



1 Specifically, he claims that the Governor's reversal of the  
2 Board's suitability findings were based on frozen  
3 factors/elements and were made without "some evidence" in the  
4 record to support his decision.

5 In the underlying state court proceedings, the San Francisco  
6 County Superior Court denied the Petitioner's Writ finding that  
7 "some evidence" existed to support the Governor's 2005 reversal.  
8 That decision was upheld by the Third Appellate District.  
9 Petitioner subsequently filed a habeas petition with the  
10 California Supreme Court but the petition was rejected as  
11 untimely filed.

12 After Petitioner filed the instant petition with this Court,  
13 the assigned Magistrate Judge issued Findings and Recommendations  
14 granting Petitioner's claims. Since that time, new Ninth Circuit  
15 jurisprudence has altered the underlying law and, as a  
16 consequence, this Court must look again at the entire factual  
17 record as well as applicable case law. Having reviewed the  
18 matter de novo, this Court will grant Petitioner's 2005 habeas  
19 petition.

20  
21 **FACTUAL BACKGROUND**  
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23 On November 1, 1981, David Larsen, a 32-year-old merchant  
24 seaman, was found dead on a sidewalk in San Francisco. He had  
25 been stabbed several times.

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1           While there are two versions of the facts of the crime,<sup>2</sup>  
2 Petitioner contended during his parole board hearing that  
3 testimony given by Green at the preliminary hearing, and upon  
4 which his plea bargain was negotiated, is correct. Green  
5 testified that Petitioner called him from a bar on the night of  
6 the stabbing, saying the victim wanted to buy marijuana. Green  
7 drove to the bar, picked up Petitioner and the victim, drove to  
8 Seneca and Mission Streets, and parked the car. Green stated  
9 that the victim and Petitioner got out of the car, but only  
10 Petitioner returned a few minutes later, saying "Let's go!"  
11 Green, noticing blood on Petitioner's hands asked him what  
12 happened. Petitioner told him, "Don't ask; you don't know  
13 nothing."

14           According to Petitioner's statement to the Board, after the  
15 victim attempted to back out of the drug buy, an argument ensued.  
16 The argument escalated when Petitioner grabbed the victim's arm  
17 to keep him from leaving. The victim swung his duffel bag at  
18 Petitioner and Petitioner stabbed the victim. Petitioner stated  
19 that he was high and under the influence of alcohol at the time.

20           Green testified that he and Petitioner thereafter proceeded  
21 by car to Green's parents' home where Petitioner washed up and  
22 changed clothes. According to Green, they then drove to Diana  
23 Zelms' house.

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26           <sup>2</sup> Petitioner's sister, Diana Zelms, reported to police that  
27 Miranda and Cliff Green, his accomplice in this crime, followed  
28 the victim out of a bar after observing the victim with a large  
amount of money. They proceeded to follow the victim until  
Petitioner exited the vehicle, stabbed the victim in the neck  
several times and stole the victim's wallet.

1 Green believed Petitioner was under the influence of PCP at the  
2 time of the crime because his eyes were glassy and because of his  
3 odd behavior. Green claims that neither he nor Petitioner  
4 learned of the victim's death until the following evening.

5  
6 **PROCEDURAL BACKGROUND**  
7

8 In 1985, Petitioner pled guilty to second-degree murder and  
9 received a sentence of 16 years to life.

10 In April of 2005, the Board found Petitioner suitable for  
11 parole. In September of 2005, Governor Schwarzenegger reversed  
12 the Board's decision. In November of 2005, Petitioner filed a  
13 Petition for Writ of Habeas Corpus in Superior Court for the City  
14 and County of San Francisco, challenging the Governor's reversal.

15 On January 9, 2006, the Superior Court, in a reasoned  
16 decision, denied the petition, holding that the Governor's  
17 decision was supported by "some evidence relevant to the factors  
18 the Governor is required to consider under article V, section  
19 8(b) of the California Constitution." The court also held that  
20 the Governor has given "individualized consideration" to the  
21 "specified criteria." Petitioner then filed a petition with the  
22 California Court of Appeal on January 31, 2006, which was  
23 summarily denied on March 14, 2006.

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1           Petitioner attempted to file a petition in the California  
2 Supreme Court, but that petition was erroneously rejected as  
3 untimely by the clerk (because he failed to give Petitioner the  
4 benefit of the so-called "mailbox rule").<sup>3</sup> Petitioner filed the  
5 instant federal habeas corpus petition on March 14, 2006.

