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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

GILBERT CARDENAS,	1:10-cv-01076-OWW-DLB (HC)	
Petitioner,		FINDINGS AND RECOMMENDATION
v.		REGARDING PETITION FOR WRIT OF
		HABEAS CORPUS
		[Doc. 1]
JAMES D. HARTLEY,		
Respondent.		

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Petitioner is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is represented by Tracy Renee Lum, Esq.

BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation (CDCR) following his conviction of kidnapping for robbery and ransom. He is serving a fourteen year-to-life sentence, plus a four year enhancement.

In the instant petition, Petitioner does not challenge the validity of his conviction; rather, he challenges the Board of Parole Hearings' February 24, 2009 decision finding Petitioner unsuitable for release.

Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court challenging the Board's 2009 decision. The superior court denied the petition in a reasoned decision finding some evidence to support the Board's decision of unsuitability.

1 Petitioner then raised the same claims in a petition for writ of habeas corpus in the  
2 California Court of Appeal. The petition was denied with citations to In re Lawrence, 44 Cal.4th  
3 1181 (2008) and In re Shaputis, 44 Cal.4th 1241 (2008).

4 Petitioner then filed a petition for writ of habeas corpus in the California Supreme Court,  
5 which was summarily denied.

6 Petitioner filed the instant federal petition for writ of habeas corpus on June 15, 2010.  
7 Respondent filed an answer to the petition on September 13, 2010, and Petitioner filed a traverse  
8 on September 22, 2010.

### 9 STATEMENT OF FACTS

10 On November 27, 1993, victim, Carrie Denise Reese called the Long Beach Police  
11 Department to report she had been at the Bank of America ATM machine at San Fernando Road  
12 and Sierra Highway, making a deposit. Co-defendant, Paguada, walked toward her with a .38  
13 caliber revolver. He held it close to her stomach and told her to get into the vehicle. She got  
14 into the back of the van, and then Paguada put duct tape over her eyes and sat on the seat next to  
15 her while co-defendant Sanchez and Petitioner got into the front seat and drove off. Paguada  
16 asked Reese for her pin number and he would not kill her. He then asked her if she had children  
17 and she said she had three. Paguada told Reese to cooperate if she wanted to see her children  
18 again. Paguada then went through her purse and took her money and jewelry. Paguada stopped  
19 at the bank but decided not to use the ATM because there were too many people around. They  
20 then went to buy gas. A short time later, Petitioner stopped the van and took the victim out, then  
21 tied her to a fence with duct tape and told her she would get her vehicle back. Reese was able to  
22 free herself and call police.

23 On December 7, 1993, victim, Papazian, went to an ATM machine at Bank of America at  
24 Crenshaw Boulevard and Pacific Coast Highway. He withdrew \$200 and started to walk back to  
25 his car. Sanchez and Paguada approached Papazian wearing ski masks, and Papazian threw  
26 down his wallet and offered his car keys. The defendants forced the victim into the backseat of  
27 the car. One of them got beside him and covered his eyes with duct tape, and the other defendant  
28 began to drive away. They drove for a while and then stopped and were met by another vehicle.

1 They all got out and the victim was taken into a residence. His hands and feet were tied and he  
2 was placed into a closet. He was fed, given water to drink and taken to the restroom on a regular  
3 basis. The victim was asked for his pin number, and the defendants took his ATM and credit  
4 cards. They found his address and told him they were going to his house to get some things.  
5 They threatened to kill him and his family. One of them played Russian roulette by placing the  
6 gun in his mouth and pulling the trigger several times. Palazian was left in the closet for a total  
7 of four days. On the fourth day, the victim was taken to his home and placed in a closet. The  
8 defendants took some additional items from the house before leaving. The victim was given a  
9 knife to free himself, and was told to not turn in his credit cards for several days and to cash a  
10 \$5,000 check to be taken to a certain location. He was told to follow the directions because they  
11 knew where his mother and grandmother lived. The victim was able to free himself and call  
12 police.

