IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LEONARD PAUL RUBIO,

Petitioner, No. CIV S-05-0638 LKK DAD P

vs.

JEANNE S. WOODFORD,

Respondent. FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner alleges that the decision of the California Board of Parole Hearings (hereinafter "Board") to deny him parole at his second parole consideration hearing on February 26, 2002, violated his rights to due process and equal protection, his right to effective assistance of counsel, and the Americans with Disabilities Act (ADA). Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner's application for habeas corpus relief be denied.

PROCEDURAL BACKGROUND

Petitioner is confined pursuant to a judgment of conviction entered in the Solano County Superior Court in 1988. (Pet. at 2.) A jury found petitioner guilty of one count of second

degree murder, and it was determined that he used a firearm in the commission of the crime. (Id.) On May 12, 1988, petitioner was sentenced to state prison for a term of fifteen years to life with the possibility of parole. (Id.) The Superior Court stayed the two-year sentencing enhancement for the use of a firearm. (Id.) Petitioner was also given credit for time served (603 days plus 302 days, per California Penal Code § 4019). (See Answer, Ex.1 at 2.)

Petitioner's initial parole consideration hearing, held on June 1, 1999, resulted in a denial of parole. (Pet., Attach. D.) A subsequent parole consideration hearing was held on February 26, 2002. (Pet., Attach. A - entitled "Hearing Transcripts.") On that date, a two-member panel of the Board found petitioner not suitable and denied parole for two years. (Id. at 49-53.) Petitioner challenges that latter decision in this habeas action.

Petitioner filed an administrative appeal from the February 26, 2002, Board decision on May 3, 2002. (Pet., Attach. D, entitled "Administrative Appeal (CDC 1040) and Decision.") The Board's Office of Policy and Appeals denied petitioner's requests for relief, except one. In this regard, it agreed with petitioner that "the panel had insufficient evidence to conclude that he needs therapy." (Id. at 5.) In this regard, the Office of Policy and Appeals stated that,

> [a] review of the prisoner's psychiatric/psychological reports reveal that the prisoner has no mental health disorder and there is no recommendations [sic] for any form of therapy. Therefore, the reference made regarding 'therapy' on page 52 of the Decision will be deleted.

(Id.)

On February 27, 2004, petitioner filed a habeas petition challenging the 2002 parole denial in the Solano County Superior Court. (Pet., at unnumbered 5.) By order filed March 4, 2004, the Solano County Superior Court denied the petition. (Pet., Attach. entitled "Previous Court Orders.") Petitioner next challenged the 2002 parole denial by submitting a habeas petition to the California Court of Appeal for the First Appellate District. (Id.) The state appellate court summarily denied that petition on March 24, 2004. (Id.) Petitioner then filed a

habeas petition with the California Supreme Court that was summarily denied by order filed March 16, 2005. (Id.)

Petitioner's federal habeas petition challenging the 2002 parole denial was received for filing by this court on March 31, 2005.

ANALYSIS

I. Standards of Review Applicable to Habeas Corpus Claims

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001).

The court looks to the last reasoned state court decision as the basis for the state court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d).[1] Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). When it is clear that a state court has not reached the merits of a petitioner's claim, or has denied the claim on procedural grounds, AEDPA's deferential standard does not apply and a federal habeas court must review the claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

II. Petitioner's Claims

Petitioner challenges the Board's 2002 finding of parole unsuitability on seven grounds. Stated in the order presented in the petition, he claims an entitlement to habeas relief because: (1) the Board's failure to fix his term violates California Penal Code § 3041 and the Due Process Clause of the U.S. Constitution; (2) the Board held petitioner's exercise of his right not to discuss his commitment offense against him; (3) the Board's decision was arbitrary and violated his right to due process because there was no evidence to support its finding that he was an unreasonable risk of danger to society; (4) the Board has failed to establish and apply equal standards of evaluation and that the denial of parole eligibility for two years violated his constitutional rights to due process and equal protection; (5) he was denied effective assistance of

[1] Such is the case here. The Solano County Superior Court's two-page opinion denying the petitioner's request for habeas relief contained no reasoning beyond cursory approval of the Board's decision. (See Pet., Attach. entitled "Previous Court Orders.") The California Court of Appeals for the First Appellate District and the California Supreme Court summarily denied the habeas petitions submitted by petitioner. (Id.)

counsel; (6) the Board violated his rights under the Americans with Disabilities Act; and (7) he has been denied "complete and meaningful review of his petition" in state court, in violation of the Fourteenth Amendment.

A. The Board's decision and the applicable law

The Board commenced its decision denying petitioner parole by stating that the panel had reviewed "all information received at the hearing and relied on the following circumstances in concluding that the prisoner is not yet suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison." (Pet., Attachment A, entitled "2002 Parole Hearing Transcript," p. 49.) The phrases "unreasonable risk of danger to society" and "a threat to public safety" are derived from § 3041(b) of the California Penal Code and § 2281(a) of Title 15 of the California Code of Regulations. Pursuant to the Penal Code provision,

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

Cal. Penal Code § 3041(b).

The state regulation governing parole suitability findings for life prisoners states as follows with regard to the statutory requirement of California Penal Code § 3041(b):

> Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

Cal. Code Regs. tit. 15, § 2281(a). The same regulation requires the Board to consider all relevant, reliable information available regarding,

> the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and

> other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release.

Cal. Code Regs. tit. 15, § 2281(b).

The regulation identifies circumstances that tend to show suitability or unsuitability for release. Id., § 2281(c) & (d). The following circumstances tend to show that a prisoner is suitable for release: the prisoner has no juvenile record of assaulting others or committing crimes with a potential of personal harm to victims; the prisoner has experienced reasonably stable relationships with others; the prisoner has performed acts that tend to indicate the presence of remorse or has given indications that he understands the nature and magnitude of his offense; the prisoner committed his crime as the result of significant stress in his life; the prisoner's criminal behavior resulted from having been victimized by battered women syndrome; the prisoner lacks a significant history of violent crime; the prisoner's present age reduces the probability of recidivism; the prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release; institutional activities indicate an enhanced ability to function within the law upon release. Id., § 2281(d).