6           In Findings and Recommendations ("F&Rs") dated July 28,  
7 2009, the assigned Magistrate Judge recommended that  
8 1) Petitioner's application for a writ of habeas corpus be  
9 granted; 2) that Respondent Thomas L. Carey, Warden of the  
10 California State Prison, Solano (hereinafter "Respondent") be  
11 directed to release Petitioner from custody within 10 days of any  
12 order adopting the F&Rs, with Petitioner subject to the terms and  
13 conditions set by the Board; and 3) that Respondent be directed  
14 to file, within 10 days of Petitioner's release, a notice with  
15 the court confirming the date on which Petitioner was released.

16           On August 5, 2009, Respondent filed objections to the  
17 Magistrate Judge's F&Rs. On August 11, 2009, Petitioner filed a  
18 reply to Respondent's objections. On August 19, 2009, this Court  
19 issued an administrative stay order pending the Ninth Circuit's  
20 *en banc* review in Hayward v. Marshall, 512 F.3d 536 (9th Cir.  
21 2008). The Hayward *en banc* decision was filed on April 22, 2010.  
22 Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010). The Hayward  
23 decision and its progeny provide new guidance to district courts  
24 in evaluating a state prisoner habeas corpus petition.

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26           <sup>3</sup> "Incarcerated *pro se* litigants, since they cannot avail  
27 themselves of the freedom of other litigants, may 'file' a notice  
28 of appeal simply by delivering it to prison authorities for  
mailing, rather than by actually filing it with the clerk of  
court as is generally required." Houston v. Lack, 487 U.S. 266  
(1988).



1 Under the "contrary to" clause, "a federal habeas court may grant  
2 the writ if the state court arrives at a conclusion opposite to  
3 that reached by [the Supreme] Court on a question of law or if  
4 the state court decides a case differently than [the] Court has  
5 on a set of materially indistinguishable facts." Williams v.  
6 Taylor, 529 U.S. 362, 413 (2000).

7 Under the "unreasonable application" clause, a federal court  
8 may grant the writ of habeas corpus if the state court identifies  
9 the correct governing legal doctrine from the Supreme Court's  
10 decisions but applies that principle unreasonably to the facts of  
11 the prisoner's case." Williams, 529 U.S. at 413. The state  
12 court's application of clearly established federal law must be  
13 erroneous or incorrect in addition to being unreasonable. Id. at  
14 411. In conducting such an analysis, the court must evaluate  
15 whether the state court's application of clearly established  
16 federal law was "objectively unreasonable." Id. at 409. It must  
17 "look through" the summary California Court of Appeal decision to  
18 the last reasoned opinion, the Superior Court decision, in order  
19 to reach its decision. See Ylst v. Nunnemaker, 501 U.S. 797,  
20 804-05 (1991). Although, as dictated by 12 U.S.C. § 2254(d)(1),  
21 only Supreme Court law is binding on the states, federal  
22 appellate court precedent is relevant persuasive authority in  
23 determining whether a state court decision is objectively  
24 unreasonable. See Kessie v. Mendoza-Powers, 574 F.3d 675, 678  
25 (9th Cir. 2009) (internal citations omitted).

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1           **B.    Due Process Claims**

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3           A due process claim requires two analytical steps. The

4 first is whether a protected liberty interest exists; the second

5 is whether the procedures attendant upon that deprivation were

6 constitutionally sufficient. Sass v. California Board of Prison

7 Terms, 461 F.3d 1123, 1127 (9th Cir. 2006). As recognized by the

8 Supreme Court in Jago v. Van Curen, 454 U.S. 14, 17-21 (1981), a

9 parole date is not a protected liberty interest defined by the

10 federal Constitution itself. The Ninth Circuit Court of Appeals,

11 however, has found that "state-created rights may give rise to

12 liberty interests that may be enforced as a matter of federal

13 law." Pearson v. Muntz, 606 F.3d 606, 609 (9th Cir. 2010)

14 (citing Wilkinson v. Austin, 545 U.S. 209 (2005)); see also Cooke

15 v. Solis, 606 F.3d 1206 (9th Cir. 2010). The Ninth Circuit

16 further held in its *en banc* Hayward decision that if there is a

17 "right to release on parole, or to release in the absence of some

18 evidence of future dangerousness, it has to arise from

19 substantive state law creating a right to release." Hayward v.

