

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
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANNY SAUL ROSALES,)	NO. 2:07-CV-168-RHW-JPH
)	
)	
Petitioner,)	
)	REPORT AND RECOMMENDATION RE:
v.)	PETITION FOR WRIT OF HABEAS
)	CORPUS
CALIFORNIA BOARD OF PAROLE)	
HEARINGS, et al,)	
)	
)	
Respondant.)	
)	
)	
)	

I. Factual History

On January 14, 1979, Barbara Romero, Lilia Vasquez, Olivia de la Rosa and Alice de la Rosa were with five other women at Vasquez's home. Pet. Ex. 4 14:8-13. The group heard dogs barking at about 10:00 p.m., and exited the house to find Petitioner standing near Vasquez's van, with the driver's door ajar. Pet. Ex. 4 14:14-22. Vasquez looked in the vehicle to see if anything was missing and asked Petitioner what he was doing. Pet. Ex. 4 14:24-26. She then shut the vehicle's door and returned inside the house. Pet. Ex. 4 14:27-15:2.

Alice de la Rosa arrived at the home several minutes later, and saw Petitioner loitering in the area. Pet. Ex. 4 15:2-5. The four women went outside to confront Petitioner; two held his shoulders while a third checked his pockets, and found an item they believed to be from Romero's vehicle. Pet. Ex. 4 15:6-13. At this time, the women lifted Petitioner's shirt, and discovered

Report and Recommendation re:
Petition for Writ of Habeas Corpus - 1

1 a knife in the waistband of his pants. Pet. Ex. 4 15:14-17. One
2 of the women yelled for someone to call the police. Pet. Ex. 4
3 15:20-21. Petitioner then used the knife to stab all four women,
4 in the chest, abdomen, and arms, killing Romero and injuring the
5 other three. Pet. Ex. 4 15:26-16:18. When police located
6 Petitioner that evening at around 11:30, they recovered a 13-inch
7 buck knife, as well as blood-stained clothing previously reported
8 as being worn by Petitioner. Pet. Ex. 4 16:24-17:16.

9 Petitioner pled guilty on October 15, 1980 to second degree murder
10 and three counts of assault with intent to commit murder. Pet.
11 1:22-23. He was sentenced to 15-years-to-life in prison for the
12 murder count, with concurrent determinate sentences of seven years
13 to run for each of the assault counts. Pet. 1:24-25. An
14 additional one-year sentence was imposed but stayed, pursuant to
15 California Penal Code Section 12022(b), because Petitioner used "a
16 deadly or dangerous weapon in the commission of a felony." Pet.
17 1:25-2:1.

18 **II. Procedural History**

19 Petitioner was eligible for parole after serving ten years of
20 his sentence. Pet. 2:7-8. His first parole suitability hearing
21 took place in May 1989, and parole was denied. Pet. 2:8-10. The
22 California Board of Prison Terms ("the Board") continued to deny
23 Petitioner parole at every subsequent hearing, the last of which
24 took place on February 17, 2005, and denied parole for three
25 years. Pet. 2:10-2:11; Pet. Ex. 4 79:8-9. The Board concluded in
26 its 2005 decision that Petitioner was unsuitable for parole
27 because he "would pose an unreasonable risk of danger to society
28 or a threat to public safety if released from prison." Pet. Ex. 4

1 76:8-11. The Board announced its decision was based on the
2 "especially cruel and callous manner" in which the crimes were
3 committed, the "inexplicable" motive for the crimes and their
4 "very trivial" relationship to the offense, the lack of any
5 "major" criminal history for Petitioner, and his "unstable social
6 history" of using drugs and alcohol. Pet. Ex. 4 76:11-12, 76:18-
7 20, 77:7-8, 77:9-11.

