 562 U.S. ___, ___, 131
21 S. Ct. 859, 861-62 (2011), thereby altering the legal landscape with respect to federal habeas
22 review of the denial of parole to state prisoners. The action stands submitted for decision.

23 II. Standards of Review Applicable to Habeas Corpus Claims

24 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
25 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,
26 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.

1 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the
2 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
3 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas
4 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377
5 (1972).

6 This action is governed by the Antiterrorism and Effective Death Penalty Act of
7 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d
8 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting
9 habeas corpus relief:

10 An application for a writ of habeas corpus on behalf of a
11 person in custody pursuant to the judgment of a State court shall
12 not be granted with respect to any claim that was adjudicated on
the merits in State court proceedings unless the adjudication of the
claim -

13 (1) resulted in a decision that was contrary to, or involved
14 an unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

15 (2) resulted in a decision that was based on an unreasonable
16 determination of the facts in light of the evidence presented in the
State court proceeding.

17 See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362
18 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the state court’s decision
19 does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review
20 of a habeas petitioner’s claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). See
21 also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) (“[I]t is now clear both that we
22 may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error,
23 we must decide the habeas petition by considering de novo the constitutional issues raised.”).

24 The court looks to the last reasoned state court decision as the basis for the state
25 court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). See also Barker v.
26 Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005) (“When more than one state court has adjudicated

1 a claim, we analyze the last reasoned decision”). If the last reasoned state court decision adopts
2 or substantially incorporates the reasoning from a previous state court decision, this court may
3 consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque,
4 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Where the state court reaches a decision on the
5 merits but provides no reasoning to support its conclusion, a federal habeas court independently
6 reviews the record to determine whether habeas corpus relief is available under § 2254(d).
7 Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167
8 (9th Cir. 2002). When it is clear that a state court has not reached the merits of a petitioner’s
9 claim, AEDPA’s deferential standard does not apply and a federal habeas court must review the
10 claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

11 III. Scope of Review Applicable to Due Process Challenges to the Denial of Parole

12 The Due Process Clause of the Fourteenth Amendment prohibits state action that
13 deprives a person of life, liberty, or property without due process of law. A litigant alleging a
14 due process violation must first demonstrate that he was deprived of a liberty or property interest
15 protected by the Due Process Clause and then show that the procedures attendant upon the
16 deprivation were not constitutionally sufficient. Kentucky Dep’t of Corrections v. Thompson,
17 490 U.S. 454, 459-60 (1989).

18 A protected liberty interest may arise from either the Due Process Clause of the
19 United States Constitution “by reason of guarantees implicit in the word ‘liberty,’” or from “an
20 expectation or interest created by state laws or policies.” Wilkinson v. Austin, 545 U.S. 209,
21 221 (2005). See also Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States
22 Constitution does not, of its own force, create a protected liberty interest in a parole date, even
23 one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981); Greenholtz v. Inmates of
24 Neb. Penal, 442 U.S. 1, 7 (1979) (There is “no constitutional or inherent right of a convicted
25 person to be conditionally released before the expiration of a valid sentence.”). However, a
26 state’s statutory scheme, if it uses mandatory language, “creates a presumption that parole release

1 will be granted” when or unless certain designated findings are made, and thereby gives rise to a
2 constitutional liberty interest. Greenholtz, 442 U.S. at 12. See also Allen, 482 U.S. at 376-78.

3 California’s parole scheme gives rise to a liberty interest in parole protected by the
4 federal Due Process Clause. Pirtle v. California Bd. of Prison Terms, 611 F.3d 1015, 1020 (9th
5 Cir. 2010); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002); see also Swarthout v.
6 Cooke, 131 S. Ct. at 861-62 (finding the Ninth Circuit’s holding in this regard to be a reasonable
7 application of Supreme Court authority); Pearson v. Muntz, 639 F.3d 1185, 1191 (9th Cir. 2011)
8 (“[Swarthout v. Cooke did not disturb our precedent that California law creates a liberty interest
9 in parole.”) In California, a prisoner is entitled to release on parole unless there is “some
10 evidence” of his or her current dangerousness. In re Lawrence, 44 Cal.4th 1181, 1205-06, 1210
11 (2008); In re Rosenkrantz, 29 Cal.4th 616, 651-53 (2002).

