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

ARBIE M. HODGE,

Petitioner,

No. CIV S-06-483 FCD CHS P

vs.

THOMAS L. CAREY, Warden, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner Arbbie M. Hodge is a state prisoner proceeding through counsel with a first amended petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254. Petitioner is currently serving an indeterminate prison term of 16 years to life following his 1979 conviction for second degree murder in Los Angeles County. Here, petitioner does not challenge the constitutionality of that conviction, but rather, the execution of his sentence, and specifically, the February 20, 2004 reversal by Governor Schwarzenegger of the September 25, 2003 decision of the Board of Prison Terms that petitioner was suitable for parole. The pending petition presents a single ground for relief: that the Governor’s reversal is unsupported by some evidence in the record in violation petitioner’s right to due process of law. Based on a thorough review of the record and applicable law, it is recommended that the petition be granted.

1 II. BACKGROUND

2 On the morning of January 14, 1979, sometime after 4:00 a.m., several individuals
3 were involved in a street fight. Petitioner struck the victim, Thurman Allen, in the head with a
4 baseball bat, causing his death.

5 At his September 15, 2003 hearing, petitioner related the events leading up to the
6 murder as follows. (See Exhibit 13, Subsequent Parole Consideration Hearing, September 25,
7 2003 at 13-15, 42-48.)¹ Petitioner stated that he and his girlfriend, Barbara Hines,² were inside a
8 Long Beach residence with another woman, Claire Hoff. Hines and Hoff got into a physical
9 altercation inside the residence and exited the house, fighting “from the residence all the way out
10 into the middle of the street.” Petitioner heard Hines “hollering” and looked outside where he
11 saw the victim, Thurman Allen, swinging a two foot by two foot window frame which had been
12 converted into a picture frame at Hines. Petitioner called out to Allen causing Allen to turn and
13 approach petitioner. Petitioner reached into the house and grabbed a baseball bat. Petitioner and
14 Allen began fighting. Hoff ran away down the street and Hines ran into the residence. Petitioner
15 struck Allen in the head with the bat and Allen fell to the ground. Petitioner indicated that
16 because they had run away, neither Hoff nor Hines saw him strike Allen with the bat.

17 Allen was taken to the hospital where he died four days later; petitioner and Hines
18 fled the area and were later apprehended. Petitioner states that he threw the bat across the street,
19 although no bat was recovered. Prior to 1988, petitioner had claimed that he struck Allen with
20 the converted wooden frame which he had wrestled away from Allen.

21 After rejecting a plea agreement to a manslaughter charge, petitioner proceeded to
22 trial and was convicted by jury of second degree murder with personal use of a dangerous or
23 deadly weapon. He was sentenced to serve 16 years to life in state prison. His minimum eligible

24 ¹ All citations to exhibits refer to the exhibits attached to the first amended petition.
25

26 ² This individual’s name is spelled “Hanes” in the transcript of the 9/25/03 hearing,
however, it is apparent from the rest of the record that the correct spelling is “Hines.”

1 parole date passed in either 1988 or 1989.³

2 On September 25, 2003, the Board of Prison Terms (“Board”) conducted
3 petitioner’s twelfth subsequent parole suitability hearing and determined for the first time that he
4 would not pose an unreasonable risk of danger to society or a threat to public safety if released,
5 and thus that he was suitable for parole. In a written decision dated February 20, 2004, Governor
6 Schwarzenegger reversed the Board’s grant of parole. Petitioner sought habeas corpus relief in
7 the Los Angeles County Superior Court. After concluding in a reasoned decision that no
8 evidence supported the Governor’s conclusion that petitioner was unsuitable for parole, the
9 superior court granted the writ, vacated the reversal and reinstated the Board’s decision to grant
10 petitioner parole. The California Court of Appeal, Second District, stayed the superior court’s
11 order pending appeal. Ultimately, the state appellate court disagreed with the superior court, and
12 reinstated Governor’s Schwarzenegger’s reversal of the Board’s parole grant. Petitioner sought
13 further review in the California Supreme Court; relief was denied on March 1, 2006.

14 III. LEGAL STANDARD FOR FEDERAL HABEAS CORPUS

15 An application for writ of habeas corpus by a person in custody under judgment of
16 a state court can be granted only for violations of the Constitution or laws of the United States.
17 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
18 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (*citing Engle v. Isaac*, 456 U.S. 107, 119 (1982)).
19 This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to,
20 the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Lindh v. Murphy*, 521
21 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). Under
22 AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in
23 state court proceedings unless the state court’s adjudication of the claim:

24
25 ³ According to the first amended petition, petitioner’s minimum eligible parole date was
26 October 13, 1989; the Board recited at the September 25, 2003 hearing that his minimum eligible
parole date passed on February 2, 1988.

1 (1) resulted in a decision that was contrary to, or involved an
2 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

3 (2) resulted in a decision that was based on an unreasonable
4 determination of the facts in light of the evidence presented in the
State court proceeding.

5 28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*

6 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

7 This court will look to the last reasoned state court decision to determine whether the law applied

8 to petitioner's due process claim was contrary to the law set forth in the cases of the United

9 States Supreme Court or whether an unreasonable application of such law has occurred. *See*

10 *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 919 (2003).

11 IV. ANALYSIS OF THE DUE PROCESS CLAIM

12 A. Applicable Federal and State Law

13 The Due Process Clause of the Fourteenth Amendment prohibits state action that
14 deprives a person of life, liberty, or property without due process of law. A person alleging a due

15 process violation must first demonstrate that he or she was deprived of a protected liberty or

16 property interest, and then show that the procedures attendant upon the deprivation were not

17 constitutionally sufficient. *Kentucky Dep't. of Corrections v. Thompson*, 490 U.S. 454, 459-60

18 (1989); *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002).

