UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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| ROBERT LEE JOHNSON,<br><br>Petitioner,<br><br>v.<br><br>GARY SWARTHOUT, Warden,<br><br>Respondent.[1] | ) | CASE NO. 2:09-cv-02487-RSL-JLW<br><br><br><br>REPORT AND RECOMMENDATION |

I. INTRODUCTION

Petitioner Robert Johnson is currently incarcerated at the California State Prison (Solano) in Vacaville, California. In 1979, he was convicted by a jury of one count of first degree murder, with a prior conviction for second degree murder, and was sentenced in Fresno County Superior Court to a term of twenty-five-years-to-life, plus five years, with the possibility of parole. (Docket 1 at 1.) Having exhausted his remedies in the courts of California, petitioner seeks federal habeas corpus relief under 28 U.S.C. § 2254. Specifically,

[1] Petitioner recently notified the Court that he has been transferred from Deuel Vocational Institute in Tracy, California, to the California State Prison in Vacaville, California. (*See* Docket 14.) Pursuant to Federal Rule of Civil Procedure 25(d), the Court has therefore substituted petitioner's current custodian Warden Gary Swarthout as the respondent in this action.

he challenges his 2008 denial of parole by the Board of Parole Hearings of the State of California (the "Board").[2] (*See id.*)

Petitioner had been in custody for twenty-nine years at the time of his 2008 hearing and approximately thirty years as of this writing.

Respondent has filed an answer to the petition in which he contends that petitioner's state habeas corpus petition failed to comply with California's state court filing rules on successive petitions, resulting in a procedural default that bars federal consideration of his claims. (*See* Dkt. 12 at 7-8.) In the alternative, respondent asserts that petitioner's claims are without merit. (*See id.* at 8-16.)

Petitioner filed a traverse to respondent's answer in which he asserts that his petition was not successive and denies each of respondent's arguments. (*See* Dkt. 13.)

Having thoroughly reviewed the record and briefing of the parties, it is recommended that the Court find as follows:

(1) Because the record does not establish with any clarity that the California courts deemed the petition to be barred as successive, this Court should consider the petition on the merits;

(2) The U.S. Supreme Court has clearly held that where a state statutory scheme includes mandatory language that creates a presumption of parole release based on certain designated findings, that statute gives rise to a federal constitutional liberty interest in parole;

(3) California statutes and regulations contain such mandatory language;

(4) That language provides that a prisoner serving an indeterminate life sentence has an expectation of parole release unless the Board or the Governor finds that he will pose an unreasonable risk of danger to society if released on parole;

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[2] The Board of Parole Hearings replaced the Board of Prison Terms, which was abolished on July 1, 2005. *See* California Penal Code § 5075(a).

(5) The California Supreme Court has interpreted this statutory language to provide that an adverse parole decision must be supported by "some evidence" of current dangerousness;

(6) Whether "some evidence" of current dangerousness exists is determined in accordance with California law;

(7) Applying these standards, the record before the Board in 2008 contained "some evidence" of petitioner's dangerousness;

(8) The denial of parole therefore did not violate petitioner's federal due process rights, and the decision of the Fresno County Superior Court upholding the denial was a reasonable application of clearly established federal law;

(9) Petitioner's Ex Post Facto Clause claims should be denied as petitioner fails to demonstrate that the legislative amendments at issue have disadvantaged him; and

(10) The Court should deny the petition for a writ of habeas corpus and dismiss this action with prejudice.

II. FACTUAL BACKGROUND

The Board's 2008 report referenced the 2004 Board's summary of the facts of the commitment offense, but failed to include that summary in the record. (*See* Dkt. 1, Exhibit C at 6.) This Court therefore relies upon the Fresno County Probation Officer's Report, dated July 2, 1979, which was included in the record and which summarized the background facts in this case as follows:

> On March 12, 1979 Fresno police officers were dispatched to the scene of a shooting. Upon arrival, officers observed Charles Williams lying on the ground, bleeding from the abdomen. The victim was subsequently transported to Valley Medical Center. Approximately one hour later, officers were advised that Mr. Williams had died during surgery. A subsequent autopsy revealed that the cause of death was due to multiple gunshot wounds. One of the wounds was in the right chest area, the second in the left chest area, a third wound to the left wrist and a fourth wound to the right abdomen.