13 On December 11, 1993, Torrance police officers went to the victim's residence and  
14 waited for a telephone call from defendants. They called at 9:07 and asked the victim if he had  
15 the money and was ready to drop it off. Palazian was directed to put the money in an envelope,  
16 then into a plastic bag, and take to a pre-arranged location to drop off. He was then to go home  
17 and wait for another phone call to tell him where he could pick up his car. Police were  
18 dispatched to the Fantastic Burger, but were spotted by the defendants. They sped away and  
19 were lost in traffic. At 11:00 p.m. that same evening, the victim received a second phone call  
20 and was told to put the money on a bus bench in front of a liquor store at Carson and Western.  
21 An officer made the money drop at midnight, and a Camaro was spotted in the area driving by  
22 several times. At 1:00 a.m. a man with a beard approached the bench, picked up the package and  
23 walked down the street. The Camaro was spotted passing the person several times but did not  
24 stop. The police detained the individual who retrieved the money. He told them that he had  
25 been walking down the street when approached by two men who said they would pay him to  
26 pick up the package.

27 Officers observed the Camaro stop by a pay phone at 401 East Carlson. Victim Papazian  
28 received a phone call about that same time. Petitioner hung up the phone when he spotted the

1 officers. He then took off in the Camaro and was chased by officers. Petitioner finally stopped  
2 and was arrested without incident. The person who picked up the money identified both  
3 Petitioner and Sanchez as the person who asked him to pick up the money.

#### 4 DISCUSSION

##### 5 I. Standard of Review

6 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
7 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its  
8 enactment. Lindh v. Murphy, 521 U.S. 320 (1997), *cert. denied*, 522 U.S. 1008 (1997); Jeffries  
9 v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997), *quoting Drinkard v. Johnson*, 97 F.3d 751, 769  
10 (5th Cir.1996), *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by Lindh v.*  
11 Murphy, 521 U.S. 320 (1997) (holding AEDPA only applicable to cases filed after statute's  
12 enactment). The instant petition was filed after the enactment of the AEDPA; thus, it is  
13 governed by its provisions.

14 Petitioner is in custody of the California Department of Corrections and Rehabilitation  
15 pursuant to a state court judgment. Even though Petitioner is not challenging the underlying state  
16 court conviction, 28 U.S.C. § 2254 remains the exclusive vehicle for his habeas petition because  
17 he meets the threshold requirement of being in custody pursuant to a state court judgment. Sass  
18 v. California Board of Prison Terms, 461 F.3d 1123, 1126-1127 (9th Cir.2006), *citing White v.*  
19 Lambert, 370 F.3d 1002, 1006 (9th Cir.2004) (“Section 2254 ‘is the exclusive vehicle for a  
20 habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the  
21 petition is not challenging [her] underlying state court conviction.’”).

22 The instant petition is reviewed under the provisions of the Antiterrorism and Effective  
23 Death Penalty Act which became effective on April 24, 1996. Lockyer v. Andrade, 538 U.S.  
24 63, 70 (2003). Under the AEDPA, an application for habeas corpus will not be granted unless  
25 the adjudication of the claim “resulted in a decision that was contrary to, or involved an  
26 unreasonable application of, clearly established Federal law, as determined by the Supreme  
27 Court of the United States” or “resulted in a decision that was based on an unreasonable  
28 determination of the facts in light of the evidence presented in the State Court proceeding.” 28

1 U.S.C. § 2254(d); see Lockyer, 538 U.S. at 70-71; Williams, 529 U.S. at 413.

2 “[A] federal court may not issue the writ simply because the court concludes in its  
3 independent judgment that the relevant state court decision applied clearly established federal  
4 law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411.

5 A federal habeas court making the “unreasonable application” inquiry should ask whether the  
6 state court’s application of clearly established federal law was “objectively unreasonable.” Id. at  
7 409. Petitioner has the burden of establishing that the decision of the state court is contrary to  
8 or involved an unreasonable application of United States Supreme Court precedent. Baylor v.  
9 Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the  
10 states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a  
11 state court decision is objectively unreasonable. See Clark v. Murphy, 331 F.3d 1062, 1069 (9th  
12 Cir.2003); Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir.1999).

