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

ARTARLIO DABNEY,

Petitioner,

No. CIV S-10-0872 JAM CKD

vs.

D. K. SISTO,

Respondent.

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 May 25, 2007. Respondent filed an answer on July 2, 2010, and petitioner has filed a traverse. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner’s application for habeas corpus relief be dismissed.

PROCEDURAL BACKGROUND

Petitioner was convicted in 1982 of first-degree murder with a firearm. He is serving a state prison term of twenty-five years (plus two years) to life. (Dkt. No. 1 (“Ptn.”) at 2.) On May 25, 2007, at petitioner’s fourth subsequent parole consideration hearing, the Board found

1 petitioner unsuitable for release and issued a two-year denial of parole. (Dkt. No. 16 (“Ans.”), Ex.  
2 1, Part B at 59-69.)

3           Petitioner filed three state habeas petitions challenging the Board’s 2007 decision.  
4 On November 7, 2007, he filed a petition in the Santa Clara County Superior Court, which was  
5 denied on the merits on February 5, 2008. (Ans., Exs. 1, 2.) On July 28, 2008, he filed a petition  
6 in the California Court of Appeal, Sixth Appellate District, which was summarily denied on  
7 August 7, 2008. (Ans., Exs. 3, 4.) On October 8, 2008, he filed a petition in the California  
8 Supreme Court, which was summarily denied on April 15, 2009. (Ans., Exs. 5, 6.)

9           On January 12, 2010, petitioner commenced this action by filing the instant  
10 petition. (Dkt. No. 1.) Respondent filed an answer on July 2, 2010. (Dkt. No. 16.) Petitioner  
11 filed a traverse on August 4, 2010. (Dkt. No. 17.)

## 12 ANALYSIS

### 13 I. Standards of Review Applicable to Habeas Corpus Claims

14           A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of  
15 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,  
16 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.  
17 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the  
18 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);  
19 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas  
20 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377  
21 (1972).

22           This action is governed by the Antiterrorism and Effective Death Penalty Act of  
23 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d  
24 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting  
25 habeas corpus relief:

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1 An application for a writ of habeas corpus on behalf of a  
2 person in custody pursuant to the judgment of a State court shall  
3 not be granted with respect to any claim that was adjudicated on  
4 the merits in State court proceedings unless the adjudication of the  
5 claim -

6 (1) resulted in a decision that was contrary to, or involved  
7 an unreasonable application of, clearly established Federal law, as  
8 determined by the Supreme Court of the United States; or

9 (2) resulted in a decision that was based on an unreasonable  
10 determination of the facts in light of the evidence presented in the  
11 State court proceeding.

12 See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362  
13 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the state court's decision  
14 does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review  
15 of a habeas petitioner's claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). See  
16 also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) (“[I]t is now clear both that we  
17 may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error,  
18 we must decide the habeas petition by considering de novo the constitutional issues raised.”).

19 The court looks to the last reasoned state court decision as the basis for the state  
20 court judgment.<sup>1</sup> Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). See also Barker v.  
21 Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005) (“When more than one state court has adjudicated  
22 a claim, we analyze the last reasoned decision”). If the last reasoned state court decision adopts  
23 or substantially incorporates the reasoning from a previous state court decision, this court may  
24 consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque,  
25 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Where the state court reaches a decision on the  
26 merits but provides no reasoning to support its conclusion, a federal habeas court independently  
reviews the record to determine whether habeas corpus relief is available under § 2254(d).  
Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167

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<sup>1</sup> Here, the last reasoned state court decision issued from the Santa Clara County Superior Court. See Ans., Ex. 2.

1 (9th Cir. 2002). When it is clear that a state court has not reached the merits of a petitioner's  
2 claim the AEDPA's deferential standard does not apply and a federal habeas court must review  
3 the claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

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

5 The Due Process Clause of the Fourteenth Amendment prohibits state action that  
6 deprives a person of life, liberty, or property without due process of law. A litigant alleging a  
7 due process violation must first demonstrate that he was deprived of a liberty or property interest  
8 protected by the Due Process Clause and then show that the procedures attendant upon the  
9 deprivation were not constitutionally sufficient. Kentucky Dep't of Corrections v. Thompson,  
10 490 U.S. 454, 459-60 (1989).

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

22 California's parole scheme gives rise to a liberty interest in parole protected by the  
23 federal Due Process Clause. Pirtle v. California Bd. of Prison Terms, 611 F.3d 1015, 1020 (9th  
24 Cir. 2010); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002); see also Swarthout, 131 S.  
25 Ct. at 861-62 (finding the Ninth Circuit's holding in this regard to be a reasonable application of  
26 Supreme Court authority); Pearson v. Muntz, \_\_\_ F.3d \_\_\_, 2011 WL 1238007, at \*4 (9th Cir.

1 Apr. 5, 2011) (“[Swarthout v. Cooke did not disturb our precedent that California law creates a  
2 liberty interest in parole.”) In California, a prisoner is entitled to release on parole unless there is  
3 “some evidence” of his or her current dangerousness. In re Lawrence, 44 Cal.4th 1181, 1205-06,  
4 1210 (2008); In re Rosenkrantz, 29 Cal.4th 616, 651-53 (2002).