The following circumstances tend to indicate unsuitability for release: the prisoner committed the offense in an especially heinous, atrocious, or cruel manner; the prisoner had a previous record of violence; the prisoner has an unstable social history; the prisoner's crime was a sadistic sexual offense; the prisoner had a lengthy history of severe mental problems related to the offense; the prisoner has engaged in serious misconduct in prison. Id., § 2281(c). Factors to consider in deciding whether the prisoner's offense was committed in an especially heinous, atrocious, or cruel manner include: multiple victims were attacked, injured, or killed in the same or separate incidents; the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; the victim was abused, defiled or mutilated during or after the

offense; the offense was carried out in a manner that demonstrated an exceptionally callous disregard for human suffering; the motive for the crime is inexplicable or very trivial in relation to the offense. Cal. Code Regs., tit. 15, § 2281(c)(1)(A) - (E).

Under current California law, as recently clarified by the State Supreme Court,

> the determination whether an inmate poses a current danger is not dependent upon whether his or her commitment offense is more or less egregious than other, similar crimes. (Dannenberg, supra, 34 Cal. 4th at pp 1083-84 [parallel citations omitted].) Nor is it dependent solely upon whether the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense. Rather, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [citations omitted].

In re Lawrence, 44 Cal. 4th 1181, 1221 (2008).

In addressing the factors it considered in reaching its 2002 decision that petitioner was unsuitable for parole, the Board in this case stated as follows:

> PRESIDING COMMISSIONER HEPBURN:
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> . . . Mr. Rubio, we did deny your parole for a two year period. Let me read the decision to you. The Panel reviewed all of the information received at the hearing and relied on the following circumstances in concluding that the prisoner is not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. Number one reason, of course, was the timing and gravity of the commitment offense itself, which was carried out in a very callous manner, and for reasons which are very trivial in relation to the offense. These conclusions were drawn from the Statement of Facts wherein the prisoner had an ongoing relationship with the victim in this case, Heather Dunn, and the fact that he abused her physically over a period of time. That's in the record. And was jealous. He thought that she was dating other people. He armed himself with a gun and went to the front of her school where he shot her and killed her. He had no previous record. He had been a student finishing up high school getting ready to go to college prior to his incarceration. He did have a problem with substance abuse and drinking, as he has previously indicated, consuming large amounts of alcohol with

his football buddies, and things of that nature. His institutional behavior, on the other hand, has been very good. He has – hasn't had a disciplinary since 1993. He has improved himself educationally, taking college courses. He's participated in self-help programs including theology classes, AA and Spirituality Class, among others. He's done well in his work assignments. He's upgraded himself vocationally. Psychological evaluation completed by Dr. Duprey on 4/27/99 is fairly supportive of release. CC1 completed his report. Mr. Rubio did indicate that he does disagree with the conclusions by CC1 Curzon, C-U-R-Z-O-N, in his report, but there is an interesting comment Mr. Curzon makes in his report. He writes that:

"Rubio has prepared himself educationally and vocationally and has been, basically, a model prisoner. However, there seems to be a degree of uncertainty of his emotional maturity should he have another relationship if he were released at this time. With this uncertainty comes a moderate degree of threat to the public if he were released at this time."

His parole plans appear to be in order. He's got significant family support, certainly has vocational skills, job offers, things of that nature, which will assist him when he is released on parole. In response to 3042 notices, we had a representative from the prosecuting agency, the District Attorney's Office in Solano, County, who was present at the hearing and voiced opposition to parole. As I indicated, this is a two year denial. In a separate decision, the Hearing Panel finds that the prisoner has been convicted of murder and it's not reasonable to expect that parole would be granted at a hearing during the next two years. Specific reasons for this finding are as follows. Timing and gravity of the commitment offense, which was carried out in a rather cruel manner for reasons which were trivial in relation to the gravity of the offense, which I have previously described. Also, he hasn't completed necessary programming, which is essential to his adjustment. And that would be in the form of any self-help programs that might assist him in dealing with the causative factors of the commitment offense itself and the underlying issues. So, the Panel's recommendation is going to be that he remain disciplinary free, to the extent that it's available, participate in self-help and therapy programs. And that completes the reading of the decision. Commissioner Thompson, do you have any comments you'd like to make?

DEPUTY COMMISSIONER THOMPSON:

No, thank you.

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> PRESIDING COMMISSIONER HEPBURN:
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> Mr. Rubio, the gravity of the crime (inaudible). I'm also concerned with your version of the offense here. I would like to have talked to you. It's certainly your right to not talk about the crime, but the version I'm left with is what it says in the file here, and it doesn't – the physical evidence and the circumstances don't make sense to me with your – with your version of what occurred, and I'd like – would have liked to explore that with you. And you might consider doing that sometime because I'm sure future Panels are going to have the same questions that I have. And that causes me concern for your level of remorse, because if you're not accepting responsibility for what you actually did, then remorse is meaningless. If you have remorse for what you actually did, then that's true remorse. I can't determine that from what we have on file here. That's my comment. And that will complete this hearing at 12:32 p.m. And good luck to you, and here's a copy of the decision.

