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

EDWIN D. McMILLAN,  
Petitioner,

No. CIV S-11-0303-JAM-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

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 challenging the denial of parole. Pending before the court is petitioner’s petition for a writ of habeas corpus (Doc. 1).

Rule 4 of the Federal Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” In the instant case, it is plain that petitioner is not entitled to federal habeas relief. Reversing the Ninth Circuit’s decision in Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc), the United

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1 States Supreme Court recently observed:

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

9           Swarthout v. Cooke, 562 U.S. \_\_\_, 2011 WL 197627, at \*2 (Jan. 24, 2011) (per  
10 curiam) (citing Greenholtz v. Inmates of Neb. Penal and Correctional Complex,  
11 442 U.S. 1, 7 (1979)) (emphasis in original).

12 The Court held:

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

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

26           Id.

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

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1           Here, to the extent petitioner claims that the decision to deny parole was not based  
2 on “some evidence” or otherwise failed to satisfy substantive due process, the claim is foreclosed  
3 as a matter of law because there is no clearly established federal constitutional substantive due  
4 process right in parole. To the extent petitioner claims that he was not provided the minimal  
5 procedural due process protections of notice and an opportunity to be heard, the petition must be  
6 denied because it is clear on the face of the petition and documents attached thereto that  
7 petitioner was provided the minimum procedural protections guaranteed by the federal  
8 constitution.

9           Petitioner’s references in the petition to “equal protection” and vagueness do not  
10 change the court’s analysis. In essence, petitioner is challenging the Parole Board’s application  
11 of California substantive parole law in his case. He claims that evidence cited by the Parole  
12 Board as bases to deny parole were not accurate reflections of his case. He also claims that the  
13 Parole Board and state courts misapplied the “egregious exception” to a presumption of parole  
14 suitability. These claims are all substantive in nature and touch on alleged errors in the  
15 application of state law. As the Court stated in Cooke, however, it is no place for the federal  
16 court to review claims of state law error.

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1           Based on the foregoing, the undersigned recommends that petitioner's petition for  
2 a writ of habeas corpus (Doc. 1) be summarily dismissed.

3           These findings and recommendations are submitted to the United States District  
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
5 after being served with these findings and recommendations, any party may file written  
6 objections with the court. Responses to objections shall be filed within 14 days after service of  
7 objections. Failure to file objections within the specified time may waive the right to appeal.  
8 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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10 DATED: February 25, 2011

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12 **CRAIG M. KELLISON**  
13 UNITED STATES MAGISTRATE JUDGE  
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