## 13 II. Review of Petition

14 There is no independent right to parole under the United States Constitution; rather, the  
15 right exists and is created by the substantive state law which defines the parole scheme.  
16 Hayward v. Marshall, 603 F.3d 546, 559, 561 (9th Cir. 2010) (en banc) (citing Bd. of Pardons v.  
17 Allen, 482 U.S. 369, 371 (1987); Pearson v. Muntz, 606 F.3d 606, 609 (9th Cir. 2010) (citing  
18 Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005)); Cooke v.  
19 Solis, 606 F.3d 1206, 1213 (9th Cir. 2010). “[D]espite the necessarily subjective and predictive  
20 nature of the parole-release decision, state statutes may create liberty interests in parole release  
21 that are entitled to protection under the Due Process Clause.” Bd. of Pardons v. Allen, 482 U.S.  
22 at 371.

23 In California, the Board of Parole Hearings’ determination of whether an inmate is  
24 suitable for parole is controlled by the following regulations:

25 (a) General. The panel shall first determine whether the life prisoner is suitable  
26 for release on parole. Regardless of the length of time served, a life prisoner shall be  
27 found unsuitable for a denied parole if in the judgment of the panel the prisoner will pose  
28 an unreasonable risk of danger to society if released from prison.

(b) Information Considered. All relevant, reliable information available to the  
panel shall be considered in determining suitability for parole. Such information shall

1 include the circumstances of the prisoner's social history; past and present mental state;  
2 past criminal history, including involvement in other criminal misconduct which is  
3 reliably documented; the base and other commitment offenses, including behavior before,  
4 during and after the crime; past and present attitude toward the crime; any conditions of  
5 treatment or control, including the use of special conditions under which the prisoner  
6 may safely be released to the community; and any other information which bears on the  
7 prisoner's suitability for release. Circumstances which taken alone may not firmly  
8 establish unsuitability for parole may contribute to a pattern which results in a finding of  
9 unsuitability.

10 Cal. Code Regs. tit. 15, §§ 2402(a) and (b). Section 2402(c) sets forth circumstances tending to  
11 demonstrate unsuitability for release. "Circumstances tending to indicate unsuitability include:

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

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

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

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

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

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

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

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

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

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

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

Cal. Code Regs. tit. 15, § 2402(c)(1)(A)-(E),(2)-(9).

Section 2402(d) sets forth the circumstances tending to show suitability which include:

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

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

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

5 (4) Motivation for Crime. The prisoner committed his crime as a result of significant  
6 stress in his life, especially if the stress has built over a long period of time.

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

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

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

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

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

16 Cal. Code Regs. tit. 15, § 2402(d)(1)-(9).

17 The California parole scheme entitles the prisoner to a parole hearing and various  
18 procedural guarantees and rights before, at, and after the hearing. Cal. Penal Code § 3041.5. If  
19 denied parole, the prisoner is entitled to subsequent hearings at intervals set by statute. *Id.* In  
20 addition, if the Board or Governor find the prisoner unsuitable for release, the prisoner is entitled  
21 to a written explanation. Cal. Penal Code §§ 3041.2, 3041.5. The denial of parole must also be  
22 supported by "some evidence," but review of the Board's or Governor's decision is extremely  
23 deferential. *In re Rosenkrantz*, 29 Cal.4th 616, 128 Cal.Rptr.3d 104, 59 P.3d 174, 210 (2002).