8 Petitioner filed a habeas petition with the California
9 Supreme Court on June 14, 2006, which was summarily denied on
10 January 24, 2007. Pet. 2:12-13; Pet. 2:15-16. Both sides admit
11 Petitioner has exhausted his available state court remedies, and
12 that this petition was timely filed. Pet. 2:12-13; Ans. 4:20-21;
13 Ans. 4:24. As of the filing to this court, Petitioner was in
14 custody at California State Prison, Solano, in Vacaville,
15 California. Pet. 1:20-21.

16 Petitioner claims he is being held unlawfully on the
17 following grounds:

- 18 1. Petitioner's rights to due process of law under
19 the Fifth and Fourteenth Amendments to the United
20 States Constitution were violated when the Board
21 determined that he was unsuitable for parole in
the absence of evidentiary support in the record
and a rational connection between its findings and
conclusions;
- 22 2. Petitioner's rights to due process of law under
23 the Fifth and Fourteenth Amendments to the United
24 States Constitution were violated when the Board
25 determined that he was unsuitable for parole based
on his failure to meet conditions which the
evidence before the Board demonstrated have
already been met;
- 26 3. Petitioner's rights to due process of law under
27 the Fifth and Fourteenth Amendments to the United
28 States Constitution were also violated when the
Board, in finding petitioner unsuitable for
parole, did not engage in individualized decision

1 making, but merely implemented an unwritten policy
2 of blanket denial of parole for virtually every
3 prisoner who had been given an indeterminate life
4 sentence for murder;

5 4. Petitioner's right to be free from cruel and
6 unusual punishment under the Eighth and Fourteenth
7 Amendments to the United States Constitution was
8 violated when the Board subjected him to a pro
9 forma parole hearing in which he could not
10 demonstrate his suitability for parole; and

11 5. Petitioner's right to be free from cruel and
12 unusual punishment under the Eighth and Fourteenth
13 Amendments to the United States Constitution and
14 his rights to due process of law under the Fifth
15 and Fourteenth Amendments to the United States
16 Constitution were violated when the Board, in
17 imposing an effective life sentence without parole
18 upon Petitioner, took from him the benefit for
19 which he had bargained when he entered his guilty
20 plea, although the state maintained this benefit
21 for which it had bargained.

22 Pet. 3:1-4, 9:12-15, 12:17-21, 14:16-18, 15:11-16.

23 **III. Discussion**

24 Petitioner's claims fall into two categories: first, that
25 the Board violated his right to due process when it found him
26 unsuitable for parole; and second, that his continued imprisonment
27 as a result of the denial constituted cruel and unusual
28 punishment. Because Petitioner was afforded "constitutionally
sufficient" procedures in his parole hearing and there is no right
to a premature release date for life-maximum prisoners in the
State of California, it is recommended that the petition be
denied.

29 **A. Due Process**

30 Petitioner claims his due process rights were violated when
31 the Board denied him parole, thereby entitling him to a writ of
32 habeas corpus. A prisoner in custody as a result of a state court
33 judgment may apply to a district court for a writ of habeas corpus

1 only on the grounds that his custody violates the Constitution or
2 the laws or treaties of the United States. 28 U.S.C. § 2254(a).
3 When a prisoner's confinement is not violative of federal law,
4 however, a federal court is not at liberty to issue such a writ.
5 *Wilson v. Corcoran*, 131 S. Ct. 13, 14 (2010). "It is not the
6 province of a federal habeas court to reexamine state-court
7 determinations on state-law questions." *Estelle v. McGuire*, 502
8 U.S. 62, 67-68 (1991). Federal courts are therefore unable to
9 grant habeas relief on the basis of errors of state law. This
10 court may only grant Petitioner's writ if the California Supreme
11 Court erred in summarily denying the original petition because
12 Petitioner's confinement violates federal law or the
13 Constitution—not because his confinement violates State law.

