



1 Petitioner's traverse was filed on September 13, 2010.

2 Petitioner filed a supplement to the traverse on September 24,  
3 2010.

4 I. Consideration of Dismissal of the Petition

5 Rule 4 of the Rules Governing § 2254 Cases in the United  
6 States District Courts (Habeas Rules) requires the Court to make  
7 a preliminary review of each petition for writ of habeas corpus.  
8 The Court must summarily dismiss a petition "[i]f it plainly  
9 appears from the petition and any attached exhibits that the  
10 petitioner is not entitled to relief in the district court...."  
11 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.  
12 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.  
13 1990). Habeas Rule 2(c) requires that a petition 1) specify all  
14 grounds of relief available to the Petitioner; 2) state the facts  
15 supporting each ground; and 3) state the relief requested.  
16 Notice pleading is not sufficient; rather, the petition must  
17 state facts that point to a real possibility of constitutional  
18 error. Rule 4, Advisory Committee Notes, 1976 Adoption;  
19 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.  
20 Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in a petition  
21 that are vague, conclusory, or palpably incredible are subject to  
22 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th  
23 Cir. 1990).

24 Further, the Court may dismiss a petition for writ of habeas  
25 corpus either on its own motion under Habeas Rule 4, pursuant to  
26 the respondent's motion to dismiss, or after an answer to the  
27 petition has been filed. Advisory Committee Notes to Habeas Rule  
28 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43

1 (9th Cir. 2001).

2 Here, Respondent answered the petition on August 25, 2010,  
3 and Petitioner filed a traverse in September 2011. Subsequently,  
4 the United States Supreme Court decided Swarthout v. Cooke, 562  
5 U.S. -, 131 S.Ct. 859, 861-62 (2011). Because Swarthout appears  
6 to apply in the instant case, and because no motion to dismiss  
7 any claims in the petition has been filed, the Court proceeds to  
8 consider whether the petition states a cognizable claim for  
9 relief.

## 10 II. Background

11 Petitioner alleges that she is an inmate of Valley State  
12 Prison for Women in Chowchilla who is serving a sentence of  
13 twenty-five (25) years to life imposed in the San Diego County  
14 Superior Court upon Petitioner's 1989 conviction of first degree  
15 murder with personal use of a firearm. (Pet. 1, 51.) Petitioner  
16 challenges the decision of California's Board of Parole Hearings  
17 (BPH) made after a hearing held on April 10, 2007, to deny  
18 Petitioner parole for five years. (Pet. 16.) Petitioner also  
19 argues that the state court decisions upholding the parole  
20 determination were objectively unreasonable. (Pet. 14-18.)

21 It appears from Petitioner's allegations and accompanying  
22 documentation that she attended the parole hearing held before  
23 the board on April 10, 2007. (Pet., doc. 1-2, 1, 13.)

24 Petitioner spoke to the Board about numerous parole suitability  
25 factors. (Id. at 17-80; doc. 1-3, 1-79; doc. 1-4, 1-4.)

26 Petitioner made a statement in favor of parole to the board on  
27 her own behalf. (Doc. 1-4, 41-44.) Petitioner was also assisted  
28 at the hearing by counsel, who appeared and advocated on her

1 behalf. (Doc. 1-2, 1, 10, 13, 20, 24; doc. 1-3, 5; doc. 1-4, 37-  
2 41.) Petitioner was present when the board gave a statement of  
3 reasons for the denial of parole. (Doc. 1-4, 55-70.) The  
4 decision was based on the nature of the commitment offense,  
5 Petitioner's failure to take full responsibility for her offense,  
6 Petitioner's dysfunctional social history and insufficient  
7 participation and progress in beneficial self-help programming,  
8 problems with her parole plan, and Petitioner's history of  
9 substance abuse. (Id.)

