

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SAMUEL VENEGAS,	)	1:11-cv-00765-LJO-SKO-HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS THE PETITION WITHOUT
v.	)	LEAVE TO AMEND FOR FAILURE TO
	)	STATE A COGNIZABLE CLAIM (Doc. 1)
	)	
NICK DAWSON, et al.,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DECLINE TO ISSUE A CERTIFICATE OF
Respondents.	)	APPEALABILITY AND TO DIRECT THE
	)	CLERK TO CLOSE THE CASE
	)	

**OBJECTIONS DEADLINE:  
THIRTY (30) DAYS**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the petition, which was filed on May 11, 2011.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly

1 appears from the petition and any attached exhibits that the  
2 petitioner is not entitled to relief in the district court....”  
3 Habeas Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.  
4 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.  
5 1990). Habeas Rule 2(c) requires that a petition 1) specify all  
6 grounds of relief available to the Petitioner; 2) state the facts  
7 supporting each ground; and 3) state the relief requested.  
8 Notice pleading is not sufficient; rather, the petition must  
9 state facts that point to a real possibility of constitutional  
10 error. Rule 4, Advisory Committee Notes, 1976 Adoption;  
11 O’Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.  
12 Allison, 431 U.S. 63, 75 n.7 (1977)). Allegations in a petition  
13 that are vague, conclusory, or palpably incredible are subject to  
14 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th  
15 Cir. 1990).

16 Further, the Court may dismiss a petition for writ of habeas  
17 corpus either on its own motion under Habeas Rule 4, pursuant to  
18 the respondent's motion to dismiss, or after an answer to the  
19 petition has been filed. Advisory Committee Notes to Habeas Rule  
20 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43  
21 (9th Cir. 2001).

22 Here, Petitioner alleges that he is an inmate of the Avenal  
23 State Prison at Avenal, California, serving a sentence of seven  
24 (7) years to life imposed by the Los Angeles County Superior  
25 Court for Petitioner’s conviction in November 1979 of conspiracy  
26 to commit murder, first degree murder, discharge of a firearm  
27 into an inhabited dwelling, and assault with a deadly weapon.  
28 (Pet. 1.) Petitioner challenges the decision of the California

1 Board of Parole Hearings (BPH) made after a hearing held on May  
2 6, 2009, finding Petitioner unsuitable for parole. (Pet. 4, 7-  
3 39.) Petitioner also challenges the decisions of the state  
4 courts that upheld the BPH's decision. (Pet. 7-8, 18-19.)

5 It appears from the allegations of the petition and the  
6 transcript of the hearing of May 6, 2009, submitted by Petitioner  
7 with his petition, that Petitioner reviewed his central file in  
8 advance of the hearing, attended the hearing, discussed numerous  
9 suitability factors with the commissioners of the BPH and  
10 testified under oath, and made a personal statement in favor of  
11 parole. (Pet. 46, 48, 53-98, 105-08.) Further, an attorney  
12 appeared at the hearing, acknowledged receipt of full  
13 documentation in advance of the hearing, and advocated on  
14 Petitioner's behalf, including making a statement to the BPH in  
15 favor of parole. (Pet. 46, 48, 52-53, 98-105.)

16 The attachments to the petition further demonstrate that  
17 Petitioner was present when the BPH gave a statement of the  
18 reasons for the BPH's decision to deny parole for three years,  
19 which was based on the conclusion that Petitioner posed a present  
20 risk of danger to society or a threat to public safety if  
21 released. (Pet. 109.) The BPH relied on the commitment offense,  
22 which included a gang action involving multiple victims in  
23 separate incidents, Petitioner's history of criminality and gang  
24 leadership, and Petitioner's minimization of his conduct. (Pet.  
25 109-16.)

26 Accordingly, the Court notes that the undisputed record of  
27 the pertinent proceedings of the BPH shows that Petitioner had  
28 access to information before the hearing, attended the hearing

1 and had an opportunity to be heard, and received a statement of  
2 reasons for the decision.