> According to the POR, Mrs. Patricia Williams testified that she drove up to her house with friends and observed Robert Johnson exit her home. She also observed Charles Williams exit the home. A conversation ensued between Williams and Johnson. Mrs. Williams stated that, although she did not hear the conversation initially, the voices were somewhat soft. Later however, Johnson began talking in a rather loud voice. Mrs. Williams exited her car and approached the two men. As she approached, she heard Johnson state, "You said you wanted to speak to my wife. There she is. You want to talk to her. There she is, because you're not going to talk to her unless you talk to her in front of me." Williams then lit a cigarette and smiled in Johnson's direction. Johnson stated, "Don't be smiling in my face man." Johnson then stepped back, opened his coat, and began firing with a handgun in William's direction. Patricia Williams testified that at the time Johnson fired, Williams had one hand at his side and another hand at his mouth with a lit cigarette. Williams then grabbed his side with one hand and grabbed Patricia for support with the other. Mrs. Williams eased Charles Williams to the ground and then laid on top of him in an effort to prevent Johnson from shooting Williams again. While they were on the ground, Johnson moved towards the front of them and fired two more shots.
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> A witness who had been in the vehicle with Mrs. Williams testified that she had observed Johnson at a party a few days prior to the shooting. He had a handgun at the party. It was further stated that after the shooting Johnson had said, "That nigger was doomed to die. If I hadn't shot him, I was going to beat him to death sooner or later." Mr. Johnson subsequently surrendered to authorities on March 15, 1979.

(Dkt. 1, Exh. A at 4-5.)

During the 2008 hearing, the Board also incorporated by reference petitioner's version of the facts leading up to the commitment offense. (*See id.*, Exh. C at 7.) Again, those facts are not included in this record. (*See id.*) Petitioner was convicted by a jury of one count of first degree murder, with a prior conviction for second degree murder, and was sentenced in Fresno County Superior Court to a term of twenty-five-years-to-life, plus five years, with the

possibility of parole. (*See* Dkt. 1 at 1.) He began serving his life sentence in the California Department of Corrections on July 23, 1979. (*See id.*, Ex. C at 1.) Petitioner's minimum eligible parole date was set for August 15, 1998. (*See id*.) He has been incarcerated for more than thirty years for this offense and twelve years past his minimum eligible parole date.

The parole denial, which is the subject of this petition, followed a parole hearing held on December 31, 2008. (*See id.*) This was petitioner's fifth parole application, including his initial parole consideration hearing. His previous applications were also denied.[3] After his 2008 denial, petitioner filed habeas corpus petitions in the Fresno County Superior Court, and the California Court of Appeal and Supreme Court. Those petitions were unsuccessful. This federal habeas petition followed. Petitioner contends his 2008 denial violated his federal rights under the Due Process Clause and the Ex Post Facto Clause of the U.S. Constitution. Thus, the habeas petition before this Court does not attack the propriety of his conviction or sentence, but solely challenges the Board's 2008 decision finding him unsuitable for parole and the Board's application of post-conviction legislative amendments governing the parole hearing process.

## III. PARTIES' CONTENTIONS

Petitioner contends that the Board violated his state and federal due process rights by finding him unsuitable for parole based solely upon the immutable facts of the commitment offense and his prior criminal history. (*See* Dkt. 1 at 5-5a3.) Specifically, he asserts that there

[3] Petitioner has had one subsequent parole hearing since his 2008 parole denial. (*See* Dkt. 12, Exh.7.) He has yet to file a habeas corpus petition challenging that decision. A prior petition, challenging the Board's 2007 denial, is currently pending before the Honorable Marsha S. Berzon. (*See* Case No. 2:08-cv-01425-MSB.) The parties in that case were recently directed to submit supplemental briefs addressing specific case status-related questions, post-*Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc). (*See* Case No. 2:08-cv-01425-MSB, Dkt. 23.)

is "no evidence" to support the Board's conclusion that his expression of remorse was not genuine. (*See id*.) In addition, petitioner argues that amendments to the California Penal Code and California Code of Regulations over the past thirty years, including the recent amendment by "Proposition 9, California's Victims' Bill of Rights Act of 2008: Marsy's Law," have violated his state and federal rights to be free from *ex post facto* laws.[4] (*See id*.) *See* Cal. Penal Code § 3041.5(b)(3)(2009) (Marsy's Law changed aspects of California's parole system, including the frequency and availability of parole hearings for petitioners found not suitable for parole).

Respondent claims that the petition should be denied because petitioner procedurally defaulted by filing successive state court petitions. (*See* Dkt. 12 at 6.) If the court considers the merits of the federal petition, respondent contends that petitioner does not have a constitutionally protected liberty interest in being released on parole, that the "some evidence" standard is inapplicable in this context, and that even if he does have a protected liberty interest, the Board adequately predicated its denial of parole on "some evidence." (*See id.* at 11-16.) Respondent also contends that petitioner's Ex Post Facto Clause claim is without merit as "the [2008] amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes. . . ." (*See id.* at 9-10.) Respondent does not address petitioner's claim that thirty years of amendments have also violated his rights under the Ex Post Facto Clause. In sum, respondent argues that petitioner's federal constitutional rights were not violated by the

[4] We do not reach petitioner's claims that his state rights under the California Constitution were violated, as state claims are not cognizable in a federal habeas petition. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (asserting that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Board's 2008 decision, and that the Fresno County Superior Court's Order upholding the Board's 2008 parole denial was not an unreasonable application of clearly established federal law. (*See id.*)

## IV. STANDARD OF REVIEW AND REQUIRED SHOWINGS

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this petition because it was filed after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Because petitioner is in custody of the California Department of Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir. 2004) (providing that § 2254 is "the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying state court conviction."). Under AEDPA, a habeas petition may not be granted with respect to any claim adjudicated on the merits in state court unless petitioner demonstrates that the highest state court decision rejecting his petition was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented. . . ." 28 U.S.C. § 2254(d)(1) and (2).

As a threshold matter, this Court must ascertain whether relevant federal law was "clearly established" at the time of the state court's decision. To make this determination, the Court may only consider the holdings, as opposed to dicta, of the U.S. Supreme Court. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). In this context, Ninth Circuit precedent

remains persuasive but not binding authority. *See id.* at 412-13; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

The Court must then determine whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. At all times, a federal habeas court must keep in mind that it "may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be [objectively] unreasonable." *Id.* at 411. It is the petitioner's burden to establish that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254; *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

AEDPA also requires federal courts to give considerable deference to state court decisions, and state courts' factual findings are presumed correct. *See* 28 U.S.C. § 2254(e)(1). Federal courts are bound by a state's interpretation of its own laws. *See Murtishaw v. Woodford*, 255 F.3d 926, 964 (9th Cir. 2001) (citing *Powell v. Ducharme*, 998 F.2d 710, 713 (9th Cir. 1993)). This deference, however, is accorded only to "reasoned decisions" by the

state courts. To determine whether the petitioner has met this burden, a federal habeas court looks to the last reasoned state court decision because subsequent unexplained orders upholding that judgment are presumed to rest upon the same ground. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007).

In this case, after the Fresno County Superior Court denied petitioner's habeas petition on the merits, petitioner filed petitions in the California Court of Appeal and Supreme Court. (*See* Dkt. 1, Exhs. D, E, and F.) Both appellate courts denied the petitions summarily. (*See id*.) This Court should therefore regard the superior court decision as the last reasoned decision of the state courts and should accord that decision the deference required by AEDPA.

V. PROCEDURAL DEFAULT

Respondent contends this Court is barred from reviewing both of petitioner's federal claims because petitioner procedurally defaulted when he filed a successive habeas corpus petition in state court. Because the California Supreme Court cited *In re Clark*, 5 Cal.4th 750 (1993), and *In re Miller*, 17 Cal.2d 734 (1941), in denying habeas relief to petitioner, respondent contends that the California Supreme Court found the state habeas corpus petition, upon which this federal petition is based, successive and repetitious. (*See* Dkt. 12 at 4.)

It is a state court's prerogative to decline to review a claim based upon a procedural default. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). Absent several well-established exceptions, federal courts are barred from reviewing a federal question decided by a state court when the decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). To be "independent," the state rule must not be "interwoven with the federal law."

*Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). To be "adequate" the state rule must be "well-established and consistently applied." *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003) (citing *Poland v. Stewart*, 169 F.3d 573, 577 (9th Cir. 1999)).

Even if the relevant state procedural rule is found to be independent and adequate, the federal courts will reach the merits of the claim if the prisoner can demonstrate: 1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or 2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

Petitioner raised two separate federal Ex Post Facto Clause claims in two separate state habeas petitions, and raised his federal Due Process Clause claim challenging his 2008 Board denial in his second state habeas corpus petition. (*See* Dkt. 12, Exhs. 5 and 13.) In both petitions, the Fresno County Superior court addressed his claims on the merits. (*See* Dkt. 1, Exhs. D and H.) The California Court of Appeal denied both petitions without comment or citation to authority. (*See id.*, Exhs. E and H.) Though the petitions were filed at different times, the California Supreme Court denied both petitions on the same day. (*See id.*, Exhs. F and H.) The first petition was denied without comment or citation to authority. (See id., Exh. H.) The second petition was denied without comment, but the court included citations to *Miller* and *Clark*. (*See id.*, Exh. F.) After carefully reviewing the record, it appears that the first petition presented only one claim in the California Supreme Court, the Ex Post Facto Claim, and that petitioner did so prospectively, as the Board had not yet applied Marsy's Law to his case. (*See* Dkt. 12, Exh. 5.) The second petition presented both his federal Due Process

Clause and Ex Post Facto Clause claims, exactly as they are presented in this petition. (*See id.*, Exh. 13.)

It is difficult to conclude, with any degree of confidence, just what the California Supreme Court intended in citing *Miller* and *Clark*. In *Miller*, the California Supreme Court denied a habeas petition because the prior petition "was based on the same grounds set forth in the present petition" and "no change in the facts or the law substantially affecting the rights of the petitioner has been disclosed" in the interim. 17 Cal. 2d at 735. That does not appear to be our case, as the second petition challenged the merits of the denial, but the first petition did not. Nevertheless, by invoking *Miller* in the second state habeas petition, we know that the California Supreme Court sought to deny "the petition for the same reasons that it denied the previous one," but we do not know whether that denial was for procedural or substantive reasons, or both. *Kim v. Villalobos*, 799 F.2d 1317, 1319 n.1 (9th Cir. 1986). *See also Karis v. Vasquez*, 828 F. Supp. 1449, 1457 (E.D. Cal. 1993) (holding that a federal court will look through a state court's citation to *Miller* to the basis for decision in the first state petition). Accordingly, the effect of *Miller* is simply to maintain the status quo based upon how the claims were addressed in the first state habeas petition; it does not act as a separate procedural bar to federal habeas review. *See Ylst*, 501 U.S. at 804 n.3 ("Since a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing procedural default, its effect on the availability of federal habeas is nil. . . .").