19 A protected liberty interest may arise from either the Due Process Clause itself or
20 from state laws. *Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The United States

21 Constitution does not, in and of itself, create a protected liberty interest in receipt of a parole

22 date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). Where a state's statutory parole scheme

23 uses mandatory language, however, that state statute "creates a presumption that parole release

24 will be granted" when or unless certain designated findings are made, thereby giving rise to a

25 constitutional liberty interest. *McQuillion*, 306 F.3d at 901 (*quoting Greenholtz v. Inmates of*

26 *Nebraska Penal*, 442 U.S. 1, 12 (1979)). The Ninth Circuit Court of Appeals has held that

1 California state prisoners who have been sentenced to prison with the possibility of parole have a
2 clearly established, constitutionally protected liberty interest in receipt of a parole release date.
3 *Irons v. Carey*, 505 F.3d 846, 850-51 (9th Cir. 2007) (citing *Sass v. Cal. Bd. of Prison Terms*,
4 461 F.3d 1123, 1128 (9th Cir. 2006)); *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003);
5 *McQuillion*, 306 F.3d at 903; and *Allen*, 482 U.S. at 377-78 (quoting *Greenholtz*, 442 U.S. at
6 12)).

7 The full panoply of rights afforded a defendant in a criminal proceeding is not
8 constitutionally mandated in the context of a parole proceeding. See *Pedro v. Or. Parole Bd.*,
9 825 F.2d 1396, 1398-99 (9th Cir. 1987). The Supreme Court has held that a parole board’s
10 procedures are constitutionally adequate if the inmate is given an opportunity to be heard and a
11 decision informing him of the reasons he did not qualify for parole. *Greenholtz*, 442 U.S. at 16.

12 Additionally, as a matter of *state* constitutional law, denial of parole to California
13 inmates must be supported by “some evidence” demonstrating future dangerousness. *Hayward v.*
14 *Marshall*, No. 06-55392, slip op. at 34-35 (9th Cir. April 22, 2010) (en banc) (citing *In re*
15 *Rosenkrantz*, 59 P.3d 174, 210 (Cal. 2002), *In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008), and
16 *In re Shaputis*, 190 P.3d 573, 582 (Cal. 2008)). The federal Due Process Clause requires, in turn,
17 that California comply with its own quantum of evidence requirement. See *Hayward v.*
18 *Marshall*, No. 06-55392, (Berzon, J., concurring in part and dissenting in part at 13).

19 The analysis of whether some evidence supports denial of parole to a California
20 state inmate is framed by the state’s statutes and regulations governing parole suitability
21 determinations. See *Irons*, 505 F.3d at 851. This court “must look to California law to determine
22 the findings that are necessary to deem [a petitioner] unsuitable for parole, and then must review
23 the record to determine whether the state court decision holding that these findings were
24 supported by ‘some evidence’ [] constituted an unreasonable application of the ‘some evidence’
25 principle.” *Id.*

26 ////

1 Title 15, Section 2402 of the California Code of Regulations sets forth various
2 factors to be considered by the Board in its parole suitability findings for murderers. The
3 regulation is designed to guide the Board's assessment of whether the inmate poses "an
4 unreasonable risk of danger to society if released from prison," and thus whether he or she is
5 suitable for parole. *In re Lawrence*, 44 Cal.4th 1181, 1214, 1202 (2008). The Board is directed
6 to consider all relevant, reliable information available regarding

7 the circumstances of the prisoner's social history; past and present
8 mental state; past criminal history, including involvement in other
9 criminal misconduct which is reliably documented; the base and
10 other commitment offenses, including behavior before, during and
11 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.

12 15 Cal. Code Regs. § 2402(b). The regulation also lists several specific circumstances which
13 tend to show suitability or unsuitability for parole. 15 Cal. Code Regs. § 2402(c)-(d). The
14 overriding concern is public safety and the focus is on the inmate's *current* dangerousness. *In re*
15 *Lawrence*, 44 Cal. 4th at 1205. Thus, the proper articulation of the standard of review is not
16 whether some evidence supports the reasons cited for denying parole, but whether some evidence
17 indicates that a parolee's release would unreasonably endanger public safety. *In re Shaputis*, 44
18 Cal.4th 1241, 1254 (2008). In other words, there must be some rational nexus between the facts
19 relied upon and the ultimate conclusion that the prisoner continues to be a threat to public safety.
20 *In re Lawrence*, 44 Cal. 4th at 1227.

21 B. The Board's Decision

22 The panel of the Board which presided over petitioner's 2003 parole suitability
23 hearing relied on several factors in finding him to be suitable for parole. The presiding
24 commissioner indicated:

25 We're finding you suitable for parole and I'll explain our reasons.
26 We have reviewed all information received from the public and
relied on the following circumstances in concluding that you would