24 Because California's statutory parole scheme guarantees that prisoners will not be denied  
25 parole absent some evidence of present dangerousness, the Ninth Circuit Court of Appeals  
26 recently held California law creates a liberty interest in parole that may be enforced under the  
27 Due Process Clause. *Hayward v. Marshall*, 602 F.3d at 561-563; *Pearson v. Muntz*, 606 F.3d at  
28 609. Therefore, under 28 U.S.C. § 2254, this Court's ultimate determination is whether the state  
court's application of the some evidence rule was unreasonable or was based on an unreasonable  
determination of the facts in light of the evidence. *Hayward v. Marshall*, 603 F.3d at 563;  
*Pearson v. Muntz*, 606 F.3d at 608.

1 The applicable California standard “is whether some evidence supports the *decision* of  
2 the Board or the Governor that the inmate constitutes a current threat to public safety, and not  
3 merely whether some evidence confirms the existence of certain factual findings.” In re  
4 Lawrence, 44 Cal.4th 1181, 1212 (2008) (emphasis in original and citations omitted). As to the  
5 circumstances of the commitment offense, the Lawrence Court concluded that

6 although the Board and the Governor may rely upon the aggravated circumstances  
7 of the commitment offense as a basis for a decision denying parole, the  
8 aggravated nature of the crime does not in and of itself provide some evidence of  
9 current dangerousness to the public unless the record also establishes that  
10 something in the prisoner’s pre- or post-incarceration history, or his or her current  
11 demeanor and mental state, indicates that the implications regarding the  
12 prisoner’s dangerousness that derive from his or her commission of the  
13 commitment offense remain probative to the statutory determination of a  
14 continuing threat to public safety.

11 Id. at 1214.

12 In addition, “the circumstances of the commitment offense (or any of the other factors  
13 related to unsuitability) establish unsuitability if, and only if, those circumstances are probative  
14 to the determination that a prisoner remains a danger to the public. It is not the existence or  
15 nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the  
16 significant circumstance is how those factors interrelate to support a conclusion of current  
17 dangerousness to the public.” In re Lawrence, 44 Cal.4th at 1212.

18 “In sum, a reviewing court must consider ‘whether the identified facts are *probative* to  
19 the central issue of *current* dangerousness when considered in light of the full record before the  
20 Board or the Governor.’” Cooke v. Solis, 606 F.3d at 1214 (emphasis in original) (citing  
21 Hayward v. Marshall, 603 F.3d at 560).

22 A. Last Reasoned State Court Decision

23 In the last reasoned decision of the Los Angeles County Superior Court, the court denied  
24 the petition stating, in pertinent part:

25 The Board found the Petitioner unsuitable for parole after a parole  
26 suitability hearing held on February 24, 2009. The Petitioner was denied parole  
27 for five years. The Board concluded that the Petitioner was unsuitable for parole  
28 and would pose an unreasonable risk of danger to society and a threat to public  
safety. The Board based its decision on the commitment offense and on the  
Petitioner’s minimization of his role in the crimes. The Court finds that there is



1 some evidence to support the Board's determination that the Petitioner currently  
2 presents an unreasonable risk of danger to society.

3 The Board determined that the commitment offense was "especially  
4 heinous, atrocious or cruel" because the Petitioner demonstrated a "callous  
5 disregard for human suffering" and because his motivation was inexplicable. See  
6 Cal. Code Regs., tit. 15 § 2281, subds (c)(1)(D) and (c)(1)(E). After committing  
7 the otherwise ordinary kidnapping for robbery, the Petitioner and his co-  
8 defendants left the first victim tied to a fence in the middle of the night without  
9 any transportation and roughly 30 minutes away from home by car. The three  
10 men then kept the second victim in a closet for four days. Moreover, the  
11 Petitioner concedes that at the time of the commitment offense, he had no  
12 criminal history, and faced no serious financial problems. The Petitioner's  
13 motivation to participate in these offenses is inexplicable given his background.  
14 His motivation to hold Mr. Papazian hostage for four days is particularly curious  
15 because the Petitioner and his co-defendants could surely have robbed the victim  
16 and burglarized his home without having to detain the victim for so long. The  
17 Petitioner asserts that he was largely motivated by a sense of loyalty to his  
18 friends, but such loyalty it seems would explain the Petitioner's silence rather  
19 than his active participation.

