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

DONALD NORWOOD,

Petitioner,

No. 2:09-cv-2047-GEB-JFM (HC)

vs.

D.K. SISTO,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2008 decision of the Board of Parole Hearings (“the Board”) denying him parole. Petitioner claims his due process rights were violated by the Board when it relied on the circumstances of petitioner’s commitment offense to deny parole, used unconstitutionally vague standards and criteria to find him unsuitable for parole, and maintained a pattern of construing murder cases as “particularly egregious” under regulations addressing parole suitability. Pet. at 5. Upon careful consideration of the record and the applicable law, the undersigned recommends that petitioner’s application for habeas corpus relief be denied.

FACTUAL AND PROCEDURAL BACKGROUND

In 1983, petitioner was convicted of second degree murder with use of a firearm and attempted voluntary manslaughter, and sentenced to twenty-two years to life in prison. See Pet. at 1. On May 7, 2008, petitioner appeared before the Board for a parole consideration

1 hearing. See Pet., Ex. A. Petitioner appeared at and participated in the hearing. See id.  
2 Following deliberations held at the conclusion of the hearing, the Board announced their decision  
3 to deny petitioner parole and the reasons for that decision. Id. at 69-76.

4 This action was filed on July 24, 2009. Respondent filed an answer on September  
5 14, 2009. Petitioner did not file a traverse.

## 6 ANALYSIS

### 7 I. Standards for a Writ of Habeas Corpus

8 Federal habeas corpus relief is not available for any claim decided on the merits in  
9 state court proceedings unless the state court's adjudication of the claim:

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

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

14 28 U.S.C. § 2254(d).

15 Under section 2254(d)(1), a state court decision is “contrary to” clearly  
16 established United States Supreme Court precedents if it applies a rule that contradicts the  
17 governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially  
18 indistinguishable from a decision of the Supreme Court and nevertheless arrives at different  
19 result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406  
20 (2000)).

21 Under the “unreasonable application” clause of section 2254(d)(1), a federal  
22 habeas court may grant the writ if the state court identifies the correct governing legal principle  
23 from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the  
24 prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ  
25 simply because that court concludes in its independent judgment that the relevant state-court  
26 decision applied clearly established federal law erroneously or incorrectly. Rather, that

1 application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75  
2 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal  
3 question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”).

4           The court looks to the last reasoned state court decision as the basis for the state  
5 court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court  
6 reaches a decision on the merits but provides no reasoning to support its conclusion, a federal  
7 habeas court independently reviews the record to determine whether habeas corpus relief is  
8 available under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

## 9 II. Petitioner’s Claims

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

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

1 made, and thereby gives rise to a constitutional liberty interest.” Greenholtz, 442 U.S. at 12. See  
2 also Allen, 482 U.S. at 376-78.

3 California’s parole statutes give rise to a liberty interest in parole protected by the  
4 federal due process clause. Swarthout v. Cooke, 562 U.S. \_\_\_\_ (2011), No. 10-333, 2011 WL  
5 197627, at \*2 (Jan. 24, 2011). In California, a prisoner is entitled to release on parole unless  
6 there is “some evidence” of his or her current dangerousness. In re Lawrence, 44 Cal.4th 1181,  
7 1205-06, 1210 (2008); In re Rosenkrantz, 29 Cal.4th 616, 651-53 (2002). However, in  
8 Swarthout the United States Supreme Court held that “[n]o opinion of [theirs] supports  
9 converting California’s ‘some evidence’ rule into a substantive federal requirement.” Swarthout,  
10 2011 WL 197627, at \*3. Rather, the protection afforded by the federal due process clause to  
11 California parole decisions consists solely of the “minimal” procedural requirements set forth in  
12 Greenholtz, specifically “an opportunity to be heard and . . . a statement of the reasons why  
13 parole was denied.” Id. at \*2-3.

14 Here, the record reflects that petitioner was present at the 2008 parole hearing,  
15 that he participated in the hearing, and that he was provided with the reasons for the Board’s  
16 decision to deny parole. According to the United States Supreme Court, the federal due process  
17 clause requires no more. Accordingly, petitioner’s application for a writ of habeas corpus should  
18 be denied.

19 Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United  
20 States District Courts, “[t]he district court must issue or a deny a certificate of appealability when  
21 it enters a final order adverse to the applicant.” Rule 11, 28 U.S.C. foll. § 2254. A certificate of  
22 appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial  
23 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either  
24 issue a certificate of appealability indicating which issues satisfy the required showing or must  
25 state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b). For the reasons

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1 set forth in these findings and recommendations, petitioner has not made a substantial showing of  
2 the denial of a constitutional right. Accordingly, no certificate of appealability should issue.

3 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

- 4 1. Petitioner's application for a writ of habeas corpus be denied; and
- 5 2. The district court decline to issue a certificate of appealability.

6 These findings and recommendations are submitted to the United States District  
7 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
8 days after being served with these findings and recommendations, any party may file written  
9 objections with the court and serve a copy on all parties. Such a document should be captioned  
10 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
11 objections shall be filed and served within fourteen days after service of the objections. The  
12 parties are advised that failure to file objections within the specified time may waive the right to  
13 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 DATED: March 24, 2011.

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17 UNITED STATES MAGISTRATE JUDGE

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