20 Marshall, 603 F.3d 546, 555 (9th Cir. 2010). The Court concluded

21 that California's parole scheme gives rise to such a right, and

22 that a prisoner is entitled to release in the absence of "some

23 evidence" of current dangerousness. See Pearson, 606 F.3d at

24 611.

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1           Having established that such a liberty interest exists in  
2 the California parole scheme, a federal habeas petition brought  
3 by a California prisoner is reviewed on two grounds: (1) whether  
4 the California judicial decision approving the Governor's or  
5 parole board's decision rejecting parole was an unreasonable  
6 application of the California "some evidence" requirement; or  
7 (2) whether the decision was based on an unreasonable  
8 determination of the facts in light of the evidence standard.  
9 See Hayward, 603 F.3d at 563. While parole denial must be  
10 supported by "some evidence," review of the Governor's reversal  
11 decision is "extremely deferential." In re Rosencrantz, 29  
12 Cal.4th 616, 665 (2002).

13  
14           **C.    Analysis**

15  
16           As a threshold matter, the California Court of Appeal and  
17 Supreme Court did not reach the merits of Petitioner's claims.  
18 Consequently, with regards to the 2005 reversal, this Court  
19 reviews the decision of the San Francisco County Superior Court  
20 because it is the only state judicial order setting forth reasons  
21 for denying habeas corpus relief to Petitioner. Robinson v.  
22 Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004); see also Ylst v.  
23 Nunnemaker, 501 U.S. 797, 802 (1991) (holding that where there  
24 has been one reasoned state judgment rejecting a federal claim,  
25 later unexplained orders upholding that judgment or rejecting the  
26 same claim rest upon the same ground).

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1 The California Supreme Court has held that "some evidence"  
2 is required by the state regulatory, statutory, and  
3 constitutional provisions that govern parole decisions in  
4 California. Cooke, 606 F.3d at 1214 (citing In re Rosenkrantz,  
5 29 Cal. 4th 616 (2002)). Under California law, "the paramount  
6 consideration for both the Board and the Governor" must be  
7 "whether the inmate currently poses a threat to public safety and  
8 thus may not be released on parole" [citation], and "the facts  
9 relied upon by the Board or the Governor [must] support the  
10 ultimate decision that the inmate remains a threat to public  
11 safety" in light of the full record available to the Board or  
12 Governor. Id. (quoting In re Lawrence, 22 Cal. 4th 1182 (2008)).  
13 A reviewing court must inquire "whether some evidence supports  
14 the decision of the Board or the Governor that the inmate  
15 constitutes a current threat to public safety." See Hayward,  
16 603 F.3d at 562.

17 The California Supreme Court has provided extensive guidance  
18 for application of the "some evidence" rule. In Lawrence, supra,  
19 the Court held that the Board may consider the circumstances of  
20 the commitment offense when making a parole decision, but the  
21 nature of the crime does not by itself provide for some evidence  
22 of an individual's current dangerousness to the public. An  
23 aggravated offense does not, in every case, establish that the  
24 inmate is a current threat to public safety. Hayward, 603 F.3d  
25 at 562; Cooke, 606 F.3d at 1214.

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1 The record must also establish that the prisoner's pre- or post-  
2 incarceration history or his current demeanor and mental state  
3 indicate that the "implications regarding the prisoner's  
4 dangerousness that derive from his or her commission of the  
5 commitment offense remain probative to the statutory  
6 determination of a continuing threat to public safety." Cooke,  
7 606 F.3d at 1214.

8 The Ninth Circuit has looked to the California parole  
9 regulations which identify circumstances that indicate  
10 unsuitability for release. Those circumstances include the  
11 aggravated nature of the commitment offense, an unstable social  
12 history, a history of severe mental problems related to the  
13 offense, and serious misconduct in jail. Pirtle v. California  
14 Board of Prison Terms, 2010 WL 2732888 (9th Cir. 2010) (citing  
15 Cal. Code Regs., tit. 15, § 2402(c)). Circumstances showing  
16 suitability for parole include the lack of a juvenile record, a  
17 stable social history; signs of remorse, significant stress as a  
18 motivation for the crime, lack of a criminal history, realistic  
19 plans for the future, and good institutional behavior. Id.  
20 (citing Cal. Code Regs., tit. 15 § 2402(d)). The Ninth Circuit  
21 directed district courts confronted with the application of the  
22 "some evidence" rule to decide "whether the California judicial  
23 decision approving the Governor's decision rejecting parole was  
24 an 'unreasonable application' of the California 'some evidence'  
25 requirement, or was 'based on unreasonable determination of the  
26 facts in light of the evidence.'" Hayward, 603 F.3d at 563.

