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

LARRY MONDRAGON,

Petitioner,

No. 2: 10-cv-0362 GEB KJN P

vs.

MICHAEL MARTELL,

Respondent.

AMENDED

FINDINGS AND RECOMMENDATIONS

_____ /

I. Introduction

Petitioner is a state prisoner proceeding without counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1983 petitioner was convicted of second degree murder. Petitioner is serving a sentence of 20 years to life.

In the instant action, petitioner challenges the October 2008 decision by the California Board of Parole Hearings (“BPH”) finding him unsuitable for parole. This was petitioner’s tenth subsequent suitability hearing. (Dkt. No. 9-1, at 87 of 119.) This action is proceeding on the original petition filed by petitioner on February 11, 2010. Petitioner alleges that there was insufficient evidence to support the decision finding him unsuitable for parole.

On October 8, 2010, the undersigned recommended that the petition be granted and directed the BPH to set a parole date for petitioner within thirty days. On October 12, 2010,

1 in Haggard v. Curry, No. 10-16819, 2010 WL 4015006 (9th Cir. Oct. 12, 2010), the Ninth
2 Circuit held that the appropriate remedy following a finding that the BPH's decision was not
3 supported by some evidence is an order that the BPH conduct another eligibility hearing at which
4 the prisoner's rights are respected. On October 21, 2010, respondent filed objections arguing, in
5 part, that the remedy ordered in the October 8, 2010 findings and recommendations was
6 inconsistent with Haggard v. Curry. Accordingly, the undersigned issues the amended findings
7 and recommendations which include the proper remedy as discussed in Haggard v. Curry.

8 II. Anti-Terrorism and Effective Death Penalty Act ("AEDPA")

9 In Williams (Terry) v. Taylor, 529 U.S. 362 (2000), the Supreme Court defined
10 the operative review standard in a habeas corpus action brought pursuant to 28 U.S.C. § 2254.
11 Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the
12 court. There is a dichotomy between "contrary to" clearly established law as enunciated by the
13 Supreme Court, and an "unreasonable application of" that law. Id. at 405. "Contrary to" clearly
14 established law applies to two situations: (1) where the state court legal conclusion is opposite
15 that of the Supreme Court on a point of law; or (2) if the state court case is materially
16 indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is
17 opposite.

18 "Unreasonable application" of established law, on the other hand, applies to
19 mixed questions of law and fact, that is the application of law to fact where there are no factually
20 on point Supreme Court cases which mandate the result for the precise factual scenario at issue.
21 Id. at 407-08. It is this prong of the AEDPA standard of review which directs deference be paid
22 to state court decisions. While the deference is not blindly automatic, "the most important point
23 is that an *unreasonable* application of federal law is different from an incorrect application of
24 law....[A] federal habeas court may not issue the writ simply because that court concludes in its
25 independent judgment that the relevant state-court decision applied clearly established federal
26 law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410-

1 11 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the
2 objectively unreasonable nature of the state court decision in light of controlling Supreme Court
3 authority. Woodford v. Viscotti, 537 U.S. 19 (2002).

4 “Clearly established” law is law that has been “squarely addressed” by the United
5 States Supreme Court. Wright v. Van Patten, 552 U.S. 120 (2008). Thus, extrapolations of
6 settled law to unique situations will not qualify as clearly established. See e.g., Carey v.
7 Musladin, 549 U.S. 70, 76 (2006) (established law not permitting state sponsored practices to
8 inject bias into a criminal proceeding by compelling a defendant to wear prison clothing or by
9 unnecessary showing of uniformed guards does not qualify as clearly established law when
10 spectators' conduct is the alleged cause of bias injection).

11 The state courts need not have cited to federal authority, or even have indicated
12 awareness of federal authority, in arriving at their decision. Early v. Packer, 537 U.S. 3 (2002).
13 Nevertheless, the state decision cannot be rejected unless the decision itself is contrary to, or an
14 unreasonable application of, established Supreme Court authority. Id. An unreasonable error is
15 one in excess of even a reviewing court’s perception that “clear error” has occurred. Lockyer v.
16 Andrade, 538 U.S. 63, 75-76 (2003). Moreover, the established Supreme Court authority
17 reviewed must be a pronouncement on constitutional principles, or other controlling federal law,
18 as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v.
19 Packer, 537 U.S. at 9.

20 However, where the state courts have not addressed the constitutional issue in
21 dispute in any reasoned opinion, the federal court will independently review the record in
22 adjudication of that issue. “Independent review of the record is not de novo review of the
23 constitutional issue, but rather, the only method by which we can determine whether a silent state
24 court decision is objectively unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.
25 2003).

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1 When reviewing a state court’s summary denial of a claim, the court “looks
2 through” the summary disposition to the last reasoned decision. Shackleford v. Hubbard, 234
3 F.3d 1072, 1079 n.2 (9th Cir. 2000).

4 III. Discussion

5 A. Insufficient Evidence

6 Petitioner alleges that there was insufficient evidence to support the BPH’s 2008
7 decision finding him unsuitable for parole. Petitioner raised this claim in a habeas corpus
8 petition filed in the Contra Costa Superior Court. (Dkt. Nos. 9-1, 9-2). The Contra Costa
9 Superior Court issued a reasoned decision denying this petition. (Dkt. 9-3). The California
10 Court of Appeal and California Supreme Court issued orders summarily denying petitioner’s
11 habeas petitions challenging the BPH’s 2008 decision. (Dkt. Nos. 9-6, 9-9.) Accordingly, the
12 undersigned considers whether the denial of petitioner’s claim by the Superior Court was an
13 unreasonable application of clearly established Supreme Court authority.

14 The Due Process Clause of the Fourteenth Amendment to the United States
15 Constitution prohibits state action that “deprive[s] a person of life, liberty or property without
16 due process of law.” U.S. Const. amend. XIV, § 2. A person alleging a due process violation
17 must demonstrate that he or she was deprived of a protected liberty or property interest, and then
18 show that the procedures attendant upon the deprivation were not constitutionally sufficient.
19 Kentucky Dep’t. of Corrs. v. Thompson, 490 U.S. 454, 459-60 (1989); McQuillion v. Duncan,
20 306 F.3d 895, 900 (9th Cir. 2002). A protected liberty interest may arise from either the Due
21 Process Clause itself or from state laws. Board of Pardons v. Allen, 482 U.S. 369, 373 (1987).
22 In the context of parole, the United States Constitution does not, in and of itself, create a
23 protected liberty interest in the receipt of a parole date, even one that has been set. Jago v. Van
24 Curen, 454 U.S. 14, 17-21 (1981). However, when a state’s statutory parole scheme uses
25 mandatory language, it “‘creates a presumption that parole release will be granted’ when or
26 unless certain designated findings are made, thereby giving rise to a constitutional liberty

1 interest.” McQuillion, 306 F.3d at 901 (quoting Greenholtz v. Inmates of Neb. Penal, 442 U.S.
2 1, 12 (1979)).