20 The Petitioner correctly notes that over time, the relevance of the  
21 commitment offense to his current dangerousness attenuates. See *In re Lawrence*,  
22 *supra*, 44 Cal.4th at 1211. The Board noted in its denial that this was the  
23 Petitioner's first suitability hearing, and found that the commitment offense  
24 weighed heavily against his suitability. The Petitioner asserts that the Board  
25 inappropriately determined that it could rely solely on the commitment offense  
26 because this was the Petitioner's first hearing. However, the Board merely noted  
27 that the level of attenuation was not as great in the Petitioner's case as in other  
28 cases where more than a quarter-century separate the hearing and the offense.  
Under *Lawrence*, the relevance of the commitment offense to current  
dangerousness is something of a sliding scale, and the board merely noted the  
Petitioner's location on that scale. As discussed below, the board then went on to  
address how the Petitioner's minimization of his role in the crime and his lack of  
credibility created a rational nexus between his commitment offense and his  
present risk for dangerousness. See *Id.* at 1228.

The Board admitted that its initial review of the Petitioner's impressive  
application inclined it to grant him parole. Nonetheless, the Board went on to  
explain that the Petitioner's behavior at the hearing persuaded it to deny his  
application instead. At his hearing, the Petitioner repeatedly minimized his level  
of participation. Though he attempted to portray himself as merely along for the  
ride, as the driver in the first kidnapping and in collecting the ransom, when his  
two co-defendants got out of the car to kidnap Mr. Papazian, he was unaware of  
what they intend[ed] to do until it was too late. This assertion, however, is  
contradicted by the fact that the two men had orchestrated a similar kidnapping in  
a bank parking lot 10 days earlier and by his statement to the a [sic] psychologist  
four months before the hearing that he "realized what was going to happen" when  
his co-defendants left the car. Similarly, after accepting the accuracy of his  
probation report, which stated that the Petitioner called in sick to work to guard  
the closet where Papazian was held, the Petitioner told the Board that he went to  
work every day and avoided the closet as much as possible. When confronted  
with the discrepancy, the Petitioner stated that he may have called in sick to work  
once or twice, but claimed he wanted nothing to [do] with the detention.

1 The question before the Court is “whether some evidence supports the  
2 decision of the Board . . . that the inmate constitutes a threat to public safety.” *In*  
3 *re Lawrence, supra*, 44 Cal.4th at 1212. The Petitioner’s behavior was both  
4 callous and inexplicable. The Petitioner’s attempts to minimize his conduct to the  
5 Board and his inconsistent assertions of fact indicate that he still lacks insight into  
6 what caused him to commit such serious offenses to begin with. Particularly  
7 given the fact that the Petitioner’s motivation was inexplicable, that lack of  
8 insight is “some evidence” that the Petitioner is at risk of reoffending and that he  
9 poses an unreasonable risk to public safety. See *In re Shaputis* (2008) 44 Cal.4th  
10 1241, 1261 [lack of insight into crime when combined with gravity of  
11 commitment offense “some evidence” of dangerousness].

12 The Board also considered the Petitioner’s post-conviction rehabilitative  
13 progress, including his participation in a multitude of self-help groups, his two  
14 vocational certifications, and his spotless disciplinary record. However, they  
15 concluded that the Petitioner would pose an unreasonable threat to public safety.  
16 Cal. Pen. Code § 3041(b). Because the Board’s interpretation of the evidence is  
17 “reasonable and reflects due consideration of all relevant statutory factors,” the  
18 Court must affirm the Board’s judgment. *In re Shaputis, supra*, 44 Cal.4th at  
19 1258.

20 (Ex. 2, to Answer.)

21 B. 2009 Board Hearing

22 At Petitioner’s initial parole hearing in 2009, the Board found him unsuitable based on  
23 the circumstances of the commitment offense, lack of insight, and attempt to minimize his  
24 involvement in the offense.