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1           The "some evidence" standard is extremely deferential and  
2 any conflict of evidence, or weight given to the evidence, is  
3 within the authority of the Board or Governor and requires only a  
4 "modicum of evidence" of unsuitability for parole. In re Lazor,  
5 172 Cal. App. 4th 1185, 1198 (2009) (quoting Lawrence, 44 Cal.  
6 4th at 1191, n. 2). A federal habeas court may not substitute  
7 its own judgment for the Board's merely because it would weigh  
8 the evidence differently. Id. at 1199 (quoting Rosenkrantz,  
9 29 Cal. 4th at 677). Therefore, this Court must determine  
10 whether the evidence cited by the Governor and the Board of  
11 Prison Terms conforms with the "some evidence" requirements that  
12 Petitioner is a current threat to public safety.

13  
14           **1. State Judicial Review of Governor's 2005 Reversal**

15  
16           Following a review of the Superior Court's decision and  
17 application of relevant case law, this Court concludes that the  
18 Governor's 2005 reversal of the Parole Board's decision does not  
19 satisfy the "some evidence" standard. The Superior Court noted  
20 that in his decision to reverse the Board's 2005 decision to  
21 grant Petitioner parole, the Governor states that "the gravity of  
22 this crime alone is sufficient...to conclude that his release  
23 from prison would pose an unreasonable risk to public safety."  
24 (Gov. Reversal pp. 3).

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1 The Governor also states, however, that "after carefully  
2 considering the very same factors the Board must consider, I find  
3 that the gravity of the second-degree murder [Petitioner]  
4 committed presently outweighs any factors supportive of his  
5 parole." (Id.) The factors he discussed in that regard are:  
6 (1) Petitioner's criminal history; (2) his history of drug use;  
7 and (3) circumstances of the commitment offense. (Id. at 1-3)  
8 The San Francisco County Superior Court denied Petitioner relief  
9 concluding that there was "some evidence" supporting the  
10 Governor's decision. (Sup. Ct. Dec'n pp. 2). The Superior Court  
11 cited the same factors that the Governor referenced indicating  
12 unsuitability.

13  
14 **2. District Court Inquiry into Decisions by the**  
15 **Governor and the Superior Court**

16 This Court must inquire whether the Governor's decision to  
17 reverse the Board and the subsequent Superior Court decision are  
18 supported by "some evidence" as it is defined by the California  
19 Supreme Court and interpreted by the Ninth Circuit Court of  
20 Appeals. Moreover, a reviewing court must also consider whether  
21 the facts identified by the state entities are "probative" to the  
22 central issue of "current dangerousness." Cooke, 606 F.3d at  
23 1214.

24 As to the Governor's contention that "the gravity of this  
25 crime alone is sufficient...to conclude that his release from  
26 prison would pose an unreasonable risk to public safety," the  
27 Ninth Circuit has noted as recently as July 2010 that the  
28 California Supreme Court expressly rejects that contention.

1 Pirtle, 2010 WL 2732888 at 5 (9th Cir. 2010) (citing Lawrence, 82  
2 Cal. Rptr. 3d 169) ("the aggravated circumstances of a commitment  
3 offense [do not] inherently establish current dangerousness...").  
4 This conclusion is well-settled law in this circuit and any  
5 decision the Governor may have made based on this contention is  
6 an unreasonable application of the California "some evidence"  
7 requirements. See also Hayward, 603 F.3d at 562; Cooke, 606 F.3d  
8 at 1214.