10 Petitioner asks this Court to review whether there was some  
11 evidence to support the conclusion that Petitioner was unsuitable  
12 for parole because she posed a current threat of danger to the  
13 public if released. Petitioner complains that in numerous  
14 respects, the board and the state courts misinterpreted the facts  
15 or made factual conclusions that are not supported by the  
16 evidence. Petitioner contends that the board did not consider  
17 all relevant information, and it denied her rights to review  
18 relevant documents. Petitioner also complains that the state  
19 courts wrongfully denied an evidentiary hearing. Petitioner  
20 complains that the denial of parole was punishment for having  
21 married an ex-correctional officer. Petitioner alleges that her  
22 rights to due process and equal protection of the laws were  
23 violated; further, her protection against cruel and unusual  
24 punishment under the Eighth and Fourteenth Amendments was  
25 infringed by the board's reliance on the victim's sister's  
26 version of the commitment offense and false allegations of  
27 Correctional Officer Robinson. (Pet. 8-12, 19-45.)

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1           III. Failure to Allege a Claim Cognizable on Habeas Corpus

2           Because the petition was filed after April 24, 1996, the  
3 effective date of the Antiterrorism and Effective Death Penalty  
4 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh  
5 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008  
6 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

7           A district court may entertain a petition for a writ of  
8 habeas corpus by a person in custody pursuant to the judgment of  
9 a state court only on the ground that the custody is in violation  
10 of the Constitution, laws, or treaties of the United States. 28  
11 U.S.C. §§ 2254(a), 2241(c) (3); Williams v. Taylor, 529 U.S. 362,  
12 375 n.7 (2000); Wilson v. Corcoran, 562 U.S. -, -, 131 S.Ct. 13,  
13 16 (2010) (per curiam).

14           The Supreme Court has characterized as reasonable the  
15 decision of the Court of Appeals for the Ninth Circuit that  
16 California law creates a liberty interest in parole protected by  
17 the Fourteenth Amendment Due Process Clause, which in turn  
18 requires fair procedures with respect to the liberty interest.  
19 Swarthout v. Cooke, 562 U.S. -, 131 S.Ct. 859, 861-62 (2011).

20           However, the procedures required for a parole determination  
21 are the minimal requirements set forth in Greenholtz v. Inmates  
22 of Neb. Penal and Correctional Complex, 442 U.S. 1, 12 (1979).<sup>1</sup>

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24           <sup>1</sup>In Greenholtz, the Court held that a formal hearing is not required  
25 with respect to a decision concerning granting or denying discretionary  
26 parole; it is sufficient to permit the inmate to have an opportunity to be  
27 heard and to be given a statement of reasons for the decision made. Id. at  
28 16. The decision maker is not required to state the evidence relied upon in  
coming to the decision. Id. at 15-16. The Court reasoned that because there  
is no constitutional or inherent right of a convicted person to be released  
conditionally before expiration of a valid sentence, the liberty interest in  
discretionary parole is only conditional and thus differs from the liberty  
interest of a parolee. Id. at 9. Further, the discretionary decision to  
release one on parole does not involve retrospective factual determinations,

1 Swarthout v. Cooke, 131 S.Ct. 859, 862. In Swarthout, the Court  
2 rejected inmates' claims that they were denied a liberty interest  
3 because there was an absence of "some evidence" to support the  
4 decision to deny parole. The Court stated:

5       There is no right under the Federal Constitution  
6       to be conditionally released before the expiration of  
7       a valid sentence, and the States are under no duty  
8       to offer parole to their prisoners. (Citation omitted.)  
9       When, however, a State creates a liberty interest,  
10       the Due Process Clause requires fair procedures for its  
11       vindication-and federal courts will review the  
12       application of those constitutionally required procedures.  
13       In the context of parole, we have held that the procedures  
14       required are minimal. In Greenholtz, we found  
15       that a prisoner subject to a parole statute similar  
16       to California's received adequate process when he  
17       was allowed an opportunity to be heard and was provided  
18       a statement of the reasons why parole was denied.  
19       (Citation omitted.)