25 The commitment offenses involved multiple victims being robbed at gunpoint on  
26 separate occasions. The offenses were carried out in a dispassionate and calculated manner.  
27 After robbing both victims by gunpoint, the victims were kidnapped. The first victim had her  
28 eyes and mouth duct taped so she could not scream. She was told to cooperate if she wanted to  
see her children again. She was ultimately abandoned in an isolated area and tied to a fence with  
duct tape. The second victim was held hostage in a closet for four days with his hands and feet  
tied. One of the suspects played Russian roulette by placing the gun in the victim’s mouth and  
pulling the trigger several times. Petitioner and his crime partners burglarized the home of the  
second victim and took several items. The victim was finally released on the fourth day and  
placed in a closet in his own home. However, Petitioner and his partners carried on the offense  
by having the second victim drop off money. The commitment offenses were clearly carried out  
in a cruel manner based on the fact that the victims were kidnapped, duct taped, and threatened.

1  
2 The Board found that Petitioner lacked insight into the causative factors of the  
3 commitment offense. At the hearing, Petitioner continued to minimize his participation in the  
4 commitment offenses. He told the Board that he avoided contact with the second victim who  
5 was kept in the closet and claimed he went to work every day during that time. However, the  
6 probation report reflected that Petitioner stated he called in sick to watch the victim in the closet,  
7 and he later acknowledged that he may have done so.

8 Petitioner also said that during the robbery of the second victim, he did not know what  
9 was happening. Yet, Petitioner told the psychologist when his crime partners exited the vehicle  
10 he knew what was going to happen. He claimed that when his partners did not return, he drove  
11 and parked near the bank and fell asleep. His partners then mysteriously appeared and honked  
12 the horn to wake him up. Petitioner's version of the events are contradictory to the evidence that  
13 was before the Board, and the Board was legitimately concerned about Petitioner's insight into  
14 the causative factors of the offense.

15 Moreover, Petitioner repeatedly stated that he went along with the offenses out of loyalty  
16 to his best friend, Mr. Sanchez. Yet, Petitioner was an active participant in the offenses and any  
17 claim to the contrary is suspect. Petitioner went to the second victim's home and stole items,  
18 which were later found at his own home. He also used the victim's credit cards to purchase  
19 items. He was later involved in picking up the ransom money from the second victim. Given  
20 that Petitioner made several contradictory statements demonstrating an attempt to minimize his  
21 involvement in the offenses, such evidence suggests that Petitioner has not yet come to terms  
22 with his conduct and remains an unreasonable risk to public safety. In Shaputis, the California  
23 Supreme Court stated that "[a]n inmate's version of the offense may indicate a lack of insight  
24 and provide a nexus between the offense and his current dangerousness." In re Shaputis, 44  
25 Cal.4th at 1260. Here, there is some evidence to support the Board's finding that Petitioner's  
26 minimization of his participation in the commitment offenses demonstrates his current  
27 dangerousness. In determining whether Petitioner was suitable for release, the Board's purpose  
28 at the hearing is to review and analyze not only what is said, but how it is said. Thus, Petitioner's

1 past and present attitude toward the crime was properly considered pursuant to § 2402(b).  
2 Petitioner’s claim to the contrary is rejected.

3 The Board considered the factors in support of suitability and commended Petitioner for  
4 the progress he has made. Nevertheless, the Board concluded that the positive aspects did not  
5 outweigh the factors of unsuitability, namely, the circumstances of the commitment offense, lack  
6 of insight, and attempt to minimize his conduct. The state courts’ determination that there was  
7 some evidence to support the Board’s 2009 decision is not an unreasonable application of  
8 California’s some evidence standard, nor an unreasonable determination of the facts in light of  
9 the record.