(Pet., Attachment A, at 49-53)

B. Due Process

Petitioner's principal claim is that his right to due process was violated by the Board's denial of parole. The petitioner presents this due process claim in several different grounds for relief in the petition. Thus, he alleges that: (1) § 3041(b) of the California Penal Code creates a liberty interest and a due process right to a presumptive parole release date and the Board's failure to fix his term violates that right (Ground 1); (2) the Board held the petitioner's exercise of his right not to discuss his commitment offense against him (Ground 2); (3) the denial of parole was arbitrary because there was no evidence to support it (Ground 3); and (4) "petitioner has been denied his right to a complete and meaningful review of his petition" in state court (Ground 7). (See Pet. at 1-23.) The court addresses the merits of each of these versions of petitioner's core due process claim.[2]

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[2] Petitioner also presents several state law claims. For instance, he alleges that the Board must ensure that prison terms be "uniform." (Pet., Ground 1 at 3.) Petitioner also claims that California Penal Code § 3041 requires the Board to grant him a parole date because of its direction that one year prior to an inmate's minimum eligible parole date, a Board panel shall meet with the inmate and "shall normally" set a parole release date. He claims that under this provision "the Board was required to fix his term at his initial hearing and that their continuous

The Due Process Clause of the Fourteenth Amendment prohibits state action that deprives a person of life, liberty, or property without due process of law. One alleging a due process violation must first demonstrate that he was deprived of a liberty or property interest protected by the Due Process Clause and then show that the procedures attendant upon the deprivation were not constitutionally sufficient. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459-60 (1989); McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir. 2002).

A protected liberty interest may arise from either the Due Process Clause of the United States Constitution or state laws. Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States Constitution does not, of its own force, create a protected liberty interest in a parole date, even one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981). However, "a state's statutory scheme, if it uses mandatory language, 'creates a presumption that parole release will be granted' when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest." McQuillion, 306 F.3d at 901 (quoting Greenholtz v. Inmates of Nebraska Penal, 442 U.S. 1, 12 (1979)). California's parole scheme gives rise to a cognizable liberty interest in release on parole, even for prisoners who have not already been granted a parole date. Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003); McQuillion, 306 F.3d at 903; see also In re Lawrence, 44 Cal. 4th at 1204, 1210, 1221. Accordingly, this court must examine whether the

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failure to set his term has, by de facto, set his term at maximum life." (Id. at p.1) In addition, petitioner argues that the Board's failure to find him suitable for parole violated various provisions of state law. Many of petitioner's arguments based on state law have been rejected by the California Supreme Court which has held, for example, that the Board is not required to refer to sentencing matrices or to compare other crimes of the same type in deciding whether a prisoner is suitable for parole. In re Dannenberg, 34 Cal. 4th 1061, 1084, 1098 (2005); see also In re Lawrence, 44 Cal. 4th 1181, 1217, 1221 (2008). More importantly for purposes of this federal habeas corpus action, petitioner has cited no federal authority for the proposition that the Due Process Clause requires a state parole board to either set a parole date where it believes a prisoner poses an unreasonable risk of danger to society or to engage in a comparative analysis before denying parole suitability. In short, petitioner's arguments that the Board or the state courts erred in applying state law in determining his release date are not cognizable in this federal habeas corpus proceeding. Estelle, 502 U.S. at 67-68.

deprivation of petitioner's liberty interest in this case lacked adequate procedural protections and therefore violated due process.

Because "parole-related decisions are not part of the criminal prosecution, the full panoply of rights due a defendant in such a proceeding is not constitutionally mandated." Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987) (internal quotations and citation omitted). Where, as here, parole statutes give rise to a protected liberty interest, due process is satisfied in the context of a parole hearing where a prisoner is afforded notice of the hearing, an opportunity to be heard and, if parole is denied, a statement of the reasons for the denial. Id. at 1390 (quoting Greenholtz, 442 U.S. at 16). See also Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (describing the procedural process due in cases involving parole issues). Violation of state mandated procedures will constitute a due process violation only if the violation causes a fundamentally unfair result. Estelle, 502 U.S. at 65.

In California, the setting of a parole date for a state prisoner is conditioned on a finding of suitability. Cal. Penal Code § 3041; Cal. Code Regs. tit. 15, §§ 2401 & 2402. The requirements of due process in the parole suitability setting are satisfied "if some evidence supports the decision." McQuillion, 306 F.3d at 904 (citing Superintendent v. Hill, 472 U.S. 445, 456 (1985)). See also Powell v. Gomez, 33 F.3d 39, 40 (9th Cir. 1994) (citing Perveler v. Estelle, 974 F.2d 1132, 1134 (9th Cir. 1992)). For purposes of AEDPA, Hill's "some evidence" standard is "clearly established" federal law. Sass, 461 F.3d at 1129 (citing Hill, 472 U.S. at 456). "The 'some evidence' standard is minimally stringent," and a decision will be upheld if there is any evidence in the record that could support the conclusion reached by the factfinder. Powell, 33 F.3d at 40 (citing Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987)); Toussaint v. McCarthy, 801 F.2d 1080, 1105 (9th Cir. 1986). However, "the evidence underlying the board's decision must have some indicia of reliability." Jancsek, 833 F.2d at 1390. See also Perveler, 974 F.2d at 1134. Determining whether the "some evidence" standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses,

or the weighing of evidence. Toussaint, 801 F.2d at 1105. The question is whether there is any reliable evidence in the record that could support the conclusion reached. Id.

When a federal court assesses whether a state parole board's suitability determination was supported by "some evidence" in a habeas case, the analysis "is framed by the statutes and regulations governing parole suitability determinations in the relevant state." Irons v. Carey, 505 F.3d 846, 851 (9th Cir. 2007). Accordingly, this court must

> look to California law to determine the findings that are necessary to deem a prisoner unsuitable for parole, and then must review the record in order to determine whether the state court decision holding that these findings were supported by "some evidence" in [petitioner's] case constituted an unreasonable application of the "some evidence" principle articulated in Hill.

Id. In California, the overriding concern in determining parole suitability is public safety. In re Dannenberg, 34 Cal. 4th at 1086. This "core determination of 'public safety' . . . involves an assessment of an inmate's current dangerousness." In re Lawrence, 44 Cal. 4th at 1205 (emphasis in original). Accordingly, in California

> when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.

