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

RICHARD HAMILTON MCKAY, JR.,

Petitioner,

No. CIV S-05-2525 LKK EFB P

vs.

ROSANNE CAMPBELL, et al.,

Respondents.

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. He challenges the decision of the California Board of Parole Hearings (hereinafter “Board”) to deny him parole at his subsequent parole consideration hearing held on February 4, 2004. He claims that the Board’s failure to find him suitable for parole violated his right to due process.

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. \_\_\_, No. 10-333, 2011 WL 197627, at \*2 (Jan. 24, 2011) (per curiam). In the context of a California parole suitability hearing, a petitioner receives adequate process when he/she is allowed an opportunity to be heard and a statement of the reasons why parole was

1 denied. *Id.* at \*\*2-3 (federal due process satisfied where petitioners were “allowed to speak at  
2 their parole hearings and to contest the evidence against them, were afforded access to their  
3 records in advance, and were notified as to the reasons why parole was denied”); *see also*  
4 *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1, 16 (1979). For the reasons that follow,  
5 applying this standard here requires that the petition for writ of habeas corpus be denied on  
6 petitioner’s claim that the Board’s failure to find him suitable for parole violated his right to due  
7 process because there was no evidence he posed a current danger to society.

### 8 **I. Procedural Background**

9 In 1976, petitioner was convicted of first degree murder, first degree robbery, and assault.  
10 Pet. at 1.<sup>1</sup> On February 10, 1977, he was sentenced to seven years to life in state prison.  
11 Answer, Ex. 1. On February 4, 2004, the Board held a parole consideration hearing and found  
12 petitioner not suitable for parole. *Id.* at 71.

13 Petitioner challenged the Board’s decision in a petition for writ of habeas corpus filed in  
14 the California Superior Court on May 27, 2005. Answer, Ex. 6. That petition was denied in a  
15 reasoned decision on the merits. *Id.*, Ex. 7. On July 25, 2005, petitioner filed a petition for writ  
16 of habeas corpus in the California Court of Appeal. *Id.*, Ex. 8. That petition was summarily  
17 denied by order dated July 29, 2005. *Id.*, Ex. 9. Petitioner filed a petition for review in the  
18 California Supreme Court on August 29, 2005. *Id.*, Ex. 10. That petition was summarily denied  
19 by order dated October 19, 2005. *Id.*, Ex. 11.

20 Petitioner filed the instant petition for a writ of habeas corpus on December 13, 2005.  
21 Respondent filed an answer on December 1, 2006, and petitioner filed a traverse on December  
22 27, 2006.

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

1 **II. Timeliness of Petition**

2 Respondent argues that the claims contained in the instant petition are barred by the  
3 statute of limitations set forth in 28 U.S.C. § 2244(d). Answer at 7-8. He asserts that petitioner  
4 did not begin his state court challenges to the Board’s 2004 suitability decision until after the one  
5 year limitations period had expired. *Id.*<sup>2</sup>

6 This action was filed after April 26, 1996, and the provisions of the Antiterrorism and  
7 Effective Death Penalty Act of 1996 (“AEDPA”) are applicable. *See Lindh v. Murphy*, 521 U.S.  
8 320, 336 (1997); *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). The AEDPA imposed a  
9 one-year statute of limitations on the filing of federal habeas petitions. Title 28 U.S.C. § 2244  
10 provides as follows:

11 (d) (1) A 1-year period of limitation shall apply to an application  
12 for a writ of habeas corpus by a person in custody pursuant to the  
13 judgment of a State court. The limitation period shall run from the  
14 latest of –

15 (A) the date on which the judgment became final by the  
16 conclusion of direct review or the expiration of the time for  
17 seeking such review;

18 (B) the date on which the impediment to filing an  
19 application created by State action in violation of the Constitution  
20 or laws of the United States is removed, if the applicant was  
21 prevented from filing by such State action;

22 (C) the date on which the constitutional right asserted was  
23 initially recognized by the Supreme Court, if the right has been  
24 newly recognized by the Supreme Court and made retroactively  
25 applicable to cases on collateral review; or

26 (D) the date on which the factual predicate of the claim or  
claims presented could have been discovered through the exercise  
of due diligence.

(2) The time during which a properly filed application for State  
post-conviction or other collateral review with respect to the

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<sup>2</sup> Respondent filed a motion to dismiss in this case, arguing that petitioner had no federally protected liberty interest in parole. Dckt. No. 6. He did not raise his argument based on the statute of limitations in that motion.

1           pertinent judgment or claim is pending shall not be counted toward  
2           any period of limitation under this subsection.