1 not -- that you will not be an unreasonable risk of danger to society
2 or a threat to public safety and are suitable for parole. While
3 imprisoned, you've enhanced your ability to function within the
4 law upon release through participation in self-help, education
5 programs, vocational programs, and institutional job assignments.
6 You have been in AA, the Violence Prevention Program, VORG,
7 Anger Management, and your work reports have been exceptional.
8 You've done everything that's been asked of you. Because of
9 maturation, growth, greater understanding, and advanced age,
10 you've reduced your probability of recidivism. You have realistic
11 parole plans, which include family support and a residence. You
12 have maintained close family ties while imprisoned via letters,
13 visits, and phone calls. And [you] have recently maintained
14 positive institutional behavior, which includes -- which indicates a
15 significant improvement in self-control. And you do show signs of
16 remorse. You did indicate that you understand the nature and the
17 magnitude of the offense and accepts responsibility for the criminal
18 behavior and has a desire to change towards good citizenship (sic).
19 The psychological evaluation, which is dated June 24th, 2003, by
20 John Rouse, R-O-U-S-E, is positive. In that, under the Assessment
21 of Dangerousness, the doctor basically states that the inmate has
22 less than average -- or rather, I should say, potential for
23 dangerousness of being less than an average inmate. In addition,
24 the Correctional Counselor, dated 6/11/03, by initial E. Lee, L
25 double E, indicates a degree of threat as low. The psychologist
26 evaluation also indicates that the Board would foresee that this
inmate should be (indiscernible) to factors of his parole rather than
any mental issue -- mental health issues. He has not -- he has no
diagnosis or (indiscernible) pathology -- psychopathology, which
was related to his life crime. He has never been diagnosed as
having a significant mental disorder, nor has he made any
complaints of a mental disorder. We do indicate you have a
limited history of violent type behavior and the life crime appears
to have been situationally related... The following [are] conditions
of parole: Do not use/possess alcoholic beverages. Submit to
alcohol testing. Submit to anti-narcotic testing. Submit to THC
testing and participate in a substance abuse program, such as AA
and NA. These special conditions are being implied since the
inmate has admitted being a heroin [addict] at one time and also
[to] having an alcohol problem at one time. Mr. Hodge, I got
pretty rough with you in regards to the crime and what -- the
statements you've made. We went back and read a lot of reports.
And the basic -- the basis of this whole -- this whole situation is
that a baseball bat, although it is not mentioned in the POR and
was not mentioned, as you say in court, was mentioned by
witnesses in the initial police report. The picture that we're talking
about was a picture frame that the victim, Mr. Allen, took out of
(indiscernible) house, Ms. Hoff's house, after dropping off boxes
of marijuana for her to sell, apparently, to get her husband out of
jail. He has this picture under his arm as he walked into the street.
There is no doubt in my mind that the altercation occurred between

1 the two women out in the street and the injuries were a lot more
2 severe than we thought. I mean, we're talking about one lady who
3 was stabbed in the shoulder and the back, who needed stitches.
4 And the other one had a lamp thrown on her head and wound up
5 having stitches on her head. But primarily, Mr. Allen, whether he
6 intended to or didn't intend to, did have a picture under his arm.
7 The picture was somewhat destroyed during the altercation, which
8 would mean to me it was more than just dropped. Which it could
9 have been used to defend himself or to maybe attack somebody.
10 Maybe the bat hit. There is no doubt in my mind neither that the
11 bat was, in fact, the weapon used to strike the victim. You've been
12 in -- you've been down for 24 years and there's no doubt in my
13 mind also that very possibly you might forget some of this story.
14 You have to live with it 24 hours a day, seven days a week. You
15 did indicate, and there is no doubt in my mind, that the bat was
16 thrown over the fence and then you said it was the picture thrown
17 over the fence. The picture was, in fact, found thrown over a fence
18 with the (indiscernible). And we're not talking about a picture
19 frame as I might have thought. We're talking about, probably a
20 painting in a frame. It talks about the painting being partially
21 removed from the frame. Regardless, our quandary, is, if we
22 denied you parole today, what would we ask you to do? Remain
23 disciplinary free for another year? You've done that for 24 years. I
24 can't think of a single thing to ask you to do if we deny you for
25 parole, except more time. I think you've done enough, 24 years.
26 That does conclude the reading of the decision.

(Exhibit 13, Subsequent Parole Consideration Hearing, September 25, 2003 at 59-63.)

C. The Governor's Reversal

In his written review dated February 20, 2004, Governor Schwarzenegger likewise noted the positive factors for petitioner's release:

Mr. Hodge has been incarcerated now for 25 years, and he has served his time quite well. He has been free of any serious discipline action for his entire prison period. Mr. Hodge also has earned his GED and upgraded himself vocationally by becoming proficient in dry-cleaning, tailoring and laundry. He has maintained and advanced these skills through his steady work in the Prison Industry Authority. He has availed himself of self-help and therapy programs, including intermittently attending Alcohol Anonymous and Narcotics Anonymous. There is some indication in the record that Mr. Hodge additionally participated in Anger Management and the Victim/Offender Reconciliation Group. He has received favorable psychological, work, and counseling evaluations. I commend Mr. Hodge for bettering himself and enhancing his ability to function within the law upon release. His prison conduct demonstrates his gained maturity, responsibility and

1 self-control.

2 (Exhibit 14, Indeterminate Sentence Parole Release Review, February 20, 2004 at 1-2.)

3 Ultimately, however, the Governor determined that petitioner was not suitable for
4 parole. He began by summarizing petitioner's criminal history:

5 Mr. Hodge's criminal conduct began when he was a child in Ohio.
6 Beginning at age 14, he was found responsible for several theft-
7 related crimes and spent time in and out of a boys detention home
8 and on probation in Ohio. As an adult, Mr. Hodge was arrested
9 more than 25 times and convicted more than 10 for mostly theft-
10 related crimes. From age 19 to 38, Mr. Hodge was on and off
11 probation and in and out of county jails in Ohio. When he beat Mr.
12 Allen to death, he was on probation in Ohio and had absconded
13 from that state. Mr. Hodge had no significant record of violence or
14 assaulting others at the time.

15 (Ex. 14, Indeterminate Sentence Parole Release Review, February 20, 2004 at 1.) The Governor
16 went on to describe how petitioner's pre-prison history painted a picture very different from that
17 of his in-prison conduct:

18 In addition to his many criminal entanglements, Mr. Hodge admits
19 to considerable drug abuse for approximately 10 years, during
20 which time he was addicted to heroin and overdosed twice. He
21 also admits to being unemployed for much of his life and to
22 supporting himself and his drug habits by gambling and stealing.