3 Under California law, prisoners serving indeterminate prison sentences “may
4 serve up to life in prison, but they become eligible for parole consideration after serving
5 minimum terms of confinement.” In re Dannenberg, 34 Cal.4th 1061, 1078, 23 Cal.Rptr.3d 417
6 (2005). Generally, one year prior to an inmate’s minimum eligible parole release date, the Board
7 will set a parole release date “in a manner that will provide uniform terms for offenses of similar
8 gravity and magnitude in respect to their threat to the public.” In re Lawrence, 44 Cal.4th 1181,
9 1202, 82 Cal.Rptr.3d 169 (citing Cal.Penal Code § 3041(a)). A release date will not be set,
10 however, if the Board determines “that the gravity of the current convicted offense or offenses, or
11 the timing and gravity of current or past convicted offense or offenses, is such that consideration
12 of the public safety requires a more lengthy period of incarceration...” Cal.Penal Code §
13 3041(b).

14 California state prisoners who have been sentenced to prison with the possibility
15 of parole have a clearly established, constitutionally protected liberty interest in receipt of a
16 parole release date. Allen, 482 U.S. at 377-78 (quoting Greenholtz, 442 U.S. at 12); Irons v.
17 Carey, 505 F.3d 846, 850-51 (9th Cir. 2007) (citing Sass v. Cal. Bd. of Prison Terms, 461 F.3d
18 1123, 1128 (9th Cir. 2006)); Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003); McQuillion,
19 306 F.3d at 903.

20 In the context of parole proceedings, it is well established that inmates are not
21 guaranteed the “full panoply of rights” afforded to criminal defendants under the Due Process
22 Clause. See Pedro v. Or. Parole Bd., 825 F.2d 1396, 1398-99 (9th Cir. 1987). Nonetheless,
23 inmates are afforded limited procedural protections. The Supreme Court has held that a parole
24 board's procedures are constitutionally adequate so long as the inmate is given an opportunity to
25 be heard and a decision informing him of the reasons he did not qualify for parole. Hayward v.
26 Marshall, 603 F.3d 546, 560 (9th Cir. 2010) (quoting Greenholtz, 442 U.S. at 16). As a matter of

1 state constitutional law, denial of parole to California inmates must be supported by “some
2 evidence” demonstrating future dangerousness. Hayward, 603 F.3d at 562 (citing In re
3 Rosencrantz, 29 Cal.4th 616, 128, 128 Cal.Rptr.2d 104 (2002)); see also In re Lawrence, 44
4 Cal.4th 1181, 1191, 82 Cal.Rptr.3d 169 (2008) (recognizing the denial of parole must be
5 supported by “some evidence” that an inmate “poses a current risk to public safety”); In re
6 Shaputis, 44 Cal.4th 1241, 1254, 82 Cal.Rptr.3d 213 (2008) (same). “California’s ‘some
7 evidence’ requirement is a component of the liberty interest created by the parole system of [the]
8 state,” Cooke v. Solis, 606 F.3d 1206, 1213 (9th Cir. 2010), and compliance with this
9 evidentiary standard is, therefore, mandated by the federal Due Process Clause. Pearson v.
10 Muntz, 606 F.3d 606, 611 (9th Cir. 2010). Thus, a federal court undertaking review of a
11 “California judicial decision approving the ... decision rejecting parole” must determine whether
12 the state court’s decision “was an ‘unreasonable application’ of the California ‘some evidence’
13 requirement, or was ‘based on an unreasonable determination of the facts in light of the
14 evidence.’” Hayward, 603 F.3d at 562-63 (quoting 28 U.S.C. § 2254(d)(2)).

15 When assessing whether a state parole board’s suitability decision was supported
16 by “some evidence,” the analysis “is framed by the statutes and regulations governing parole
17 suitability determinations in the relevant state.” Irons, 505 F.3d at 851. The court must
18 look to California law to determine what findings are necessary to deem a petitioner unsuitable
19 for parole, and then must review the record to determine whether the state court decision holding
20 that these findings were supported by “some evidence” or whether it constituted an unreasonable
21 application of the “some evidence” principle. Id.

22 Title 15, Section 2402 of the California Code of Regulations sets forth various
23 factors to be considered by the Board in its parole suitability findings for murderers. The
24 regulation is designed to guide the Board’s assessment regarding whether the inmate poses an
25 “unreasonable risk of danger to society if released from prison,” and thus whether he or she is
26 suitable for parole. In re Lawrence, 44 Cal.4th at 1202, 82 Cal.Rptr.3d 169. The Board is

1 directed to consider all relevant, reliable information available, including the circumstances of
2 the prisoner's: social history; past and present mental state; past criminal history, including
3 involvement in other criminal misconduct which is reliably documented; the base and other
4 commitment offenses, including behavior before, during and after the crime; any conditions of
5 treatment or control, including the use of special conditions under which the prisoner may safely
6 be released to the community; and any other information which bears on the prisoner's suitability
7 for release. 15 Cal.Code Regs. § 2402(b).

8 The regulation also lists several specific circumstances which tend to show
9 suitability or unsuitability for parole. 15 Cal.Code Regs. § 2402(c)-(d). Factors tending to show
10 unsuitability include,

11 (1) The Commitment Offense. The prisoner committed the offense in an
12 especially heinous, atrocious or cruel manner. The factors to be considered
include:

13 (A) Multiple victims were attacked, injured or killed in the same or
14 separate incidents.

15 (B) The offense was carried out in a dispassionate and calculated manner,
such as an execution-style murder.

16 (C) The victim was abused, defiled, or mutilated during or after the
17 offense.

18 (D) The offense was carried out in a manner which demonstrates an
exceptionally callous disregard for human suffering.

19 (E) The motive for the crime is inexplicable or very trivial in relation to
20 the offense.

