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

RICHARD E. KARR,

Petitioner,

No. CIV S-06-0599 KJM DAD P

vs.

D. K. SISTO, et al.,

Respondents.

FINDINGS & RECOMMENDATIONS

\_\_\_\_\_ /

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner raises a due process challenge to the decision of the California Board of Parole Hearings (hereinafter “Board”) to deny him parole at his parole consideration hearing held on April 14, 2004. The matter has been fully briefed by the parties and is submitted for decision. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner’s application for habeas corpus relief be denied.

I. Procedural Background

Petitioner is confined pursuant to a 1976 judgment of conviction entered against him in the Alameda County Superior Court following his conviction on a charge of first degree

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1 murder. (Doc. No. 1 at 1.) Pursuant to that conviction, petitioner was sentenced to seven years  
2 to life in state prison. (Id.)<sup>1</sup>

3 The parole consideration hearing that is placed at issue by the instant federal  
4 habeas petition was held on April 14, 2004. (Doc. No. 1-1 at 62.) Petitioner appeared at and  
5 participated in the hearing. (Id. at 64, et seq.) Following deliberations held at the conclusion of  
6 the hearing, the Board panel announced their decision to deny petitioner parole for one year as  
7 well as the reasons for that decision. (Doc. No. 1-2 at 31-34.)

8 Petitioner challenged the Board's 2004 decision to deny parole in a petition for  
9 writ of habeas corpus filed in the California Supreme Court. (Answer, Ex. 5.) That petition was  
10 denied by order filed January 4, 2006, with citations to In re Rosenkrantz, 29 Cal.4th 616 (2002)  
11 and In re Dannenberg, 34 Cal.4th 1061 (2005). (Answer, Ex. 6.)<sup>2</sup>

12 On March 22, 2006, petitioner filed his federal application for habeas relief in this  
13 court. Therein, petitioner contends that the Board's 2004 decision to deny him parole was not  
14 supported by "some evidence" that he posed a current danger to society if released from prison,  
15 as required under California law. (Doc. No. 1 at 7, 25-35.) By order dated October 9, 2009, this  
16 action was stayed pending final disposition of Hayward v. Marshall, 603 F.3d 546 (9th Cir.  
17 2010).<sup>3</sup> The en banc decision in Hayward was issued by the Ninth Circuit Court of Appeals on  
18 April 22, 2010. On July 12, 2010, the stay was lifted in this action was allowed to proceed.

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

22 <sup>2</sup> Petitioner did not challenge the Board's 2004 decision in either the California Superior  
Court of the California Court of Appeals.

23 <sup>3</sup> As the undersigned noted in findings and recommendation recommending the stay of  
24 this action, on August 29, 2007, petitioner had filed another petition for a writ of habeas corpus  
25 in this court, challenging a 2006 decision by the Board finding him unsuitable for parole. By  
26 order dated November 24, 2008, that petition was transferred to visiting judge Mary M.  
Schroeder for decision. On April 8, 2009, that action had been stayed pending final disposition  
of Hayward v. Marshall. Therefore, it was deemed appropriate to stay this action challenging an  
earlier Board decision to deny parole as well.

1 II. Scope of Review Applicable to Due Process Challenges to the Denial of Parole

2 The Due Process Clause of the Fourteenth Amendment prohibits state action that  
3 deprives a person of life, liberty, or property without due process of law. A litigant alleging a  
4 due process violation must first demonstrate that he was deprived of a liberty or property interest  
5 protected by the Due Process Clause and then show that the procedures attendant upon the  
6 deprivation were not constitutionally sufficient. Kentucky Dep’t of Corrections v. Thompson,  
7 490 U.S. 454, 459-60 (1989).

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

19 California’s parole scheme gives rise to a liberty interest in parole protected by the  
20 federal Due Process Clause. Pirtle v. California Bd. of Prison Terms, 611 F.3d 1015, 1020 (9th  
21 Cir. 2010); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002); see also Swarthout v.  
22 Cooke, 562 U.S. \_\_\_, \_\_\_, 131 S. Ct. 859, 861-62 (2011) (finding the Ninth Circuit’s holding in  
23 this regard to be a reasonable application of Supreme Court authority); Pearson v. Muntz,  
24 \_\_\_ F.3d \_\_\_, 2011 WL 1238007, at \*4 (9th Cir. Apr. 5, 2011) (“[Swarthout v. Cooke did not  
25 disturb our precedent that California law creates a liberty interest in parole.”) In California, a  
26 prisoner is entitled to release on parole unless there is “some evidence” of his or her current

1 dangerousness. In re Lawrence, 44 Cal.4th 1181, 1205-06, 1210 (2008); In re Rosenkrantz, 29  
2 Cal.4th 616, 651-53 (2002).

3           In Swarthout, the Supreme Court reviewed two cases in which California  
4 prisoners were denied parole - in one case by the Board, and in the other by the Governor after  
5 the Board had granted parole. Swarthout, 131 S. Ct. at 860-61. The Supreme Court noted that  
6 when state law creates a liberty interest, the Due Process Clause of the Fourteenth Amendment  
7 requires fair procedures, “and federal courts will review the application of those constitutionally  
8 required procedures.” Id. at 862. The Court concluded that in the parole context, however, “the  
9 procedures required are minimal” and that the “Constitution does not require more” than “an  
10 opportunity to be heard” and being “provided a statement of the reasons why parole was denied.”  
11 Id. (citing Greenholtz, 442 U.S. at 16). The Supreme Court therefore rejected Ninth Circuit  
12 decisions that went beyond these minimal procedural requirements and “reviewed the state  
13 courts’ decisions on the merits and concluded that they had unreasonably determined the facts in  
14 light of the evidence.” Swarthout, 131 S. Ct. at 862. In particular, the Supreme Court rejected  
15 the application of the “some evidence” standard to parole decisions by the California courts as a  
16 component of the federal due process standard. Id. at 862-63.<sup>4</sup> See also Pearson, 2011 WL  
17 1238007, at \*4.