In re Lawrence, 44 Cal. 4th at 1212 (citing In re Rosenkrantz, 29 Cal. 4th 616, 658 (2002); In re Dannenberg, 34 Cal. 4th at 1071; and In re Lee, 143 Cal. App. 4th 1400, 1408 (2006)).[3]

In recent years the Ninth Circuit Court of Appeals has been called upon to address the issues raised by petitions such as that now pending before this court in three significant cases, each of which will be discussed below. First, in Biggs, the Ninth Circuit Court of Appeals

[3] Under California law, the Board is not to engage in a comparative analysis of the period of confinement being served by other inmates for similar crimes. In re Lawrence, 44 Cal. 4th at 1217; In re Dannenberg, 34 Cal. 4th at 1070-71. Rather, the suitability determination is to be individualized and is to focus upon the public safety risk currently posed by the particular offender. (Id.)

recognized that a continued reliance on an unchanging factor such as the circumstances of the offense could at some point result in a due process violation.[4] While the court in Biggs rejected several of the reasons given by the Board for finding the petitioner in that case unsuitable for parole, it upheld three: (1) petitioner's commitment offense involved the murder of a witness; (2) the murder was carried out in a manner exhibiting a callous disregard for the life and suffering of another; and (3) petitioner could benefit from therapy. Biggs, 334 F.3d at 913. However, the court in Biggs cautioned that continued reliance solely upon the gravity of the offense of conviction and petitioner's conduct prior to committing that offense in denying parole could, at some point, violate due process. In this regard, the court observed:

> As in the present instance, the parole board's sole supportable reliance on the gravity of the offense and conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. Over time, however, should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of Biggs' offense and prior conduct would raise serious questions involving his liberty interest in parole.

Id. at 916. The court in Biggs also stated that "[a] continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." Id. at 917.

In Sass, the Board found the petitioner unsuitable for parole at his third suitability hearing based on the gravity of his offenses of conviction in combination with his prior offenses. 461 F.3d at 1126. Citing Biggs, the petitioner in Sass contended that reliance on these unchanging factors violated due process. The court disagreed, concluding that these factors

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[4] That holding has been acknowledged as representing the law of the circuit. Irons v. Carey, 505 F.3d 846, 853 (9th Cir. 2007); Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1129 (9th Cir. 2006).

amounted to "some evidence" to support the Board's determination. Id. at 1129. The court provided the following explanation for its holding:

> While upholding an unsuitability determination based on these same factors, we previously acknowledged that "continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and *could* result in a due process violation." Biggs, 334 F.3d at 917 (emphasis added). Under AEDPA it is not our function to speculate about how future parole hearings could proceed. Cf. id. The evidence of Sass' prior offenses and the gravity of his convicted offenses constitute some evidence to support the Board's decision. Consequently, the state court decisions upholding the denials were neither contrary to, nor did they involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

Id.

In Irons the Ninth Circuit sought to harmonize the holdings in Biggs and Sass, stating as follows:

> Because the murder Sass committed was less callous and cruel than the one committed by Irons, and because Sass was likewise denied parole in spite of exemplary conduct in prison and evidence of rehabilitation, our decision in Sass precludes us from accepting Iron's due process argument or otherwise affirming the district court's grant of relief.
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> We note that in all the cases in which we have held that a parole board's decision to deem a prisoner unsuitable for parole solely on the basis of his commitment offense comports with due process, the decision was made before the inmate had served the minimum number of years required by his sentence. Specifically, in Biggs, Sass, and here, the petitioners had not served the minimum number of years to which they had been sentenced at the time of the challenged parole denial by the Board. Biggs, 334 F.3d at 912; Sass, 461 F.3d at 1125. All we held in those cases and all we hold today, therefore, is that, given the particular circumstances of the offenses in these cases, due process was not violated when these prisoners were deemed unsuitable for parole prior to the expiration of their minimum terms.
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> Furthermore, we note that in Sass and in the case before us there was substantial evidence in the record demonstrating rehabilitation. In both cases, the California Board of Prison Terms appeared to give little or no weight to this evidence in reaching its conclusion

> that Sass and Irons presently constituted a danger to society and thus were unsuitable for parole. We hope that the Board will come to recognize that in some cases, indefinite detention based solely on an inmate's commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process, given the liberty interest in parole that flows from the relevant California statutes. Biggs, 334 F.3d at 917.

Irons, 505 F.3d at 853-54.[5]

After taking into consideration the Ninth Circuit decisions in Biggs, Sass, and Irons, and for the reasons set forth below, this court concludes that petitioner is not entitled to federal habeas relief with respect to his due process challenge to the Board's February 26, 2002, decision denying him parole.

1. Whether "some evidence" supports the Board's decision

When the Board read its decision to deny parole into the record, it began with its "[n]umber one reason... the timing and gravity of the conviction offense itself, which was carried out in a very callous manner, and for reasons which were trivial in relation to the gravity of the offense." (Pet., Attach. A at 49.) The Board summarized the facts of the offense, then listed positive and negative factors of the petitioner's pre-conviction life. (Id. at 49.) It noted that petitioner had no previous criminal record and was preparing to go to college at the time of the crime, but he also had physically abused the victim prior to the offense and had "a problem with substance abuse and drinking."[6] (Id. at 49-50.) The Board noted numerous post-conviction factors that leaned in the petitioner's favor, including his vocational, educational and disciplinary record. (Id. at 50.) The Board summarized these favorable factors by stating that "[h]is institutional behavior... has been very good." (Id.) It noted his participation in self-help programs

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[5] The California Supreme Court has also acknowledged that the aggravated nature of the commitment offense, over time, may fail to provide some evidence that the inmate remains a current threat to public safety. In re Lawrence, 44 Cal. 4th at 1218-20 & n.20.

[6] While the record does reflect that petitioner admitted to and addressed a pre-conviction drinking problem, nowhere is there any evidence of his abusing any other chemical substance before or after the crime of conviction.