9       Turning to the other factors the Superior Court noted as  
10 being discussed by the Governor in his reversal letter,  
11 Petitioner's criminal history appears to bear no relation to risk  
12 of current dangerousness. Petitioner's convictions other than  
13 the commitment offense include the following infractions: minor  
14 in possession of alcohol, misdemeanor battery in 1976, giving  
15 false information to police and receiving stolen property.  
16 Petitioner was arrested but not convicted of several petty, non-  
17 dangerous crimes as well as one arrest for assault with a deadly  
18 weapon. None of Petitioner's adult criminal history involved  
19 crimes that were either felonious or involved significant  
20 violence. (Answer, Ex. B at 7)

21       Furthermore, as of the 2005 Board hearing, 22 years had  
22 passed since Petitioner's most recent prior conviction. The  
23 parole regulations consider a lack of "any significant history of  
24 violent crime" as an indicator of suitability for parole, so to  
25 find Petitioner's criminal history to be an indicator of  
26 unsuitability for parole results is an unreasonable determination  
27 of the facts in light of the evidence. Cooke, 606 F.3d at 1213.

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1 Turning next to Petitioner's history of drug abuse, the  
2 Petitioner stated to the Board that he had been drug-free and  
3 sober since 1990 and there is no evidence to refute that  
4 assertion. The Governor and the Board have acknowledged  
5 Petitioner's abstention from drugs and alcohol in their  
6 decisions. Petitioner has engaged in Narcotics Anonymous and  
7 Alcoholics Anonymous. (Petition at 140). A psychiatrist  
8 reporting to the 2005 Board stated that Petitioner "needs and  
9 will continue to need program support for [his] addiction...[but]  
10 his present risk to the community is low."<sup>4</sup> In a recent Ninth  
11 Circuit case, the court found that where a prisoner has been  
12 discipline-free for nearly a decade, the record did not provide  
13 evidence of current dangerousness. Cooke, 606 F.3d at 1215.  
14 Therefore, any relation between Petitioner's prior drug use and  
15 his current dangerousness appears to have no evidentiary support.

16 The final factor noted by the Governor in reversing the  
17 Board's decision is the nature of the commitment offense itself.  
18 Petitioner admits to stabbing the victim in the neck several  
19 times and then stealing his wallet. The Governor noted that  
20 Petitioner had the opportunity to stop stabbing the victim, but  
21 did not do so. The Governor also noted that Petitioner committed  
22 the murder under the influence of PCP and alcohol.

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25 <sup>4</sup> The Board ordered as special conditions of Petitioner's  
26 parole that he: 1) not use alcoholic beverages, 2) submit to  
27 alcohol testing, 3) submit to anit-narcotic testing, 4) submit to  
28 THC testing, 5) participate in a substance abuse program, such as  
AA or NA, 6) attend Parole Outpatient Clinic, and 7) parole to  
the Modesto Gospel Mission, a 13-month residential recovery  
facility. Petition at 124, 145.

1           The Governor states, but Petitioner refutes, that Petitioner  
2 told two versions of the crime. Petitioner's sister reported to  
3 police that Petitioner confessed to targeting the victim for  
4 robbery while they were in the bar. Petitioner himself, on the  
5 other hand, states that it was a crime of impulse, brought on by  
6 the fact that he was high on PCP and alcohol and that the victim  
7 tried to back out of the contemplated drug purchase. Cliff  
8 Green, Petitioner's convicted accomplice, corroborated  
9 Petitioner's version of the facts while under oath at the  
10 preliminary hearing. Green also stated he believed Petitioner  
11 was high at the time of the crime. As noted above, while there  
12 is no doubt that Petitioner committed a heinous crime, these  
13 circumstances cannot form the sole basis for the denial of  
14 parole.

15           Turning now to the factors considered by the Governor and  
16 the Superior Court that favor suitability for parole, many exist.  
17 First, the Governor acknowledges that Petitioner

18           "...has worked during his incarceration to  
19 enhance his ability to function within the law upon  
20 release. He has upgraded educationally and  
21 vocationally by earning his GED, becoming certified as  
22 an optician, and completing vocational training in  
23 silk screening. He has held several skilled  
24 institutional jobs, including as a plumber, and has  
25 participated in wide array of self-help and therapy,  
26 including Creative Conflict Resolutions, Stress  
27 Management, Men's Violence Prevention, PLATO classes,  
28 Victims/Offenders Learning Together, and Breaking  
Barriers. He has participated in extracurricular  
activities including Men's Advisory Council and  
several religious activities, and has made seemingly  
solid efforts to address his history of substance-  
abuse by participating in Alcoholics Anonymous,  
Narcotics Anonymous, Framework for Recovery, and a  
religious 12-step program.