14 When a prisoner such as Petitioner claims he is entitled to a
15 writ because his due process rights have been violated, the
16 inquiry is two-part: (1) Whether the prisoner has been "deprived
17 of an existing liberty of property interest," and if so, (2)
18 Whether the State's procedures were "constitutionally sufficient."
19 *Swarthout v. Cooke*, --- U.S. ----, 131 S. Ct. 859, 861 (2011). As
20 a threshold issue, in order to entertain Petitioner's application
21 for habeas relief, there must be an established liberty interest
22 in parole. While no "federal constitutional liberty interest in
23 parole" exists, and States are not bound to offer parole to their
24 respective prisoners, States may adopt statutes creating such a
25 liberty interest that is entitled to due process protection. *Id.*
26 at 861; *Board of Pardons v. Allen*, 482 U.S. 369, 371 (1987).

27 It is reasonable to interpret Supreme Court jurisprudence as
28 finding that California law creates a liberty interest in parole

1 when the State's parole standards have been met. *Swarthout v.*
2 *Cooke* at 861. The interest at issue in Petitioner's case is
3 therefore State-created and not guaranteed by the Constitution or
4 "laws or treaties of the United States," and habeas relief may be
5 granted only if the procedures mandated by federal due process
6 were not present at Petitioner's parole suitability hearing. *Id.*
7 at 862.

8 Where a State has created a liberty interest in parole, as
9 California has done, the only constitutionally-required process is
10 the "opportunity [for the prisoner] to be heard," and if parole is
11 denied, for the prisoner to be informed "in what respect he falls
12 short of qualifying for parole." *Greenholtz v. Inmates of Neb.*
13 *Penal and Correctional Complex*, 442 U.S. 1, 16 (1979). In
14 Petitioner's 2005 parole hearing, he was advised of his right to
15 appear, and elected not to do so. Pet. Ex. 4 5:5-5:7. At the
16 conclusion of the hearing, the Board stated its reasons for
17 denying the parole request. Pet. Ex. 4 76:5-81:5. Petitioner was
18 thereby afforded all of the due process procedures
19 constitutionally guaranteed to him in order to protect his liberty
20 interest, making the State's procedures "constitutionally
21 sufficient."

22 Petitioner proffers that California's requirement of "some
23 evidence" to support a conclusion of parole unsuitability is a
24 component of the liberty interest in parole, and an absence of
25 "some evidence" supporting the Board's decision equates to a
26 violation of due process. *Id.* at 1; Pet. 9:1-11. The bases of
27 Petitioner's claims of infringement are evidentiary—whether the
28 Board had adequate factual support to deny his request for parole.

1 Such claims are beyond the scope of this court's inquiry, because
2 the Supreme Court has never found the California "some evidence"
3 requirement to be a substantive federal requirement, and "[a]
4 finding that there is no evidence in the record supporting a
5 parole denial is irrelevant unless there is a federal right at
6 stake, as required by § 2254(a)." *Id.* at 3. Federal courts must
7 determine whether the procedures required by the Constitution are
8 applied, while State courts must determine whether they are
9 applied properly. *Id.* at 3.

10 *Greenholtz*, the controlling case law where the "federal right
11 at stake" is due process protection of a State-created liberty
12 interest in parole, restricted analysis to whether
13 constitutionally-mandated procedures were present in parole
14 proceedings—i.e., whether the defendant was given the opportunity
15 to be heard and informed as to why parole was denied—but did not
16 address the issue of whether the evidence used during those
17 proceedings supported the conclusions drawn therein. *Id.* at 3.
18 The "some evidence" requirement is a requirement under California
19 State, not federal, law; regardless of whether there was "some
20 evidence" supporting the Board's decision at Petitioner's hearing,
21 a "mere error of state law" does not precipitate a denial of due
22 process. *Swarthout v. Cooke* at 862. The procedures in
23 Petitioner's 2005 hearing were "constitutionally sufficient;" it
24 is irrelevant whether or not the evidence on the record supported
25 the conclusions reached in those proceedings, because this court
26 does not review for errors in the application of State law,
27 including whether or not "some evidence" supported the Board's
28 decision. Any finding to the contrary would require federal

1 courts to review the manner in which States apply their own
2 procedures and laws in cases concerning liberty or property
3 interests. *Id.* at 863.

