

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS RAY MILLER, <i>Petitioner-Appellant,</i> v. OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION, <i>Respondent-Appellee.</i>
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No. 07-36086
D.C. No.
CV-05-00440-
MWM
OPINION

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted
October 6, 2010—Portland, Oregon

Filed April 25, 2011

Before: Richard A. Paez and Richard R. Clifton,
Circuit Judges, and Larry A. Burns,* District Judge.

Opinion by Judge Burns

*The Honorable Larry A. Burns, United States District Judge for the Southern District of California, sitting by designation.

COUNSEL

Anthony D. Bornstein, Office of the Federal Public Defender,
Portland, Oregon, for the petitioner-appellant.

Justice Rillera, Office of the Oregon Attorney General,
Salem, Oregon, for the defendant-appellee.

OPINION

BURNS, District Judge:

We held in *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), abrogation on other grounds recognized in *Pearson v. Muntz*, ___ F.3d ___ (9th Cir. 2011), that only state law can give rise to a liberty interest in parole that is entitled to the protections of the Due Process Clause of the Constitution. This habeas appeal presents the question whether an Oregon statute creates a liberty interest in *early eligibility* for parole. We hold that it does. We also hold, following *Swarthout v. Cooke*, 131 S.Ct. 859 (2011), that the Oregon Board of Parole and Post-Prison Supervision (“Board”) did not violate Appellant’s due process rights when it denied him that eligibility.

BACKGROUND

Douglas Miller was convicted of aggravated murder by an Oregon jury in August 1982 for hiring another man to kill his wife. He received an indeterminate life sentence with a 30-year minimum term during which he is not eligible for parole. He is still serving that minimum term.

Twenty years into his sentence Miller became eligible for his first “murder review hearing.” This hearing, provided for under Oregon law, permits an individual who has been convicted of aggravated murder the opportunity to show that he is “likely to be rehabilitated within a reasonable period of time.” Or. Rev. Stat. § 163.105(3) (1981). If the individual can make that showing, his sentence is converted to life imprisonment with the possibility of parole and he immediately becomes parole-eligible. Two sections of the murder review statute are pertinent:

(3) At any time after 20 years from the date of imposition of a minimum period of confinement [for

soliciting murder] . . . the State Board of Parole, upon the petition of a prisoner so confined, shall hold a hearing to determine if the prisoner is likely to be rehabilitated within a reasonable period of time. The sole issue shall be whether or not the prisoner is likely to be rehabilitated within a reasonable period of time

(a) The prisoner shall have the burden of proving by a preponderance of the evidence the likelihood of rehabilitation within a reasonable period of time; and . . .

(4) If, upon hearing all the evidence, the board finds that the prisoner is capable of rehabilitation and that the terms of the prisoner's confinement should be changed to life imprisonment with the possibility of parole, or work release, it shall enter an order to that effect and the order shall convert the terms of the prisoner's confinement to life imprisonment with the possibility of parole or work release.

Or. Rev. Stat. § 163.105(3)-(4) (1981). To be clear, these particular sections speak only to *early eligibility* for a parole hearing for persons convicted of aggravated murder; they promise nothing as far as actually being paroled after the hearing.

Before his hearing, Miller was given advance access to records and information, and was permitted to submit a multitude of documents to the Board to demonstrate the likelihood of his rehabilitation within a reasonable time. At the hearing, the Board engaged Miller in an extended discussion of his crime, and gave him a full opportunity to be heard. The Board deliberated, and, without elaboration, denied his request for an early parole hearing.

Miller then sought administrative review of the Board's decision, which under Oregon law is equivalent to a motion

for reconsideration. On review, the Board upheld its decision, this time offering the following written explanation:

After considering all of the evidence presented at the hearing, the board concluded that you are not taking responsibility for the crime in a way that would show that you are likely to be rehabilitated within a reasonable period of time. You arranged for your wife to be killed so you could get the insurance money. You also did not want to pay for the expenses that a divorce would involve. You minimized your involvement in the crime during the hearing by denying it was your intent that the murder be carried out. The board is to consider the totality of the circumstances and the evidence presented at the murder review hearing before making its decision. When all of this was taken into consideration, the board felt that you had not satisfied your burden.

Miller appealed to the Oregon Court of Appeals, which affirmed without issuing an opinion. *Miller v. Bd. of Parole and Post-Prison Supervision*, 95 P.3d 756 (Or. Ct. App. 2004). The Oregon Supreme Court denied review. *Miller v. Bd. of Parole and Post-Prison Supervision*, 108 P.3d 1173 (Or. 2005).