"including theology classes, AA and Spirituality Class, among others." (Id.) It noted that he has "significant" family and vocational support outside of prison "which will assist him when he is released on parole." (Id. at 51.) It also acknowledged a favorable psychological evaluation from 1999 and report prepared by a correctional counselor (CC-I) that praised the petitioner as a "model prisoner." (Id.. at 50.) However, the Board focused on the correctional counselor's statement in his report that "there seems to be a degree of uncertainty of [the petitioner's] emotional maturity should he have another relationship if he were released at this time." (Id.. at 50-51.)[7] This concern expressed by petitioner's correctional counselor was the primary negative post-conviction evidence that appeared relevant to the Board.

The court begins with the Board's "[n]umber one reason" for denying parole, i.e., "the timing and gravity of the commitment offense itself, which was carried out in a very callous manner, and for reasons which are very trivial in relation to the offense." (Id. at 49.) In his due process claim, petitioner argues that this was an arbitrary reason derived from a mischaracterization of the commitment offense (see Pet., Ground 1 at 3; Ground 3 at 10); that the record shows that he was not at the time of the hearing a danger to society (see Pet., Ground 3 at 12); and that the Board has improperly continued to rely on the nature of the offense and pre-conviction factors to justify its refusal to grant parole, in the face of "an impeccable prison record." (Id., Ground 7 at 22-23). In analyzing such claims, the question is whether there is "some evidence" to sustain the Board's decision. In addition, "the evidence underlying the board's decision must have some indicia of reliability." Jancsek, 833 F.2d at 1390.

At the time of the parole hearing in question, petitioner had served more than fifteen-years in prison, the minimum term of the sentence imposed for the second-degree murder

[7] The Board also noted the fact that both the Solano County District Attorney and the Benicia Police Department opposed a finding of parole suitability. However, under Hill, district attorneys' and law enforcement officers' opinions, without more, cannot be considered "some evidence" supporting the Board's decision. Rosenkrantz v. Marshall, 444 F. Supp. 2d 1063, 1080 n.14 (C.D. Cal. 2006).

in his case.[8] As noted above, this is of significance because the Ninth Circuit has suggested that in cases where the prisoner has not served the minimum term for a conviction of murder at the time of a parole hearing, the "particular circumstances" of the offense, which naturally and statutorily informs the sentence given the prisoner, may by itself constitute "some evidence" sufficient to deny parole without violating a petitioner's right to due process. See Irons, 505 F.3d at 853-54. That is not to say that after the minimum term has been served that the aggravating circumstances surrounding a conviction offense are irrelevant or that they cannot be considered in denying parole. As the California Supreme Court recently explained,

> the statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.
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> * * *
>
> [T]he aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-conviction history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.

In re Lawrence, 44 Cal. 4th at 1211-14 (emphasis in original).

Nonetheless, because at the time of the February 26, 2002 hearing petitioner had served more time in prison than the fifteen-year minimum term to which he was sentenced, the gravity of his commitment offense alone cannot automatically suffice as "some evidence"

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[8] The court's calculation that petitioner had served in excess of the minimum term of fifteen years includes the credit he received for actual time served prior to his sentencing on May 13, 1988 but does not include any so-called "good time" credits. The credit for time actually served by petitioner is reflected in the abstract of judgment attached as Exhibit 1 to respondent's answer.

justifying the denial of parole. On the other hand, if there is in the petitioner's post-conviction record some evidence of current dangerousness to complement the Board's finding that the petitioner's reason for second-degree murder (jealousy)[9] was trivial in relation to the gravity of the offense, then the due process concerns that would be raised by reliance solely on the nature of the commitment offense or on any other pre-conviction factors would be adequately addressed. Id.

a. Post-conviction evidence

It is undisputed that there is strong evidence of rehabilitation in this case. The Board appears to have concluded that, despite that record of self-improvement, petitioner's psychological and mental development since his incarceration warranted denying parole. Thus, the Board stated in conclusion that,

> [petitioner] hasn't completed necessary programming, which is essential to his adjustment. And that would be in the form of any self-help programs that might assist him in dealing with the causative factors of the commitment offense itself and the underlying issues.

(Pet., Attach. A at 52.)[10] The Board had two pieces of evidence before it from which to draw this conclusion. First, the Board reviewed the opinion of correctional counselor, Mr. Curzon,

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[9] Contrary to the position taken by petitioner, the Board's finding that the reason for the crime was trivial was not an unreasonable one. The court does note that the Board may have de-emphasized other factors that also may have contributed to the petitioner's decision making on the day of the crime in question. Those factors included having an abusive father at home and living in a difficult domestic environment in the days preceding petitioner's commission of the murder. (See Pet., Attach. A at 15-19.) As noted above, one of the factors favoring a finding of suitability is that the prisoner committed his crime as the result of significant stress in his life. Cal. Code Regs. tit. 15, § 2281(d). It is undisputed that significant stress at least partially contributed to petitioner's lack of judgment when he committed the murder. However, it is also undisputed that petitioner's suspicion that the victim was interested in other boys provided his immediate motivation for the crime. As the Board found, that was a trivial reason in relation to the gravity of the offense.

[10] The Board reached this conclusion in denying parole for two years. Petitioner challenges that decision in Ground 4 of his petition, addressed below. For purposes of reviewing the decision to deny parole, the recommendation regarding continued self-help is closely associated with the evidence of the petitioner's emotional maturation in prison.

regarding petitioner's vocational and educational preparation and his success with self-help programming. (See Pet., Attach. A at 23.) Second, the Board also reviewed petitioner's most recent psychological evaluation prepared in April 1999, nearly three years before the hearing. (See id. at 24-25.)[11]

> As noted above, the correctional counselor's report stated as follows:
>
> Rubio has prepared himself educationally and vocationally and has been, basically, a model prisoner. However, there seems to be a degree of uncertainty of his emotional maturity should he have another relationship if he were released at this time. With this uncertainty comes a moderate degree of threat to the public if he were released at this time.