10 Petitioner contends that he was subjected to an ex post facto law violation when the  
11 Board applied Proposition 9 “Marsy’s Law” to him retroactively. The Ex Post Facto Clause of  
12 the United States Constitution prohibits the states from passing any “ex post facto law,” a  
13 prohibition that “is aimed at laws ‘that retroactively alter the definition of crimes or increase the  
14 punishment for criminal acts.’” Cal. Dept. of Corrections v. Morales, 514 U.S. 499, 504 (1995);  
15 see also Weaver v. Graham, 450 U.S. 24, 28 (1981) (providing that “[t]he ex post facto  
16 prohibition forbids the Congress and the States to enact any law ‘which imposes a punishment  
17 for an act which was not punishable at the time it was committed; or imposes additional  
18 punishment to that then prescribed.’”). The United States Supreme Court has held that  
19 “[r]etroactive changes in laws governing parole of prisoners, in some instances, may be violative  
20 of this precept.” Garner v. Jones, 529 U.S. 244, 250 (2000).

21 On November 4, 2008, California voters passed Proposition 9, the “Victims’ Bill of  
22 Rights Act of 2008: Marsy’s Law,” which, *inter alia*, altered the frequency of parole hearings for  
23 prisoners not found suitable for parole. Prior to the passage of Proposition 9, in the event a  
24 prisoner was determined unsuitable for parole, a subsequent parole hearing would be held  
25 annually thereafter. Cal Penal Code § 3041.5(b)(2) (2008). If the parole board determined it was  
26 not reasonable to expect parole would be granted within the next year, it could defer rehearing  
27 for two years. Id. If the prisoner was convicted of murder and it was not reasonable to expect  
28 he/she would be granted parole within the year, the board could select a rehearing term of up to

1 five years. Id. Proposition 9 changed the frequency of subsequent parole hearings as follows:

2 The board shall schedule the next hearing, after considering the views and  
3 interests of the victim, as follows:

4 (A) Fifteen years after any hearing at which parole is denied, unless the  
5 board finds by clear and convincing evidence that the criteria relevant to  
6 the setting of parole release dates enumerated in subdivision (a) of Section  
7 3041 are such that consideration of the public and victim’s safety does not  
8 require a more lengthy period of incarceration for the prisoner than 10  
9 additional years.

10 (B) Ten years after any hearing at which parole is denied, unless the board  
11 finds by clear and convincing evidence that . . . consideration of the public  
12 and victim’s safety does not require a more lengthy period of incarceration  
13 for the prisoner than seven additional years.

14 (C) Three years, five years, or seven years after any hearing at which  
15 parole is denied, because . . . consideration of the public and victim’s  
16 safety requires a more lengthy period of incarceration for the prisoner, but  
17 does not require a more lengthy period of incarceration for the prisoner  
18 than seven additional years.

19 Cal. Penal Code § 3041.5(b)(3) (November 4, 2008).

20 Petitioner claims an ex post facto violation occurred when Proposition 9 was applied to  
21 him retroactively. Prior to passage of Proposition 9, Petitioner was eligible for annual parole  
22 review hearings. Petitioner asserts that with the passage of Proposition 9, the minimum time he  
23 must serve before a subsequent parole hearing is now three years. In this case, the Court does  
24 not find an ex post facto violation.

25 In Morales, a California statute changed the frequency of reconsideration hearings for  
26 parole from every year to up to three years for prisoners convicted of more than one murder. 514  
27 U.S. at 503. The Supreme Court determined the statute did not violate ex post facto because the  
28 retroactive application of the change in California law did not create “a sufficient risk of  
increasing the measure of punishment attached to the covered crimes.” Garner v. Jones, 529  
U.S. 244, 250 (2000), *quoting*, Morales, 514 U.S. at 509. The Supreme Court noted that the law  
“did not modify the statutory punishment for any particular offenses,” it did not “alter the  
standards for determining either the initial date of parole eligibility or an inmate’s suitability for  
parole,” and it “did not change the basic structure of California’s parole law.” Garner, 529 U.S.  
at 250, *citing*, Morales, 514 U.S. at 507. Likewise, in this case Proposition 9 did not modify the

1 punishment for Petitioner’s offense of attempted murder, it did not alter his initial parole  
2 eligibility date, and it did not change the basic structure of California’s parole law. The board  
3 must consider the same factors in determining parole suitability as before. See Cal. Penal Code  
4 3041(b); Cal. Code Regs., tit. 15, § 2402(b).