Thus, only the California Supreme Court's citation to *Clark* provides a possible basis for finding petitioner's claims procedurally barred. The reference to *Clark*, however, could be an invocation of: (1) the prohibition against successive petitions; (2) the bar on piecemeal

claims; (3) the bar on untimely petitions; or (4) all of the above. 5 Cal.4th 750. Because it is unclear whether the California Supreme Court cited *Clark* for a different reason than it cited *Miller*, I recommend this Court choose a different path and decide petitioner's claims on the merits. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) ("We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be."); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same."); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998) (Circuit precedent makes clear that a court's decision on the issue of procedural default must be informed by furthering "the interests of comity, federalism, and judicial efficiency"); *Samayoa v. Ayers*, 649 F. Supp. 2d 1102, 1115-16 (S.D. Cal. 2009) (citing *Batchelor v. Cupp*, 693 F.2d 859, 864 (9th Cir. 1982)) (when a court decides that the merits of the petition are "less complicated and less time-consuming than adjudicating the issue of procedural default, a court may exercise discretion in its management of the case to reject the claims on their merits and forgo an analysis" of the procedural default issue). *See, e.g., Martin v. Walker*, 357 Fed. Appx. 793 (9th Cir. 2009) (unpublished) (holding that California's timeliness rule as set forth in *Clark* is undefined and not consistently applied and, thus, petitioner's claims should be considered on the merits), *cert. granted*, --- S. Ct. ---, 2010 WL 621406 (U.S. Jun 21, 2010).

In sum, it appears from the state courts' record that the petitions filed with the California State Supreme Court presented different claims based upon a different set of facts and that the basis for the California State Supreme Court's denial is unclear. Because it

would be counterproductive to go through a lengthy analysis of the procedural default issue based upon multiple hypothetical scenarios only to conclude that petitioner's claims are without merit, I recommend this Court decline to render an opinion on whether these claims were successive and instead consider the merits.

## VI. FEDERAL HABEAS CHALLENGES TO STATE PAROLE DENIALS

### A. *Due Process Right Under California's Parole Scheme*

Under the Fifth and Fourteenth Amendments to the U.S. Constitution, the federal and state governments are prohibited from depriving an inmate of life, liberty or property without the due process of law. U.S. Const. amends. V and XIV. A prisoner's due process claim must be analyzed in two steps: the first asks whether the state has interfered with a constitutionally protected liberty or property interest of the prisoner, and the second asks whether the procedures accompanying that interference were constitutionally sufficient. *Ky. Dep't of Corrections. v. Thompson*, 490 U.S. 454, 460 (1989).

Accordingly, our first inquiry is whether petitioner has a constitutionally protected liberty interest in parole. The U.S. Supreme Court articulated the governing rule in this area in *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482 U.S. 369 (1987). *See McQuillion v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002) (applying "the 'clearly established' framework of *Greenholtz* and *Allen*" to California's parole scheme). The Court in *Greenholtz* determined that although there is no constitutional right to be conditionally released on parole, if a state's statutory scheme employs mandatory language that creates a presumption that parole release will be granted if certain designated findings are made, the statute gives rise to a constitutional liberty interest. *See Greenholtz*, 442 U.S. at 7,

12; *Allen*, 482 U.S. at 377-78. *See also Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.").

As discussed *infra*, the California statutes and regulations at issue in this case contain mandatory language providing that a prisoner serving an indeterminate life sentence has an expectation of parole unless, in the judgment of the parole authority, he "will pose an unreasonable risk of danger to society if released from prison." 15 CCR § 2402(a). Specifically, California Penal Code § 3041(b) provides that the Board "*shall* set a release date unless it determines . . . that consideration of the public safety requires a more lengthy period of incarceration for this individual. . . ." Cal. Penal Code § 3041(b) (emphasis added). The California Supreme Court has interpreted this language to provide that an adverse parole decision must be supported by "some evidence" demonstrating current dangerousness. *See In re Lawrence*, 44 Cal.4th 1181, 1204 (2008); *In re Shaputis*, 44 Cal.4th 1241, 1254 (2008). Thus, the California Supreme Court has held that as a matter of state constitutional law, this mandatory language in California's parole scheme creates a liberty interest in parole. *See Lawrence*, 44 Cal.4th at 1204; *Shaputis*, 44 Cal.4th at 1254, 1258; *In re Rozenkrantz*, 29 Cal.4th 616, 654 (2002).