23 According to various psychological reports, Mr. Hodge asserts that
24 he comes from a large family consisting of more than 20 half-
25 siblings, and he has somewhere between five and seven children
26 resulting from multiple relationships. Although he has not
maintained direct contact with many family members, he has
maintained ties with several siblings and cousins and has
established other relationships via letters. As for his parole plans,
he has a confirmed housing offer from the Salvation Army, which
may also assist him with employment counseling. But Mr. Hodge
does not have a job offer or even a solid employment plan. In
2001, and again in 2002, the Board denied parole to him partly
because of his lacking employment plans. I recognize that Mr.
Hodge is 63 years old- and statistically has a reduced probability of
recidivism due to his age- but he needs to have a solid plan for
supporting himself. Mr. Hodge had no documented employment
record when he entered prison, and he stated at his 2003 parole
hearing that he is not expecting any social-security or other
financial support upon release. Mr. Hodge is proficient in dry-
cleaning, laundry and tailoring- and the record before me indicates

1 he is physically capable of working in these fields. He is assigned
2 to and has been working in the Prison Industry Authority laundry
3 since October 1997. A recent Life Prisoner Evaluation mentions
4 Mr. Hodge may plan to contact the Employment Development
5 Department upon being paroled. This is something- but it is not
6 enough. Mr. Hodge was unemployed and living unstably when he
7 killed Mr. Allen. Without a way to provide for himself, the odds
8 that he will slip back into the only lifestyle he knows outside of
9 prison- crime, drugs and gambling- are increased. Since Mr.
10 Hodge's lifestyle played a role in Mr. Allen's murder, if he were to
11 return to his old ways, the public would be at risk.

12 Mr. Hodge committed a serious, violent crime. He charged Mr.
13 Allen- a man who had nothing more than a picture frame in his
14 hand at the time- with a baseball bat and then used it to brutally
15 abuse him. Mr. Hodge hit Mr. Allen two times in the head, hard
16 enough to knock him to the ground and ultimately kill him. While
17 understand the picture frame was possibly a converted window
18 frame and was quite large, Mr. Hodge's reason for hitting Mr.
19 Allen- let alone doing so with deadly force- does not make sense.
20 He claims that he saw Mr. Allen swinging the frame and feared
21 that Mr. Allen was going to hit his girlfriend with it. Even if this
22 were true, we are talking about a frame described by Mr. Hodge at
23 his 2003 hearing as being wooden and two or three feet in size.
24 Whaling lethally on Mr. Allen with a baseball bat was hardly an
25 appropriate response. Mr. Hodge's act was not one of chivalry to
26 protect his girlfriend, it was senseless, brutal murder.

1 Mr. Hodge over the years has recited different versions of what
2 actually happened in the street the morning he attacked Mr. Allen.
3 He pled not guilty to the murder charge, and he denied at trial that
4 he knew anything about a baseball bat. He now admits to using a
5 baseball bat during the attack. This is progress. But when Mr.
6 Hodge was asked by the Board at his 2003 parole hearing why he
7 did not testify truthfully at trial about the murder weapon, Mr.
8 Hodge summed it up as "a misunderstanding." Mr. Hodge's
9 "misunderstanding" continued for nearly 10 years- since it was not
10 until 1988 when he first admitted to using a bat. Moreover, when
11 the Board questioned Mr. Hodge about his believability, given the
12 dramatic change in his story since trial, he responded by saying
13 "[y]ou can believe it or not." Mr. Hodge continues his attempts to
14 evade responsibility and to explain away or dismiss his previous
15 lies.

16 Moreover, I would be remiss not to note that in 1998, an evaluator
17 used "sociopath" to describe Mr. Hodge. Also Mr. Hodge
18 admitted at this 2003 hearing that he has not participated in
19 Alcoholics Anonymous or Narcotics Anonymous since 2001.
20 Notably, psychological reports in the record suggest that Mr.
21 Hodge may be unpredictable if he uses alcohol or drugs.

1 The 2003 psychological assessment of Mr. Hodge made a one-
2 sentence conclusion that he accepts culpability for his crime. I
3 note that, in addition to telling psychological staff and the Board at
4 his parole hearings that he takes responsibility for killing Mr.
5 Allen, Mr. Hodge in 1996 wrote an apology letter intended for the
6 victim's family. In his less-than two-page letter, he acknowledged
7 his regret, said he was sorry for his actions and emphasized his
8 hope for forgiveness by the family. I question the evaluator's one-
9 sentence finding- and Mr. Hodge's sincerity when he says that he
10 fully accepts, understands, and is sorry for this murder. As I
11 discussed above, Mr. Hodge has given multiple versions of what
12 happened the day Mr. Allen was fatally abused. His credibility is
13 shaky, at best. Aside from his own statements, I see insufficient
14 evidence in the record to support a conclusion that Mr. Hodge has
15 really accepted full responsibility for what he did. In 1999, when
16 Mr. Hodge was asked by a psychologist whether he had
17 participated in the Victim/Offender Reconciliation Group, Mr.
18 Hodge said, "that's for people with violent problems. I'm not
19 violent." When the psychologist reminded Mr. Hodge that his
20 crime was certainly one of violence, he said, "well the crime was
21 yeah, but they didn't believe my story that I hit somebody just in a
22 fight." Likewise, in a different writing, Mr. Hodge scribed another
23 eight pages to "put the nature of [his] offense in a better
24 perspective and to show that the degree of [his] guilt was blown
25 out of proportion..." This "continuation" - as Mr. Hodge called it -
26 is not dated but notes within it an earlier writing dated April 1995.
It illustrates Mr. Hodge's minimization of his criminal conduct,
and it clearly was written either shortly before or after the 1996
letter to the Allen family. Given the record before me, I simply am
unsatisfied that Mr. Hodge has accepted full responsibility for his
crime. I also am unconvinced that he considers what he did -
attacking and killing a man - as serious as it is. On this factor
alone, I could conclude that Mr. Hodge would pose a risk of danger
if released at this time.

Mr. Hodge committed an atrocious crime, which followed years of
unremitting criminal behavior and instability. The Long Beach
Police Department opposes his parole, calling the murder merciless
and a blatant disregard for human life. The Department further
emphasized that Mr. Hodge was on probation at the time he
committed his crime. The Los Angeles District Attorney's Office
also opposes parole for Mr. Hodge, opining that he is developing
the final version of his story and needs to take full responsibility
for his crime. That office also referenced his "horrendous"
criminal history and lacking parole plans.