20 Swarthout, 131 S.Ct. 859, 862. The Court concluded that the  
21 petitioners had received the process that was due as follows:

22       They were allowed to speak at their parole hearings  
23       and to contest the evidence against them, were afforded  
24       access to their records in advance, and were notified  
25       as to the reasons why parole was denied....

26       That should have been the beginning and the end of  
27       the federal habeas courts' inquiry into whether  
28       [the petitioners] received due process.

29 Swarthout, 131 S.Ct. at 862. The Court in Swarthout expressly  
30 noted that California's "some evidence" rule is not a substantive  
31 federal requirement, and correct application of California's  
32 "some evidence" standard is not required by the Federal Due  
33 Process Clause. Id. at 862-63.

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36 as in disciplinary proceedings in prison; instead, it is generally more  
37 discretionary and predictive, and thus procedures designed to elicit specific  
38 facts are unnecessary. Id. at 13. In Greenholtz, the Court held that due  
39 process was satisfied where the inmate received a statement of reasons for the  
40 decision and had an effective opportunity to insure that the records being  
41 considered were his records, and to present any special considerations  
42 demonstrating why he was an appropriate candidate for parole. Id. at 15.

1 Here, in her due process claim, Petitioner asks this Court  
2 to engage in the very type of analysis foreclosed by Swarthout.  
3 This Court will not re-weigh the evidence or otherwise review the  
4 correctness of the board's factual conclusions. Further, a  
5 review of the transcript does not reveal the absence of any  
6 necessary information or the denial of Petitioner's access to  
7 such information. Petitioner does not state facts that point to  
8 a real possibility of constitutional error or that otherwise  
9 would entitle Petitioner to habeas relief because California's  
10 "some evidence" requirement is not a substantive federal  
11 requirement. Review of the record for "some evidence" to support  
12 the denial of parole is not within the scope of this Court's  
13 habeas review under 28 U.S.C. § 2254.

14 Petitioner cites state law concerning the appropriate weight  
15 to be given to evidence. To the extent that Petitioner's claim  
16 or claims rest on state law, they are not cognizable on federal  
17 habeas corpus. Federal habeas relief is not available to retry a  
18 state issue that does not rise to the level of a federal  
19 constitutional violation. Wilson v. Corcoran, 562 U.S. — , 131  
20 S.Ct. 13, 16 (2010); Estelle v. McGuire, 502 U.S. 62, 67-68  
21 (1991). Alleged errors in the application of state law are not  
22 cognizable in federal habeas corpus. Souch v. Schiavo, 289 F.3d  
23 616, 623 (9th Cir. 2002).

24 Further, to the extent that Petitioner complains of errors  
25 in the state post-conviction process, Petitioner does not state a  
26 claim that would entitle her to relief in this proceeding. It is  
27 established that federal habeas relief is not available to  
28 redress procedural errors in the state collateral review process.

1 Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998); Carriger v.  
2 Stewart, 95 F.3d 755, 763 (9th Cir. 1996), vacated on other  
3 grounds, Carriger v. Stewart, 132 F.3d 463 (1997); Franzen v.  
4 Brinkman, 877 F.2d 26, 26 (9th Cir. 1989).

5 A petition for habeas corpus should not be dismissed without  
6 leave to amend unless it appears that no tenable claim for relief  
7 can be pleaded were such leave granted. Jarvis v. Nelson, 440  
8 F.2d 13, 14 (9th Cir. 1971).

9 Here, it is clear from the allegations in the petition that  
10 Petitioner attended the parole suitability hearing, made  
11 statements to the BPH, and received a statement of reasons for  
12 its decision. Thus, Petitioner's own allegations and  
13 documentation establish that she had an opportunity to be heard  
14 at the hearing and received a statement of reasons for the  
15 decision in question. It therefore does not appear that  
16 Petitioner could state a tenable due process claim.

17 Accordingly, it will be recommended that Petitioner's due  
18 process claim concerning the evidence supporting the denial of  
19 parole be dismissed without leave to amend.