3       Petitioner asks this Court to review whether there was some  
4 evidence to support the conclusion that Petitioner was unsuitable  
5 for parole because he posed a current threat of danger to the  
6 public if released. (Pet. 14, 18-19, 26-39.) Petitioner raises  
7 the following claims in the petition: 1) in concluding that  
8 Petitioner posed a danger, the BPH improperly relied on  
9 Petitioner's having participated in two murders that were never  
10 charged or proved (pet. 8); 2) the BPH improperly relied on the  
11 immutable facts of Petitioner's thirty-one-year-old crime and a  
12 fourteen-year-old rule violation report (pet. 8, 17); 3) the  
13 evidence actually demonstrated Petitioner's suitability for  
14 parole (pet. 9, 11-12); 4) the trial court illegally and  
15 unreasonably found that Petitioner was responsible for three  
16 people being killed (pet. 10); 5) the BPH improperly relied on a  
17 single 2007 psychology report that indicated that Petitioner  
18 presented a high risk of danger to society (pet. 14-17); and 6)  
19 state law created a liberty interest in parole that supported  
20 Petitioner's reasonable expectation of parole, and Petitioner's  
21 liberty interest was infringed by the BPH's decision (pet. 21-  
22 28).

23       II. Failure to Allege a Claim Cognizable on Habeas Corpus

24       Because the petition was filed after April 24, 1996, the  
25 effective date of the Antiterrorism and Effective Death Penalty  
26 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh  
27 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008  
28 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

1 A district court may entertain a petition for a writ of  
2 habeas corpus by a person in custody pursuant to the judgment of  
3 a state court only on the ground that the custody is in violation  
4 of the Constitution, laws, or treaties of the United States. 28  
5 U.S.C. §§ 2254(a), 2241(c)(3); Williams v. Taylor, 529 U.S. 362,  
6 375 n.7 (2000); Wilson v. Corcoran, 562 U.S. -, -, 131 S.Ct. 13,  
7 16 (2010) (per curiam).

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

14 However, the procedures required for a parole determination  
15 are the minimal requirements set forth in Greenholtz v. Inmates  
16 of Neb. Penal and Correctional Complex, 442 U.S. 1, 12 (1979).<sup>1</sup>  
17 Swarthout v. Cooke, 131 S.Ct. 859, 862. In Swarthout, the Court  
18 rejected inmates' claims that they were denied a liberty interest  
19 because there was an absence of "some evidence" to support the  
20

---

21 <sup>1</sup>In Greenholtz, the Court held that a formal hearing is not required  
22 with respect to a decision concerning granting or denying discretionary  
23 parole; it is sufficient to permit the inmate to have an opportunity to be  
24 heard and to be given a statement of reasons for the decision made. Id. at  
25 16. The decision maker is not required to state the evidence relied upon in  
26 coming to the decision. Id. at 15-16. The Court reasoned that because there  
27 is no constitutional or inherent right of a convicted person to be released  
28 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,  
as in disciplinary proceedings in prison; instead, it is generally more  
discretionary and predictive, and thus procedures designed to elicit specific  
facts are unnecessary. Id. at 13. In Greenholtz, the Court held that due  
process was satisfied where the inmate received a statement of reasons for the  
decision and had an effective opportunity to insure that the records being  
considered were his records, and to present any special considerations  
demonstrating why he was an appropriate candidate for parole. Id. at 15.

1 decision to deny parole. The Court stated:

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

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

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

23 That should have been the beginning and the end of  
24 the federal habeas courts' inquiry into whether  
25 [the petitioners] received due process.

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

Petitioner asks this Court to engage in the very type of  
analysis foreclosed by Swarthout. Petitioner does not state  
facts that point to a real possibility of constitutional error or  
that otherwise would entitle Petitioner to habeas relief because  
California's "some evidence" requirement is not a substantive  
federal requirement. Review of the record for "some evidence" to  
support the denial of parole is not within the scope of this

1 Court's habeas review under 28 U.S.C. § 2254.

2 Although Petitioner may not be incorrect in claiming that he  
3 has a liberty interest in parole under the terms of California  
4 law, the Court in Swarthout determined that only minimal due  
5 process is due to one with Petitioner's alleged expectation of  
6 parole. Petitioner received all process that was due.