(Id. at 23-24, 50-51.)[12] In announcing its decision the Board relied in part on the correctional counselor's assessment of petitioner's emotional maturity. (Id. at 50.) The Board also described the 1999 psychological evaluation as "fairly supportive of release." (Id. at 50.)[13]

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[11] Neither of these documents has been included in the attachments and exhibits presented by the parties to this court. Accordingly, the court's review of these reports in determining whether there was "some evidence" supporting the Board's decision to deny parole is limited to the excerpts from the reports that were read into the record at petitioner's parole suitability hearing.

[12] At the outset of the hearing, petitioner's attorney informed the Board that petitioner had received the correctional counselor's report only five days earlier and that, according to petitioner, it "contains numerous errors and is factually incorrect and does not incorporate the information that is available to any interviewer within the C-File." (Id. at 3.) Petitioner asked for a 90-day continuance of the hearing so that he could formulate a written response to the report. (Id. at 8.) That request was denied. (Id.) Later in the hearing, the Board gave the petitioner an opportunity to "point out to us items in this report that you disagree with." (Id. at 8, 24.) However, petitioner restricted his response to expressing his disagreement without further explanation. (Id. at 24.)

[13] Earlier, the Board had read the following excerpt of petitioner's 1999 psychological evaluation into the record:

> Inmate Rubio does not suffer from a major mental disorder. Violence potential is judged to be below average for this population of inmates. Prognosis is favorable. However, the threat that the inmate poses on society if paroled would need to be made on other grounds than psychiatric or psychological. It is recommended that the inmate continue his vocational training and self-help and otherwise upgrading (inaudible) academically, which

There is some incongruity between the opinions expressed in these two reports that deserves discussion. First, while both evaluations are professional opinions, one is an expert opinion while the other is lay. The psychologist's expert opinion supported release, as the Board itself recognized. However, that psychological evaluation also concluded that the assessment of "the threat that the inmate poses on society if paroled would need to be made on other grounds than psychiatric or psychological." (Id. at 25.) The implication of the psychologist's statement is that while some other grounds may have existed for concluding that petitioner was not suitable for release in 1999, there were no psychological or psychiatric grounds upon which to rely in reaching that conclusion.

Pointing to the 1999 psychological report and his model behavior during the years following it, petitioner challenges the correctional counselor's opinion regarding his emotional maturity. Specifically, he argues that "[s]taff counselors are not authorized to make such an assessment." (Pet., Ground 5 at 17.)[14] Petitioner cites to the CDCR's Operations Manual, which states that the clinical psychological evaluations required for every parole hearing must be prepared by a qualified psychologist or a qualified CC-II counselor. See CDCR Operations Manual §§ 62090.14 and 62090.14.1. Petitioner argues that Mr. Curzon was only a level CC-I counselor at the time of the challenged parole hearing, making him unqualified as a matter of

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> are all thought to be helpful in moving toward a proper re-socialization and internalization of emotional, social values.

(See Pet., Attach. A at 24-25.)

[14] Petitioner puts his argument that the correctional counselor lacked the qualifications to assess his state of mind in the context of a claim that he received ineffective assistance of counsel. (See Pet., Ground 5.) He argues that his lawyer performed deficiently when he did not object to the inclusion of the counselor's opinion in the record. (See Pet., Ground 5 at 17.) The Sixth Amendment's guarantee of effective assistance of counsel does not extend to parole hearings and, therefore, petitioner is not entitled to relief on his ineffective assistance of counsel claim. Dorado v. Kerr, 454 F.2d 892, 897 (9th Cir. 1972). To the extent that some points made by petitioner in support of that claim inform the question of whether "some evidence" existed to support the Board's decision, the court addresses those points in the context of the petitioner's core due process claim.

prison policy to render an opinion on petitioner's psychological state. According to petitioner, this lack of qualification calls into question the reliability of the counselor's "emotional maturity" comment as "some evidence" that the petitioner still posed a threat sufficient to deny him parole in 2002. Petitioner contends that if there is no "indicia of reliability" in the counselor's statement, then the only post-conviction evidence that the Board relied upon cannot stand as "some evidence" supporting its decision.

Because Mr. Curzon was only a level CC-I counselor at the time of the hearing, the court agrees that he was not qualified to submit the required psychological evaluation to the Board. However, that is not what Mr. Curzon did here. Moreover, the Board's consideration of his opinion as petitioner's correctional counselor did not result in a due process violation. Petitioner's argument that Curzon's expression of concern regarding petitioner's "emotional maturity," "overrules" the psychologist's 1999 evaluation is unpersuasive.[15] A close look at the psychologist's opinion reflects a distinction between petitioner's psychological state and his "emotional maturity" which helps to reconcile the apparent contradiction between these two pieces of evidence. After stating that the petitioner "does not suffer from a major mental disorder" and recommending that an assessment of the threat posed by his release be made on other grounds, the psychologist also recommended that petitioner continue his vocational, educational and self-help programming, "which are all thought to be helpful in moving toward a proper re-socialization and internalization of emotional, social values." (Pet., Attach. A at 24-25) (emphasis added). This observation by the psychologist suggests that while no major psychological deficiencies were present, the petitioner was still, in the psychologist's opinion, maturing emotionally in 1999 but had not reached such a level of maturity that would justify ending his rehabilitation in prison. In that context, the correctional counselor's concern

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[15] Nor is a petition for writ of habeas corpus the proper vehicle to request, as the petitioner does in his application, an order from the court requiring the Board "to stop accepting Counselor evaluations as expert witness testimony that overrules Psychiatric Evaluation, expert testimony." (Pet., Ground 5 at 17.)

regarding petitioner's emotional maturity in 2002 directly addresses the non-psychological factors (arguably including "emotional maturity") suggested in the psychologist's 1999 assessment. In this way the counselor's observation can be seen to follow the psychologist's evaluation rather than to overrule it. The psychologist's evaluation supports, at least tacitly, the counselor's opinion regarding some risk posed to the public by petitioner's release on parole because of the "uncertainty of his emotional maturity should he have another relationship if he were released to parole."