3           The Ninth Circuit has determined that the one-year period of limitation set forth in 28  
4 U.S.C. § 2244 “applies to all habeas petitions filed by persons in ‘custody pursuant to the  
5 judgment of a State court,’ even if the petition challenges an administrative decision rather than a  
6 state court judgment.” *Shelby v. Bartlett*, 391 F.3d 1061, 1062 (9th Cir. 2004) (citation omitted).  
7 The statute of limitations for habeas petitions challenging parole suitability hearings is based on  
8 § 2244(d)(1)(D): the date on which the factual predicate of the claim or claims could have been  
9 discovered through the exercise of due diligence. *Redd v. McGrath*, 343 F.3d 1077, 1081-82  
10 (9th Cir. 2003). Prior to December 1, 2004, the Board employed an administrative appeals  
11 process which allowed for appeal of unfavorable parole suitability decisions. Answer at 8 n.3.  
12 While the administrative appeals process was in effect, the AEDPA limitations period for habeas  
13 petitions challenging parole suitability hearings began to run on the date of the Board’s denial of  
14 a petitioner’s administrative appeal. *Redd*, 343 F.3d at 1082. However, the Board terminated  
15 the inmate appeals process effective May 1, 2004. *See, e.g., Jacobson v. Schwarzenegger*, 357  
16 F. Supp.2d 1198, 1208 (C.D. Cal. 2004); *Stratton v. Marshall*, No. C 07-0431 CW, 2009 WL  
17 1759694, \*4 (E.D. Cal. June 22, 2009) (citing Cal. Code Reg. tit. 15, § 2050).

18           In this case, the Board’s February 4, 2004 decision that petitioner was unsuitable for  
19 parole became final on May 4, 2004. Answer, Ex. 4 at 71. Respondent argues that because the  
20 inmate appeals process was terminated before May 4, 2004, the triggering event for the  
21 limitations period in this case was May 5, 2004, the day after petitioner’s parole decision became  
22 final. Respondent is correct that where the Board’s suitability decision was rendered after the  
23 administrative appeals process was repealed, or where the inmate did not file an administrative  
24 appeal of the Board’s decision, the factual predicate of a petitioner’s claims is “discovered”  
25 when the Board’s decision denying parole becomes final. *See, e.g., Wilson v. Sisto*, No. Civ. S-  
26 07-0733 MCE EFB P, 2008 WL 4218487, at \*2 (E.D. Cal. Sept. 5, 2008) (“Courts ordinarily

1 deem the factual predicate to have been discovered the day the decision becomes final, i.e., 120  
2 days after the Board finds a petitioner not suitable for parole”) (citing *Nelson v. Clark*, No. 1:08-  
3 cv-00114 OWW SMS HC, 2008 WL 2509509, at \*4 (E.D. Cal. June 23, 2009)). *Contra*  
4 *McGuire v. Mendoza-Powers*, No. 1:07-CV-00086 OWW GSA HC, 2008 WL 1704089, at \*10  
5 (E.D. Cal. April 10, 2008) (deeming factual predicate to have been discovered on the date of the  
6 Board decision).

7         Petitioner represents, however, that he received a memorandum from the Board  
8 informing him the administrative appeals process had been repealed effective May 1, 2004, but  
9 that all claims “arising prior to May 1, 2004” could still be presented to the Board and would be  
10 resolved by October, 2004. Traverse at 5. Petitioner states that he “attempted to comply with  
11 . . . the presentation of claims to the Board for all claims arising prior to May 1, 2004.” *Id.*  
12 Petitioner argues that, under these circumstances, the limitations period in this case did not begin  
13 to run until October 31, 2004, the last date on which such pending or late-filed appeals would be  
14 decided by the Board. *Id.*

15         Petitioner was found unsuitable for parole at his February 4, 2004 suitability hearing.  
16 Under the regulations in existence at that time, petitioner had 90 days, or until May 4, 2004, to  
17 appeal the decision denying him parole. *Webb v. Walker*, No. 2:05-cv-00291-JKS-GGH, 2008  
18 WL 4224619, at \*4 (E.D. Cal. Sept. 15, 2008); Cal. Code Regs. tit. 15, § 2052(c). It is not clear  
19 from the record before the court whether petitioner actually filed an administrative appeal of the  
20 Board’s unfavorable suitability decision. Petitioner informs the court that he “attempted to  
21 comply with . . . the presentation of claims to the Board for all claims arising prior to May 1,  
22 2004.” Traverse at 5. On the other hand, in petitioner’s application for a writ of habeas corpus  
23 filed in the California Superior Court, when asked to explain “what administrative review you  
24 sought or explain why you did not seek such review,” petitioner responded that the  
25 administrative appeal process had been abolished effective May 1, 2004 and, therefore, “this  
26 [sic] is no administrative appeal process available to petitioner in this matter.” Answer, Ex. 6 at

1 86. This implies that petitioner did not actually file an administrative appeal of the Board's  
2 decision in his case.

