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

DAVID PRIEST,

Petitioner,

No. CIV S-09-2979 MCE EFB P

vs.

J. W. HAVILAND,

Respondent.

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_/

Petitioner is a state prisoner proceeding *in propria persona* with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the decision of the California Board of Parole Hearings (hereinafter “Board”) to deny him parole at a parole consideration hearing held on January 7, 2008. He claims that the Board’s decision finding him unsuitable for parole violated his right to due process, and that the misconduct of the District Attorney during the suitability hearing prejudiced him and rendered the Board’s decision arbitrary and capricious.

As discussed below, the United States Supreme Court has held that the only inquiry on federal habeas review of a denial of parole is whether the petitioner has received “fair procedures” for vindication of the liberty interest in parole given by the state. *Swarthout v. Cooke*, 562 U.S. \_\_\_\_ (2011), No. 10-333, 2011 WL 197627, at \*2 (Jan. 24, 2011). In the context of a California parole suitability hearing, a petitioner receives adequate process when he/she is

1 allowed an opportunity to be heard and a statement of the reasons why parole was denied. *Id.* at  
2 \*\*2-3 (federal due process satisfied where petitioners were “allowed to speak at their parole  
3 hearings and to contest the evidence against them, were afforded access to their records in  
4 advance, and were notified as to the reasons why parole was denied”); *see also Greenholtz v.*  
5 *Inmates of Neb. Penal*, 442 U.S. 1, 16 (1979). For the reasons that follow, applying this standard  
6 here requires that the petition for writ of habeas corpus be denied.

### 7 **I. Procedural Background**

8 Petitioner is confined pursuant to a 1987 judgment of conviction entered against him in  
9 the San Joaquin County Superior Court following his conviction on charges of second degree  
10 murder with use of a weapon. Pet. at 1.<sup>1</sup> Pursuant to that conviction, petitioner was sentenced to  
11 sixteen years to life in state prison. *Id.*

12 The parole consideration hearing that is placed at issue by the instant petition was held on  
13 January 7, 2008. Dckt. 1-1, at 106. Petitioner appeared at and participated in the hearing. *Id.* at  
14 106-72. Following deliberations held at the conclusion of the hearing, the Board panel  
15 announced their decision to deny petitioner parole for two years and the reasons for that  
16 decision. *Id.* at 173-81.

17 Petitioner challenged the Board’s 2008 decision in a petition for writ of habeas corpus  
18 filed in the San Joaquin County Superior Court. Answer, Ex. 2. The Superior Court denied that  
19 petition in a reasoned decision. *Id.* at 1. Petitioner subsequently challenged the Board’s 2008  
20 decision in a petition for writ of habeas corpus filed in the California Court of Appeal and in a  
21 petition for review filed in the California Supreme Court. *Id.*, Exs. 3, 4. Those petitions were  
22 summarily denied. *Id.*

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26 <sup>1</sup> Page number citations such as these are to the page number reflected on the court’s  
CM/ECF system and not to page numbers assigned by the parties.

1 **II. Petitioner’s Claims**

2 **A. Prosecutorial Misconduct**

3 In his first ground for relief, petitioner claims that a Deputy District Attorney who was  
4 present at the 2008 parole suitability hearing committed prejudicial misconduct which rendered  
5 the Board’s suitability decision “arbitrary and capricious.” Pet. at 25. The background to this  
6 claim is the following. At the 2008 hearing, petitioner answered in the affirmative when he was  
7 asked whether his “explanation for the murder is your wife told you she was raped by [the  
8 victim].” Dckt. 1-1, at 145. Petitioner conceded that his wife did not report the rape to law  
9 enforcement authorities. *Id.* However, he stated that his wife told him the victim had raped her.  
10 *Id.* at 149. When it was his turn to ask questions, the representative from the District Attorney’s  
11 Office asked petitioner whether he was aware his wife had “denied telling [petitioner] that she  
12 was raped to a District Attorney’s Investigator.” *Id.* at 156. He further stated that “about four  
13 years ago” petitioner’s wife had denied the rape occurred. *Id.* Petitioner stated he didn’t believe  
14 this was true, and mentioned a 2000 letter written to the Board by his wife, wherein she  
15 explained that she had told petitioner the victim had raped her. *Id.* at 156-57. *See also* Pet. at  
16 52-53. The Deputy District Attorney then asked petitioner whether he was aware “that his wife  
17 admitted to forging that letter.” Dckt. 1-1, at 157. Petitioner stated this was not true. *Id.*