Miller next filed a habeas corpus petition under 28 U.S.C. § 2254, alleging that the Board violated his due process rights because it lacked “some evidence” to support its finding that he could not be rehabilitated within a reasonable period of time. The district court disagreed and denied relief, finding “there is certainly ‘some evidence’ supporting the Board’s decision.” *Miller v. Oregon Bd. of Parole and Post-Prison Supervision*, 2007 WL 4245912, *4 (D. Or. 2007). We have jurisdiction pursuant to 28 U.S.C. § 1291.

In the time between the district court’s denial of Miller’s habeas petition and our review of his appeal, the law has

changed. We explain below the intervening changes, their application to Miller's habeas petition, and the reasons we affirm the district court's denial of relief.

DISCUSSION

We review *de novo* a district court's denial of habeas relief. *Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir. 1998). Habeas relief is warranted when a person is in custody "in violation of the Constitution or laws or treaties of the United States" and the state court's adjudication of the merits of his or her claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254. In the absence of a reasoned state court decision on a prisoner's claim, we independently review the record. *See Himes v. Thompson*, 336 F.3d 848, 852-53 (9th Cir. 2003).

A. *Miller's Liberty Interest in Early Eligibility for a Parole Hearing*

[1] We first address whether Miller has a liberty interest in becoming parole-eligible *early*, that is, before the expiration of the minimum term of his sentence. The Constitution does not, itself, guarantee a liberty interest in parole, but a state's substantive parole scheme may create one that is enforceable under the Due Process Clause. *See Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12, 16 (1979) (Due Process Clause applies to discretionary parole-release determinations made by the Nebraska Board of Parole); *Bd. of Pardons v. Allen*, 482 U.S. 369, 370-71 (1987) (Montana parole scheme created a federally protected liberty interest in parole). Our en banc court recently reiterated this principle in *Hayward*: "If there is any right to release on parole, or to release in the absence of some evidence of future dangerous-

ness, it has to arise from substantive state law creating a right to release.” 603 F.3d at 555.

[2] A state parole statute establishes a protected liberty interest in parole when it uses language that creates a presumption that the prisoner will be paroled if certain conditions are satisfied. The Nebraska parole statute in *Greenholtz* provided: “Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because [one of four enumerated factors exists].” 442 U.S. at 11. The Supreme Court reasoned that this language created an “expectancy of release” that was “entitled to some measure of constitutional protection.” *Id.* at 12.

Allen involved a Montana parole statute similar to Nebraska’s: “[T]he board shall release on parole . . . any person confined in the Montana state prison or the women’s correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]” 482 U.S. at 376. The Court held that this statute gave rise to a protected liberty interest in parole release because, like the Nebraska statute in *Greenholtz*, it “uses mandatory language (‘shall’) to ‘creat[e] a presumption that parole release will be granted’ when the designated findings are made.” *Id.* at 377-78 (quoting *Greenholtz*, 442 U.S. at 12). In addition, the Court “reject[ed] the argument that a statute that mandates release ‘unless’ certain findings are made is different from a statute that mandates relief ‘if,’ ‘when,’ or ‘subject to’ such findings being made. Any such statute creates a presumption that parole release will be granted.” *Id.* at 378 (quotations omitted).

In *McQuillion v. Duncan*, 306 F.3d 895 (9th Cir. 2002), we had to decide whether California’s parole scheme created a liberty interest in parole, and we drew heavily on *Greenholtz* and *Allen*. The parole statute at issue read:

The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed

.....

Cal. Penal Code § 3041(b). We determined that this statute paralleled the Nebraska and Montana parole statutes at issue in *Greenholtz* and *Allen*, respectively. We explained that the California statute created a presumption that parole would be granted unless “statutorily defined determinations are made,” and we held it therefore gave rise to a liberty interest in parole that is federally protected by the Due Process Clause. *McQuillion*, 306 F.3d at 901. See also *Pearson v. Muntz*, ___ F.3d ___ (9th Cir. 2011) (observing that the Supreme Court “did not disturb our precedent that ‘California law creates a liberty interest in parole.’” (quoting *Cooke*, 131 S.Ct. at 861)).

Here, Oregon argues that the language of its murder review statute distinguishes it from the statutes in *Greenholtz*, *Allen*, and *McQuillion* and does not create a liberty interest in early parole eligibility. Those statutes mandate that parole boards “shall” parole a prisoner “unless” they have reasons not to (*Greenholtz* and *McQuillion*) or, in the affirmative, “when” they believe the prisoner can be trusted to be law-abiding (*Allen*). By contrast, Oregon’s statute places the burden on the prisoner to show that he or she is capable of rehabilitation. If the prisoner does not meet this burden, the statute explains, “the board shall deny the relief sought in the petition.” Or. Rev. Stat. § 163.105(4) (1981). In the State’s view, placing the burden of proof on the prisoner—along with the explicit command to “deny the relief” if the burden is not met—removes any presumption that a prisoner will be granted early eligibility for a parole hearing and therefore negates any liberty interest in obtaining that eligibility.

[3] We disagree. Whatever differences exist between requiring a parole board to provide reasons for not granting parole and requiring the prisoner to provide reasons why he or she should be paroled, we do not believe they control whether the statute confers a liberty interest. The parole statutes in *Greenholtz*, *Allen*, and *McQuillion* each provided that a prisoner should be paroled if certain evidentiary conditions were satisfied; similarly, the Oregon murder review statute provides for early eligibility for a parole hearing if a prisoner shows a likelihood of being rehabilitated within a reasonable amount of time. We do not read *Greenholtz*, *Allen*, and *McQuillion* to require that the evidentiary burden must be on the state to show that a prisoner is not entitled to parole—rather than on the prisoner to show that he or she *is*—in order for a liberty interest in early parole eligibility to arise.

[4] We therefore conclude that the language of Oregon’s murder review statute “creates a presumption” in favor of early eligibility for a parole hearing “when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest.” *McQuillion*, 306 F.3d at 901 (internal quotation marks omitted).

B. Miller’s Due Process Rights

We now turn to whether the Board violated Miller’s due process rights when it found he was not likely to be rehabilitated within a reasonable period of time and denied him early parole eligibility. Miller argued before the district court that the Board’s determination violated his constitutional rights because it was not supported by “some evidence” in the record. The district court also relied on the “some evidence” standard in independently scouring the record of Miller’s murder review hearing before concluding that the Board did not violate Miller’s rights. *Miller v. Oregon Bd. of Parole and Post-Prison Supervision*, 2007 WL 4245912, *3 (D. Or. 2007).

[5] In undertaking *de novo* review of the Board’s decision, the district court acted in conformity with Ninth Circuit case law at the time, which commanded independent examination of the reasonableness of parole eligibility determinations on federal habeas review. *See, e.g., Irons v. Carey*, 505 F.3d 846, 851 (9th Cir. 2007); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006). *See also Pearson v. Muntz*, 625 F.3d 539, 548 (9th Cir. 2010) (“*Hayward* specifically commands federal courts to examine the reasonableness of [the application of state law], as well as the reasonableness of the . . . determination of the facts in light of the evidence.”). Ninth Circuit case law on the scope of habeas review of parole eligibility decisions has since been superseded. The Supreme Court held in *Cooke* that in the context of parole eligibility decisions the due process right is *procedural*, and entitles a prisoner to nothing more than a fair hearing and a statement of reasons for a parole board’s decision:

When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures. In the context of parole, we have held that the procedures required are minimal. In *Greenholtz*, we found that a prisoner subject to a parole statute similar to California’s received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied. 442 U.S. at 16. “The Constitution,” we held, “does not require more.” *Ibid.*

Cooke, 131 S.Ct. at 862.

[6] In other words, the question before the district court, and the one we face on review of the district court’s decision, is not whether the Board’s decision to deny Miller early eligibility for parole was substantively reasonable, nor whether the Board correctly applied Oregon’s parole standards. Instead, it

is simply whether the state provided Miller with the minimum procedural due process outlined in *Cooke*. The Supreme Court found that the habeas petitioners in *Cooke* “were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied.” 131 S.Ct. at 862. That was sufficient, the Court held, to satisfy the Due Process Clause.

[7] Here, as in *Cooke*, Miller was afforded access to his records in advance of the hearings, and he was given the opportunity to submit information to the Board and to make a statement during the hearing. And, although the Board’s initial decision was not explained, Miller was eventually provided with a written statement of the reasons why he was denied early eligibility for parole. After *Cooke*, that is the beginning and the end of the inquiry into whether he received due process, so we need look no further to affirm the district court’s denial of Miller’s petition.

AFFIRMED.