21 (2) Previous Record of Violence. The prisoner on previous occasions inflicted or
22 attempted to inflict serious injury on a victim, particularly if the prisoner
demonstrated serious assaultive behavior at an early age.

23 (3) Unstable Social History. The prisoner has a history of unstable or tumultuous
relationships with others.

24 (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted
25 another in a manner calculated to inflict unusual pain or fear upon the victim.

26 (5) Psychological Factors. The prisoner has a lengthy history of severe mental
problems related to the offense.

1 (6) Institutional Behavior. The prisoner has engaged in serious misconduct in
2 prison or jail.

3 (15 Cal. Code Regs. § 2402(c).)

4 Factors tending to show suitability include,

5 (1) No Juvenile Record. The prisoner does not have a record of assaulting others
6 as a juvenile or committing crimes with a potential of personal harm to victims.

7 (2) Stable Social History. The prisoner has experienced reasonably stable
8 relationships with others.

9 (3) Signs of Remorse. The prisoner performed acts which tend to indicate the
10 presence of remorse such as attempting to repair the damage, seeking help for or
11 relieving suffering of the victim, or indicating that he understands the nature and
12 magnitude of the offense.

13 (4) Motivation for Crime. The prisoner committed his crime as the result of
14 significant stress in his life, especially if the stress has guilt of a long period of
15 time.

16 (5) Battered Woman Syndrome. At the time of the commission of the crime, the
17 prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b),
18 and it appears the criminal behavior was the result of that victimization.

19 (6) Lack of Criminal History. The prisoner lacks any significant history of violent
20 crime.

21 (7) Age. The prisoner's present age reduces the probability of recidivism.

22 (8) Understanding and Plans for Future. The prisoner has made realistic plans for
23 release or has developed marketable skills that can be put to use upon release.

24 (9) Institutional Behavior. Institutional activities indicate an enhanced ability to
25 function within the law upon release.

26 (15 Cal. Code Regs. § 2402(d).)

The overriding concern is public safety, In re Dannenberg, 34 Cal.4th 1061, 1086,
23 Cal.Rptr.3d 417 (2005), and the focus is on the inmate's current dangerousness. In re
24 Lawrence, 44 Cal.4th at 1205, 82 Cal.Rptr.3d 169. Thus, under California law, the standard of
25 review is not whether some evidence supports the reasons cited for denying parole, but whether
26 some evidence indicates that a parolee's release would unreasonably endanger public safety. In
re Shaputis, 44 Cal.4th 1241, 1254, 82 Cal.Rptr.3d 213 (2008). Therefore, "the circumstances of

1 the commitment offense (or any of the other factors related to unsuitability) establish
2 unsuitability if, and only if, those circumstances are probative to the determination that a prisoner
3 remains a danger to the public.” In re Lawrence, 44 Cal.4th at 1212, 82 Cal.Rptr.3d 169. In
4 other words, there must be some rational nexus between the facts relied upon and the ultimate
5 conclusion that the prisoner continues to be a threat to public safety. Id. at 1227, 82 Cal.Rptr.3d
6 169.

7 Of note, in finding petitioner unsuitable for parole, the BPH relied primarily on
8 the commitment offense and petitioner’s prior criminal record. In particular, the BPH stated that
9 the offense was carried out in a cruel manner. (Dkt. No. 9-2, at 60 of 115.) The BPH further
10 found that the offense was carried out in a manner that demonstrated a disregard for human
11 suffering. (Id.) The BPH found that petitioner’s motive for the crime was, in essence, trivial.
12 (Id.) The BPH found that petitioner had an extensive prior criminal record, including convictions
13 as a juvenile. (Id.) In order to put these findings in context, the undersigned will set forth the
14 description of petitioner’s criminal offense contained in the transcript from the 2008 suitability
15 hearing:

16 Presiding Commissioner Prizmich: But let me start on page 2
17 under evidence, the evidence, prosecution case:

18 “The scene of the homicide was an apartment complex in
19 Pittsburg. A neighbor of Margaret Revera, R-E-V-E-R-A, was
20 Linda Mondragon, M-O-N-D-R-A-G-O-N, defendant’s estranged
spouse, Linda’s brother, the victim Frank Delacruz, D-E-L-A-C-R-
U-Z, also lived in the complex with Nancy Szendejaz Serna, S-E-
R-N-A.”

21 And I’m not sure—I’m sure I botched the middle name, it’s S-Z-E-N-D-E-
22 J-A-Z, Serna. What is it? All right. Nobody else is going to –

23 Deputy Commissioner Waddell: Szendejaz, I think it is.

24 Presiding Commissioner Prizmich: Szendejaz, okay. That sounds much
25 better. Serna, I got that right I think.

26 “Revera would frequently watch Linda’s four children, one of
whom was the defendant’s daughter, Yolanda. Revera testified
that during the afternoon of September 12th, she watched Yolanda

1 nearly knocked down on the cement, her two-year-old-sister. At
2 that time, the defendant was standing next to his car in the parking
3 lot. Revera scolded Yolanda for sitting and pushing her younger –
4 the younger child. When Yolanda refused to behave, Revera
5 slapped her hand. Yolanda looked at the defendant and began to
6 scream. Defendant approached and asked Yolanda whether she
7 had deserved to be slapped. The child initially said yes, then said,
8 no, whereupon the defendant in a ‘loud and mean’ voice told
9 Revera that she had no right to strike his daughter and said if she
10 ever ‘touched’ the child again, he would kill her. Revera
11 responded that if she watched the children for the defendant and
12 Linda, they had better expect that she would discipline them.
13 Defendant became enraged and called her ‘all kinds of names.’
14 About the time that the defendant drew back his hand as if to hit
15 Revera, Linda Mondragon, who was quite intoxicated, going to
16 page 3, came out of her apartment and stepped down between the
17 two of them. Defendant pushed Linda, causing both women to fall
18 to the ground. Revera and another woman named Sandra
19 ‘dragged’ Linda, who was having trouble standing back to her
20 apartment and placed her in a chair in the living room. As Revera
21 attempted to leave the apartment, the defendant stood in her way,
22 repeating his threat to kill her if she struck his child. When Revera
23 screamed back at him, he struck her in the face. At that point,
24 Revera saw Delacruz standing in the doorway. Revera stated that
25 Delacruz appeared to have been ‘drinking’ but spoke with the
26 defendant in a calm voice. Revera slipped out of the apartment ran
to her car. And I guess that means apartment. Inside her
apartment, Revera changed her clothes, grabbed a stick, and then
stood in her doorway. There she saw the defendant walk over to
her apartment followed by Delacruz. Defendant was ‘still angry’
and told her that she had ‘better not’ touch his children. Delacruz
told the defendant to leave Revera alone. The defendant continued
to harangue Revera, and she called him a ‘sissy.’ When defendant
appeared to move towards Revera, Delacruz said, ‘Why don’t you
learn to fight men instead of always hitting on women?’ At that
point, the defendant turned to Delacruz and said, ‘I’ve been waiting
for your ass for a long time.’ Delacruz backed up. The defendant
walked toward him. According to Revera, they started pushing
each other, then the defendant went towards Delacruz’s stomach
like he was ‘stabbing something.’ She then heard Delacruz scream
that he had been stabbed. After the stabbing, Eric Nunn, N-U-N-
N, a bystander told his roommate Niecee, N-E-I-C-E-E, to get a
crowbar from their apartment. The woman returned shortly with a
crowbar, handed it to Nunn, who then gave it to Delacruz.
According to Revera, the defendant was swinging the knife at the
people in the crowd because ‘the people were trying to figure out a
way how they could get him.’ Defendant threatened to kill anyone
who came close to him. When Delacruz raised the crowbar, the
defendant ran into Linda’s apartment. Delacruz slowly ran after
him into the apartment. Revera heard yelling from inside the
apartment, then ran to summon police. Nancy Serna testified that

