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CLERK, U.S. DISTRICT COURT
NOV 14 2008
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DIXON JACKSON,) NO. CV 08-3481-VBF(E)
)
Petitioner,)
)
v.) ORDER ADOPTING FINDINGS,
)
J.W. HARTLEY, Warden,) CONCLUSIONS AND RECOMMENDATIONS OF
)
Respondent.) UNITED STATES MAGISTRATE JUDGE
)

Pursuant to 28 U.S.C. section 636, the Court has reviewed the
Petition, all of the records herein and the attached Report and
Recommendation of United States Magistrate Judge. The Court approves
and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the
Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order,
the Magistrate Judge's Report and Recommendation and the Judgment
herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Nov 7, 2008.

Valerie Baker Fairbank

VALERIE BAKER FAIRBANK
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DIXON JACKSON,) NO. CV 08-3481-VBF(E)
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Petitioner,)
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v.) REPORT AND RECOMMENDATION OF
)
J.W. HARTLEY, Warden,) UNITED STATES MAGISTRATE JUDGE
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Respondent.)
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This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on May 28, 2008, accompanied by a supporting

1 Memorandum ("Pet. Mem.")¹ and exhibits. Petitioner alleges, among
2 other things, that the California Board of Prison Terms, now the
3 California Board of Parole Hearings ("Board"),² violated Petitioner's
4 rights by failing to provide parole consideration hearings to
5 Petitioner. Respondent filed a Motion to Dismiss on June 23, 2008.
6 Petitioner filed an Opposition to the Motion to Dismiss on July 9,
7 2008.

8
9 **PROCEDURAL BACKGROUND**

10
11 In 1992, Petitioner pled nolo contendere to five counts of
12 forcible rape in violation of California Penal Code section 261(a)(2),
13 a crime carrying an upper term sentence of eight years under
14 California Penal Code section 264(a) (Pet. Mem., p. 3; Motion to
15 Dismiss, Ex. 1). Pursuant to California's Determinate Sentencing Law
16 ("DSL"), California Penal Code section 1170, the court sentenced
17 Petitioner to five consecutive upper term sentences of eight years,
18 for a total determinate sentence of forty years (see Motion to
19 Dismiss, Exs. 1, 2).

20
21 California Penal Code section 3000(b)(1) provides, in pertinent
22 part, that at the expiration of a determinate sentence the inmate
23 shall be released on parole for a period not exceeding three years.

24
25 ¹ Petitioner's Memorandum contains various sections which
26 are separately paginated. The Court refers to the Memorandum by
section title and page number.

27 ² On July 1, 2005, the California Board of Prison Terms
28 was abolished and replaced by the California Board of Parole
Hearings. See Cal. Penal Code § 5075(a).

1 Petitioner's current projected release date is May 18, 2020, and his
2 maximum release date is May 17, 2031 (Motion to Dismiss, Ex. 2).
3

4 Petitioner alleges that, in July of 1992, Petitioner filed an
5 application for a certificate of probable cause, alleging Petitioner
6 was denied the effective assistance of counsel in his criminal
7 proceedings (Pet. Mem., "Procedural History," p. 1). The Superior
8 Court allegedly denied the application (id.). Petitioner allegedly
9 sought review in the California Court of Appeal, but that court
10 allegedly denied relief, assertedly based on Petitioner's failure to
11 allege sufficient facts showing an entitlement to relief (id.).³
12 Petitioner alleges that he thereafter sought to learn how to state the
13 required facts (id.). In December of 2000, allegedly having obtained
14 sufficient information, Petitioner filed a habeas corpus petition in
15 the Superior Court alleging, inter alia, prosecutorial misconduct
16 (id.; "Procedural History," pp. 1-2). The Superior Court denied this
17 petition in 2001 (id.; "Procedural History," p. 2). Petitioner
18 alleges that he did not file any appeals related to that petition due
19 to "some debilitating mental illness" (id.).
20

21 On November 15, 2006, Petitioner submitted an "Inmate/Parolee
22 Appeal Form" to the prison appeals office, requesting a parole
23

24 ³ Petitioner's Court of Appeal petition is not in the
25 record. However, the Court takes judicial notice of the record
26 in Dixon v. Superior Court, California Court of Appeal case
27 number B071808, available on the California courts' website at
28 www.courtinfo.ca.gov. See Mir v. Little Company of Mary Hosp.,
844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice
of court records). The record for that case indicates that the
petition was filed on December 4, 1992, and was denied summarily.