4 Although it is unnecessary to address the "some evidence"
5 requirement, circumstances the Board may evaluate that tend to
6 show "some evidence" include: "the aggravated nature of the
7 commitment offense, a previous record of violence, an unstable
8 social history, sadistic sexual offenses, a history of severe
9 mental problems related to the offense, and serious misconduct in
10 jail." *Pirtle v. Cal. Board of Prison Terms*, 611 F.3d 1015, 1021
11 (9th Cir. 2010) (citing Cal. Code Regs., tit. 15, §
12 2402(c)). Petitioner stabbed four unarmed women, killing one, and
13 was subject to discipline in prison for manufacturing alcohol and
14 other offenses. Pet. Ex. 4 16:2-18, 59:23-24, 3:12-16. There
15 existed "some evidence" on which the Board could base its decision
16 to deny Petitioner parole.

17 Petitioner additionally alleges that the Board did not
18 evaluate his parole suitability on an individual basis, but
19 instead operated under a policy that denied parole to virtually
20 every prisoner serving an indeterminate life sentence, thereby
21 violating his due process rights. Because Petitioner offers no
22 evidence to support this claim, it must be denied.

23 It has been accepted that under Governors Wilson and Davis,
24 the State of California "disregarded regulations ensuring fair
25 suitability hearings and instead operated under a sub rosa policy
26 that all murderers be found unsuitable for parole." *Martin v.*
27 *Marshall*, 431 F. Supp. 2d 1038, 1048 (N.D. Cal. 2006) (citing
28 *Coleman*, 96-0783 LKK PAN, slip op. at 3). When the petitioner

1 in *Coleman* offered testimony from former Board Commissioners that
2 the no-parole policy was enforced by "(1) appointing Board members
3 less likely to grant parole and more willing to disregard their
4 statutory duty; (2) removing Board members more likely to grant
5 parole; (3) reviewing decisions finding a prisoner suitable and
6 setting a new hearing before a different panel; (4) scheduling
7 rescission hearings for prisoners who had been granted a parole
8 date; (5) re-hearing favorable rescission proceedings and hand-
9 picking panels to ensure the desired outcome; (6) panel members
10 agreeing upon an outcome in advance of the hearing; and (7)
11 gubernatorial reversal of favorable parole decisions," it was
12 determined that inmates' constitutional rights were violated,
13 because they were denied the right "to be heard by an impartial
14 decision-maker." *Id.* at 1048-49 (citing *Coleman*, 96-0783 LKK PAN,
15 slip op. at 3). This policy was established by Governor Wilson
16 and continued by Governor Davis, who served from 1999 until 2003.
17 *Id.* at 1048.

18 Petitioner's parole hearing took place in 2005, after Davis
19 ceased to act as Governor. Pet. 2:10-11; *Martin v. Marshall* at
20 1048. Petitioner attempts to support his claim that he was denied
21 individualized decision-making, by offering evidence
22 representative of the Board's procedures between 1999 and 2003—not
23 2005. Pet. Ex. 6, 7, 8, 9. There has been no evidence proffered
24 that during Petitioner's hearing, after Governor Davis left
25 office, there existed a "sub rosa policy" of denying parole; as
26 such, Petitioner's claim should be denied.

27 Because Petitioner's liberty interest in parole is not a
28 federal one, he was afforded "constitutionally sufficient"

1 procedures by having the opportunity to be heard and receiving
2 articulated findings as to why he was denied parole, and he
3 provided no evidence to support his claim that parole was denied
4 as a result of a sub rosa policy by the Board to deny parole to
5 those serving indeterminate life sentences, his right to due
6 process under the Fifth and Fourteenth Amendments was not
7 violated.