In addition, the Ninth Circuit recently considered this statutory language in *Hayward v. Marshall*, and concluded that the appropriate inquiry for a federal habeas court is whether "some evidence" of current dangerousness supported the Board or Governor's denial of parole. 603 F.3d 546, 562 (9th Cir. 2010). In other words, the federal Due Process Clause requires that California comply with its own quantum of evidence requirement. *See id*. at 569

(Berzon, J., concurring in part and dissenting in part) (asserting that "the majority is correct to review the state court decision here for compliance with the California Constitution's requirement of 'some evidence' of future dangerousness. The federal Due Process Clause requires at least that much."). Accordingly, the majority in *Hayward* observed that it did not need to decide "whether a right arises in California under the United States Constitution to parole in the absence of some evidence of future dangerousness." *Id*. The *Hayward* court could finesse this ultimate legal issue because it found, as I recommend this Court find in this case, as a matter of fact, that the record contained "some evidence" of petitioner's dangerousness.

Critical to our analysis and what the majority failed to articulate, however, is the fact that a state prisoner's right to federal habeas review of an adverse parole decision emanates from clearly established U.S. Supreme Court precedent. *See id.* at 561. *See also Estelle*, 502 U.S. at 68 ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the [United States] Constitution or laws. . . ."). The governing law in this context remains *Greenholtz* and *Allen*. This Court assumes that the Ninth Circuit in *Hayward* did not intend to overrule decades of U.S. Supreme Court precedent holding that a federal liberty interest arises from a state statute that employs mandatory language creating a presumption that parole release will be granted if certain designated findings are made. As a result, the undersigned follows the same reasoning as the concurrence, and finds that while petitioner's liberty interest in parole originates from California law, its ultimate protection on

federal habeas review arises from the federal due process clause. *See Hayward*, 603 F.3d at 569.

To provide a framework for analyzing whether "some evidence" supported the Board's decision with respect to petitioner, this Court must consider the California statutes, regulations and case law which govern decision-making by the Board. *See Biggs v. Terhune*, 334 F.3d 910, 915 (9th Cir. 2003). Under California law, the Board is authorized to set release dates and grant parole for inmates with indeterminate sentences. *See* Cal. Penal Code § 3040 and 5075, *et seq*. At the time of the 2008 hearing, § 3041(a) required the Board to meet with each inmate one year before the expiration of his minimum sentence and normally set a release date in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, as well as comply with applicable sentencing rules. Subsection (b) of this section also requires that the Board 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 at this meeting." *Id.*, § 3041(b). Pursuant to the mandate of § 3041(a), the Board must "establish criteria for the setting of parole release dates" which take into account the number of victims of the offense as well as other factors in mitigation or aggravation of the crime. The Board has therefore promulgated regulations setting forth the guidelines it must follow when determining parole suitability. *See* 15 CCR § 2402, *et seq*.

Accordingly, the Board is guided by the following regulations in making a determination whether a prisoner is suitable for parole:

> (a) General. The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.
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> (b) Information Considered. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.

15 CCR § 2402(a) and (b). Subsections (c) and (d) also set forth suitability and unsuitability factors to further assist the Board in analyzing whether an inmate should be granted parole, although "the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." 15 CCR § 2402(c).

In examining its own statutory and regulatory framework, the California Supreme Court in *Lawrence* held that the proper inquiry for a court reviewing a parole decision by the Board is "whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence

confirms the existence of certain factual findings." *Lawrence*, 44 Cal.4th at 1212. The court also asserted that a parole decision must demonstrate "an individualized consideration" of the specified criteria, but "[i]t is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; *the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public*." *Id*. at 1204-05, 1212 (emphasis added). Although the discretion of the Board in parole matters is very broad, it must offer "more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision – the determination of current dangerousness." *Id*. Thus, the California penal code, corresponding regulations, and decisional law clearly establish that the fundamental consideration in parole decisions is public safety and an assessment of a prisoner's current dangerousness. *See id.* at 1205-06.

B. *Summary of Governing Principles*

By virtue of California law, petitioner has a constitutional liberty interest in release on parole. The Board may decline to set a parole date only upon a finding that petitioner's release would present an unreasonable current risk of danger to society if he is released from prison. Where the parole authorities deny release, based upon an adverse finding on that issue, the role of a federal habeas court is narrowly limited. *See Hayward*, 603 F.3d at 562-63. It must deny relief if there is "some evidence" in the record to support the parole authority's finding of current dangerousness. *See id*. That is the determinative issue in this case.

## VII. ANALYSIS OF THE RECORD IN THIS CASE

### A. *Due Process Clause Claim*

The Board based its decision that petitioner was unsuitable for parole primarily upon his commitment offense, as well as petitioner's prior pattern of criminal conduct, failure to profit from society's prior attempts to correct his criminality, "problematic relationships . . . in the area of romantic relationships," "lack of insight into causative factors" of his prior criminality, serious misconduct while in prison, a 2008 psychological evaluation that was not "totally supportive of release," and the fact that petitioner appeared to lack remorse for his most recent crime. (*See* Dkt. 1, Exh. C at 66-69.) The Board's findings track the applicable unsuitability and suitability factors listed in § 2402(b), (c) and (d) of title 15 of the California Code of Regulations. After considering all reliable evidence in the record, the Board concluded that evidence of petitioner's positive behavior in prison did not outweigh evidence of his unsuitability for parole. (*See id*. at 70.)