1 when the defendant pulled out his knife, Delacruz instructed her to
2 go into their house and get a knife. Unarmed, Delacruz pursued
3 the defendant. When she returned without the knife, he saw the
4 defendant run into Linda's apartment. When Delacruz followed in
5 'a daze' according to Serna, she could see he was hurt. I'd seen
6 some blood in the upper neck, and his movement was just slow.
7 Carrying a crowbar – continuing to page 5 – Delacruz followed the
8 defendant into the kitchen, Serna also went inside the apartment.
9 Defendant picked up a chair with two hands and shoved Delacruz
10 with it. Delacruz fell down, dropping the crowbar. At that point,
11 according to Serna, 'Delacruz was out. His eyes were shut. He
12 had no movement. He didn't pick up the crowbar. He did not
13 pickup the crowbar, no. He didn't try to get nothing, no.' The
14 defendant then picked up the crowbar and while holding it in both
15 hands, struck the victim twice in the head. Serna attempted to
16 wrestle the crowbar away from the defendant. He jumped back and
17 threatened to hit her with the crowbar. She grabbed her dog, a pit
18 bull, and ran out of the apartment. Serna testified that Delacruz
19 was mellow but did not seem drunk. She added, however, that he
20 would drink constantly. She admitted that she drank frequently
21 and that she was aggressive – an aggressive person. She had been
22 convicted of forgery. She was in custody at the time of the trial
23 and that she had recently been on a Methadone program.”

13 I'll just read a bit more.

14 “Ike Daniels, D-A-N-I-E-L-S, testified that prior to the
15 confrontation, Delacruz was fairly high from alcohol. He
16 witnessed the defendant threaten to kill Revera on the steps of her
17 apartment and saw Delacruz attempting to calm them. He testified
18 that defendant told Delacruz to stay out of it because 'I'd been
19 waiting to kick your ass for a long time.' Delacruz responded,
20 'Come on then. If you want to kick my ass, we can fight.'
21 Delacruz also said something to the effect that someone else had
22 already whipped the defendant's ass and that it was going to – he
23 was going to finish you off. As the two men moved out to fight,
24 Daniels saw defendant draw his knife, then saw Delacruz holding
25 his bloodied stomach. After Delacruz walked quickly into the
26 house after the defendant, Daniels left to telephone police. Daniels
27 then stationed himself outside Linda's house so he could see
28 through the door. He saw Delacruz holding a crowbar in the air.
29 Defendant held a chair with both hands and struck Delacruz with
30 it. Delacruz fell to the floor, dropping the crowbar. Daniels then
31 saw the defendant swing the crowbar at the victim. He thought the
32 defendant hit him with it. Delacruz was just laying there.”

24 (Dkt. No. 9-1, at 101-06 of 119.)

25 The BPH discussed petitioner's prior criminal history at the hearing. This record
26 is succinctly summarized in the Life Prisoner Evaluation prepared by Correctional Counselors for

1 the 2008 suitability hearing:

2 II. PRE-CONVICTION FACTORS:

3 A. Juvenile Record:

4 Prisoner's first arrest was at age 16 for Truancy on 6/12/67 for which he
5 received four (4) months informal probation. Nine (9) months later,
6 Mondragon was arrested for a school burglary. While awaiting
7 disposition, he committed two (2) residential and another school burglary.
8 He was made a ward of the court. One (1) year later, he was arrested for
9 Possession of Hypodermic Needle, Curfew Violation, Attempted Escape,
10 Runaway and Violating Court Orders. Sentencing included a Boys Ranch
11 commitment. On January 19, 1970, wardship was vacated and the petition
12 was dismissed. Mondragon was again arrested at age 19 for the Burglary,
13 receiving six (6) months in county jail and three (3) years probation. It
14 appears that Mondragon was committed to the Youth Authority as an
15 adult. Thirteen (13) months after this conviction, his disciplinary pattern
16 escalated with law enforcement, being arrested for Petty Theft, Battery,
17 Disturbing the Peace, Battery on a Peace Officer or Fireman and Escape.
18 Disposition ranged from six (6) month county jail to one year California
19 Youth Authority (CYA).

20 B. Adult Conviction:

21 Prisoner had been paroled from CYA approximately one (1) week when he
22 was arrested for Burglary and Receiving Stolen Property. His arrests
23 increased in severity from Cultivating Marijuana, Assault with a Deadly
24 Weapon on a Peace Officer, Manufacturing a Weapon (While in prison,
25 prior term), to Assault with a Deadly Weapon. Each arrest resulted in a
26 conviction of state prison with total terms ranging from six (6) months to
five (5) years and to (6) months to life.

18 (Dkt. No. 9-1, at 72-73 of 119.)