The counselor's expressed concerns also hearken back to petitioner's commitment offense and helps explain the Board's recommendation that the petitioner continue "dealing with the causative factors of the commitment offense itself and the underlying issues." (Id. at 52.) The commitment offense resulted from an eighteen-year-old's tragically immature reaction against the victim when he suspected her of being interested in other boys. The counselor's concern thus informed and supported the Board's "number one reason" for its decision, which was the gravity of the crime and the triviality of the petitioner's reason for committing it. The correctional counselor's report aided the Board in the inquiry as to "whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense." In re Lawrence, 44 Cal. 4th at 1221.[16]

Petitioner also presents a separate due process argument, alleging the denial of "a complete and meaningful review of his petition." (Pet., Ground 7 at 19.) This argument focuses on the Solano County Superior Court's statement that "the nature of the offense, alone, can constitute a sufficient basis for denying parole." (Pet., Attach. entitled "Previous Court Orders,"

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[16] Obviously a first-level correctional counselor's opinion regarding a petitioner's emotional state is not as reliable, or desirable, as an updated evaluation by a qualified psychologist – something from which the Board, the petitioner and this court would have profited. But in this case it is some post-conviction evidence that the petitioner still posed a risk to the public if released in February of 2002, when viewed as a part of the whole record and in light of the offense of conviction.

Solano Superior Court Order at 2.)[17] Petitioner contends that the record "does not contain any evidence that could support a finding that the nature of the Petitioner's offense alone renders hi[m] unsuitable for parole." (Pet., Ground 7 at 20.) This court agrees that because petitioner had served in excess of his minimum term of imprisonment, reliance solely on the nature of the commitment offense to deny him parole would raise serious questions involving his liberty interest in parole. See Irons, 505 F.3d at 854; Biggs, 334 F.3d at 917; see also In re Lawrence, 44 Cal. 4th at 1218-20 & n.20.[18] However, because there was "some evidence" other than the nature of the crime to justify a conclusion that the petitioner was unsuitable for parole at his second subsequent hearing, the argument advanced by petitioner here does not state a ground on which habeas relief can be granted at this time.[19]

The Board's 2002 decision to deny petitioner parole was supported by some evidence with an indicia of reliability. Accordingly, petitioner is not entitled to relief on his claim that the Board's finding of unsuitability his right to due process.

2. Whether the Board held petitioner's silence against him

The petitioner exercised his right not to discuss the facts of the conviction offense at the 2002 hearing. He argues that the Board held his silence against him "on the pretext of

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[17] This conclusion reached by the Solano County Superior Court is inconsistent with more recent pronouncements of the Ninth Circuit and even those of the California Supreme Court.

[18] Even more recently a panel of the Ninth Circuit in Hayward v. Marshall, 512 F.3d 536, 546-47 (9th Cir. 2008), determined that under the "unusual circumstances" of that case the unchanging factor of the gravity of the petitioner's commitment offense did not constitute "some evidence" supporting the governor's decision to reverse a parole grant on the basis that the petitioner would pose a continuing danger to society. However, on May 16, 2008, the Ninth Circuit Court of Appeals decided to rehear that case en banc. Hayward v. Marshall, 527 F.3d 797 (9th Cir. 2008). Therefore, the panel decision in Hayward is no longer citable precedent.

[19] Petitioner also argues that relying on the nature of the crime of conviction as a basis for denying parole "is double jeopardy." (Pet., Attach. A at 21.) Since parole is part of the original sentence, adverse decisions concerning parole do not constitute an additional punishment for the original crime. See United States v. Brown, 59 F.3d 102, 104-05 (9th Cir. 1995). Therefore, petitioner is not entitled to relief with respect to any claim alleging a violation of his right to be free from twice being placed in jeopardy for the same offense conduct.

determining 'true remorse.'" (Pet., Ground 2 at 8.) Petitioner claims the Board's action implicates California Penal Code § 5011(b), which states that the Board "shall not require, when setting parole dates, an admission of guilt for which any inmate was committed."

The petitioner first argued this point in his administrative appeal from the denial of parole. The Board of Prison Terms' Office of Policy and Appeals rejected the argument, observing that "there is nothing in the panel's decision that references the prisoner's reluctance to speak to the life offense." (Pet., Attach. D at 3.) However, this observation ignores the Board's clear reference to the petitioner's silence at the conclusion of the parole hearing:

> PRESIDING COMMISSIONER HEPBURN:
>
> Mr. Rubio, the gravity of the crime (inaudible). I'm also concerned with your version of the offense here. I would like to have talked to you. It's certainly your right to not talk about the crime, but the version I'm left with is what it says in the file here, and it doesn't – the physical evidence and the circumstances don't make sense to me with your – with your version of what occurred, and I'd like – would have liked to explore that with you. And you might consider doing that sometime because I'm sure future Panels are going to have the same questions that I have. And that causes me concern for your level of remorse, because if you're not accepting responsibility for what you actually did, then remorse is meaningless. If you have remorse for you actually did, then that's true remorse. I can't determine that from what we have on file here. That's my comment.

(Pet., Attach. A at 52-53.) This statement by the presiding commissioner at petitioner's parole hearing is also contrary to evidence contained elsewhere in the record that petitioner had, in fact, expressed remorse for the crime.

Nonetheless, petitioner has provided this court with no authority in support of the proposition that the statutory mandate under state law comprises a federal right to due process on which habeas relief could be granted. Moreover, the California Supreme Court has found it unnecessary to "consider the technical validity" of a similar argument, brought as a state law claim, where an inmate claimed that the Board violated § 5011(b) by denying parole on the basis that he did not accept full responsibility for the crime. In re Dannenberg, 34 Cal. 4th at 1098-99

(observing that the Board's finding was merely "peripheral to its decision and did not affect the outcome"). The same is true here. Because there was, as discussed above, "some evidence" supporting the Board's decision to deny parole in 2002, the court cannot say that the presiding commissioner's comment regarding petitioner's silence was determinative of the Board's decision. Accordingly, this is not a ground on which federal habeas relief can be granted.

