IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY HINES,

Petitioner, No. CIV S-08-CV-1415 GEB CHS P

vs.

D.K. SISTO,[1]

Respondent. ORDER

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Petitioner, Larry Hines, is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently serving an indeterminate sentence of thirty-six years to life following his 1981 guilty plea to forcible rape with a penalty enhancement for use of a deadly weapon and his 1982 jury conviction for first degree murder with penalty enhancements for use of a deadly weapon and a prior violent felony. Here, Petitioner does not challenge the constitutionality of his convictions, but rather, the execution of his sentence, and specifically, the February 14, 2007 decision by the Board of Parole Hearings (the "Board") finding

[1] Gary Swarthout is substituted for his predecessor, D.K. Sisto, as the current acting warden at California State Prison, Solano, where Petitioner is currently incarcerated, pursuant to FED. R. CIV. P. 25(d).

him unsuitable for parole.

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. On December 20, 2010, the magistrate judge filed findings and recommendations herein which recommended that the petition be denied because there was "some evidence" in the record demonstrating that, at this time of his 2007 parole suitability hearing, Petitioner posed an unreasonable risk of danger to society and was thus unsuitable for parole. *Hayward v. Marshall*, 603 F.3d 546, 562 (9th Cir. 2010) (citing *In re Rosenkrantz*, 29 Cal.4th 616 (2002)). On January 24, 2011, subsequent to the issuance of the findings and recommendations, the United States Supreme Court issued its opinion in *Swarthout v. Cook*, No. 10-333, slip op. at 6 (U.S. Jan. 24, 2011), holding that while California prisoners possess a state created, federally protected liberty interest in parole, California's "some evidence" requirement is not a component of that liberty interest. To the contrary, the protection afforded by the federal due process clause to California parole decisions consists solely of the "minimal" procedural requirements set forth in *Greenholtz*, specifically, "an opportunity to be heard and . . . a statement of the reasons why parole was denied." *Id*. at 4-5. *See also Greenholtz*, 442 U.S. at 16.

Accordingly, IT IS HEREBY ORDERED that the findings and recommendations filed December 20, 2010 are VACATED. New findings and recommendations are forthcoming.

DATED: January 27, 2011

Charlene H. Sorrentino

CHARLENE H. SORRENTINO
UNITED STATES MAGISTRATE JUDGE