3         Petitioner's first state-court challenge to the Board's unfavorable suitability decision was  
4 his petition for writ of habeas corpus filed in the California Superior Court on May 27, 2005.  
5 Assuming that the statute of limitations began to run on May 5, 2004, the day after the Board's  
6 decision became final, petitioner's claims are untimely because the AEDPA limitations period  
7 expired before petitioner started the state court review process. However, if, as petitioner  
8 implies, he filed an administrative appeal pursuant to the rules in effect at the time of the Board's  
9 February 4, 2004 decision and did not receive a decision until sometime in October, under the  
10 authorities cited above his claims are timely filed.

11         Neither party has cited, and this court has not found, a Ninth Circuit decision which  
12 addresses the issue of timeliness in a case with facts similar to the instant petition. However,  
13 under the unusual circumstances of this case, and in an abundance of caution, the court will  
14 assume that petitioner's claims are timely filed and will address those claims on the merits.

### 15 **III. Petitioner's Due Process Claims**

#### 16 **A. Board's Failure to Find Petitioner Suitable for Parole**

17         Petitioner claims that the Board violated his right to due process when it found him  
18 unsuitable for parole in 2004 based solely on the unchanging factors of his commitment offense  
19 and prior criminal history. Pet. at 4. He argues that because there is no evidence he is a current  
20 danger to society, he should have received a parole date. *Id.*

21         The Due Process Clause of the Fourteenth Amendment prohibits state action that  
22 deprives a person of life, liberty, or property without due process of law. A litigant alleging a  
23 due process violation must first demonstrate that he was deprived of a liberty or property interest  
24 protected by the Due Process Clause and then show that the procedures attendant upon the  
25 deprivation were not constitutionally sufficient. *Kentucky Dep't of Corrections v. Thompson*,  
26 490 U.S. 454, 459-60 (1989).

1 A protected liberty interest may arise from either the Due Process Clause of the United  
2 States Constitution “by reason of guarantees implicit in the word ‘liberty,’” or from “an  
3 expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221  
4 (2005) (citations omitted). *See also Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The  
5 United States Constitution does not, of its own force, create a protected liberty interest in a  
6 parole date, even one that has been set. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981);  
7 *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1, 7 (1979) (There is “no constitutional or  
8 inherent right of a convicted person to be conditionally released before the expiration of a valid  
9 sentence.”); *see also Hayward v. Marshall*, 603 F.3d 546, 561 (9th Cir. 2010) (en banc).  
10 However, “a state’s statutory scheme, if it uses mandatory language, ‘creates a presumption that  
11 parole release will be granted’ when or unless certain designated findings are made, and thereby  
12 gives rise to a constitutional liberty interest.” *Greenholtz*, 442 U.S. at 12). *See also Allen*, 482  
13 U.S. at 376-78.

14 California’s parole scheme<sup>3</sup> gives rise to a liberty interest in parole protected by the  
15 federal due process clause. *McQuillion v. Duncan*, 306 F.3d 895, 902-03 (9th Cir. 2002)  
16 (“California’s parole scheme gives rise to a cognizable liberty interest in release on parole.”); *see*  
17 *Swarthout v. Cooke*, No. 10-333, 562 U.S. \_\_\_, 2011 U.S. LEXIS 1067, \*5-6 (Jan. 24, 2011)  
18 (per curiam) (stating that the Ninth Circuit’s determination that California’s parole law creates a  
19 liberty interest protected by the federal due process clause “is a reasonable application of our  
20 cases.”). However, the United States Supreme Court has held that correct application of  
21 California’s “some evidence” standard is not required by the federal Due Process Clause.  
22 *Swarthout*, 2011 WL 197627, at \*2. Rather, this court’s review is limited to the narrow question  
23 of whether the petitioner has received adequate process for seeking parole. *Id.* at \*3. (“Because  
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25 <sup>3</sup> In California, a prisoner is entitled to release on parole unless there is “some evidence”  
26 of his or her current dangerousness. *In re Lawrence*, 44 Cal.4th 1181, 1205-06, 1210 (2008); *In*  
*re Rosenkrantz*, 29 Cal.4th 616, 651-53 (2002).

1 the only federal right at issue is procedural, the relevant inquiry is what process [petitioner]  
2 received, not whether the state court decided the case correctly.”) Adequate process is provided  
3 when the inmate is allowed a meaningful opportunity to be heard and a statement of the reasons  
4 why parole was denied. *Id.* at \*\*2-3 (federal due process satisfied where petitioners were  
5 “allowed to speak at their parole hearings and to contest the evidence against them, were  
6 afforded access to their records in advance, and were notified as to the reasons why parole was  
7 denied”); *see also Greenholtz*, 442 U.S. at 16.

8 Here, the record reflects that petitioner was present at the 2004 parole hearing, that he  
9 participated in the hearing, and that he was provided with the reasons for the Board’s decision to  
10 deny parole. Pursuant to *Swarthout*, this is all that due process requires. Accordingly, petitioner  
11 is not entitled to relief on his due process claim.