5         Nevertheless as noted above, in Garner the Supreme Court found that “[r]etroactive  
6 changes in laws governing parole of prisoners, in some instances, may be violative of this  
7 precept.” 529 U.S. at 250. In Garner, the Supreme Court determined that an amendment to  
8 Georgia’s parole law did not violate ex post facto even where the frequency of reconsideration  
9 hearings was changed from every three years to every eight years. Id. at 256. The Court held  
10 that it could not conclude that the change in Georgia law lengthened the prisoner’s time of actual  
11 imprisonment because Georgia law vested broad discretion with the parole board to set a  
12 prisoner’s date of rehearing. Id. at 254-56. In addition, the Court found it significant that the  
13 parole board’s own policies permitted “expedited parole reviews in the event of a change in [a  
14 prisoner’s] circumstance or where the Board receives new information that would warrant a  
15 sooner review.” Id. at 254 [Citation.].

16         Here, the California parole board is still vested with broad discretion in selecting a date  
17 of rehearing from three years to 15 years. While it is true that Petitioner is no longer eligible for  
18 annual parole review hearings as determined by the Board, and a date must be set at the  
19 minimum of three years, the Board retains the discretion, as did the Georgia parole board in  
20 Garner, to advance a hearing at any time should there be a change in circumstances. Pursuant to  
21 Cal. Penal Code § 3041.5(b)(4), the Board

22                 may in its discretion, after considering the views and interests of the  
23 victim, advance a hearing set pursuant to paragraph (3) to an earlier date,  
24 when a change in circumstances or new information establishes a  
25 reasonable likelihood that consideration of the public and victim’s safety  
does not require the additional period of incarceration of the prisoner  
provided in paragraph (3).

26 Based on the Supreme Court’s holding in Garner, this Court does not find, and Petitioner has not  
27 demonstrated, that Proposition 9 creates more than just a “speculative and attenuated possibility  
28 of producing the prohibited effect of increasing the measure of punishment for covered crimes.”

1 Garner, 529 U.S. at 251, *quoting*, Morales, 514 U.S. at 509. For the above reasons, Petitioner's  
2 challenge to Proposition 9 must fail.

3 With respect to Petitioner's request for an evidentiary hearing, the Court finds such a  
4 hearing unnecessary. As discussed above, the existing record is more than sufficient to resolve  
5 Petitioner's claims. Baja v. Ducharme, 187 F.3d 1075, 1078 (9<sup>th</sup> Cir.1999); Totten v. Merkle, 137  
6 F.3d 1172, 1176 (9th Cir.1998); Villafuerte v. Stewart, 111 F.3d 616, 633 (9th Cir.1997) (A  
7 petitioner's request to have a federal court hear the same evidence heard by the state court in the  
8 state habeas proceeding is not a valid reason for an evidentiary hearing.); Campbell v. Wood, 18  
9 F.3d 662, 679 (9th Cir.1994) (An evidentiary hearing is not required on issues that can be  
10 resolved by reference to the state court record.).

11 RECOMMENDATION

12 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 13 1. The instant petition for writ of habeas corpus be DENIED; and  
14 2. The Clerk of Court be directed to enter judgment in favor of Respondent.

15 This Findings and Recommendation is submitted to the assigned United States District  
16 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the  
17 Local Rules of Practice for the United States District Court, Eastern District of California.

18 Within thirty (30) days after being served with a copy, any party may file written objections with  
19 the court and serve a copy on all parties. Such a document should be captioned "Objections to  
20 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served  
21 and filed within fourteen (14) days after service of the objections. The Court will then review  
22 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that  
23 failure to file objections within the specified time may waive the right to appeal the District  
24 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 IT IS SO ORDERED.

26 **Dated: October 26, 2010**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE