

MAY 21 2012

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID LEON DEW,

Petitioner - Appellant,

v.

BEN CURRY,

Respondent - Appellee,

and

BOARD OF PAROLE and ARNOLD
SCHWARZENEGGAR,

Real-party-in-interest.

No. 07-17208

D.C. No. CV-07-01818-PJH

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted May 15, 2012**

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: CANBY, GRABER, and M. SMITH, Circuit Judges.

California state prisoner David Leon Dew appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Dew contends that the Board of Parole Hearings's (Board) 2005 decision finding him unsuitable for parole was not supported by "some evidence" and therefore violated his due process rights. This claim is foreclosed. *See Swarthout v. Cooke*, 131 S. Ct. 859, 862-63 (2011) (per curiam).

Dew also contends that title 15, section 2402(c)(1) of the California Code of Regulations is unconstitutionally vague as applied to the determination that he was unsuitable for parole in 2005. This claim is also not cognizable on federal habeas review. *See Swarthout*, 131 S. Ct. at 862-63.

Finally, Dew contends that the Board breached the terms of his plea agreement by refusing to grant him parole in 2005. Dew has not demonstrated that he was promised parole under the plea agreement. The state court's determination that the Board did not breach the plea agreement was not contrary to, or an unreasonable application of clearly established federal law as determined by the Supreme Court, nor based on an unreasonable determination of the facts in light of

the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d);
Penry v. Johnson, 532 U.S. 782, 792-93 (2001).

AFFIRMED.