#### 12 **B. Reliance on Improper Parole Standards**

13 Petitioner was convicted of first-degree murder and sentenced to life imprisonment under  
14 California’s Indeterminate Sentencing Law (ISL) in 1976. In 1977, California repealed the ISL  
15 and enacted the current Determinate Sentencing Law (DSL). Petitioner has been considered for  
16 parole under DSL guidelines since that time and has been found unsuitable for release.

17 Petitioner claims that the Board violated his right to due process when it found him unsuitable  
18 for parole based on the DSL guidelines and not on the ISL guidelines. He explains:

19 At the time of petitioner’s offense and subsequent conviction, ISL,  
20 which emphasized rehabilitation, was still in effect. Subsequently,  
21 the DSL, which emphasized punishment, was enacted. As  
22 evidenced by the extensive record in this case, the BPT doesn’t  
23 give great weight to rehabilitative efforts in the parole  
24 consideration process and the basis of nearly all parole decisions is  
25 the severity of the commitment offense/punishment, while clearly  
26 disregarding any probative value of such reliance after 20, 25 or 30  
years. The different consideration criteria (ISL v. DSL) was  
recently affirmed in *In re Dannenberg* (2005) 34 Cal.4th 1061.

25 Pet. at 5.

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1 The California Superior Court rejected this claim, reasoning as follows:

2 On habeas corpus, petitioner contends that the California Board of  
3 Prison Terms impermissibly continues to violate his right to due  
4 process by refusing to fix both minimum and maximum terms of  
imprisonment for life prisoners, like himself, sentenced under the  
former indeterminate sentencing law.

5 Petitioner does not meet his burden of demonstrating a prima facie  
6 case for relief on habeas corpus. An indeterminate sentence is in  
7 legal effect a sentence for the maximum term, that is, for life.  
8 (*People v. Dyer* (1969) 269 Cal.App.2d 209, 214.) A defendant  
under an indeterminate sentence does not have a vested right to  
have his sentence fixed at a term less than the maximum sentence  
provided by statute. (*In re Lynch* (1972) 8 Cal.3d 410, 417.)

9 An inmate serving an indeterminate life term in state prison is not  
10 entitled to release on parole until he is found suitable for such  
11 release by the Board of Prison Terms. (Pen. Code 3041(b); Title  
12 15 Cal. Code of Reg. § 2281(d).) Regulations in effect both before  
and after enactment of the Determinate Sentencing Law require  
that a life prisoner first be found suitable for parole before a parole  
date is set. (*In re Stanworth* (1982) 33 Cal.3d 176, 183.)

13 No prima facie case for relief is established. An order to show  
14 cause will issue only if petitioner has established a prima facie  
15 case for relief on habeas corpus. (*People v. Romero* (1994) 8  
16 Cal.4th 728, 737; *in re Clark* (1993) 5 Cal.4th 750, 769, fn. 9.)

17 The petition for writ of habeas corpus is DENIED.

18 Answer, Ex. 7.

19 In the traverse, petitioner concedes that this claim is “predicated on state law leaving no  
20 basis for federal review.” Traverse at 13. This court also notes that the Ninth Circuit denied a  
21 similar claim in *Connor v. Estelle*, 981 F.2d 1032, 1034-35 (9th Cir. 1992). There, the court  
22 explained that because “the ISL and DSL guidelines apply identical criteria in determining  
23 parole suitability,” application of the DSL guidelines to a prisoner who was sentenced when the  
ISL was still in effect does not violate the due process clause. *Id.*

24 In addition, as explained by the Superior Court, under state law a life prisoner must first  
25 be found suitable for parole before a parole date is set. See *In re Stanworth*, 33 Cal.3d 176, 183  
26 (1982). The ISL and DSL both require that the prisoner be found suitable for parole before a

1 parole date can be set. *Id.* Petitioner was not found suitable for parole by the Board. Answer,  
2 Ex. 2. Therefore, no parole date would have been set under either the ISL or the DSL.

3 **IV. Conclusion**

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

6 These findings and recommendations are submitted to the United States District Judge  
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one  
8 days after being served with these findings and recommendations, any party may file written  
9 objections with the court and serve a copy on all parties. Such a document should be captioned  
10 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
11 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
12 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In  
13 his objections petitioner may address whether a certificate of appealability should issue in the  
14 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing  
15 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it  
16 enters a final order adverse to the applicant); *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010)  
17 (en banc) (prisoners are required to obtain a certificate of appealability to review the denial of a  
18 habeas petition challenging an administrative decision such as the denial of parole by the parole  
19 board).

20 DATED: April 7, 2011.

21   
22 EDMUND F. BRENNAN  
23 UNITED STATES MAGISTRATE JUDGE  
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26