12 In Swarthout, the Supreme Court reviewed two cases in which California
13 prisoners were denied parole - in one case by the Board, and in the other by the Governor after
14 the Board had granted parole. Swarthout, 131 S. Ct. at 860-61. The Supreme Court noted that
15 when state law creates a liberty interest, the Due Process Clause of the Fourteenth Amendment
16 requires fair procedures, “and federal courts will review the application of those constitutionally
17 required procedures.” Id. at 862. The Court concluded that in the parole context, however, “the
18 procedures required are minimal” and that the “Constitution does not require more” than “an
19 opportunity to be heard” and being “provided a statement of the reasons why parole was denied.”
20 Id. (citing Greenholtz, 442 U.S. at 16). The Supreme Court therefore rejected Ninth Circuit
21 decisions that went beyond these minimal procedural requirements and “reviewed the state
22 courts’ decisions on the merits and concluded that they had unreasonably determined the facts in
23 light of the evidence.” Swarthout, 131 S. Ct. at 862. In particular, the Supreme Court rejected
24 the application of the “some evidence” standard to parole decisions by the California courts as a

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1 component of the federal due process standard. Id. at 862-63. See also Pearson, 639 F.3d at
2 1191.¹

3 IV. The Guilty Plea and Decisions From the Parole Board and State Courts

4 In his underlying criminal case in state court, petitioner pleaded guilty to second
5 degree murder and assault with the intent to commit murder and admitted that he inflicted great
6 bodily injury. Answer (Ans.), Ex. A at 43. During the plea colloquy, the prosecutor advised
7 petitioner of the parole implications of his guilty plea and the sentence of fifteen years to life, as
8 follows:

9 [A]s the judge told you, you must do two-thirds of that sentence
10 before you are eligible for parole which means that you could do a
11 minimum of ten years.

12 This does not mean that you will be paroled at the end of ten years.

13 It only means that you will be eligible for parole at the end of ten
14 years provided you earn both good time and work time credits.

15 If you do not earn good time or work time credits, you would be
16 eligible for parole at a period of time of 15 years.

17 However, again, that just means you would be eligible for parole at
18 that time. It does not mean that you would, in fact, be paroled at
19 the end of 15 years.

20 Ans., Ex. A at 49. Later during the colloquy, defense counsel noted:

21 I think there is a question in my mind that the corrections board
22 might interpret—even though the court pursuant to a plea bargain
23 imposes a sentence to run concurrent on Counts II, III and IV—that
24 the use allegation therein might be utilized to extend the time that
25 he would be eligible for parole; that it is our understanding that
26 that would not be the case and the sentence would be to run
concurrent and not be used to extend the base time of Count I.

23 ¹ In its per curiam opinion, the Supreme Court did not acknowledge that for twenty-four
24 years the Ninth Circuit had consistently held that in order to comport with due process a state
25 parole board's decision to deny parole had to be supported by "some evidence," as defined in
26 Superintendent v. Hill, 472 U.S. 445 (1985), that bore some indicia of reliability. See Jancsek v.
Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); McQuillion v. Duncan, 306 F.3d
895, 904 (9th Cir. 2002) ("In Jancsek . . . we held that the process that is due in the parole
rescission setting is the same as the Supreme Court outlined in Superintendent v. Hill")

1 Ans., Ex. A at 61. The prosecutor also explained in petitioner’s presence:

2 [T]he Board of Prison Terms . . . will consider the entire case and
3 the entire record of the defendant in setting an initial parole date.

4 That would be what counts were charged, what counts were
5 dismissed, his total background, whether he has ever been in
6 trouble before and all those things in determining the first eligible
7 parole date.

8 I was told by the Board of Prison Terms that they could not give
9 me even an average as to what the first initial parole time period
10 would be since they are in the process of making up a matrix

11 [H]e isn’t going to get an additional three years for the GBI . . .
12 because they are going to be running concurrent.

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14
15 [T]here cannot be an eligibility for parole prior to the ten years; but
16 that the actual term to be served will be fixed by the . . . Board of
17 Prison Terms and Parole.

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19
20 So it is possible, after they have interviewed him and everything,
21 that it is possible that he would be eligible for parole at the end of
22 ten years.

23 Ans., Ex. A at 62-63.

24 Finally, the prosecutor stated:

25 . . . This is a fluid thing that could fluctuate at any time during the
26 time of your course of stay there depending not only upon your
background and the crimes you are pleading to up to date, but
anything you might do in the future.