1 consideration hearing and the setting of a parole release date, and
2 stating that Petitioner assertedly should receive a release date
3 sometime in 2007⁴ (Petition, Exhibits, pp. 1-2). The appeal was
4 returned to Petitioner with the notation that action sought was under
5 the jurisdiction of the Board, and that Petitioner should send his
6 request to the Board (Petition, Exhibits, p. 3).

7
8 On December 28, 2006, Petitioner filed a petition for writ of
9 habeas corpus in the Superior Court, alleging, inter alia, that:

10 (1) the sentencing court allegedly imposed mandatory parole without
11 informing Petitioner how he was to be paroled; (2) the imposition of a
12 three-year period of mandatory parole effectively required Petitioner
13 to serve a forty-three-year sentence instead of a forty-year sentence,
14 allegedly in violation of Petitioner's plea agreement; and

15 (3) California inmates sentenced pursuant to the DSL, such as
16 Petitioner, assertedly were entitled to the same procedures for a
17 parole consideration hearing and the setting of a release date as
18 prisoners sentenced under California's Indeterminate Sentencing Law
19 ("ISL") (Motion to Dismiss, Ex. 3). Sometime after January of 2007,
20 Petitioner filed a habeas corpus petition in the Superior Court
21 challenging his sentence under Cunningham v. California, 539 U.S. 270
22 (2007) ("Cunningham") (Pet. Mem., "Procedural History," p. 2). The
23 Superior Court denied the Cunningham petition (id.). On July 13,
24 2007, the Superior Court denied the December 28, 2006 petition on the
25 grounds that: (1) the issue whether Petitioner had the right to a
26 parole hearing for early release could or should have been raised on

27
28 ⁴ i.e., approximately fifteen years into his forty-year
determinate sentence.

1 appeal; (2) Petitioner provided no justification for the delay in
2 asserting his claim; (3) the petition was successive (apparently to
3 the Cunningham petition); and (4) there was no legal or constitutional
4 support for Petitioner's contention, because inmates sentenced to
5 indeterminate sentences were not similarly situated to those sentenced
6 under the DSL (Motion to Dismiss, Ex. 4).

7
8 Petitioner filed a habeas corpus petition in the California Court
9 of Appeal on July 19, 2007, which that court denied summarily on
10 August 7, 2007 (Motion to Dismiss, Exs. 5, 6). Petitioner filed a
11 habeas corpus petition in the California Supreme Court on
12 September 21, 2007, which that court denied summarily on March 19,
13 2008 (Motion to Dismiss, Exs. 7, 8).

14
15 **STATE LAW GOVERNING PAROLE FOR DSL INMATES**

16
17 In In re Dannenberg, 34 Cal. 4th 1061, 23 Cal. Rptr. 3d 417, 104
18 P.3d 783 (2005), cert. denied, 546 U.S. 844 (2005), the California
19 Supreme Court described the evolution of California's different
20 treatment of DSL and ISL inmates with respect to parole:

21
22 For decades before 1977, California employed an
23 "indeterminate" sentencing system for felonies. The court
24 imposed a statutory sentence expressed as a range between a
25 minimum and maximum period of confinement - often life
26 imprisonment - the offender must serve. An inmate's actual
27 period of incarceration within this range was under the
28 exclusive control of the parole authority, which focused,

1 primarily, not on the appropriate punishment for the
2 original offense, but on the offender's progress toward
3 rehabilitation. During most of this period, parole dates
4 were not set, and prisoners had no idea when their
5 confinement would end, until the moment the parole authority
6 decided they were ready for release. (See People v.
7 Jefferson (1999) 21 Cal.4th 86, 94-95, 86 Cal.Rptr.2d 893,
8 980 P.2d 441 (Jefferson); Cassou & Taugher, Determinate
9 Sentencing in California: The New Numbers Game (1978) 9
10 Pacific L.J. 5, 6-16 (Cassou & Taugher).)

11
12 The DSL, adopted in 1976, largely abandoned this
13 system. The DSL implemented the Legislature's finding that
14 "the purpose of imprisonment for crime is punishment," a
15 goal "best served by terms proportionate to the seriousness
16 of the offense," with provision for sentence "uniform[ity]"
17 for similar offenses. (§ 1170, subd. (a)(1).)