19 The undersigned will now address the other factors demonstrating suitability and
20 unsuitability discussed by the BPH in its decision. Significantly, the BPH did *not* find that
21 petitioner's disciplinary prison record demonstrated unsuitability. Rather, the BPH found that
22 petitioner's much improved disciplinary record was a positive factor in his favor:

23 In terms of your institutional behavior, you did, as so many inmates do,
24 when they come in, had some timeframe adjustment – which is a kind of
25 way of putting you didn't conform initially. It's obviously did a
26 turnaround, and you're the only one that can make that turnaround. You
made it. You started working towards what we believe would be a more
appropriate outlook in life and stopped getting the 115s and 128s. But we
did consider those. They were some time ago, and they actually work

1 more in your favor as opposed to detriment against you. You had six total
2 115s and nine 128s in this most recent prison commitment.

3 (Dkt. No. 9-2, at 60-61.)

4 Petitioner had six disciplinary convictions during his incarceration, the most
5 recent being from June 9, 1991. (Dkt. No. 9-2, at 112 of 115.) Petitioner had nine counseling
6 chronos, the last one from March 15, 2005 for disobeying an order. (Id., at 15.) Petitioner, who
7 is diabetic, had disposed of the lancet in the trash instead of turning it in. (Id.)

8 In its decision, the BPH also noted that petitioner had positively programmed
9 while in prison:

10 Again, realizing that only you are going to get yourself out of this – this
11 prison, you started programming. You started getting your vocations.
12 You started working on what ultimately came to be your – your focus in
13 life and that hopefully is your commitment to religion, and you’ve done a
14 lot of work on that, a man coming from as little educational background as
15 you have are on the threshold of possibly getting an AA.

14 (Id., at 61.)

15 In 2007, petitioner received a certificate in the vocational small engine program.
16 (Id., at 7-8.) Petitioner also had received a certificate in silk screening. (Id., at 10-11.) Petitioner
17 obtained his GED and almost had enough units for an AA degree in bible study. (Id., at 119.)

18 Regarding the psychological report prepared for the 2008 hearing, the BPH stated,
19 “we find this most recent one as we do the last one was favorable.” (Id., at 62.) A copy of the
20 psychological report is attached as an exhibit to respondent’s answer. (Id., at 70-83.) The report,
21 prepared by Dr. Jack Pascoe, concludes,

22 Since Mr. Mondragon’s last appearance before the BPH, he has
23 maintained his pro-social attitude, positive disciplinary free behavior and
24 his active participation in self-help improvement through AA and
25 educational correspondence bible study courses. His parole plans appear
26 feasible and comprehensive. His efforts to satisfy the recommendations
made by the last BPH panel as desirable and necessary for future
considerations regarding parole are documented and appear satisfactory.
*The current risk assessment comprised of results from two clinical
instruments along with an evaluative interview and review of available*

1 *records indicates that he at this time represents a low risk of recidivism if*
2 *released to the community.*

3 (Id., at 82-83 (emphasis added).)

4 The BPH also found that petitioner had suitable parole plans and a supportive
5 family:

6 In terms of your parole plans, you're lucky to have a family that's willing
7 to accept you back and be helpful to you, and we do not find any major
8 problems that we can talk to you about there. You have some job offers.
9 They seem to be viable. They're friends, so it's very likely that you will –
10 it's a job offer that you will get, and you have the job with the – it think it
11 was with C&H Sugar, but they all seem to be, in our estimation, viable.

12 (Id., at 62.)

13 Of further note, the only post-commitment factor the BPH relied on to find
14 petitioner unsuitable was his history of drug and alcohol abuse. The BPH did *not* find petitioner
15 unsuitable because he had not adequately participated in treatment programs. Rather, the BPH
16 found petitioner unsuitable because the BPH concluded petitioner had not made adequate plans
17 for obtaining alcohol treatment following his release on parole. In order to make this clear, the
18 portion of the decision where this is discussed will be quoted below:

19 Presiding Commissioner Prizmich: The biggest area of concern we have,
20 sir, is the crime itself involved alcohol or drug abuse or everybody was out
21 of sorts on that day, but it's something that you had participated in for
22 some time. You were engaged in alcohol and or drug abuse, and it's
23 something we're concerned with. You should be concerned with, and one
24 of the ways to allay our fears to allay anybody else that would look at what
25 we do, the governor's office or the Decision Review Unit, is to assure all
26 those individuals that you are going to participate in an AA or some
program like that. Now, I want to give you some suggestions on how to
do that. We're going to give you a one year denial. We believe one year
is more than adequate time for you to get yourself set up. If you chose not
to, that's your choice, but I'm going to be clear with you as [I] possibly
can, and then from that point it will be your choice as to whether you
accomplish what we think you need to do. One, is if you are a committed
religious based-individual, then the first thing you're going to do is go to a
church and establish a residency, in the sense of a spiritual residency at a
church. We suggest that you seek out – Richmond has a number of them
– seek out a church that has a 12-step program associated with that church.
Failing that, and that's unusual nowadays because most churches,
especially if it's just Christian, non-denominational based have some form
of drug and alcohol counseling associated with them. They are usually

1 based on biblical principles. They meet on a real regular basis. If that's
2 your leaning, if that's what you think you want to do is stay in religious-
3 based lifestyle, then we would suggest that you hook into a 12 step
4 program at your church. Now, if you can't find one, which would be odd
5 to me, if you can't find one, we are going to suggest that you identify –
6 now, you did a good job identifying alcohol programs, but they're usually
7 – from what I could gather in looking at that list, it's going to cost you.
8 AA or NA, if you choose those, are free of charge. I think they charge
9 something for the coffee or something like that. What we want you to do
10 is identify the AA programs that are in the area that you're going to be
11 living. Not because we want to see the boxes checked, the T's crossed or
12 the I's dotted. Those are important, but the reason we ask for that is that it
13 forces you to look into it and to make an emotional and mental
14 commitment to that's what you're going to do. We have a better feeling
15 that you're going to follow through on that than just saying I'm going to
16 go to an AA program. That is nebulous. That's meaningless. It's just a
17 statement. But when you say I've got a [program] that meets seven days a
18 week, three times a day. I can pick one from any of these three meetings a
19 day. We are located at 123 Maple Street, it's three blocks down the street.
20 That tells us a lot more about your commitment than just saying, "I'm
21 going to an AA program." Do you understand?