20 IV. Fair Tribunal

21 Petitioner refers to the reliance of the BPH and the  
22 California courts upon the "version" of Petitioner's commitment  
23 offense given by Susan Fisher, the sister of the victim of  
24 Petitioner's commitment offense. Petitioner alleges that Fisher  
25 was an "ex-BPH chairperson" and a victim rights advocate for  
26 Governor Schwarzenegger. (Pet. 11, 29.) Petitioner alleges that  
27 Fisher's statement of the offense on a crime victim's website was  
28 inconsistent with her sworn testimony given at Petitioner's



1 trial. (Pet. 29.) Petitioner complains that she was not given  
2 an evidentiary hearing by state authorities so that she could  
3 present evidence of her own version of the offense. (Id.)

4 Title 28 U.S.C. § 2254 provides in pertinent part:

5 (d) An application for a writ of habeas corpus on  
6 behalf of a person in custody pursuant to the  
7 judgment of a State court shall not be granted  
8 with respect to any claim that was adjudicated  
9 on the merits in State court proceedings unless  
10 the adjudication of the claim-

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

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

19 (e) (1) In a proceeding instituted by an application  
20 for a writ of habeas corpus by a person in custody  
21 pursuant to the judgment of a State court, a  
22 determination of a factual issue made by a State  
23 court shall be presumed to be correct. The applicant  
24 shall have the burden of rebutting the presumption  
25 or correctness by clear and convincing evidence.

26 The petitioner bears the burden of establishing that the  
27 decision of the state court was contrary to, or involved an  
28 unreasonable application of, the precedents of the United States  
Supreme Court. Lambert v. Blodgett, 393 F.3d 943, 970 n.16 (9th  
Cir. 2004); Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir.  
1996).

A state court's decision contravenes clearly established  
Supreme Court precedent if it reaches a legal conclusion contrary  
to that of the Supreme Court or concludes differently on an  
indistinguishable set of facts. Williams v. Taylor, 529 U.S.  
362, 405-06 (2000). The state court need not have cited Supreme

1 Court precedent or have been aware of it, "so long as neither the  
2 reasoning nor the result of the state-court decision contradicts  
3 [it]." Early v. Packer, 537 U.S. 3, 8 (2002). The state court  
4 unreasonably applies clearly established federal law if it either  
5 1) correctly identifies the governing rule but then applies it to  
6 a new set of facts in a way that is objectively unreasonable, or  
7 2) extends or fails to extend a clearly established legal  
8 principle to a new context in a way that is objectively  
9 unreasonable. Hernandez v. Small, 282 F.3d 1132, 1142 (9th  
10 Cir.2002); see, Williams, 529 U.S. at 408-09. An application of  
11 law is unreasonable if it is objectively unreasonable; an  
12 incorrect or inaccurate application of federal law is not  
13 necessarily unreasonable. Williams, 529 U.S. at 410.

14 A fair trial in a fair tribunal is a basic requirement of  
15 due process. In re Murchison, 349 U.S. 133, 136 (1955).  
16 California inmates have a due process right to parole  
17 consideration by neutral, unbiased decision makers. O'Bremski v.  
18 Maass, 915 F.2d 418, 422 (9th Cir. 1990).<sup>2</sup>

19 Here, the allegations of the petition and transcripts of the  
20 hearing reflect that Fisher appeared at Petitioner's parole  
21 hearing as a family member of the victim; Fisher did not function  
22 as a commissioner. There is no basis for a conclusion that the  
23 commissioners presiding at Petitioner's hearing considered any  
24 website or other extra-record source of information from Fisher.

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26  
27 <sup>2</sup>Although Petitioner mentions the Eighth and Fourteenth Amendments in  
28 connection with this claim (Pet. 11), it appears that Petitioner is alleging a  
claim concerning bias of the tribunal, which the Court understands to be a  
claim based on Petitioner's right to due process of law guaranteed by the  
Fourteenth Amendment.

1 Further, there is no evidence presented that warrants an  
2 inference that the commissioners who presided over Petitioner's  
3 parole hearing were influenced in any way by Fisher's previous  
4 status as a member of the BPH.

5 Petitioner also submitted materials concerning Presiding  
6 Commissioner Ed Martinez, who was one of two commissioners who  
7 presided over Petitioner's parole hearing. The Court finds no  
8 evidence that Commissioner Martinez exhibited any bias or  
9 unfairness while he presided over Petitioner's parole hearing.

10 Because Petitioner has not established any bias or other  
11 basis for a violation of due process with respect to the board's  
12 impartiality, Petitioner has not shown that the state courts'  
13 decisions upholding the board's denial of parole were contrary  
14 to, or involved an unreasonable application of, the precedents of  
15 the United States Supreme Court.

16 Accordingly, it will be recommended that Petitioner's claim  
17 concerning the lack of an impartial tribunal be denied.

18 V. Equal Protection

19 Petitioner alleges that the BPH's actions denied her the  
20 equal protection of the laws. (Pet. 8, 9, 24, 32.)

21 Prisoners are protected under the Equal Protection Clause of  
22 the Fourteenth Amendment from invidious discrimination based on  
23 race, religion, or membership in a protected class subject to  
24 restrictions and limitations necessitated by legitimate  
25 penological interests. Wolff v. McDonnell, 418 U.S. 539, 556  
26 (1974); Bell v. Wolfish, 441 U.S. 520, 545-46 (1979). The Equal  
27 Protection Clause essentially directs that all persons similarly  
28 situated should be treated alike. City of Cleburne, Texas v.

1 Cleburne Living Center, 473 U.S. 432, 439 (1985). Violations of  
2 equal protection are shown when a respondent intentionally  
3 discriminated against a petitioner based on membership in a  
4 protected class, Lee v. City of Los Angeles, 250 F.3d 668, 686  
5 (9th Cir. 2001), or when a respondent intentionally treated a  
6 member of an identifiable class differently from other similarly  
7 situated individuals without a rational basis, or a rational  
8 relationship to a legitimate state purpose, for the difference in  
9 treatment, Village of Willowbrook v. Olech, 528 U.S. 562, 564  
10 (2000).

11 Here, Petitioner has not alleged any facts to demonstrate a  
12 violation of equal protection. She has not alleged that she is a  
13 member of a protected class or that membership in a protected  
14 class was the basis of any alleged discrimination.

15 Accordingly, it will be recommended that Petitioner's equal  
16 protection claim be denied.

17 VI. Punishment

18 Petitioner appears to argue that she was punished, in  
19 effect, for having married an ex-correctional officer while in  
20 custody and having sued Correctional Officer Robinson for his  
21 allegedly having sexually victimized her in prison. (Pet. 24.)  
22 Petitioner argues that denial of parole for five years for these  
23 reasons was cruel and unusual punishment and a denial of due  
24 process and equal protection. (Pet. 32.)

25 The transcript of the hearing reflects that Petitioner  
26 responded to questions of Presiding Commissioner Martinez  
27 regarding her marriage to Adolpho Navarro, whom Petitioner met  
28 while he was a correctional officer at the prison where she was

1 incarcerated. Petitioner testified that they began a romantic  
2 relationship only after Navarro had stopped working at the  
3 prison, and they were married from March 1991 through May 2004,  
4 when they were divorced due to Navarro's adultery. (Doc. 2-1,  
5 74-75.) Petitioner testified that she had learned from observing  
6 her father's abuse of her mother that one could stay in a  
7 marriage with poor communication skills and little understanding  
8 of a spouse's needs. (Doc. 1-2, 77-78.) However, when Navarro  
9 found another partner, Petitioner appropriately filed for divorce  
10 because her husband's behavior was inappropriate. (Id. at 78.)  
11 When Commissioner Martinez asked Petitioner if during her  
12 relationship with Navarro, she had displayed some behavior  
13 similar to her behavior prior to the homicide, Petitioner denied  
14 it. (Id. at 79-80.)