With regard to the circumstances of the commitment offense, the Board concluded that the offense was carried out in "an especially heinous and cruel manner," "a very dispassionate and calculated manner," and "in a manner that demonstrates an exceptionally callous disregard for human suffering." (*Id.* at 64.) *See* 15 CCR § 2402(c)(1). The Board found that the crime "involved jealousy" and that "it was a verbal confrontation that rapidly escalated to deadly force." (*See* Dkt. 1, Exh. C at 65.) As noted above, the incident occurred when petitioner's wife's ex-husband (the victim) came to their home looking for petitioner's wife. Petitioner, angered by the victim, shot him multiple times at close range while his wife watched. The Board also concluded that the motive for the crime was very trivial "in

relationship to the magnitude and impact on all parties concerned." (*See id.*) *See* 15 CCR § 2402(c)(1)(E). The circumstances surrounding the commitment offense and the trivial motive for the crime provide "some evidence" to support the Board's finding that the murder was carried out in an especially heinous and cruel manner. *See* 15 CCR § 2402(c)(1).

The second, third, and fourth factors relied upon by the Board were petitioner's escalating pattern of criminal conduct, prior criminal record, and failure to profit from society's previous attempts to correct his criminality. (*See* Dkt. 1, Exh. C at 65-66.) *See* 15 CCR § 2402(b) (requiring the Board to consider a prisoner's "past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime. . . ."). Specifically, the Board asserted that petitioner's escalating "history of criminality" included an extensive juvenile record (prior convictions for receiving stolen property, a number of burglaries, and juvenile probation violations) as well as an adult conviction for second degree murder. (*See* Dkt. 1, Exh. C at 7-9 and 65-66.) The Board also found that petitioner had failed to profit from society's prior attempts to correct his criminality. Specifically, he had prior unsuccessful parole periods, and five months after being paroled for his second degree murder conviction, petitioner armed himself and committed another murder. (*See id.*) Thus, there was "some evidence" to support the Board's findings with respect to petitioner's escalating pattern of criminal conduct, prior criminal record, and failure to profit from society's previous attempts to correct his criminality.

The fifth factor cited was petitioner's "lack of insight into causative factors" of his prior criminality. (*See id.* at 66.) Specifically, the Board found:

> so far as your present and past attitude toward the crime and the present and past mental state, one of the things of concern, you've continued to maintain that you thought the victim had a weapon, in spite of the fact that there's no evidence to support this. The Panel noted you lack insight into the causative factors of your conduct, as evidenced by the fact that in previous versions of the crime it's noted that you armed yourself, that resulted in the second homicide, and this was the previous parole, arming yourself while you were on parole. You continue to make inconsistent statements, specifically that you noted that you didn't shoot the victim an additional two times while the victim was on the ground, noting that you couldn't have done it because your wife was on top of the victim. Well, actually, the report didn't read that the victim was shot an additional two times, it was that an additional two shots were fired.

(Dkt. 1, Exh. C at 66-67.) Based upon the above, there was "some evidence" to support the Board's finding that petitioner did not possess sufficient insight into the causative factors of his criminal conduct.

The sixth factor relied upon by the Board appears to be petitioner's "problematic relationships [that] were noted in the area of romantic relationships." (*Id.* at 66.) It may be that the Board was attempting to characterize petitioner's social history as unstable. *See* 15 CCR § 2402(c)(3). There is little evidence in the record to support such a finding, other than the fact that jealousy appears to have been a contributing factor in the instant offense. In fact, during the hearing, the Board spoke at length regarding petitioner's strong support system, including his extended family, his wife, and his friendships with numerous well-respected corrections officers, many of whom previously supervised petitioner. (*See* Dkt. 1, Exh. C at 10-26 and 33-34.) To the extent the Board was attempting to find that petitioner had a history of unstable relationships with others, such a finding is unsupported by the record.

The seventh factor relied upon by the Board was petitioner's disciplinary history in prison. Petitioner has received four or five CDC 115's for prison-rule violations since 1979 (the record is unclear whether it is four or five), the most recent of which occurred in 1994 and involved an assault on an inmate. (*See id*. at 31 and 68.) He also received seven 128-A's, the most recent of which occurred in 2005 when petitioner was found in possession of a medically authorized bag of ice that was larger than permitted. (*See id.* at 32 and 68.) When misconduct is believed to be a violation of law or is not minor in nature, it shall be reported on a CDC Form 115 (Rev.7/88), "Rules Violation Report" and "[w]hen . . . minor misconduct recurs after verbal counseling or if documentation of minor misconduct is needed, a description of the misconduct and counseling provided shall be documented on a CDC Form 128-A, Custodial Counseling Chrono." *See* 15 CCR § 3312(a)(2) & (3). Although the Board did not weigh this seventh factor heavily against petitioner, it did note that the 128-A violation that occurred in 1996 involved a threat and was "consistent with a pattern of jealousy." (*See* Dkt. 1, Exh. C at 68.) In addition, the 2005 offense, while minor, occurred within three years of petitioner's 2008 hearing. Petitioner's history of rule violations, though diminishing in relevance over time, still meet the very minimal "some evidence" standard and support the Board's finding that petitioner is unsuitable for release on parole.