18 In the instant petition, petitioner denies that his wife’s 2000 letter was forged or that his  
19 wife’s statements were false, and he argues that the Deputy District Attorney knew this when he  
20 confronted petitioner at the 2008 hearing about that letter. Pet. at 27. Petitioner provides  
21 evidence that, subsequent to the 2008 hearing, his then-counsel investigated this matter and later  
22 filed complaints with the California Bar Association against the two Deputy District Attorneys  
23 who attended the 2008 hearing, claiming that the questions they asked petitioner about whether  
24 his wife had fabricated the information contained in her 2000 letter were not based on existing  
25 evidence. Dckt. 1-1, at 183-86.

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1 In the context of criminal proceedings, a criminal defendant's due process rights are  
2 violated when a prosecutor's misconduct renders a trial fundamentally unfair. *Darden v.*  
3 *Wainwright*, 477 U.S. 168, 181 (1986). Relief on such claims is limited to cases in which the  
4 petitioner can establish that prosecutorial misconduct resulted in actual prejudice. *Johnson v.*  
5 *Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38  
6 (1993)); *see also Darden*, 477 U.S. at 181-83; *Turner v. Calderon*, 281 F.3d 851, 868 (9th Cir.  
7 2002). Prosecutorial misconduct violates due process when it has a substantial and injurious  
8 effect or influence in determining the jury's verdict. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899  
9 (9th Cir. 1996). Petitioner has not cited any case law which applies these laws to the conduct of  
10 a prosecutor who attends a parole suitability hearing. Respondent notes that pursuant to  
11 California law, a representative from the District Attorney's Office is allowed to attend parole  
12 consideration hearings, comment on the facts of the case, and offer an opinion about the  
13 appropriate disposition. *See* Cal. Penal Code § 3041.7; Cal. Code Regs., tit. 15 § 2030(d)(2).

14 Assuming *arguendo* that the law regarding prosecutorial misconduct applies in the  
15 context of a parole suitability hearing, petitioner is not entitled to relief on this claim. He has not  
16 demonstrated that the comments made by the Assistant District Attorney at the 2008 hearing  
17 affected the Board's decision or otherwise rendered the proceedings fundamentally unfair. As  
18 noted by respondent, the Board did not mention the District Attorney's remarks in its decision  
19 and did not rely on these remarks in finding petitioner unsuitable for parole. *See* Dckt. 1-1, at  
20 173-81. Rather, the Board relied on petitioner's defensive demeanor at the hearing "when  
21 confronted with stressful issues;" his prior criminal history; his prison disciplinary history; his  
22 history of alcohol abuse; and his most recent psychological report, which opined that he posed a  
23 low moderate risk of danger to society if released at that time. *Id.* Petitioner argues that the  
24 Board's reliance on his "demeanor" reflects that the Board relied on the District Attorney's  
25 questions and insinuations at the hearing to find him unsuitable for parole. However, the record  
26 does not support this assertion. The Board merely noted that petitioner became defensive when

1 confronted with negative information, and concluded that he was not yet able to “handle stress in  
2 a non-destructive manner.” *Id.* at 173-74. Indeed, the Board commissioner stated that “the  
3 question is not . . . whether or not your wife was raped . . .” *Id.* at 175-76. This court also notes  
4 that although opposition to parole by law enforcement is to be considered during the parole  
5 process, California Penal Code § 3046(c), “voiced opposition to parole is not an enumerated  
6 unsuitability factor . . . and such argument is not evidence of unsuitability.” *Saldade v. Adams*,  
7 573 F. Supp.2d 1303, 1310 (E.D. Cal. 2008).

8 Under the circumstances of this case, petitioner has failed to demonstrate that the actions  
9 of the District Attorney at the 2008 suitability hearing resulted in actual prejudice to him or  
10 otherwise rendered the Board’s decision arbitrary and capricious. Accordingly, petitioner is not  
11 entitled to relief on his claim of prosecutorial misconduct.

