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

MILTON MOORE, JR.,
Petitioner,

No. CIV S-10-2004-WBS-CMK-P

vs.

FINDINGS AND RECOMMENDATION

GARY SWARTHOUT,
Respondent.

_____ /

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court are petitioner’s petition for a writ of habeas corpus (Doc. 1), respondent’s answer (Doc. 10), and petitioner’s traverse (Doc. 11).

In his petition, petitioner is challenging the 2009 decision by the Board of Parole Hearings finding him unsuitable for parole. Petitioner challenges the panel’s unreasonable risk determination on the basis that the Board’s decision was not supported by some evidence that he poses an unreasonable risk to public safety. Petitioner contends that the decision was based solely on the immutable factors of his commitment offense.

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1 The issue of parole denials in California has specifically been addressed by the
2 United States Supreme Court. Reversing the Ninth Circuit’s decision in Hayward v. Marshall,
3 603 F.3d 546 (9th Cir. 2010) (en banc), the Court observed:

4 Whatever liberty interest exists [in parole] is, of course, a *state*
5 interest. There is no right under the Federal Constitution to be
6 conditionally released [on parole] before the expiration of a valid sentence,
7 and the States are under no duty to offer parole to their prisoners. *Id.* at 7.
8 When, however, a State creates a liberty interest, the Due Process Clause
9 requires fair procedures for its vindication – and federal courts will review
10 the application of those constitutionally required procedures. . . .

11 Swarthout v. Cooke, 562 U.S. ___, 131 S. Ct. 859, 862 (2011) (per curiam) (citing Greenholtz v.
12 Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 7 (1979)) (emphasis in original).

13 The Court held:

14 In the context of parole, we have held that the procedures required
15 are minimal. In Greenholtz, we found that a prisoner subject to a
16 parole statute similar to California’s received adequate process
17 when he was allowed an opportunity to be heard and was provided
18 a statement of the reasons why parole was denied. 442 U.S. at 16.
19 “The Constitution,” we held, “does not require more.” *Ibid.*
20 Cooke and Clay received at least this amount of process: They
21 were allowed to speak at their parole hearings and to contest the
22 evidence against them, were afforded access to their records in
23 advance, and were notified as to the reasons why parole was
24 denied. (citations omitted).

25 That should have been the beginning and the end of the federal
26 habeas courts’ inquiry into whether Cook and Clay received due
process. . . .

Id.

27 The Court added that “[n]o opinion of ours supports converting California’s
28 ‘some evidence’ rule into a substantive federal requirement” and “it is no federal concern . . .
29 whether California’s ‘some evidence’ rule of judicial review (a procedure beyond what the
30 Constitution demands) was correctly applied” because “a ‘mere error of state law’ is not a denial
31 of due process.” *Id.* at 862-63 (citing Engle v. Isaac, 456 U.S. 107, 121, n.21 (1982)). Thus, in
32 cases challenging the denial of parole, the only issue subject to federal habeas review is whether
33 the inmate received the procedural due process protections of notice and an opportunity to be
34 heard. There is no other clearly established federal constitutional right in the context of parole.

1 In this case, petitioner challenges the basis for the Board's determination, not the
2 process utilized. As discussed above, it is not the place of the federal court to rule on how
3 California's "some evidence" parole standard has been applied except to inquire as to the basic
4 procedural guarantees. Petitioner does not argue that he was denied any of the procedural
5 protections required by the federal constitution. Even if he did, the record clearly establishes that
6 petitioner was provided with the basic Greenholtz protections of notice, an opportunity to be
7 heard, and a statement of reasons for the decision. See Swarthout, 131 S. Ct. at 862. Because
8 the federal constitution requires nothing more in the parole context, the petition must be denied.

9 Based on the foregoing, the undersigned recommends that petitioner's petition for
10 a writ of habeas corpus (Doc. 1) 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 14 days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court. Responses to objections shall be filed within 14 days after service of
15 objections. Failure to file objections within the specified time may waive the right to appeal.
16 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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18 DATED: August 20, 2013

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20 **CRAIG M. KELLISON**
21 UNITED STATES MAGISTRATE JUDGE
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