The eighth and ninth factors relied upon by the Board were petitioner's lack of remorse at the hearing and his less than supportive 2008 psychological report regarding this same issue. (*See id.* at 67.) Petitioner argues that the Board misinterpreted the psychological report as well as his presentation and response during the hearing. (*See* Dkt. 1 at 5c.)

In assessing petitioner's overall risk, the 2008 psychological report, conducted by forensic psychologist Dr. Venard, stated that petitioner was:

> understandably eager to impress others with the changes he has made and this attempt at impression management does interfere with his natural interactive style at times. As such, Mr. Johnson presents as less than sincere in his statements of remorse. The undersigned agrees with previous evaluators, however, and notes there is no behavior or verbalized attitude to suggest Mr. Johnson is being deceptive in his statements, and he does appear regretful for his past criminal conduct.

(*Id.*, Exh. A at 11.)

When the Board asked petitioner to define remorse, he stated: "Remorse is forgiving, you know, being forgiven, you know, for the sorrow for what you did. I am very sorry for what I did." (*See id.*, Exh. C at 43.)

The Board considered Dr. Venard's findings and petitioner's response to the Board's questions and concluded that:

> The psychological report from Dr. Venard from June 12th, 2008 isn't totally supportive of release. The doctor basically did not find the 1001(a) form, but he did seem to do his best to try to address the issues that the previous Panel had requested, and of course, the one of concern to us is the request they made questioning the genuineness of your remorse. First of all, the doctor in the LS/CMI – it's an instrument that is focused on the risk of general recidivism and not violence per se, and the doctor indicated at that point that you were in the moderate range. Going to the overall risk assessment, the doctor basically does call into question, he says as such, that you present as less than sincere in your statements of remorse. The doctor makes that conclusion and then attempts to mitigate his own finding, which of course, is of concern to the Panel. We will note for the record that the doctor in the overall sense, despite the comments we've already made, did place you in the low risk for future general recidivism, which did include the potential for violence. . . . With respect to the issue of remorse, although you

> claim that you're remorseful, the Panel is not convinced that you truly understand the nature and magnitude of the offense. Today when given the opportunity to respond to Commissioner Weaver, you didn't adequately respond, in the Panel's opinion. We also note that there was a hint regarding this issue that was certainly put on the record by the Panel on November 9th of 2007, so it is not a new issue to surface.

(*Id.* at 67-68.)

Although the Board's conclusion about Dr. Venard's assessment is questionable, this Court must defer to the Board's own assessment of petitioner's response during the hearing. The Board found that while petitioner was deemed a low risk of future general recidivism, including the potential for violence, he was less than candid in his response regarding his remorsefulness. As the Fresno County Superior Court concluded in assessing this factor, "[g]iven petitioner's somewhat simplistic answer, it appears that the Board's concerns are supported by the evidence in the record. Lack of insight into the reasons for the inmate's violent behaviour and the inmate's current attitude toward the crime can be a valid basis for denying parole." (*Id.*, Exh. D at 4, citing *In re Shaputis*, 44 Cal.4th at 1246.) Like the Fresno County Superior Court, this Court should therefore find that there is "some evidence" to support the Board's finding as to this factor.

This Court notes that the Board also considered and weighed the parole suitability factors which favored petitioner, acknowledging petitioner's favorable adjustment to institutional life, that his last CDC 115 was in 1994, that his job reports and programming were excellent, and that he had received favorable recommendations from both custody and "free people" with whom he has worked. (*See id.* at 60-70.) As mentioned above, the Board has broad discretion to determine how suitability and unsuitability factors interrelate to

support its conclusion of current dangerousness to the public. *See Lawrence*, 44 Cal.4th at 1212. Despite petitioner's positive advancement and gains, the Board determined that he remains an unreasonable risk of danger to society if released on parole. (*See* Dkt. 1, Exh. C at 70.)

The Fresno County Superior Court considered all of the above factors and the evidence in the record and concluded that the Board's decision was supported by "some evidence" in the record. I therefore recommend the Court find that the California state courts' decisions upholding the Board's parole denial was a reasonable application of clearly established federal law.

B. *Ex Post Facto Claim*

Petitioner contends that the "Parole Authority has been making 30 years of changes that violate the Ex Post Facto prohibitions as applied to me." (Dkt. 1 at 5.) Specifically, petitioner asserts that such changes to the parole hearing processes along with the application of Proposition 9 (Marsy's Law) as applied to him have significantly increased the risk of increased punishment. (*See id.* at 5-5b2.)