Mr. Hodge was 39 years old when he committed this crime- and he
has come a long way since then. He should be proud of his
progress. But Mr. Hodge has failed to benefit from society's
previous attempts to correct his criminality. And sadly, I am not
satisfied that this 63-year-old man has demonstrated that his

1 institutional gains are sufficiently established to assure that his
2 success within prison will transfer outside of prison. After
3 carefully considering each of the factors the Board is required to
4 consider, I believe Mr. Hodge would pose an unreasonable risk to
5 public safety if paroled at this time. Accordingly, I REVERSE the
6 Board of Prison Terms' decision to parole Mr. Hodge.

7 (Exhibit 14, Indeterminate Sentence Parole Release Review, February 20, 2004 at 2-4.)

8 D. Superior Court Grant of Habeas Corpus

9 As set forth above, the Los Angeles County Superior Court granted petitioner's
10 application for writ of habeas corpus after concluding that no evidence supported the Governor's
11 determination that petitioner was unsuitable for parole:

12 The Governor is constitutionally authorized to make an
13 "independent decision" as to parole suitability. (*In re Rosenkrantz*
14 (2002) 29 Cal. App.4th 1299, *see* Cal. Code Regs., tit. 15, §2402.)
15 However, the Governor's decision must be supported by a
16 "modicum of evidence." (*Id.* at 676.) Here there is no evidence to
17 support the Governor's conclusion that Petitioner is unsuitable for
18 parole.

19 The Governor concluded Petitioner was unsuitable for parole based
20 upon the gravity of the commitment offense, his failure to take
21 responsibility for the crime, his past criminal history, a serious
22 drug abuse history, and Petitioner's lack of employment plans.

23 The record reflects Petitioner was inside of a dwelling where a
24 violent physical altercation occurred between two other occupants,
25 one of which was Petitioner's girlfriend. The combatants then
26 carried the fight outside and the victim, who was walking across
the street, sought to intervene. Someone yelled and Petitioner
came out of the house with a baseball bat. Petitioner confronted
the victim and struck him twice in the head with the bat. Petitioner
fled and the victim died four days later from his injuries. Thus,
there is no evidence in the record that the circumstances of the
commitment offense were "especially heinous, atrocious, or cruel."
(Cal. Code Regs., tit. 15, §2402 (c)(1).)

The record also reflects that Petitioner had a significant criminal
history prior to the commitment offense. However, the majority of
Petitioner's prior convictions are property related offenses. There
is no evidence he has a previous record of violence. (Cal. Code
Regs., tit. 15, §2402(c)(2).) Likewise, the record established that
Petitioner had a serious drug abuse history prior to his
incarceration for the commitment offense. However, there is no
evidence Petitioner has continued to abuse substances over the last

1 twenty-four years of incarceration and a prisoner's prior addiction
2 is not an appropriate consideration in determining parole
suitability. (*In re Smith* (2003) 109 Cal.App.4th 489, 505.)

3 The Governor also concluded Petitioner lacks realistic employment
4 plans. (Cal. Code Regs., tit. 15, §2402(d)(8).) However, the
5 record reflects Petitioner has gained marketable skills since his
6 incarceration and at least one of the residential programs Petitioner
has been invited to participate in offers assistance with vocational
training and job placement. Therefore, there is no evidence
Petitioner lacks realistic parole plans.

7 Lastly, the Governor cited inconsistencies in Petitioner's version of
8 the events of the life crime over the years as evidence Petitioner
9 has not fully accepted responsibility for the crime, and therefore
10 lacks remorse. (Cal. Code Regs., tit. 15, §2402(d)(3).) An inmate
11 may not be required to admit guilt in order to be found suitable for
12 parole. (Penal Code §5011(b).) However, if guilt is uncontested,
13 as it is here, the Governor may properly consider Petitioner's
14 attitude toward the crime and his lack of remorse and
15 understanding of the nature and magnitude of the offense. (*In re*
16 *McClendon* (2003) 113 Cal. App. 4th 315, 322.) When Petitioner
17 was interviewed in 1979 for the pre-sentence report, he denied any
18 involvement in the commitment offense. He apparently did not
19 even admit to having used a baseball bat as a weapon until 1988.
20 However the record reflects the Board questioned Petitioner
extensively about the circumstances of the commitment offense
and Petitioner's version of it during the most recent suitability
hearing. Petitioner admitted to the Board that he lied in court when
he said he did not have a baseball bat. Further, during the hearing
he admitted to striking the victim in the head with the bat.
Therefore, while it is true Petitioner has at times been, admittedly
untruthful, the Governor's conclusions are based upon statements
made at the least fifteen years ago, and at the most, twenty-four.
That coupled with a positive psychological evaluation, a record
free of serious misconduct, and participation in self-help
programming, contradicts the Governor's conclusion. There is no
evidence in the record that Petitioner does not currently understand
the nature and magnitude of the commitment offense. (*Id.*)

21 Therefore, the Governor is ordered to vacate the February 20, 2004
22 decision, and the Board's decision to grant parole is reinstated.
23 The Governor, in his discretion, may issue a new decision pursuant
to his authority under Article V, §8(b) of the California
Constitution and Penal Code §3041.2. (*Capistran supra*, at 1307.)

24 (Exhibit 15, BH 002650 opinion at 1-3 (footnotes omitted).)

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1 E. California Court of Appeal's Reversal

2 In finding that some evidence supported the Governor's reversal of petitioner's
3 grant of parole, the California Court of Appeal, Second District, identified and examined six
4 distinct factors or circumstances relating to parole suitability, concluding that each one
5 constituted some evidence that he was unsuitable for parole. The factors or circumstances
6 examined include (1) gravity of the offense; (2) minimization of the offense; (3) lack of remorse;
7 (4) parole plans; (5) unstable lifestyle; and (6) opposition by the Long Beach and Los Angeles
8 Police Departments.