28 ///



1           Furthermore, [Petitioner] has received favorable  
2 evaluations in recent years from correctional and  
3 mental-health professionals, including assessments  
4 that his risk to the community probably would be low  
5 if released. He has also maintained supportive  
6 relationships with family and friends, and one member  
7 of the victim's family has recently voiced support for  
8 his parole."

9 (Gov's Reversal Ltr. pp. 1-2).

10           In addition, the Board noted in its report granting parole  
11 that Petitioner has done an "excellent job" (Am. Pet. pp. 85)  
12 [rehabilitating in prison to warrant parole]. It noted that  
13 Petitioner "has the factors that are very important in  
14 considering parole and there was no opposition from law  
15 enforcement or the District Attorney." (Id.) The Board also  
16 acknowledged that Petitioner has worked very hard to earn parole.  
17 (Id.) Finally, the Board recognized that Petitioner has shown  
18 signs of remorse and currently has realistic parole plans. (Id.  
19 at 80)

20           This Court concludes that the two factors apart from  
21 circumstances of the commitment offense, as considered by the  
22 Governor and the Superior Court (namely, Petitioner's criminal  
23 history and his history of drug abuse) provide no evidentiary  
24 support for parole denial. Therefore, after considering all the  
25 factors that favor suitability for parole this Court concludes  
26 that no evidence exists to support parole denial in this case.

27           Noting the deference to state courts, this Court does not  
28 substitute its own judgment as to the weight of the evidence for  
that of the state tribunals.

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1 The Ninth Circuit has found that "disciplinary infractions  
2 occurring a decade earlier [are] not evidence of current  
3 dangerousness," Cooke v. Solis, 606 F.3d at 1215. Here, there  
4 are no major disciplinary infractions that concern the Board or  
5 the Governor.

6 An apt analogy can be made between Petitioner here and an  
7 inmate whose parole suitability was considered by the Ninth  
8 Circuit in its recent Pirtle decision. Pirtle v. California  
9 Board of Prison Terms, 2010 WL 2732888 (9th Cir. 2010). Ten  
10 years after being sentenced to a term of seventeen years to life  
11 in prison for second-degree murder, the Board determined Pirtle  
12 was "suitable for parole and would not pose an unreasonable risk  
13 of danger to society or a threat to public safety if released  
14 from prison." Id. As in this case, the Board found the  
15 petitioner in Pirtle showed remorse and accepted responsibility  
16 for the crime. Pirtle, like Petitioner, had no adult convictions  
17 for violent crimes, performed well in his prison jobs, matured  
18 since the crime, was positively evaluated by prison psychiatrists  
19 and had reasonable and realistic parole plans. The Board granted  
20 Pirtle parole, which the Ninth Circuit eventually affirmed in  
21 light of Hayward, supra. See Pirtle supra.

22 The Magistrate Judge in this case concluded that there was  
23 insufficient evidence to support Petitioner's continued  
24 incarceration, and cited the Report to the Board of Prison Terms  
25 which found that the Petitioner's danger to the community is low  
26 for the general male population. (F&R at 25). This Court agrees  
27 with that assessment and finds Petitioner suitable for parole.

28 ///

1 **CONCLUSION**


2

3 The Governor's 2005 Reversal of the Parole Board's decision  
4 granting parole was an unreasonable application of the California  
5 "some evidence" standard because the Governor erroneously  
6 contended that the gravity of the crime alone was sufficient to  
7 deny the habeas petition. In addition, the decision was not  
8 based on a reasonable determination of the facts in light of the  
9 evidence because the unsuitability factors apart from the  
10 circumstances of the commitment offense provide no evidentiary  
11 support for the denial of parole. Petitioner's suitability  
12 factors provide reassurance of low risk of danger to the  
13 community upon release.

14 Therefore, Petitioner's habeas corpus petition (ECF No. 1)  
15 is GRANTED. Since federal courts have the latitude to resolve a  
16 habeas corpus petition "as law and justice require," (28 U.S.C.  
17 § 2243) this Court orders the prisoner's release as soon as  
18 administratively possible.

19 IT IS SO ORDERED.

20 Dated: October 13, 2010

21   
22 \_\_\_\_\_  
23 MORRISON C. ENGLAND, JR.  
24 UNITED STATES DISTRICT JUDGE  
25  
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27  
28