## 12 **B. Due Process**

13 In his second ground for relief, petitioner claims that the Board’s 2008 decision finding  
14 him unsuitable for parole violated his right to due process because it was not supported by “some  
15 evidence” that he posed a current danger to society if released from prison and was improperly  
16 based on the unchanging circumstances of his commitment offense. *Pet.* at 29.

17 The Due Process Clause of the Fourteenth Amendment prohibits state action that  
18 deprives a person of life, liberty, or property without due process of law. A litigant alleging a  
19 due process violation must first demonstrate that he was deprived of a liberty or property interest  
20 protected by the Due Process Clause and then show that the procedures attendant upon the  
21 deprivation were not constitutionally sufficient. *Kentucky Dep’t of Corrections v. Thompson*,  
22 490 U.S. 454, 459-60 (1989).

23 A protected liberty interest may arise from either the Due Process Clause of the United  
24 States Constitution “by reason of guarantees implicit in the word ‘liberty,’” or from “an  
25 expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221  
26 (2005) (citations omitted). *See also Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The

1 United States Constitution does not, of its own force, create a protected liberty interest in a  
2 parole date, even one that has been set. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981);  
3 *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1, 7 (1979) (There is “no constitutional or  
4 inherent right of a convicted person to be conditionally released before the expiration of a valid  
5 sentence.”); *see also Hayward v. Marshall*, 603 F.3d 546, 561 (9th Cir. 2010) (en banc).  
6 However, “a state’s statutory scheme, if it uses mandatory language, ‘creates a presumption that  
7 parole release will be granted’ when or unless certain designated findings are made, and thereby  
8 gives rise to a constitutional liberty interest.” *Greenholtz*, 442 U.S. at 12). *See also Allen*, 482  
9 U.S. at 376-78.

10 California’s parole scheme gives rise to a liberty interest in parole protected by the  
11 federal due process clause. *Swarthout v. Cooke*, 562 U.S. at \_\_\_, 2011 WL 197627, at \*2. In  
12 California, a prisoner is entitled to release on parole unless there is “some evidence” of his or her  
13 current dangerousness. *In re Lawrence*, 44 Cal.4th 1181, 1205-06, 1210 (2008); *In re*  
14 *Rosenkrantz*, 29 Cal.4th 616, 651-53 (2002). However, the United States Supreme Court has  
15 held that correct application of California’s “some evidence” standard is not required by the  
16 federal Due Process Clause. *Swarthout*, 2011 WL 197627, at \*2. Rather, the inquiry on federal  
17 habeas is whether the petitioner has received “fair procedures” for vindication of the liberty  
18 interest in parole given by the state. *Id.* In the context of a parole suitability hearing, a petitioner  
19 receives adequate process when he/she is allowed an opportunity to be heard and a statement of  
20 the reasons why parole was denied. *Id.* at \*\*2-3 (federal due process satisfied where petitioners  
21 were “allowed to speak at their parole hearings and to contest the evidence against them, were  
22 afforded access to their records in advance, and were notified as to the reasons why parole was  
23 denied”); *see also Greenholtz*, 442 U.S. at 16.

24 Here, the record reflects that petitioner was present at the 2008 parole hearing, that he  
25 participated in the hearing, and that he was provided with the reasons for the Board’s decision to  
26 deny parole. Pursuant to *Swarthout*, this is all that due process requires. As set forth above,

1 federal due process does not require that the Board's suitability decision be supported by  
2 evidence that petitioner was not currently dangerous. Accordingly, petitioner is not entitled to  
3 relief on his due process claim.

4 **IV. Conclusion**

5 For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's  
6 application for a writ of habeas corpus be denied.

7 These findings and recommendations are submitted to the United States District Judge  
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
9 after being served with these findings and recommendations, any party may file written  
10 objections with the court and serve a copy on all parties. Such a document should be captioned  
11 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
12 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
13 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14 In any objections he elects to file, petitioner may address whether a certificate of  
15 appealability should issue in the event he files an appeal of the judgment in this case. *See* Rule  
16 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a  
17 certificate of appealability when it enters a final order adverse to the applicant); *Hayward v.*  
18 *Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc) (prisoners are required to obtain a certificate of  
19 appealability to review the denial of a habeas petition challenging an administrative decision  
20 such as the denial of parole by the parole board).

21 DATED: February 14, 2011.

22   
23 EDMUND F. BRENNAN  
24 UNITED STATES MAGISTRATE JUDGE  
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