22 Petitioner: Yup.

23 Presiding Commissioner Prizmich: So, that's what we're going to want to
24 see. Now, we're not going to say you have to go to an AA program, and I
25 can put it – if you got a date, I can put it in the granting information all I
26 want, but what I'd like to have you do is come in and tell me that's what
27 you're going to do. That's more important to me than just telling you
28 that's what you're going to do. There's a risk there. There's less of a risk
29 if you tell me that's what you want to do. So do it. If it's religious-based,
30 find one that religiously suits your needs, and I'll almost guarantee you –
31 you've got an AA gal out there that is in AA. She does the 12 steps. She
32 can help you out on that. Sounds like she's a religious person as well as
33 your family members. They're religious. They can simply ask the
34 minister, pastor, whatever they refer to him, is there an AA group
35 associated with this church, Yeah there is.

36 (Id., at 62-65)

37 In essence, the BPH found petitioner unsuitable because his failure to provide
38 them with a list of AA meetings in the area where he was to be paroled suggested that he had not
39 made a mental and emotional commitment to continuing his recovery from alcoholism following
40 his release on parole.

41 During the hearing, the BPH discussed with petitioner his attempts to obtain
42 information regarding alcohol treatment programs in Contra Costa County where he expected to

1 be paroled:

2 Presiding Commissioner Prizmich: No, it's just a – let me see the AA
3 groups. What do you got there? Okay. This has got the card. The other
4 one didn't. Thank you. If I didn't mention it, it was May 15th, 2008. So,
5 okay. Good. And we've got a list of AA meetings at Contra Costa
6 County. You've got some of those highlighted. Why are they
7 highlighted?

8 Petitioner: Yeah, these are the ones that I wrote to. This is the response
9 from the letter I wrote.

10 Presiding Commissioner Prizmich: Kaiser Permanente.

11 Petitioner: They sent a pamphlet to–

12 Presiding Commissioner Prizmich: Oh, to –

13 Petitioner: Because I asked them what they had going out there.

14 Presiding Commissioner: In Kaiser?

15 Petitioner: No, in Richmond.

16 Presiding Commissioner Prizmich: Well, this is – okay. I'm not
17 getting it here. You wrote to AA and Kaiser sent you something
18 back?

19 Petitioner: No. That's – right there where the thing that's sitting on the
20 desk, those are placed out there that deal with AA, you know, alcoholics
21 and stuff.

22 Presiding Commissioner Prizmich: Oh, they just generally. You're just
23 using that as a general commentary. So, one of the things was Kaiser?

24 Petitioner: Right.

25 Presiding Commissioner Prizmich: All right. Got you.

26 Petitioner: And then the other one I sent, they returned to sender.

Presiding Commissioner Prizmich: Okay.

Petitioner: They didn't –

Presiding Commissioner Prizmich: All right. And this is –

Petitioner: And the other one I send didn't – didn't respond.

Presiding Commissioner Prizmich: Okay. So you sent three of them out?

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Petitioner: Yeah, and I got one response.

Presiding Commissioner Prizmich: Okay. Let me – so these are just general Contra Costa County drug and alcohol –

Petitioner: Yeah, I just concentrated on Richmond.

Presiding Commissioner Prizmich: – various. It’s not AA. AA is a separate group.

Petitioner: Yeah. Yeah.

Presiding Commissioner Prizmich: Okay.

Petitioner: That was supposed to be AA, but it was a –

Presiding Commissioner Prizmich: Okay. See, these are mostly pay-for-kind of stuff. AA is free.

Petitioner: I didn’t know that.

Presiding Commissioner Prizmich: AA, you just go to the meetings and hang out. Drink coffee, smoke cigarettes.

Petitioner: Well, I think there was a misunderstanding when we were talking to the sponsor. She got these out of a –

Presiding Commissioner Prizmich: Yeah, because you had a lady. That one lady, she’s been a sponsor.

Petitioner: Um-hum.

Presiding Commissioner Prizmich: So she knows about the system. What was her name? Tracy Hill.

Petitioner: Um-hum.

Presiding Commissioner Prizmich: She probably goes to AA.

Petitioner: Yeah, she runs a program out there. She’s a –

Presiding Commissioner Prizmich: Okay. Right. I’m just saying that AA or NA, they don’t charge anything.

Petitioner: Right. Yeah, I understand that. There’s a bunch of them right there in Richmond.

Presiding Commissioner Prizmich: Okay. All right.

Petitioner: AA’s.

1 (Dkt. No. 9-2, at 38-40.)

2 The portion of the record quoted above clearly demonstrates that petitioner had
3 attempted to obtain information regarding drug treatment programs in Contra Costa County.
4 While he had successfully obtained information regarding drug treatment programs that were not
5 free, it appears that his requests for information regarding AA meetings were not responded to.
6 However, petitioner informed the BPH that there were “a bunch” of AA meetings in Richmond.

7 The transcript above demonstrates that petitioner had made a mental and
8 emotional commitment to continuing his recovery from alcoholism following his release on
9 parole. His failure to obtain a list of AA meetings did not demonstrate that he was not sincere in
10 his recovery. Moreover, the undersigned does not doubt that there are “a bunch” of AA meetings
11 in Richmond and that it is not difficult to find out when and where they are held.

12 After reviewing the record, the undersigned does *not* find that
13 “some evidence” supported the 2008 decision by the BPH that petitioner’s release would
14 unreasonably endanger public safety. In finding petitioner unsuitable, the BPH relied on the
15 circumstances of petitioner’s commitment offense, his prior criminal record, and his failure to
16 obtain a schedule of AA meetings in Contra Costa County. For the reasons discussed above,
17 petitioner’s failure to obtain a schedule of AA meetings was not indicative of his current
18 dangerousness.

19 Although the circumstances of petitioner’s commitment offense and his prior
20 criminal record are indeed troubling, the undersigned finds that based on petitioner’s years of
21 positive prison programming and his realistic parole plans and strong family ties, the
22 circumstances of petitioner’s commitment offense and his prior criminal record were no longer
23 probative to the determination of whether petitioner remained a danger to the public. There was
24 no rational nexus between the facts of petitioner’s 1983 offense and his criminal history prior to
25 that date and the fundamental question as to whether his release posed a threat to public safety in
26 2008. The fact that the 2008 BPH ordered a one year denial (*id.*, at 62) suggests that it also

1 recognized the weakened relevance of petitioner’s criminal history. Rather, the record
2 demonstrated that petitioner was suitable for parole based on the relevant law and regulations.

3 As discussed above, the Contra Costa Superior Court upheld the 2008 suitability
4 decision of the BPH. For the following reasons, the undersigned finds that this decision was an
5 unreasonable application of clearly established Supreme Court authority.