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

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

22 The Court notes that Petitioner does not allege that the  
23 procedures used for determination of his suitability for parole  
24 were deficient because of the absence of an opportunity to be  
25 heard or a statement of reasons for the ultimate decision  
26 reached. Further, Petitioner does not contradict the factual  
27 recitations and assertions that appear in the transcript of the  
28 parole proceedings and other documentation attached to the

1 petition. It is clear from the allegations in the petition and  
2 the transcript that Petitioner received documentation in advance  
3 of the hearing, attended the parole suitability hearing, made  
4 statements to the BPH, and received a statement of reasons for  
5 the decision of the BPH. Thus, Petitioner's own allegations  
6 establish that he had an opportunity to be heard and a statement  
7 of reasons for the decisions in question. It therefore does not  
8 appear that Petitioner could state a tenable due process claim.

9 Accordingly, the Court will recommend that the petition be  
10 dismissed without leave to amend because Petitioner's claims  
11 concerning the adequacy of the evidence to support the BPH's  
12 decision and the propriety of the BPH's weighing of the evidence  
13 do not state a violation of due process of law or other basis for  
14 habeas relief. Petitioner has not alleged facts that point to a  
15 real possibility of constitutional error or that would otherwise  
16 entitle Petitioner to habeas relief.<sup>2</sup>

### 17 III. Certificate of Appealability

18 Unless a circuit justice or judge issues a certificate of  
19 appealability, an appeal may not be taken to the Court of Appeals  
20 from the final order in a habeas proceeding in which the  
21 detention complained of arises out of process issued by a state  
22 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537  
23 U.S. 322, 336 (2003). A certificate of appealability may issue  
24 only if the applicant makes a substantial showing of the denial  
25 of a constitutional right. § 2253(c)(2). Under this standard, a  
26

---

27 <sup>2</sup> Because Petitioner's claim is not cognizable, the Court has not  
28 addressed whether Petitioner has named a proper respondent with day-to-day  
custody and control of Petitioner.



1 petitioner must show that reasonable jurists could debate whether  
2 the petition should have been resolved in a different manner or  
3 that the issues presented were adequate to deserve encouragement  
4 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336  
5 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A  
6 certificate should issue if the Petitioner shows that jurists of  
7 reason would find it debatable whether the petition states a  
8 valid claim of the denial of a constitutional right and that  
9 jurists of reason would find it debatable whether the district  
10 court was correct in any procedural ruling. Slack v. McDaniel,  
11 529 U.S. 473, 483-84 (2000). In determining this issue, a court  
12 conducts an overview of the claims in the habeas petition,  
13 generally assesses their merits, and determines whether the  
14 resolution was debatable among jurists of reason or wrong. Id.  
15 It is necessary for an applicant to show more than an absence of  
16 frivolity or the existence of mere good faith; however, it is not  
17 necessary for an applicant to show that the appeal will succeed.  
18 Miller-El v. Cockrell, 537 U.S. at 338.

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

22 Here, it does not appear that reasonable jurists could  
23 debate whether the petition should have been resolved in a  
24 different manner. Petitioner has not made a substantial showing  
25 of the denial of a constitutional right.

26 Accordingly, it will be recommended that the Court decline  
27 to issue a certificate of appealability.

28 ///

1 IV. Recommendation

2 Accordingly, it is RECOMMENDED that:

3 1) The petition for writ of habeas corpus be DISMISSED  
4 without leave to amend because Petitioner has failed to state a  
5 due process claim cognizable in a proceeding pursuant to 28  
6 U.S.C. § 2254; and

7 2) The Court DECLINE to issue a certificate of  
8 appealability; and

9 3) The Clerk be DIRECTED to close the action because an  
10 order of dismissal would terminate the proceeding in its  
11 entirety.

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

26 ///

27 ///

28 ///

1 appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
2 1153 (9th Cir. 1991).

3

4 IT IS SO ORDERED.

5 **Dated:** May 27, 2011

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28