9 1. Gravity of the offense

10 A prisoner's commitment offense tends to show an inmate's unsuitability for
11 parole where committed in "an especially heinous, atrocious or cruel manner." 15 Cal. Code
12 Regs. § 2402(c)(1). The facts of a commitment offense can alone be a sufficient basis for
13 denying parole where they are especially heinous or particularly egregious. *In re Rosenkrantz*, 29
14 Cal.4th 616, 682 (2002); *see also Biggs v. Terhune*, 334 F.3d 910, 913-16 (9th Cir. 2003); *Sass v.*
15 *Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1126 (9th Cir. 2006); *Irons v. Carey*, 505 F.3d 846,
16 852-53 (9th Cir. 2007). The Ninth Circuit has cautioned in dicta, however, that repeated denial
17 based solely on an inmate's commitment offense "will at some point violate due process" where
18 there is evidence of rehabilitation and the prisoner has served the minimum term on his sentence.
19 *See Irons*, 505 F.3d at 853-54.

20 Under section 2402(c)(1), the circumstances that support a finding that a prisoner
21 committed an offense in an especially heinous or cruel manner include that (A) multiple victims
22 were attacked, injured or killed; (B) the offense was carried out in a dispassionate and calculated
23 manner, such as an execution-style murder; (C) the victim was abused, defiled or mutilated; (D)
24 the offense was carried out in a manner which demonstrates an exceptionally callous disregard
25 for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to
26 the offense." 15 Cal. Code Regs. §2402 (c)(1)(A)-(E). The relevant inquiry is an individualized

1 one: “whether the circumstances of the commitment offense, when considered in light of other
2 facts in the record, are such that they continue to be predictive of current dangerousness many
3 years after commission of the offense.” *In re Lawrence*, 44 Cal.4th at 1221. The passage of time
4 and attendant changes in the inmate’s psychological or mental attitude are relevant
5 considerations. *Id.*

6 Here, the state appellate court found there was some evidence that petitioner was
7 unsuitable for parole based on the gravity of his commitment offense because the offense showed
8 an exceptionally callous disregard for human suffering and because the motive was trivial
9 relative to the offense. *See* Cal. Code Regs. tit. 15 §2402(c)(1)(D)-(E). These terms have been
10 applied by the California courts as follows:

11 A prisoner’s commitment offense may constitute a circumstance
12 tending to show that a prisoner is presently too dangerous to be
13 found suitable for parole, but the denial of parole may be
14 predicated on a prisoner’s commitment offense only where the
15 Board can “point to factors beyond the minimum elements of the
16 crime for which the inmate was committed” that demonstrate the
17 inmate will, at the time of the suitability hearing, present a danger
18 to society if released. [*In re*] *Dannenberg*, 34 Cal.4th [1061] at
19 1071, 23 Cal.Rptr.3d 417, 104 P.3d 783 (Cal.2005). Factors
20 beyond the minimum elements of the crime include, *inter alia*,
21 that... “[t]he offense was carried out in a manner that demonstrates
22 an exceptionally callous disregard for human suffering,” and that
23 “[t]he motive for the crime is inexplicable or very trivial in relation
24 to the offense.” Cal.Code Regs., tit. 15 §2402(c)(1)(D)-(E).”

19 *Irons*, 505 F.3d at 851-51.

20 In California, “[s]econd degree murder is defined as the unlawful killing of a
21 human being with malice aforethought, but without the additional elements-- i.e., willfulness,
22 premeditation, and deliberation- that would support a conviction of first degree murder.” *People*
23 *v. Nieto Benitez*, 4 Cal.4th 91, 102 (1992). “Such malice may be express or implied. It is
24 express when there is manifested a deliberate intention unlawfully to take away the life of a
25 fellow creature. It is implied, when no considerable provocation appears, or when the
26 circumstances attending the killing show an abandoned and malignant heart.” *People v.*

1 *Mattison*, 4 Cal.3d 177, 182 (1971) citing Cal. Penal Code § 188.

2 Under California law:

3 all second degree murders by definition involve some callousness-
4 i.e., lack of emotion or sympathy, emotional insensitivity,
5 indifference to the feelings and sufferings of others. [Citation.] As
6 noted, however, parole is the rule, rather than the exception, and a
7 conviction for second degree murder does not automatically render
8 one unsuitable... Therefore, to demonstrate “an exceptionally
9 callous disregard for human suffering” (§ 2402, subd. (C)(1)(D)),
10 the offense in question must have been committed in a more
11 aggravated or violent manner than that ordinarily shown in the
12 commission for second degree murder.

13 *In re Scott*, 119 Cal.App.4th 871, 891 (1st Dist. 2004). Such aggravated circumstances may
14 include torture, severe trauma, as where “[d]eath resulted from severe trauma inflicted with
15 deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple
16 wounds inflicted with a weapon not resulting in immediate death or actions calculated to induce
17 terror in the victim” (*Id.* at 892), “rehearsing the murder, execution of a sleeping victim,
18 stalking,” (*see In re Weider*, 145 Cal.App.4th 570, 589 (6th Dist. 2006)), or where there is
19 evidence that the defendant “acted with cold, calculated, dispassion; or... gratuitously increased
20 or unnecessarily prolonged [the victim’s] pain and suffering” (*In re Smith*, 114 Cal.App.4th 343,
21 367 (6th Dist. 2003)).