15 The evidence at the hearing included documentation of a  
16 prison disciplinary investigation in 1990 concerning whether  
17 Petitioner had a personal relationship with Navarro. It was  
18 reported that Petitioner had refused to cooperate. (Doc. 1-2,  
19 80.) Additional investigation revealed that Petitioner had  
20 letters and photographs reflecting a romantic relationship with  
21 Navarro since late 1989. (Doc. 1-3, 2-5.)

22 Commissioner Martinez explained to Petitioner that the issue  
23 concerning this conduct of Petitioner was that Petitioner had a  
24 relationship, which she denied during an investigation, and the  
25 relationship itself was against the correctional department's  
26 policy. (Doc. 1-3, 5-9.) Although Petitioner believed that her  
27 marriage was helpful to her progress, Commissioner Martinez  
28 characterized the decision to become involved with a correctional

1 officer as a poor decision. (Id. at 9.) Petitioner said that  
2 she fully understood, and she agreed with the Commissioner.  
3 (Id.) Commissioner Martinez summarized the matter by saying that  
4 the focus of the discussion was Petitioner's judgment and  
5 decision-making, and that there had been a pattern of behavior  
6 carrying over from before the commitment offense to after it.  
7 (Id. at 10-11.)

8 The board then brought up an internal affairs investigation  
9 conducted in 2007 concerning Petitioner's allegations that a male  
10 correctional officer named Sean Robinson had a sexual  
11 relationship with Petitioner for several years. The allegation  
12 had surfaced only after Petitioner had obtained confidential  
13 information concerning the officer from a family member.  
14 Petitioner filed a lawsuit concerning the alleged sexual  
15 misconduct. (Id. at 15.) The investigators concluded that  
16 although Petitioner alleged that the relationship had existed, it  
17 could not be substantiated. Evidence included witnesses who  
18 related that Petitioner was infatuated with Robinson and  
19 endeavored to be located wherever the officer was in the prison,  
20 as well as a photograph of the officer which Petitioner had  
21 claimed he had given her but which was actually printed on a  
22 vocational graphic arts in-service training book. Evidence of  
23 sexual misconduct alleged by Petitioner had not surfaced in the  
24 investigation. The conclusion was that it was questionable if  
25 Petitioner had moved forward in her rehabilitation during her  
26 incarceration because her conduct was similar to the crime for  
27 which she was incarcerated. (Doc. 1-3, 12-15.)

28 The conclusion concerning the similarity of Petitioner's

1 post-offense behavior with pre-offense conduct was based on  
2 Petitioner's commitment offense, namely, the murder of a former,  
3 long-term boyfriend, whom Petitioner had stalked obsessively.  
4 Petitioner had secretly acquired information concerning her  
5 victim and his whereabouts. After the victim found a new partner  
6 and moved to a new place to reside with her, Petitioner continued  
7 to contact the victim and his partner, harassed the victim's  
8 family, and threatened and confronted the victim repeatedly.  
9 (Doc. 1-2, 27-37.)

10 Petitioner denied Robinson's allegations that she had  
11 stalked him, and she contended that she had been set up by  
12 Robinson, who had read her file concerning the commitment  
13 offense. (Doc. 1-3, 15-19.)

14 In explaining their decision to deny parole, the  
15 commissioners relied on the nature of the commitment offense,  
16 noting that after Petitioner's lengthy relationship with the  
17 victim disintegrated due to his having another partner,  
18 Petitioner stalked the victim in a calculated manner and shot him  
19 repeatedly after renting an apartment next to his. (Doc. 1-4,  
20 55-57.) Petitioner's programming was found to have been good  
21 except for the 1990 disciplinary report concerning conspiring  
22 with a staff member, which was considered to show a continuing  
23 pattern of behavior. (Id. at 58, 68-70.) The primary concern  
24 appeared to be that Petitioner failed to take responsibility for  
25 her offense because she asserted that she killed the victim  
26 reactively at a time when she intended to kill herself. (Id. at  
27 63, 66.) Petitioner also needed to address her substance abuse  
28 problem. (Id. at 61.)