27 Ans., Ex. A at 64. The prosecutor then asked petitioner if he understood “that there is absolutely
28 no guarantee that the Board of Prison Terms will set your first eligibility date at the 15 years less
29 the one third.” Ans., Ex. A at 65. Petitioner responded that he understood. Id.

30 Following his entry of plea, petitioner was sentenced to a total aggregate term of
31 fifteen years to life in state prison. Ans. Ex. A at 50 (discussion of concurrent terms imposed on
32 other charges). When he reached prison, petitioner’s minimum eligible parole date was

1 determined to be June 26, 1989 and he appeared before the Board in 1989, 1991, and 1995.

2 See, e.g., Ans, Ex. A at 217.

3 On May 24, 2000, the Board again considered petitioner's case. Petitioner did not
4 appear before the Board at that time, but he instead allowed counsel to represent his interests at
5 the hearing. The Board listened to counsel's presentation, argument by a representative of the
6 Los Angeles County District Attorney's Office, and statements from the murder victim's mother
7 and sister. The Board then ruled:

8 The Board has considered Mr. Rosales' case and we've denied his
9 parole for a four year period. I'm going to read the decision. The
10 Panel reviewed all the information received from the public and
11 relied on the following circumstances in concluding that the
12 prisoner is not suitable for parole and would pose an unreasonable
13 risk of danger to society or a threat to public safety if released from
14 prison. Number one was the commitment offense, which the Panel
15 finds was carried out in an especially cruel and callous manner.
16 Multiple victims were attacked and injured or killed in the same
17 incident. And the offense was carried out in a manner which
18 demonstrates an exceptionally callous disregard for human
19 suffering. These conclusions are drawn from the Statement of
20 Facts wherein the petitioner burglarized the victim's vehicle, and
21 the victim, accompanied by three other victims, confronted Mr.
22 Rosales. They realized that he had taken property from the
23 victim's vehicle. They attempted to detain him and call the police.
24 he took objection to this. He pulled out a large knife and began
25 stabbing the victims who were defenseless at that point. Stabbed
26 each of the victims resulting in the death of one victim and the
critical injury to other three victims . . . who . . . survived the
incident, received extensive injuries which have caused them a life
time of problems, including the inability to bear children as a result
of the actions of Mr. Rosales. Regarding his institutional
behavior, he has programmed fairly well while he's been in the
institution. He has upgraded vocationally. He had participated in a
number of self-help programs including contemplated [sic]
meditation, AA, and Alternatives to Violence, for which he should
be commended, as least for that participation. Response to 3042
notices, we did have significant opposition to parole for Mr.
Rosales. We received correspondence from Los Angeles County
Sheriff's Department We had a representative from the
District Attorney's Office in Los Angeles who was here to oppose
parole. We also had two family members . . . [who] voiced
opposition to parole We have resolutions from a number of
city councils in the area opposing parole for Mr. Rosales We
have quite a few letters with what are easily hundreds and hundreds
of signatures from individuals opposing parole for Mr. Rosales.

1 And the Panel makes the following findings: That the prisoner
2 continues to need therapy in order to face, discuss, understand and
3 cope with stress in a non-destructive manner. Until further
4 progress is made, the prisoner continues to be unpredictable and a
5 threat to others. He should be commended for his positive
6 programming though. He has remained disciplinary-free for an
7 extended period He has upgraded vocationally. He has
8 participated in self-help programs. However, those positive
9 aspects of his behavior do not outweigh the factors of unsuitability.

10 Ans., Ex. A at 167-69.

11 In separately denying parole for a period of four years in petitioner's case, the

12 Board noted:

13 The Panel also finds that Mr. Rosales needs additional therapy in
14 order to examine his apparent hostility toward women and to
15 develop an understanding of the profound impact his actions have
16 had on the lives of the victims and the victim's families. In
17 addition, it is very difficult to adequately assess Mr. Rosales' level
18 of insight into the commitment offense in as much as he has
19 declined to attend this hearing and discuss the matter with the
20 Board.

21 Ans., Ex. A at 170.

22 Petitioner pursued administrative remedies and then, still acting pro per, filed
23 petitions for writ of habeas corpus in the Sacramento County Superior Court, the California
24 Court of Appeal, and California Supreme Court, arguing that the Board's unsuitability finding
25 was not supported by "some evidence;" that its finding that he needed further therapy lacked
26 evidentiary support; that the Board abused its discretion in denying parole for four years; that the
Board has changed petitioner's sentence to one of life imprisonment without the possibility of
parole, which is disproportionate to his crime; that California Penal Code §§ 12 and 13 have been
violated by the refusal to impose a definite sentence; and that the Board erred in not setting a
parole date in his case. Ans., Ex. C at 16-55. The Sacramento County Superior Court issued the
only reasoned decision in denying petitioner state habeas relief, reasoning as follows:

The callous nature of the commitment offense provides "some
evidence" of Petitioner's unsuitability for parole and is good cause
for a 4 year suitability denial.