22 Similarly, a finding of “triviality” sufficient to justify the denial of parole must
23 also relate to an inmate’s current dangerousness:

24 The offense committed by most prisoners serving life terms is, of
25 course, murder. Given the high value our society places upon life,
26 there is no motive for unlawfully taking the life of another human
being that could not reasonably be deemed “trivial.” The
Legislature has foreclosed that approach, however, by declaring
that murderers with life sentences must “normally” be given
release dates when they approach their minimum eligible parole
dates. (Pen. Code, § 3041, subd. (a).) The governing statute also
states that the Board shall set a release date “unless it determines
that the gravity of the 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.” (Pen. Code, §

1 3041, subd. (b).) This language means “a more lengthy period of
2 incarceration” is called for where the gravity of the offense or
3 offenses of the prisoner in question is more indicative of a danger
4 to the public if the prisoner is released than would ordinarily be the
5 case. The reference in Board regulations to motives that are “very
6 trivial in relationship to the offense” therefore requires
7 comparisons; to fit the regulatory description, the motive must be
8 materially less significant (or more “trivial”) than those which
9 conventionally drive people to commit the offense in question, and
10 therefore more indicative of a risk of danger to society if the
11 prisoner is released than is ordinarily presented.

12 *In re Scott*, 119 Cal.App.4th at 893.

13 Here, the court of appeal specifically held, with respect to the Governor’s
14 consideration of petitioner’s commitment offense:

15 [E]ven if force was necessary to protect Hines, nothing in the
16 record demonstrates Hodge was required to resort to deadly force
17 and the fact Hodge struck Allen twice in the head with the baseball
18 bat demonstrates his disregard for human suffering. Further, the
19 Governor could conclude Hodge’s motive in killing Allen, i.e.,
20 preventing Allen’s intervention in the fight between Hoff and
21 Hines, was trivial relative to the offense.

22 Additionally, even accepting Hodge’s version of Allen’s murder as
23 true, the Governor properly could conclude Hodge demonstrated
24 callous disregard for human suffering by failing to stop the fight in
25 the front yard, despite Hoff’s visible injuries. Instead, Hodge
26 escalated the situation by obtaining a baseball bat, which he used to
27 trike Allen twice in the head, causing his death. *Dannenberg*,
28 *supra*, specifically held multiple blows to the head may render a
29 murder egregious based on extreme and substantial violence,
30 thereby exceeding the minimum conduct necessary for a conviction
31 of the life offense. (*In re Dannenberg*, *supra*, 34 Cal.4th at p.
32 1095.)

33 Finally, under Penal Code section 3041, subdivision (b), the timing
34 and gravity of current or past offenses is a consideration in parole
35 determinations. Here, rather than complete his probation
36 obligation in Ohio, Hodge absconded to California where he
37 engaged in a variety of criminal behavior which continued even
38 after the murder of Allen. Also, Hodge disposed of the murder
39 weapon and fled with Hines to San Diego, postponing his eventual
40 arrest in this case. Flight from the scene of the crime, which is
41 viewed as conduct “affirming [the] violent act,” can be considered
42 a factor in determining whether an [offense] is more egregious than
43 the statutory minimum necessary for a conviction. (See *In re*
44 *Rosenkrantz*, *supra*, 29 Cal.4th at p. 683.)

1 In sum, review of the record reveals some evidence supports the
2 Governor's conclusion that Hodge's offense was committed with
3 an exceptionally callous disregard for human suffering and the
4 motive was trivial relative to the offense.

5 (Exhibit 16, B180414 opinion, November 14, 2005 at 13-14.)

6 Despite the state appellate court's conclusion, there is in fact no evidence that
7 petitioner's offense was so heinous, atrocious, or cruel that it continues to be predictive of his
8 current dangerousness this many years later, given the other facts in the record demonstrating
9 significant rehabilitation and changes in his psychological and mental attitude. *See In re*
10 *Lawrence*, 44 Cal.4th at 1221.

11 It is undisputed that (a) petitioner's offense arose out of a fight between his
12 pregnant girlfriend and another woman, (b) the victim sought to intervene in the fight while
13 wielding a large wooden window frame, and (c) petitioner killed the victim by striking him in the
14 head either once or twice with a baseball bat.

15 These facts (in addition to the others recited by the court) do not support a finding
16 that this offense was committed in an exceptionally aggravated or violent manner, compared to
17 other second degree murders, due to an exceptionally callous disregard for human suffering or an
18 extremely trivial motive, within the meaning of the relevant parole regulation. *See, e.g., In re*
19 *Rico*, 171 Cal.App.4th 659, 682-83 (2nd Dist. 2009) (no evidence of exceptionally callous
20 disregard for human suffering where inmate did not "choose an especially painful or slow
21 method for the killing, did not attempt to prolong or exacerbate the victim's suffering, did not
22 terrorize, taunt, or torment the victim, and did not attempt to prevent him from obtaining aid"); *In*
23 *re Roderick*, 154 Cal.App.4th 242, 266 (1st Dist. 2007) (escalation of a physical fight does not
24 support a finding "that the motive for the murder was less significant than in other second degree
25 murder cases"); *Saldate v. Adams*, 573 F.Supp.2d 1303, 1311-12 (E.D. Cal. 2008) (commitment
26 offense, which arose out of a fight outside a 7-11 during which the inmate attacked and killed the
victim by stabbing him multiple times after the victim began fighting with the petitioner's friend,

1 was not committed in an especially heinous, atrocious or cruel manner and did not constitute
2 some evidence of unsuitability for parole when such conduct occurred approximately 20 years
3 prior).

4 The California Court of Appeal cited *In re Dannenberg*, 34 Cal.4th at 1095, as
5 holding that multiple blows to the head may render a murder egregious based on extreme and
6 substantial violence, thereby exceeding the minimum conduct necessary for a conviction of the
7 life offense. In *Dannenberg*, the inmate had “struck multiple blows to his wife’s head with a
8 pipe wrench,” and then either “placed her head in the water, or at least left it there without
9 assisting her until she was dead.” *Id.* The *Dannenberg* court did not hold that multiple blows to
10 the head automatically render a murder especially egregious. Even assuming, in this case, that
11 petitioner struck the victim in the head twice with the bat, that conduct did not show an
12 *exceptionally* callous disregard for human suffering, compared to the typical second degree
13 murder.