18
19 Under the DSL, most felonies are now subject, in the
20 alternative, to three precise terms of years (for example,
21 two, three, or four years, or three, five, or seven years).
22 The court selects one of these alternatives (the lower,
23 middle, or upper term) when imposing the sentence. (§ 1170,
24 subds. (a)(3), (b); see Jefferson, supra, 21 Cal.4th 86, 95,
25 86 Cal.Rptr.2d 893, 980 P.2d 441.) The offender must serve
26 this entire term, less applicable sentence credits, within
27 prison walls, but then must be released for a further period
28 of supervised parole. (§ 3000, subd. (b); see Cassou &

1 Taugher, supra, 9 Pacific L.J. 5, 26.)

2
3 However, certain serious offenders, including
4 "noncapital" murderers (i.e., those murderers not punishable
5 by death or life without parole), remain subject to
6 indeterminate sentences. These indeterminate sentences may
7 serve up to life in prison, but they become eligible for
8 parole consideration after serving minimum terms of
9 confinement. (See Jefferson, supra, 21 Cal.4th 86, 92-93, 86
10 Cal.Rptr.2d 893, 980 P.2d 441.) As under prior law, life
11 inmates' actual confinement periods within the statutory
12 range are decided by an executive parole agency. This
13 agency, an arm of the Department of Corrections, is now
14 known as the BPT.^[5] (See § 3040.)
15

16 Section 3041 addresses how the Board is to make parole
17 decisions for indeterminate life inmates. Subdivision (a)
18 provides that, one year before the prisoner's minimum
19 eligible parole date, a Board panel shall meet with the
20 inmate, "shall normally set a parole release date," and
21 shall do so "in a manner that will provide uniform terms for
22 offenses of similar gravity and magnitude in respect to
23 their threat to the public." The release date also must
24 "comply with the sentencing rules that the Judicial Council
25 may issue and any sentencing information relevant to the
26 setting of parole release dates." The Board must "establish

27
28 ⁵ Now the California Board of Parole Hearings. See
fn. 2, ante.

1 criteria for the setting of parole release dates and in
2 doing so shall consider the number of victims of the crime .
3 . . and other factors in mitigation or aggravation of the
4 crime."

5
6 . . .

7
8 However, subdivision (b) of section 3041 specifies the
9 circumstances under which a date for an indeterminate life
10 inmate's release on parole need not be fixed. Subdivision
11 (b) provides that a parole release date shall be set "unless
12 [the Board] determines" that the inmate is presently
13 unsuitable for the fixing of a parole date, i.e., that "the
14 gravity of the current convicted offense or offenses, or the
15 timing and gravity of current or past convicted offense or
16 offenses, is such that consideration of the public safety
17 requires a more lengthy period of incarceration for this
18 individual, and that a parole date, therefore, cannot be
19 fixed at this meeting." . . .

20
21 The regulations governing murderers serving
22 indeterminate life sentences have long provided that
23 determination of an individual inmate's suitability for
24 parole under section 3041, subdivision (b) must precede any
25 effort to set a parole release date under the uniform-term
26 principles of section 3041, subdivision (a). As currently
27 worded, the regulations specify that "[t]he panel shall
28 first determine whether the life prisoner is suitable for

1 release on parole. Regardless of the length of time served,
2 a life prisoner shall be found unsuitable for and denied
3 parole if in the judgment of the panel the prisoner will
4 pose an unreasonable risk of danger to society if released
5 from prison." (Cal.Code Regs., tit. 15, § 2402(a), italics
6 added.)

7
8 In re Dannenberg, 34 Cal. 4th at 1077-80 (footnotes renumbered;
9 italics omitted).

10
11 A DSL sentence includes a mandatory three-year parole term which
12 follows: (1) the expiration of a term of imprisonment for a year and a
13 day;⁶ (2) the expiration of a determinate term imposed pursuant to
14 California Penal Code section 1170; or (3) the expiration of a term
15 reduced by earned credits. See Cal. Penal Code § 3000(b)(1). "Under
16 the Determinate Sentencing Law, parole is not part of the prison term,
17 but is required to be served after release from prison." Reed v.
18 Kernan, 2008 WL 906098 at *6 (E.D. Cal. Apr. 2, 2008), adopted, 2008
19 WL 2388386 (E.D. Cal. June 6, 2008) (citing People v. Jefferson, 21
20 Cal. 4th 86, 95-96, 86 Cal. Rptr. 2d 893, 980 P.2d 441 (1999); see
21 also Consiglio v. Hickman, 2008 WL 682645 at *1 (E.D. Cal. Mar. 10,
22 2008) ("parole and imprisonment are separate components of a sentence
23 under the Determinate Sentencing Law").

24
25 ⁶ Contrary to Petitioner's apparent assertion (see Pet.
26 Mem., "Necessity for Evidentiary Hearing/Order to Show Cause,"
27 p. 5), the "year and a day" provision of Penal Code section
28 3000(b)(1) does not fix a DSL inmate's minimum period of
confinement at a year and a day, and does not apply to
Petitioner, who received a sentence much longer than a year
and a day.