1 Ans., Ex. C at 250.

2 After counsel was appointed in this federal habeas action, petitioner returned to
3 the state courts, this time arguing that there was no rational relationship connection between the
4 Board’s findings and the denial of parole and no evidentiary support for the Board’s findings;
5 that his rights were violated when the Board denied him parole for failure to meet conditions
6 which he had already met; that the Board did not engage in individualized decision making but
7 instead relied on the “no parole” policy; that his right to be free of cruel and unusual punishment
8 was violated because the Board subjected him to a pro forma hearing which made it impossible
9 for him to demonstrate his suitability for release on parole; and that his right to be free of cruel
10 and unusual punishment was violated when the Board’s actions, in essence, imposed a sentence
11 of life imprisonment without the possibility of parole. The Los Angeles County Superior Court
12 denied the petition raising these claims on the grounds of untimeliness. Petitioner’s Exhibits, Ex.
13 11.² Thereafter, petitioner again sought habeas relief in the California Supreme Court raising
14 these same new claims and that court issued a one-line denial of his petition. Id., Ex. 12.

15 V. The Board’s Finding That Petitioner Was Unsuitable For Parole (Claims One and Two)

16 Petitioner seeks federal habeas relief on the grounds that the Board’s decision in
17 2000 to deny him parole, and the findings upon which that denial was based, were not supported
18 by “some evidence” as required under California law. However, under the Supreme Court’s
19 decision in Swarthout, this court may not review whether California’s “some evidence” standard
20 was correctly applied in petitioner’s case. 131 S. Ct. at 862-63; see also Miller v. Oregon Bd. of
21 Parole and Post-Prison Supervision, 642 F.3d 711, 716 (9th Cir. 2011) (“The Supreme Court
22 held in [Swarthout v.] Cooke that in the context of parole eligibility decisions the due process
23

24 ² Although respondent’s counsel mentions the Los Angeles County Superior Court’s
25 ruling on this petition in her answer, she does not argue that any of petitioner’s claims for federal
26 habeas relief are procedurally barred. The court therefore deems any reliance on procedural bar
to have been waived. Cone v. Bell, ___ U.S. ___, ___, 129 S. Ct. 1769, 1791, n. 6 (2009)
 (“[P]rocedural default may be waived if it is not raised as a defense.”)

1 right is *procedural*, and entitles a prisoner to nothing more than a fair hearing and a statement of
2 reasons for a parole board’s decision[.]”); Roberts v. Hartley, 640 F.3d 1042, 1046 (9th Cir.
3 2011) (under the decision in Swarthout, California’s parole scheme creates no substantive due
4 process rights and any procedural due process requirement is met as long as the state provides an
5 inmate seeking parole with an opportunity to be heard and a statement of the reasons why parole
6 was denied); Pearson, 639 F.3d at 1191 (“While the Court did not define the minimum process
7 required by the Due Process Clause for denial parole under the California system, it made clear
8 that the Clause’s requirements were satisfied where the inmates ‘were allowed to speak at their
9 parole hearings and to contest the evidence against them, were afforded access to their records in
10 advance, and were notified as to the reasons why parole was denied.’”)

11 The federal habeas petition pending before the court in this case reflects that
12 petitioner was represented by counsel at his 2000 parole suitability hearing. The record also
13 establishes that at that hearing petitioner was given the opportunity to be heard and received a
14 statement of the reasons why parole was denied by the Board panel. That is all the process that
15 was due petitioner under the Constitution. Swarthout, 131 S. Ct. 862; see also Miller, 642 F.3d
16 at 716; Roberts, 640 F.3d at 1046; Pearson, 639 F.3d at 1191. It now plainly appears that
17 petitioner is not entitled to relief with respect to his due process claims. Accordingly, petitioner
18 is not entitled to federal habeas relief with respect to his claim that the Board failed to properly
19 apply California’s “some evidence” standard and thereby violated his right to due process in
20 denying him parole in 2000.³