5 In Swarthout, the Supreme Court reviewed two cases in which California  
6 prisoners were denied parole – in one case by the Board, and in the other by the Governor after  
7 the Board had granted parole. Swarthout, 131 S. Ct. at 860-61. The Supreme Court noted that  
8 when state law creates a liberty interest, the Due Process Clause of the Fourteenth Amendment  
9 requires fair procedures, “and federal courts will review the application of those constitutionally  
10 required procedures.” Id. at 862. The Court concluded that in the parole context, however, “the  
11 procedures required are minimal” and that the “Constitution does not require more” than “an  
12 opportunity to be heard” and being “provided a statement of the reasons why parole was denied.”  
13 Id. (citing Greenholtz, 442 U.S. at 16). The Supreme Court therefore rejected Ninth Circuit  
14 decisions that went beyond these minimal procedural requirements and “reviewed the state  
15 courts’ decisions on the merits and concluded that they had unreasonably determined the facts in  
16 light of the evidence.” Swarthout, 131 S. Ct. at 862. In particular, the Supreme Court rejected  
17 the application of the “some evidence” standard to parole decisions by the California courts as a  
18 component of the federal due process standard. Id. at 862-63. See also Pearson, 2011 WL  
19 1238007 at \*4.

### 20 III. Petitioner’s Claim

21 Petitioner seeks federal habeas relief on the grounds that the Board’s 2007  
22 decision to deny him parole, the findings upon which that denial was based, and the Santa Clara  
23 County Superior Court’s decision to affirm the Board were not supported by “some evidence,” as  
24 required under California law. However, after the Supreme Court’s decision in Swarthout, it is  
25 clear that the question of whether the Board reasonably applied California’s “some evidence”  
26 standard in a prisoner’s parole hearing does not give rise to a claim for federal habeas relief.

1 Swarthout, 131 S. Ct. at 862-63; see also Miller v. Oregon Bd. of Parole and Post-Prison  
2 Supervision, \_\_\_ F.3d \_\_\_, 2011 WL 1533512, at \*5 (9th Cir. Apr. 25, 2011) (“The Supreme  
3 Court held in [Swarthout v.] Cooke that in the context of parole eligibility decisions the due  
4 process right is *procedural*, and entitles a prisoner to nothing more than a fair hearing and a  
5 statement of reasons for a parole board’s decision[.]”); Roberts v. Hartley, \_\_\_ F.3d \_\_\_, 2011 WL  
6 1365811, at \*3 (9th Cir. Apr. 12, 2011) (under the decision in Swarthout, California’s parole  
7 scheme creates no substantive due process rights and any procedural due process requirement is  
8 met as long as the state provides an inmate seeking parole with an opportunity to be heard and a  
9 statement of the reasons why parole was denied); Pearson, 2011 WL 1238007, at \*3 (9th Cir.  
10 Apr. 5, 2011) (“While the Court did not define the minimum process required by the Due Process  
11 Clause for denial parole under the California system, it made clear that the Clause’s requirements  
12 were satisfied where the inmates ‘were allowed to speak at their parole hearings and to contest  
13 the evidence against them, were afforded access to their records in advance, and were notified as  
14 to the reasons why parole was denied.’”)

15           In this case, the habeas petition and exhibits attached thereto show that petitioner  
16 was represented by counsel at his 2007 parole suitability hearing. The record also establishes  
17 that petitioner was heard at the hearing and received a statement of the reasons why the Board  
18 panel decided to deny him parole. See Ptn., Ex.C, Parts 1 and 2. Petitioner thus received all the  
19 process due him under the Constitution. Swarthout, 131 S. Ct. 862; see also Miller, 2011 WL  
20 1533512, at \*5; Roberts, 2011 WL 1365811, at \*3; Pearson, 2011 WL 1238007, at \*3. His  
21 petition must be dismissed.

22           Accordingly, IT IS HEREBY RECOMMENDED that:

- 23           1. The petition for writ of habeas corpus (Dkt. No. 1) be dismissed; and
- 24           2. This case be closed.

25           These findings and recommendations are submitted to the United States District  
26 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-

1 one days after being served with these findings and recommendations, any party may file written  
2 objections with the court and serve a copy on all parties. Such a document should be captioned  
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
4 shall be served and filed within fourteen days after service of the objections. Failure to file  
5 objections within the specified time may waive the right to appeal the District Court’s order.  
6 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.  
7 1991).

8 In any objections he elects to file, petitioner may address whether a certificate of  
9 appealability should issue in the event he files an appeal of the judgment in this case. See Rule  
10 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a  
11 certificate of appealability when it enters a final order adverse to the applicant); Hayward v.  
12 Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc) (prisoners are required to obtain a certificate of  
13 appealability to review the denial of a habeas petition challenging an administrative decision  
14 such as the denial of parole by the parole board).

15 Dated: September 21, 2011

16   
17 CAROLYN K. DELANEY  
18 UNITED STATES MAGISTRATE JUDGE

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