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23           <sup>4</sup> In its per curiam opinion the Supreme Court did not acknowledge that for twenty-four  
24 years the Ninth Circuit had consistently held that in order to comport with due process a state  
25 parole board’s decision to deny parole had to be supported by “some evidence,” as defined in  
26 Superintendent v. Hill, 472 U.S. 445 (1985), that bore some indicia of reliability. See Jancsek v.  
Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); McQuillion v. Duncan, 306 F.3d  
895, 904 (9th Cir. 2002) (“In Jancsek . . . we held that the process that is due in the parole  
rescission setting is the same as the Supreme Court outlined in Superintendent v. Hill . . .”)

1 III. Petitioner’s Due Process Claim

2 As noted above, petitioner seeks federal habeas relief on the grounds that the  
3 Board’s 2004 decision to deny him parole, and the findings upon which that denial was based,  
4 were not supported by “some evidence” as required under California law.<sup>5</sup> However, under the  
5 Supreme Court’s decision in Swarthout this court may not review whether California’s “some  
6 evidence” standard was correctly applied in petitioner’s case. 131 S. Ct. at 862-63; see also  
7 Miller v. Oregon Bd. of Parole and Post-Prison Supervision, \_\_\_ F.3d \_\_\_, 2011 WL 1533512, at  
8 \*5 (9th Cir. Apr. 25, 2011) (“The Supreme Court held in [Swarthout v.] Cooke that in the  
9 context of parole eligibility decisions the due process right is *procedural*, and entitles a prisoner  
10 to nothing more than a fair hearing and a statement of reasons for a parole board’s decision[.]”);  
11 Roberts v. Hartley, \_\_\_ F.3d \_\_\_, 2011 WL 1365811, at \*3 (9th Cir. Apr. 12, 2011) (under the  
12 decision in Swarthout, California’s parole scheme creates no substantive due process rights and  
13 any procedural due process requirement is met as long as the state provides an inmate seeking  
14 parole with an opportunity to be heard and a statement of the reasons why parole was denied);  
15 Pearson, 2011 WL 1238007, at \*3 (9th Cir. Apr. 5, 2011) (“While the Court did not define the  
16 minimum process required by the Due Process Clause for denial parole under the California  
17 system, it made clear that the Clause’s requirements were satisfied where the inmates ‘were  
18 allowed to speak at their parole hearings and to contest the evidence against them, were afforded  
19 access to their records in advance, and were notified as to the reasons why parole was denied.’”)

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21 <sup>5</sup> Petitioner also claims that the April 14, 2004 parole consideration hearing was  
22 “invalid” because it was held after the time period set forth in the California Penal Code, and that  
23 his current period of imprisonment has extended his term of confinement beyond the maximum  
24 term set forth in California law. (Doc. No. 1 at 7, 32.) These claims are based on violations of  
25 state law and are therefore not cognizable in this federal habeas corpus proceeding. See Rivera  
26 v. Illinois, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1446, 1454 (2009) (“[A] mere error of state law . . . is not a  
denial of due process”) (quoting Engle v. Isaac, 456 U.S. 107, 121, n. 21 (1982) and Estelle v.  
McGuire, 502 U.S. 62, 67, 72-73 (1991)). A habeas court may not grant the writ on the basis of  
errors of state law where, as here, the combined effect of those errors does not violate the Federal  
Constitution. Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Pulley v. Harris, 465 U.S. 37, 41  
(1984); Parle v. Runnels 387 F.3d 1030, 1045 (9th Cir. 2004). Accordingly, any such claims  
lack merit and should also be rejected.

1 As noted above, the federal habeas petition pending before the court in this case  
2 reflects that at the 2004 parole suitability hearing petitioner was given the opportunity to be heard  
3 and received a statement of the reasons why parole was denied by the Board panel. That is all  
4 the process that was due petitioner under the Constitution. Swarthout, 131 S. Ct. 862; see also  
5 Miller, 2011 WL 1533512, at \*5; Roberts, 2011 WL 1365811, at \*3; Pearson, 2011 WL 1238007,  
6 at \*3. It now plainly appears that petitioner is not entitled to relief with respect to his due process  
7 claims. Therefore, the pending petition should be denied.

8 IV. Conclusion

9 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for  
10 a writ of habeas corpus be denied.

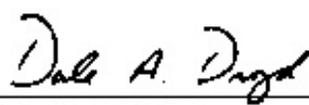
11 These findings and recommendations are submitted to the United States District  
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
13 one days after being served with these findings and recommendations, any party may file written  
14 objections with the court and serve a copy on all parties. Such a document should be captioned  
15 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
16 shall be served and filed within fourteen days after service of the objections. Failure to file  
17 objections within the specified time may waive the right to appeal the District Court's order.  
18 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.  
19 1991).

20 In any objections he elects to file, petitioner may address whether a certificate of  
21 appealability should issue in the event he files an appeal of the judgment in this case. See Rule  
22 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a  
23 certificate of appealability when it enters a final order adverse to the applicant); Hayward v.  
24 Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc) (prisoners are required to obtain a certificate of  
25 appealability to review the denial of a habeas petition challenging an administrative decision

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1 such as the denial of parole by the parole board), abrogated on other grounds in Swarthout v.  
2 Cooke, 562 U.S. \_\_\_, 131 S. Ct. 859 (2011).

3 DATED: June 3, 2011.

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7 DALE A. DROZD  
8 UNITED STATES MAGISTRATE JUDGE

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