1 "The Board . . . has no discretion to grant or withhold parole to
2 a prisoner who has served a determinate term. The prisoner neither
3 applies for nor has the right to reject release on parole." People v.
4 Burgener, 41 Cal. 3d 505, 529 n.12, 224 Cal. Rptr. 112, 714 P.2d 1251
5 (1986), overruled on other grounds, People v. Reyes, 19 Cal. 4th 743,
6 80 Cal. Rptr. 2d 734, 968 P.2d 445 (1998); see also Terhune v.
7 Superior Court, 65 Cal. App. 4th 864, 76 Cal. Rptr. 2d 841 (1998);
8 McCarthy v. Superior Court, 191 Cal. App. 3d 1023, 236 Cal. Rptr. 833
9 (1987). The statutory provisions governing suitability hearings do
10 not apply to DSL prisoners. See Cal. Penal Code § 3041(a) (provision
11 applicable "[i]n the case of any inmate sentenced pursuant to any
12 provision of law other than Chapter 4.5 (commencing with Section 1170)
13 of Title 7 of Part 2" (emphasis added).

14
15 **PETITIONER'S CONTENTIONS**

16
17 The Petition is not a model of clarity. The form Petition
18 contains a list of Petitioner's grounds for relief that differs from
19 the list of Petitioner's grounds for relief contained in the
20 Memorandum attached to the Petition and from other claims alleged in
21 the Memorandum. The Court construes the Petition to assert the
22 following claims:

23
24 1. The sentencing court allegedly imposed a mandatory three-year
25 parole term, assertedly implying that Petitioner would be entitled to
26 release on parole, but allegedly without disclosing "what particular
27 rights or real interest in parole the petitioner was entitled too
28 [sic]" (Pet. Mem., Introduction, p. 3; "Procedural History," p. 5);

1 2. The court and the Board allegedly failed to disclose
2 "essential facts that notify the plaintiff [sic] of his ineligibility
3 or eligibility for parole" (Pet., p. 5);
4

5 3. The Board's alleged failure to provide Petitioner with parole
6 consideration hearings assertedly violated Petitioner's plea agreement
7 (Pet., p. 5; Pet. Mem., Introduction, p. 3; "Procedural History,"
8 pp. 5, 6);
9

10 4. The Board assertedly denied Petitioner his alleged rights to
11 a parole suitability hearing and the setting of an early release date,
12 assertedly in violation of Due Process, the Equal Protection Clause
13 and the Eighth Amendment (Pet. Mem., "Procedural History," p. 5;
14 "Deliberate Indifference," pp. 1-3);
15

16 5. The Board allegedly enforces an alleged "no parole policy"
17 against DSL inmates, assertedly by assuming jurisdiction over a DSL
18 inmate who has completed his or her term of imprisonment (Pet., p. 6);
19

20 6. The Board has interpreted parole statutes to
21 "administratively increase" Petitioner's sentence from 40 years to 43
22 years, "with a potential increase to 44 years," allegedly in violation
23 of Petitioner's asserted Due Process right in early release (Pet.
24 Mem., Introduction, p. 3);
25

26 7. The Board assertedly violates the separation of powers
27 doctrine by allegedly asserting absolute power over parole matters
28 (Pet. Mem., "Court Standard of Review," p. 3);

1 8. The Board allegedly imposes involuntary servitude on an
2 inmate by compelling the inmate to serve a parole term after the
3 completion of his or her prison term (Pet. Mem., "California Parole
4 Practices," pp. 1-8);

5
6 9. The mandatory three-year parole period allegedly constituted
7 a "statutory enhancement," the imposition of which assertedly violated
8 Cunningham because the underlying facts allegedly were not charged or
9 proved beyond a reasonable doubt (Pet. Mem., "Statutorial
10 Enhancements," pp. 1-5; Pet. Mem., "Conclusion," p. 5); and
11

12 10. The state courts allegedly violated Due Process, state law,
13 court rules and Petitioner's Faretta⁷ rights, assertedly by
14 "abbreviating" Petitioner's habeas rights (Pet., p. 6; Pet. Mem.,
15 "Procedural History," p. 5).
16

17 **RESPONDENT'S CONTENTIONS**

18
19 Respondent contends:

20
21 1. The Petition allegedly is untimely;
22

23 2. The doctrine of procedural default allegedly bars
24 Petitioner's claims;

25 ///

26 ///

27
28 ⁷ Faretta v. California, 422 U.S. 806 (1975).