Respondent contends that the U.S. Supreme Court's decision in *California Dept. of Corrections v. Morales*, 514 U.S. 499, 512 (1995), which held that a 1981 amendment authorizing the Board to defer subsequent suitability hearings for up to three years did not present a risk of prolonged confinement sufficient to violate the Ex Post Facto Clause, governs this case. (*See* Dkt. 12 at 9-10.) Accordingly, respondent argues that the Fresno County Superior Court's decision applying *Morales* was a reasonable application of clearly established federal law. (*See id.*)

The Ex Post Facto Clause of the United States Constitution prohibits the states from passing any "ex post facto law," a prohibition that "is aimed at laws 'that retroactively alter the definition of crimes or increase the punishment for criminal acts.'" *Cal. Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995). *See also Weaver v. Graham*, 450 U.S. 24, 28 (1981) (providing that "[t]he *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'"). The United States Supreme Court has held that "[r]etroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept." *Garner v. Jones*, 529 U.S. 244, 250 (2000). In order for a law to violate the Ex Post Facto Clause, "it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29.

Petitioner's first contention is a general allegation that thirty years of legislative amendments have increased his punishment. There is no federal law that supports his claim. Specifically, the U.S. Supreme Court considered the 1981 amendments to § 3041 of the California Penal Code and held that the risk of prolonged confinement that might result due to such amendments was not sufficient to violate the Ex Post Facto Clause where the amendments simply altered the method of setting parole release dates under the same substantive standards. *See Morales*, 514 U.S. at 512. In examining subsequent amendments to this same statute, courts have similarly found no ex post facto violations. *See Giovinco v. Carey*, 130 Fed. Appx. 104 (9th Cir. 2005) (unpublished) (holding that the 1994 amendments providing that the Board may schedule parole hearings no later than five years after any hearing where a convicted murder is denied parole did not violate the Ex Post Facto Clause)

(citing *Morales*, 514 U.S. at 509). Accordingly, the Fresno County Superior Court's reliance upon *Morales* was not misplaced and was a reasonable application of federal law as to this portion of petitioner's claim.

With regard to petitioner's contention regarding the Board's application of Marsy's Law, this claim is now moot as the Board corrected its premature application of Marsy's Law to petitioner's case and granted him a one-year denial. (*See* Dkt. 12, Exh. 7; *see also* Case No. 2:08-cv-01425-MSB, Dkt. 24 at 5.) Accordingly, petitioner's claim that he was subject to increased punishment pursuant to the amendments in Marsy's Law is inapposite as the Board has reversed its position and applied the prior and applicable one-year denial in this case. I therefore recommend this Court deny petitioner's Ex Post Facto Clause claim. If the Board applies Marcy's Law to another parole application, petitioner is free to challenge that application in his related federal habeas petition.

## VIII. CERTIFICATE OF APPEALABILITY

The federal rules governing habeas cases brought by state prisoners were recently amended to require a district court that denies a habeas petition to grant or deny a certificate of appealability in the ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. § 2254 (effective December 1, 2009). Previously, the Ninth Circuit held that a prisoner was not required to obtain a certificate of appealability from administrative decisions, such as a denial of parole. *See White v. Lambert*, 370 F.3d 1002, 1010 (9th Cir. 2004); *Rosas v. Nielsen*, 428 F.3d 1229, 1231-32 (9th Cir. 2005).

In *Hayward* the Ninth Circuit overruled "those portions of *White* and *Rosas* which relieve a prisoner from obtaining a certificate of appealability." *Hayward*, 603 F.3d at 554. A

certificate of appealability is now required to "confer jurisdiction on [the Ninth Circuit] in an appeal from a district court's denial of habeas relief in a § 2254 case, regardless of whether the state decision to deny release from confinement is administrative or judicial." *Id.*

In order to obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Specifically, if a court denies a petition, a certificate of appealability may only be issued "if jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at 338.

For the reasons set forth in the discussion of the merits in my Report and Recommendation, jurists of reason would not find the result recommended in this case debatable. Accordingly, I recommend that the Court deny petitioner a certificate of appealability on the issue of whether the state courts' rejection of petitioner's claims 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.

## IX. CONCLUSION

For the reasons stated above, this Court finds that as of the 2008 Board hearing there was evidence that petitioner would have posed an unreasonable risk of danger to society or

threat to public safety if released from prison. In addition, petitioner has failed to demonstrate an Ex Post Facto Clause violation. Accordingly, the Fresno County Superior Court's decision upholding the Board's parole denial on its merits and also denying petitioner relief as to his Ex Post Facto claim was a reasonable application of clearly established federal law. I therefore recommend the Court: 1) find that petitioner's federal constitutional rights were not violated; 2) deny the petition; 3) dismiss this action with prejudice; and 4) deny a certificate of appealability.

This Report and Recommendation is submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen (14) days after being served with this Report and Recommendation, any party may file written objections with this Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendation." Any response to the objections shall be filed and served within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time might waive the right to appeal this Court's Order. *See Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this Report and Recommendation.

DATED this 28th day of June, 2010.

JOHN L. WEINBERG
United States Magistrate Judge