1           The record thus shows that Petitioner's relationship with  
2 Navarro was considered significant because Petitioner engaged in  
3 secretive behavior, and the relationship was contrary to the  
4 rules and policies of the correctional institution; it was  
5 important because Petitioner acted covertly in violation of  
6 policies regarding relationships, and not because Petitioner  
7 exercised any right to a relationship or to a marital status.

8           Likewise, the situation involving Robinson reflected  
9 continued pursuit or stalking behavior with a correctional  
10 officer. Both instances were considered and evaluated in the  
11 context of Petitioner's programming and progress while in the  
12 institution. The record does not support the allegations that  
13 Petitioner was punished.

14           Petitioner adamantly denies that her relationship with  
15 Navarro predated his separation from employment with the prison,  
16 and just as emphatically alleges that she was pursued by Robinson  
17 instead of pursuing him. The Court reiterates that it is not  
18 within the scope of this Court's review of the board's and the  
19 state courts' proceedings to re-weigh the evidence or to evaluate  
20 the application of the "some evidence" rule.

21           Petitioner has not demonstrated that she was punished for  
22 exercise of her right to marry or involvement in relationships  
23 with correctional officers. Likewise, Petitioner has not  
24 demonstrated that she was "punished" for having filed a lawsuit  
25 against, or because of, Correctional Officer Robinson. Instead,  
26 the record reflects that the board appropriately considered the  
27 extent to which Petitioner had progressed with respect to her  
28 participation in, and judgment concerning, interpersonal



1 relationships. The record supports the conclusion that  
2 Petitioner's conduct with correctional officers was considered to  
3 reflect a lack of progress in rehabilitation and programming in  
4 connection with Petitioner's tendency to develop obsessive  
5 attachments with inappropriate partners - matters central to the  
6 commission of Petitioner's commitment offense.

7 Accordingly, it will be recommended that Petitioner's claim  
8 of unfairness or inappropriate punishment in violation of the  
9 Eighth and Fourteenth Amendments be denied.

10 In summary, the Court concludes that Petitioner's due  
11 process claim concerning the absence of some evidence to support  
12 the denial of parole is not cognizable in a proceeding pursuant  
13 to 28 U.S.C. § 2254. The remaining claims should be denied  
14 because Petitioner has not shown that she is entitled to relief  
15 on her Fourteenth Amendment claims concerning the lack of an  
16 impartial tribunal and denial of equal protection, or on her  
17 claim under the Eighth and Fourteenth Amendments.

18 VII. Request for an Evidentiary Hearing

19 Petitioner requests that she be given an evidentiary  
20 hearing.

21 If a petition is not dismissed, the Court must review the  
22 answer, any transcripts and records of state-court proceedings,  
23 and any materials submitted under Rule 7 to determine whether an  
24 evidentiary hearing is warranted. Habeas Rule Rule 8(a). In  
25 considering a request for an evidentiary hearing, a court must  
26 first determine whether a factual basis exists in the record to  
27 support the petitioner's claim. Baja v. Ducharme, 187 F.3d 1075,  
28 1078 (9th Cir. 1999). A court will determine whether the

1 Petitioner has alleged facts that, if proven, would entitle him  
2 or her to habeas relief. Earp v. Ornoski, 431 F.3d 1158, 1167  
3 (9th Cir. 2005).

4 As demonstrated by the foregoing analysis of the pleadings  
5 and exhibits, Petitioner did not allege or document specific  
6 facts that, if proven, would entitle her to relief. Petitioner's  
7 complaints with the inferences and conclusions drawn by the board  
8 concern factual inconsistencies or controversies that were  
9 considered by the board and were resolved against Petitioner by  
10 the board in an appropriate exercise of its adjudicatory powers.  
11 The record before the Court is adequate for a decision on the  
12 merits.