6 The Superior Court found that the record demonstrated that petitioner remained a
7 danger to the public. In making this finding, the Superior Court relied on the commitment
8 offense and petitioner’s prior record. (Dkt. 9-3, at 5-6 of 12.) The Superior Court also found that
9 petitioner’s disciplinary record “was relevant to his unsuitability for parole.” (*Id.*, at 8 of 12.)
10 However, as discussed above, the BPH did not rely on petitioner’s prison disciplinary record in
11 finding him unsuitable. The BPH stated that his failure to have received a prison disciplinary in
12 many years “work[s] more in your favor as opposed to detriment against you.” (Dkt. No. 9-2, at
13 60-61.) Because this was not a ground relied on by the BPH in finding petitioner unsuitable, the
14 Superior Court was not entitled to rely on it. *Hatcher v. Carey*, 2010 WL 3258578 at *3 (9th Cir.
15 Aug. 17, 2010) (unpublished) (citing *In re Elkins*, 144 Cal.App. 4th 475, 493 (Cal. Ct. App.
16 2006) (disregarding unsuitability circumstances not relied upon by Governor when reviewing
17 Governor's decision reversing Board's suitability finding)).

18 The Superior Court also suggested that the BPH found that petitioner had not
19 participated in sufficient self-help programs while in prison:

20 Participation in therapy or self-help while incarcerated is a criterion for
21 suitability in that such institutional activity indicates an enhanced ability to
22 function within the law upon release. Cal. Code Regs., Title 15 s.
23 2402(d)(9). Petitioner had participated in correspondence school. Ex. D,
24 p. 51. Ex. C, p. 8, 10, 12. In the present case, the Board recognized
25 petitioner’s efforts to disassociate himself from his prior gang
26 involvement. Ex. B, p. 13; Ex. D, p. 60-61, 87) and his pursuit of his bible
studies. Ex. D, p. 93-94. The Board recognized the gains he made
towards obtaining an AA degree. Ex. D, p. 96, 101. *Otherwise there was
no evidence on the record before the Board to show that petitioner had
taken any other course or programmed in any other fashion. Ex. D, p. 84.*

(Dkt. 9-3, at 8 (emphasis added)).

1 As discussed above, the BPH did not find petitioner unsuitable based on his
2 failure to participate in self-help programs. In fact, in its decision, the BPH commended
3 petitioner for his positive programming:

4 Again, realizing that only you are going to get yourself out of this – this
5 prison, you started programming. You started getting your vocations.
6 You started working on what ultimately came to be your – your focus in
7 life and that hopefully is your commitment to your religion, and you’ve
8 done a lot of work on that, a man coming from as little educational
background as you have are on the threshold of possibly getting an AA
degree. We’re going to encourage you to get those last four units. We
believe that’s within your reach. We’re not going to make it a requirement,
but we think that that would be a very good thing for you to do.

9 (Dkt. 9-2, at 61 of 115.)

10 Moreover, the page cited by the Superior Court in support of its finding that
11 petitioner had not adequately programmed, i.e. page 84 of the transcript from the 2008 hearing, is
12 from the statement by Deputy District Attorney Waddell who appeared at the hearing to oppose
13 petitioner’s release. At page 84 of the transcript, Deputy District Attorney Waddell stated that
14 “[h]e has, to his credit, upgraded vocationally and recently in the small engine repair program.
15 The silk screening then goes back a while . . .” (Dkt. 9-2, at 84.) Deputy District Attorney
16 Wadell went on to acknowledge petitioner’s academic achievements but went on to argue, “[h]e
17 could expand, I think, his self-help to other courses other than just AA and the bible
18 correspondence course.” (*Id.*) In finding that petitioner had not adequately programmed, the
19 Superior Court apparently improperly relied on the District Attorney’s argument that petitioner
20 should be required to participate in more programming.

21 As discussed above, the BPH did not find that petitioner was unsuitable for parole
22 based on inadequate programming. Because this was not a ground relied on by the BPH in
23 finding petitioner unsuitable, the Superior Court was not entitled to rely on it. Hatcher v. Carey,
24 supra.

25 The Superior Court next found that “[t]he area of concern for the Board was that
26 alcohol abuse was involved in the commitment offense.” (Dkt. 9-3, at 8 of 12.) The Superior

1 Court went on to find that petitioner's participation in AA was inadequate:

2 Given this casual connection there was some evidence to support the
3 Board's concern with the petitioner's limited involvement in substance
4 abuse treatment in prison. Ex. D, p. 97. Since his incarceration petitioner
5 had only sporadically attended Alcoholics Anonymous program until
6 between 2005 and 2008 when he upgraded his commitment to Alcoholics
7 Anonymous. Ex. C, p. 8, 10, 12, 14; Ex. E, p. 7; Ex. D, p. 52-54, 84.
8 Despite petitioner's rehabilitative gains derived from his bible studies,
9 petitioner's gains in addressing his own substance abuse issue were
10 relatively recent. By his own account, it had only been six or seven years
11 since he decided to turn his life around while in prison. Ex. D, p. 65-66,
12 85.

13 The Board observed that the petitioner also failed to identify the
14 Alcoholics Anonymous program in the area that he was going to live. Ex.
15 D, p. 99. On June 18, 2008 the psychological evaluator diagnosed
16 petitioner as suffering from "alcohol dependence with physiological
17 dependence in a controlled environment and amphetamine abuse." Ex. D,
18 p. 57; Ex. E, p. 8. The evaluator concluded that the petitioner posed a low
19 risk of recidivism for violent behavior. Ex. E, p. 11-12. The evaluator
20 however emphasized that the petitioner's ongoing involvement in an
21 established 12 step program such as AA was critical in order for him to
22 maintain his sobriety. Ex. D, p. 59; Ex. E, p. 12. It was critical to his
23 ability to maintain an "overall pattern of pro-social conduct in the
24 community." Ex. E, p. 9.

25 The Board in turn recommended that the petitioner establish spiritual
26 residency with a church that offers a 12 step program. Ex. D, p. 98. The
record supports this recommendation. In terms of his plans to maintain his
sobriety, the petitioner had "put great reliance on his Christian faith and
associated support programs available to him in the community." Ex. E, p.
5. However, petitioner did not have an AA sponsor in the community.
Petitioner had investigated the availability of substance abuse programs
that required a monetary fee for participation in the program rather than
programs offered through Alcoholics Anonymous which do not charge a
fee. Ex. D, p. 75, 98.