8 B. Cruel and Unusual Punishment

9 Petitioner claims that the Board subjected him to cruel and
10 unusual punishment, violating his Eighth and Fourteenth Amendment
11 rights, when it denied his application for parole. Because there
12 is no federal right to parole, the petition does not pass section
13 2254(a) muster. *Swarthout v. Cook* at 862; see 28 U.S.C. §
14 2254(a). While California has created a liberty interest in
15 receiving parole where parole standards have been met, there is no
16 absolute right to be paroled. See *Swarthout v. Cooke* at 862.

17 As determined by the California Supreme Court, the cruel and
18 unusual punishment clause "does not require the Board . . . to set
19 premature release dates for current life-maximum prisoners who, it
20 believes, present public safety risks." *In re Dannenberg*, 34 Cal.
21 4th 1061, 1098 (2005). Petitioner was sentenced to 15-years-to-
22 life when he pled guilty to second degree murder and three counts
23 of assault with intent to commit murder. Pet. 1:22-1:24. As a
24 "life-maximum" prisoner, Petitioner is not entitled to a premature
25 release date if the Board determines he poses a present risk to
26 public safety. See *Dannenberg*, 34 Cal. 4th at 1098. Indeed,
27 the Board found Petitioner was "not suitable" for parole, as his
28 release "would pose an unreasonable risk of danger to society or a

1 threat to public safety." Pet. Ex. 4 76:9-11. In concluding that
2 Petitioner posed a present risk to public safety, the Board's
3 denial of Petitioner's request for parole did not constitute cruel
4 and unusual punishment, thereby not violating the Eighth or
5 Fourteenth Amendments.

6 **IV. Conclusion**

7 Petitioner's due process right under the Fifth and Fourteenth
8 Amendments and his right to be free from cruel and unusual
9 punishment under the Eighth and Fourteenth Amendments have not
10 been infringed, because he was given "constitutionally sufficient"
11 procedures to protect his State-created liberty interest in
12 parole, there is no evidence of a sub rosa policy to deny parole
13 to prisoners serving indeterminate life sentences, and the
14 California Board of Prison Terms is not required to release life-
15 maximum prisoners before the expiration of their sentences.
16 Accordingly, Petitioner's application for writ of habeas corpus
17 should be **DENIED**. This court will subsequently not recommend a
18 Certificate of Appealability, because Petitioner has not made the
19 requisite showing of a denial of a constitutional right. 28
20 U.S.C. § 2253(c)(2).

21 **V. Recommendation**

22 In accordance with the foregoing, **IT IS RECOMMENDED** that the
23 court issue an order approving and adopting this report and
24 recommendation.

25 **VI. Objections**

26 Any party may object to a magistrate judge's proposed findings,
27 recommendations or report within **fourteen (14)** days following
28 service with a copy thereof. Such party shall file written

1 objections with the Clerk of the Court and serve objections on all
2 parties, specifically identifying the portions to which objection is
3 being made, and the basis therefor. Any response to the objection
4 shall be filed within **fourteen (14)** days after receipt of the
5 objection. Attention is directed to FED. R. CIV. P. 6(d), which adds
6 additional time after certain kinds of service.

7 A district judge will make a de novo determination of those
8 portions to which objection is made and may accept, reject, or
9 modify the magistrate judge's determination. The judge need not
10 conduct a new hearing or hear arguments and may consider the
11 magistrate judge's record and make an independent determination
12 thereon. The judge may, but is not required to, accept or consider
13 additional evidence, or may recommit the matter to the magistrate
14 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621
15 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72;
16 LMR 4, Local Rules for the Eastern District of Washington.

17 A magistrate judge's recommendation cannot be appealed to a
18 court of appeals; only the district judge's order or judgment can be
19 appealed.

20 The District Court Executive is directed to file this Report
21 and Recommendation and provide copies to the parties and the
22 referring district judge.

23
24 DATED this 25 day of March, 2011.

25 s/ James P. Hutton
26 JAMES P. HUTTON
27 UNITED STATES MAGISTRATE JUDGE
28