13 It will be recommended that Petitioner's request for an  
14 evidentiary hearing be denied.

15 VIII. Certificate of Appealability

16 Unless a circuit justice or judge issues a certificate of  
17 appealability, an appeal may not be taken to the Court of Appeals  
18 from the final order in a habeas proceeding in which the  
19 detention complained of arises out of process issued by a state  
20 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537  
21 U.S. 322, 336 (2003). A certificate of appealability may issue  
22 only if the applicant makes a substantial showing of the denial  
23 of a constitutional right. § 2253(c)(2). Under this standard, a  
24 petitioner must show that reasonable jurists could debate whether  
25 the petition should have been resolved in a different manner or  
26 that the issues presented were adequate to deserve encouragement  
27 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336  
28 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A

1 certificate should issue if the Petitioner shows that jurists of  
2 reason would find it debatable whether the petition states a  
3 valid claim of the denial of a constitutional right and that  
4 jurists of reason would find it debatable whether the district  
5 court was correct in any procedural ruling. Slack v. McDaniel,  
6 529 U.S. 473, 483-84 (2000).

7 In determining this issue, a court conducts an overview of  
8 the claims in the habeas petition, generally assesses their  
9 merits, and determines whether the resolution was debatable among  
10 jurists of reason or wrong. Id. It is necessary for an  
11 applicant to show more than an absence of frivolity or the  
12 existence of mere good faith; however, it is not necessary for an  
13 applicant to show that the appeal will succeed. Miller-El v.  
14 Cockrell, 537 U.S. at 338.

15 A district court must issue or deny a certificate of  
16 appealability when it enters a final order adverse to the  
17 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

18 Here, it does not appear that reasonable jurists could  
19 debate whether the petition should have been resolved in a  
20 different manner. Petitioner has not made a substantial showing  
21 of the denial of a constitutional right. Accordingly, it will be  
22 recommended that the Court decline to issue a certificate of  
23 appealability.

24 IX. Recommendation

25 Accordingly, it is RECOMMENDED that:

26 1) Petitioner's due process claim concerning the evidence  
27 supporting the denial of parole be DISMISSED without leave to  
28 amend for failure to state a claim cognizable in a proceeding

1 pursuant to 28 U.S.C. § 2254; and

2       2) The petition be DENIED insofar as Petitioner claims that  
3 her Fourteenth Amendment right to due process of law was violated  
4 by the absence of an impartial tribunal, her Fourteenth Amendment  
5 right to the equal protection of the laws was denied by the  
6 actions of the Board of Parole Hearings, and her Eighth and  
7 Fourteenth Amendment rights were violated by the reliance of the  
8 Board of Parole Hearings on reports concerning Petitioner's  
9 conduct relating to her romantic involvement with correctional  
10 officers; and

11       3) The Court DENY Petitioner's request for an evidentiary  
12 hearing; and

13       4) The Court DECLINE to issue a certificate of  
14 appealability; and

15       4) The Clerk be DIRECTED to enter judgment for Respondent.

16       These findings and recommendations are submitted to the  
17 United States District Court Judge assigned to the case, pursuant  
18 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of  
19 the Local Rules of Practice for the United States District Court,  
20 Eastern District of California. Within thirty (30) days after  
21 being served with a copy, any party may file written objections  
22 with the Court and serve a copy on all parties. Such a document  
23 should be captioned "Objections to Magistrate Judge's Findings  
24 and Recommendations." Replies to the objections shall be served  
25 and filed within fourteen (14) days (plus three (3) days if  
26 served by mail) after service of the objections. The Court will  
27 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §  
28 636 (b) (1) (C). The parties are advised that failure to file

1 objections within the specified time may waive the right to  
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
3 1153 (9th Cir. 1991).

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5 IT IS SO ORDERED.

6 **Dated: May 11, 2011**

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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