21
22 ³ In his petition and traverse, petitioner contends that the Board failed to comply with
23 state laws and regulations when it found him unsuitable for parole at his May 2000 hearing.
24 Petitioner’s arguments that the state court erred in applying state law are not cognizable in this
25 federal habeas corpus proceeding. See Rivera v. Illinois, ___ U.S. ___, 129 S. Ct. 1446, 1454
26 (2009) (“[A] mere error of state law . . . is not a denial of due process”) (quoting Engle v. Isaac,
456 U.S. 107, 121, n. 21 (1982) and Estelle v. McGuire, 502 U.S. 62, 67, 72-73 (1991)). A
habeas court may not grant the writ on the basis of errors of state law where, as here, the
combined effect of those errors does not violate the Federal Constitution. Lewis v. Jeffers, 497
U.S. 764, 780 (1990); Parle v. Runnels 387 F.3d 1030, 1045 (9th Cir. 2004).

1 VI. Reliance On The “No Parole” Policy And Individualized Decision Making (Claim 3)

2 Petitioner argues that the Board did not engage in individualized decision making
3 in denying him parole because they relied on California’s “no parole policy.” In support of this
4 contention, petitioner offers the declaration of Albert Leddy, who was a Commissioner and then
5 the Chairman of the Board of Prison Terms until his retirement in 1992. Petitioner’s Exhibits 7
6 ¶ 2. Leddy avers that former Governor Pete Wilson installed commissioners who favored a “no
7 parole” policy and that thereafter, the number of inmates paroled declined precipitously. Id. at
8 ¶¶ 5, 14. Petitioner also offers a portion of a deposition of a Edmund Tong, who is not further
9 identified by petitioner, but who discusses in the except of his testimony changes in the Board of
10 Prison Terms under Governor Wilson. According to Mr. Tong, under prior administrations, the
11 Board panel was concerned that the regulations be followed, but this changed during the Wilson
12 administration Id., Ex. 8 at 48: 1-9. He also identified two commissioners, John Gillis and Ron
13 Koenig, who he believed reached their parole decisions based on their perception of what the
14 governor wanted them to do. Id., Ex. 8 at 106: 16-20. In addition, petitioner has submitted the
15 transcript from a 1999 legislative hearing on parole, which examined former Governor Wilson’s
16 impact on the parole system in California.

17 Petitioner is entitled to a parole hearing before an unbiased decision maker who
18 considers his case individually. O’Bremski v. Maass, 915 F.3d 418, 422 (9th Cir. 1990).
19 Contrary to petitioner’s claim, the record before this court reflects that the Board panel examined
20 the facts of petitioner’s case in reaching its decision. Moreover, petitioner’s “proof” of the
21 Board’s alleged bias is little but speculation and hearsay and concerns a period before the May
22 2000 suitability hearing that petitioner challenges here. Finally, nothing in petitioner’s
23 supporting evidence shows that the Board panel members hearing his case – Commissioners
24 Hepburn, Munoz and Cater – were appointed by Governor Wilson, were influenced by that
25 governor’s views (even assuming those views have been proven) or embraced a no-parole policy
26 themselves. Petitioner has failed to satisfy his burden of establishing that he is entitled to relief

1 in these habeas proceedings. Tidwell v. Marshall, 526 F. Supp.2d 1031, 1046 (C.D. Cal. 2007)
2 (where a habeas petitioner broadly claims that a Board panel was biased he bears the burden of
3 producing evidence demonstrating bias) see In re Morrall, 102 Cal. App.4th 280, 285 (2003)
4 (“political rhetoric does not establish such a blanket policy”).