C. The two-year denial of parole

Petitioner claims that "[a] one-year denial is the maximum permitted under Penal Code § 3041.5(b)(2) and the Board violated Rubio's rights to due process and equal protection under the law, when it denied parole for two years." (Pet., Ground 4 at 14.) As stated above, violation of state mandated procedures will constitute a due process violation only if the violation causes a fundamentally unfair result. Estelle, 502 U.S. at 65. Here, petitioner's claim does not even allege a violation of a state mandated procedure and actually misstates the statutory provision at issue. At the time of the Board's decision, California Penal Code § 3041.5(b)(2)(A) stated that the Board could set a two-year denial "after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the bases for the finding." Here, the Board did give the following "specific reasons" for its decision to deny petitioner parole for two years: (1) the "timing and gravity of the conviction offense" and (2) the finding that petitioner "hasn't completed necessary programming, which is essential to his adjustment. And that would be in the form of any self-help programs that might assist him in dealing with the causative factors of the commitment offense itself and the underlying issues." (Pet., Attach. A at 51-52.) Because the Board followed the state statutory procedure, there can be no due process violation.

There is also no federal equal protection guarantee implicated by petitioner's claim. One alleging an equal protection violation in the parole context must demonstrate that he was treated differently from other similarly situated prisoners and that the Board lacked a rational basis for its decision. McGinnis v. Royster, 410 U.S. 263, 269-70 (1973); McQueary v. Blodgett,

924 F.2d 829, 835 (9th Cir. 1991). Petitioner has failed to show that any other inmate who was similarly situated to him was denied parole for only one year. He also has failed to show that the reasons stated by the Board did not provide a rational basis for the two-year denial. Accordingly, petitioner is not entitled to relief on his claim that his equal protection rights were violated by the Board's conclusion that he was not suitable for parole for two years.

D. The Americans with Disabilities Act

Next, petitioner claims that the Board violated the Americans with Disabilities Act (ADA) because "it relied in part on petitioner's admitted alcohol abuse history to deny him parole."[20] (Pet. at 18.) Claims brought pursuant to the ADA are cognizable in habeas corpus actions. Bogovich v. Sandoval, 189 F.3d 999, 1004 (9th Cir. 1999). On the other hand, "[t]he parole board... undeniably does have legitimate penological interests in considering [parole candidates'] substance abuse backgrounds during the individualized inquiry for parole suitability." Thompson v. Davis, 295 F.3d 890, 898 n.4 (9th Cir. 2002). Here, while the Board did mention petitioner's history of alcohol abuse in its decision, there is no indication in the record that the petitioner's pre-conviction history of alcohol abuse was a determinative factor in the Board's decision to deny parole. Moreover, there was other evidence concerning the petitioner's lack of emotional maturity that supported the decision to deny parole in 2002. Thus, the Board did not rely solely on petitioner's pre-conviction alcohol abuse as a basis for denying him parole. Therefore petitioner's ADA claim does not state a basis on which relief could be granted.

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[20] Petitioner presents a similar argument in his third claim where he alleges "[t]he Board decision partially rests on the conclusion that Rubio's pre-commitment history is peppered with unstable social history, substance abuse and drinking." (Pet., Ground 5 at 9.) Even accepting that characterization of the Board's decision as accurate, petitioner is not entitled to habeas relief. As discussed above, there was some evidence in petitioner's post-conviction record supporting that decision and the mere mention of petitioner's pre-conviction history is not a basis for relief.

E. Claims alleged in the traverse

Petitioner's traverse has a section headed "Further Allegations" centering on the grant of parole he received in his third subsequent hearing on November 28, 2005, and the reversal of that decision by the full Board on February 22, 2006. (See Traverse, Attach. B.) The stated reason for that reversal was the full Board's finding that the victim's next of kin had not been notified of the hearing, a procedural deficiency that the full Board construed as "an error of law which could result in a different decision upon rehearing." (Id.)

Petitioner argues that the reversal of the decision to grant parole by the full Board shows: (1) that he was treated differently from prisoners whose victims' next of kin do not appear at a hearing after being notified; and (2) that "the executive's implementation of the parole system in California" has "arbitrarily established a policy of almost never permitting parole." (Traverse, ¶ 9.) He characterizes the allegedly arbitrary executive policy as an impermissible ex post facto application of policy against him.

Petitioner's challenges to this third parole decision, first set forth in his traverse, have no bearing on the merits of the petition now before the court. Claims raised for the first time in a traverse are not cognizable bases for relief. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (a traverse is not the proper pleading to raise additional grounds for relief). The court may address only the petition before it, which challenges the denial of parole at petitioner's hearing of February 26, 2002. The full Board's reversal of the grant of parole in 2005 can only be challenged in this court by a separate, timely filed federal petition for writ of habeas corpus.[21]

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[21] This is a close case with respect to the Board's 2002 decision to deny parole. The counselor's concern about the risk posed by petitioner's release due to uncertainty with respect to his emotional maturity should he have another relationship, even when coupled with the psychologist's recommendation that petitioner continue programming in order to move toward re-socialization and internalization of emotional and social values, is a relatively thin reed upon which to deny parole in light of petitioner's pre-offense history and model conduct while in prison. It suffices only under the minimally stringent "some evidence" standard applicable here. If that record remained intact and the full Board in 2006 reversed a panel decision to grant

For all of the reasons set forth above, the petition now before the court states no grounds upon which petitioner is entitled to relief at this time. Therefore it will be recommended that the petition be denied.

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

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

DATED: February 10, 2009.

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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petitioner parole based on a procedural deficiency caused by the Board's failure to notify the victim's next of kin of the hearing, an even more serious due process issue would be presented.