Accordingly, there was some evidence to support the Board's conclusion
that the petitioner would benefit from consistent involvement in substance
abuse programming while both incarcerated and upon release given that
the use of alcohol was related to the murder and to some of his prior
violent criminal misconduct.

24 (Dkt. 9-3, at 8-10 of 12.)

25 As discussed above, the BPH did not find petitioner unsuitable for parole on
26 grounds that he had not adequately participated in AA or other drug and alcohol programs while

1 in prison. Because this was not a ground relied on by the BPH in finding petitioner unsuitable,
2 the Superior Court was not entitled to rely on it.¹ Hatcher v. Carey, supra.

3 The Superior Court also found that the BPH properly found petitioner unsuitable
4 for parole because he had not adequately investigated AA programs in Contra Costa County.
5 (Dkt. 9-3, at 9 of 12.) As discussed above, petitioner’s failure to obtain a list of AA meetings in
6 Contra Costa County was not “some evidence” of his current dangerousness. This finding by the
7 Superior Court was an unreasonable application of clearly established Supreme Court authority.

8 Finally, the Superior Court stated that the BPH found petitioner unsuitable based
9 on his attitude toward the offense. (Id., at 10 of 12.). In particular, the Superior Court cited a
10 portion of the psychological report stating that petitioner’s insight into his offense was limited.
11 (Dkt. 9-2, at 76.) The Superior Court found that petitioner’s lack of remorse rendered him
12 unsuitable. (9-3, at 10 of 12.)

13 During the hearing, the BPH discussed this portion of the psychological report:

14 However, you reiterated that you thought that your claim of self-defense
15 should have served to reduce your culpability in this offense and there
16 reduce the severity of your sentence, and I’m on page 7 of the report. The
17 doctor said nonetheless, you indicated you are resigned to your conviction
18 and sentence and you just hope that you can attain parole and in this
19 regard, he said that you exhibited minor frustration and discouragement
20 that in your view previous Board Panels have not appeared to consider the
21 changes that you’ve made in your life and primarily becoming a new man
22 through your Christian faith...

19 (Dkt. 9-2, at 21 of 115.)

20 While the BPH acknowledged the portion of the psychological report cited by the
21 Superior Court, it did not find petitioner unsuitable on grounds that he lacked insight or failed to
22 show adequate remorse. In fact, the BPH found that the psychological report was favorable. (Id.,
23 at 61-62.) Because the BPH did not find petitioner unsuitable based on a lack of insight or

24 ¹ Attached to the 2008 Life Prisoner Evaluation were documents indicating that
25 petitioner had perfect AA attendance in 2005, 2006 and 2007. (Dkt. No. 9-1, at 76, 78, 79.) The
26 psychological report did not state that petitioner required additional alcohol or drug treatment
before being released on parole. (Dkt. No. 9-2, at 70-82.)

1 remorse, the Superior Court was not entitled to rely on these grounds. Hatcher v. Carey, *supra*.

2 For the reasons discussed above, the undersigned finds that the Superior Court's
3 opinion upholding the 2008 BPH decision finding petitioner unsuitable for parole was an
4 unreasonable application of clearly established Supreme Court authority. "Some evidence" did
5 not support the BPH decision that releasing petitioner would pose a danger to the community.
6 As discussed above, petitioner's criminal history and commitment offense were no longer
7 probative of whether petitioner remained a danger to the public if released on parole. Rather, the
8 evidence demonstrated that petitioner met the criteria for parole. Accordingly, the undersigned
9 recommends that the petition be granted.²

10 Conclusion

11 The remedy for a finding that the BPH's decision was not supported by some
12 evidence is an order that the BPH conduct another eligibility hearing at which the prisoner's
13 rights are respected. See Haggard v. Curry, No. 10-16819, 2010 WL 4015006 (9th Cir. Oct. 12,
14 2010).³

15 ///

16 ² Interestingly, petitioner apparently still has not been paroled despite, as noted above,
17 the BPH expressly noting that it was ordering a one year denial (Dkt. No. 9-2, at 62-63).
18 Accordingly, the recommendation that the petition be granted assumes petitioner's record
remains substantially unchanged from the time of the 2008 hearing.

19 ³ In Haggard, the Ninth Circuit relied on In re Prather, 50 Cal.4th 238, 112 Cal.Rptr.3d
20 291 (2010), for its holding regarding the appropriate remedy following a determination that the
BPH finding of parole unsuitability was not supported by some evidence. In Prather, the
21 California Supreme Court stated, "[i]n conducting a suitability hearing after a court's grant of
habeas corpus relief, the Board is bound by the court's findings and conclusions regarding the
22 evidence in the record and, in particular, by the court's conclusion that no evidence in the record
supports the Board's determination that the prisoner is unsuitable for parole. Thus, an order
generally directing the Board to proceed in accordance with due process of law does not entitle
23 the Board to 'disregard a judicial determination regarding sufficiency of evidence [of current
dangerousness] and to simply repeat the same decision on the same record.'" In re Prather, 50
24 Cal.4th at 258, quoting In re Masoner, 172 Cal.App.4th 1098, 1110, 91 Cal.Rptr.3d 689 (2009).
"Rather, a judicial order granting habeas corpus relief implicitly precludes the Board from again
25 denying parole – unless some *additional* evidence (considered alone or in conjunction with other
evidence in the record, and not already considered and rejected by the reviewing court) supports a
26 determination that the prisoner remains currently dangerous." Id. (emphasis in original.)

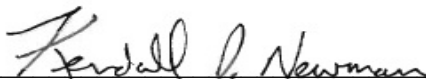
1 Accordingly, IT IS HEREBY RECOMMENDED that:

2 1. Petitioner's application for a writ of habeas corpus be granted;

3 2. Respondent Warden be ordered to release petitioner within sixty days of the
4 adoption of these findings and recommendations if a new suitability hearing is not held; if a
5 suitability hearing is held within that time, the parties be ordered to file status reports within
6 thirty days of petitioner's suitability hearing informing the court of the outcome of the hearing.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
12 objections shall be filed and served within fourteen days after service of the objections. The
13 parties are advised that failure to file objections within the specified time may waive the right to
14 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: November 23, 2010

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19 KENDALL J. NEWMAN
20 UNITED STATES MAGISTRATE JUDGE

21 mon362.157(2)