5 VII. The Denial Of Parole And The Eighth Amendment (Claim 4)

6 Petitioner argues that the Board wantonly inflicts unnecessary pain on petitioner
7 in administering his sentence in violation of the Eighth Amendment. In advancing this argument
8 petitioner relies on two capital cases, Atkins v. West Virginia, 536 U.S. 304 (2002) and Gregg v.
9 Georgia, 428 U.S. 153 (1977), for the proposition that the Eighth Amendment is violated when
10 punishment involves the unnecessary and wanton infliction of pain without penological
11 justification wholly apart from the proportionality of the punishment. Second Amended Petition
12 at 17. Petitioner cites nothing to suggest that this branch of Eighth Amendment jurisprudence
13 has any application outside the capital context. Indeed, citing Gregg, the Ninth Circuit has
14 recognized that “[i]n the context of executions, the Eighth Amendment prohibits punishments
15 that involve the unnecessary and wanton infliction of pain” Beardslee v. Woodford, 395
16 F.3d 1064, 1070 (9th Cir. 2005) (internal citation & quotation omitted). Moreover, the Ninth
17 Circuit has said that any emotional trauma from dashed expectations concerning parole “does not
18 offend the standards of decency in modern society.” Baumann v. Arizona Department of
19 Corrections, 754 F.2d 841 (9th Cir. 1985). See also Bowens v. Sisto, No. CIV S-08-CV-1489
20 LKK CHS, 2011 WL 2198322, at *8 (E.D. Cal. June 6, 2011) (“Petitioner fails to articulate how
21 the denial of parole to an inmate serving an indeterminate life sentence constitutes cruel and
22 unusual punishment, particularly where a parole grant in this context would effectively reduce his
23 presumptively valid maximum sentence of life imprisonment.”); Grant v. Swarthout, No.
24 2:06cv02842-RCT, 2010 WL 3941926, at *2 (E.D. Cal. Oct. 6, 2010); Gross v. Quarterman,
25 Civil Action No. H-04-136, 2007 WL 4411755 at *12 (S.D. Tex. 2007) (“denying parole and

26 ////

1 requiring an inmate to serve his entire sentence is punishment, but it does not constitute cruel and
2 unusual punishment.”).

3 To the extent that petitioner is raising a proportionality challenge to his sentence,
4 he fares no better. With the exception of capital cases, successful Eighth Amendment challenges
5 to the proportionality of a sentence have been “exceedingly rare.” Rummel v. Estelle, 445 U.S.
6 263, 272, (1980). See also Solem v. Helm, 463 U.S. 277, 289-90 (1983); Ramirez v. Castro, 365
7 F.3d 755, 775 (9th Cir. 2004). The Eighth Amendment forbids only extreme sentences that are
8 grossly disproportionate to the crime. Solem, 463 U.S. at 288, 303; Harmelin v. Michigan, 501
9 U.S. 957, 1001 (1991) (Kennedy, J., concurring). A life sentence for murder, even without the
10 possibility of parole, is not constitutionally disproportionate. Harris v. Wright, 93 F.3d 581, 583-
11 585 (9th Cir. 1996); United States v. LaFleur, 971 F.2d 200, 211 (9th Cir.1991) (“[I]t is clear
12 that a mandatory life sentence for murder does not constitute cruel and unusual punishment.”);
13 see also Harmelin, 501 U.S. at 1009 (upholding a sentence of life imprisonment with no
14 possibility of parole for a first offense crime of possession of 672 grams of cocaine as not being
15 disproportionate). —

16 VIII. Violation Of The Plea Bargain (Claim 5)

17 Plea agreements are contractual in nature and are construed using the ordinary
18 rules of contract interpretation. United States v. Transfiguracion, 442 F.3d 1222, 1228 (9th Cir.
19 2006); Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003). Courts will enforce the literal
20 terms of the plea agreement but must construe any ambiguities against the prosecution. United
21 States v. Franco-Lopez, 312 F.3d 984, 989 (9th Cir. 2002). “[W]hen a plea rests in any
22 significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part
23 of the inducement or consideration, such promise must be fulfilled.” Santobello v. New York,
24 404 U.S. 257, 262 (1971). In construing a plea agreement, this court must determine what
25 petitioner reasonably believed to be its terms at the time of the plea. United States v. Anderson,
26 970 F.2d 602, 607 (9th Cir. 1992), as amended, 990 F.2d 1163 (9th Cir. 1993).

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
2 shall be served and filed within twenty-one days after service of the objections. The parties are
3 advised that failure to file objections within the specified time may waive the right to appeal the
4 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 In any objections he elects to file, petitioner may address whether a certificate of
6 appealability should issue in the event he files an appeal of the judgment in this case. See Rule
7 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a
8 certificate of appealability when it enters a final order adverse to the applicant); Hayward v.
9 Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc) (prisoners are required to obtain a certificate of
10 appealability to review the denial of a habeas petition challenging an administrative decision
11 such as the denial of parole by the parole board), overruled in part by Swarthout, 562 U.S. ____ ,
12 131 S. Ct. 859 (2011).

13 DATED: July 30, 2011.

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16 _____
17 DALE A. DROZD
18 UNITED STATES MAGISTRATE JUDGE

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