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

JON BURNIGHT,

Petitioner,

No. CIV S-08-1894 MCE CHS P

vs.

D.K.SISTO,

Respondent.

ORDER VACATING FINDINGS AND RECOMMENDATIONS

_____/

Petitioner Burnight is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a January 23, 2007 decision of the state parole authority that he was not suitable for parole. On November 16, 2010, findings and recommendations issued herein, recommending that the petition be granted because the state parole authority’s decision was unsupported by some evidence in the record. This particular finding relied on formerly controlling authority of the United States Court of Appeals for the Ninth Circuit, directing that “courts in this circuit... need only decide whether the California judicial decision approving the governor’s decision rejecting parole was an ‘unreasonable application’ of the California ‘some evidence’ requirement, or was ‘based on an unreasonable determination of the facts in light of the evidence.’” *Hayward v. Marshall*, 603

1 F.3d 546, 562-63 (9th Cir. 2010) (citations omitted).

2 Subsequent to the filing of the pending findings and recommendations, however,
3 the United States Supreme Court held in *Swarthout v. Cooke*, No. 10-333, slip op. at 4-5 (U.S.
4 January 24, 2011), that a federal court’s inquiry into whether an inmate in California received
5 due process in the parole suitability hearing context does not include review of California’s
6 “some evidence” requirement. Rather, in the parole suitability context, “the only federal right at
7 issue is procedural.” *Id.* at 6. Thus, this court may only review a parole board’s procedures to
8 see that an inmate received an opportunity to be heard and a decision informing him of the
9 reasons he did not qualify for parole. *See Swarthout*, slip op. at 4-5 (citing *Greenholtz*, 442 U.S.
10 at 16).

11 In light of this new controlling Supreme Court authority, IT IS HEREBY
12 ORDERED THAT the findings and recommendations signed on November 15, 2010 and filed on
13 November 16, 2010, are VACATED. New findings and recommendations will issue.

14 DATED: January 27, 2011

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16 CHARLENE H. SORRENTINO
17 UNITED STATES MAGISTRATE JUDGE
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