14 By statute, the “timing and gravity” of petitioner’s commitment offense is a
15 proper consideration for his parole suitability determination. It is not apparent, however, and
16 neither the Governor nor the court of appeal explained, how the fact that petitioner absconded
17 from a probation term in the 1970s in Ohio remained probative to a determination of his current
18 dangerousness at the time of the 2003 hearing. See *In re Lawrence*, 44 Cal.4th at 1221. The
19 timing of petitioner’s offense does not, by itself, require a more lengthy period of incarceration in
20 this case.

21 Similarly, the fact that petitioner fled from the scene of the crime does not make
22 his offense especially aggravated for parole suitability purposes and does not constitute reliable
23 evidence probative to a determination of his current dangerousness. The state appellate court
24 cited *In re Rosenkrantz*, 29 Cal.4th 616 at 673, as holding that flight from a crime scene “is
25 viewed as conduct ‘affirming [the] violent act.’” In *Rosenkrantz*, the inmate’s commitment
26 offense was a fatal shooting with a newly purchased Uzi firearm. After the murder, the inmate in

1 *Rosenkrantz* remained a fugitive for 24 days during which time he kept the loaded Uzi with him,
2 posed with it for photographs, and contacted authorities on multiple occasions, making
3 statements such as “I had to do it because he asked for it,” and “nobody can fuck with me like
4 that and get away with it.” *In re Rosenkrantz*, 29 Cal.4th at 671. The inmate ignored pleas to
5 turn himself in, stating that he wanted to just have fun “for a little while, then go and get chained
6 up,” and that “he did society a favor” by shooting the victim. *Id.* It is obvious how the inmate’s
7 conduct in *Rosenkrantz* “continued to affirm his violent act after it had occurred.” In contrast,
8 there is no evidence that the petitioner in this case engaged in conduct affirming Allen’s murder
9 during the time that he was on the run.

10 The state appellate court’s contention that petitioner demonstrated callous
11 disregard for human suffering by failing to stop the fight between the women, and instead
12 escalating the situation, is also misguided. “The mere fact that there are a lot of other choices a
13 person could have made,” including “[t]hat a prisoner could have avoided his or her commitment
14 offense,” does not rationally support a finding that a crime was committed in an especially
15 heinous, atrocious or cruel manner.” *In re Roderick*, 154 Cal.App.4th at 266. Moreover, the
16 proper question for analysis is whether the *murder* demonstrated callous disregard for human
17 suffering, not whether petitioner’s conduct in failing to stop the fight between Hines and Hoff did
18 so.

19 In considering the circumstances of petitioner’s commitment offense, both the
20 Governor and the state appellate court ignored strong evidence in the record which undermined
21 their chosen conclusion with respect to this factor. For example, reliance on petitioner’s
22 commitment offense to deny parole ignores the repeated findings by psychologists that his crime
23 was situationally related and uncharacteristic of him. (*See, e.g.*, Exhibit 22, Psychological
24 Evaluation for the Board of Prison Terms, July 2003 (“this offense appeared to be out of
25 character for Mr. Hodge who had no history of violence prior” and “Mr. Hodge has a limited
26 history of violent type behavior and the life crime appears to have been situationally related.”));

1 Exhibit 23, Category X Psychological Evaluation, September 1990 (stating that the offense was
2 “quite an uncharacteristic show of aggression”).) Reliance on the commitment offense also
3 ignores petitioner’s consistent exemplary conduct in prison over more than two decades (*see*,
4 *e.g.*, Exhibit 20, Psychological Evaluation for the Board of Prison Terms, February 1998 (“Prison
5 adjustment has been exemplary.”); Exhibit 21, Life Prisoner Evaluation Report, January 1993
6 Calendar (characterizing petitioner as a “Model Inmate”)), and the fact that multiple evaluators
7 have indicated that petitioner no longer poses a danger to society (*see, e.g.*, Exhibit 22,
8 Psychological Evaluation for the Board of Prison Terms, July 2003 at 4) (“It is the opinion of this
9 examiner that his risk of dangerousness is less than that of the average inmate incarcerated here
10 at CSP-Solano and would be expected to be so over the course of the next years.”); Exhibit 24,
11 Psychosocial Evaluation for the Board of Prison Terms, October 2000 (“He presented with no
12 particular impulse, emotional control, attitude or anger dyscontrol that would give one pause in
13 assessing his level of dangerousness.”); Exhibit 25, Life Prisoner Evaluation Report, August
14 2003 Calendar (“this writer believes the prisoner would pose a low degree of threat to the public
15 at this time, if released from prison”); Exhibit 27, Life Prisoner Evaluation Report, March 2002
16 Calendar (same); Exhibit 26, Life Prisoner Evaluation Report, May 2000 Calendar (same);
17 Exhibit 28, Life Prisoner Evaluation Report, March 1999 Calendar (same); Exhibit 21, Life
18 Prisoner Evaluation Report, January 1993 Calendar (same); Exhibit 29, Life Prisoner Evaluation
19 Report, February 1992 Calendar (same).)

20 Given all the evidence demonstrating significant rehabilitation and changes in
21 petitioner’s psychological and mental attitude, it was unreasonable for the court of appeal to
22 conclude that his offense was so violent or aggravated that it remained probative, on its own, to
23 an assessment of his current dangerousness at the time of the 2003 parole suitability hearing,
24 which was more than 24 years after the offense. *See In re Lawrence*, 44 Cal.4th at 1221. The
25 offense was not carried out with the type of gratuitous violence, torture or disregard for the
26 victim that would permit it to be defined as “especially callous” as that term has been defined and

1 applied by the California courts. Similarly, there are no facts which suggest that the motive for
2 petitioner's actions was sufficiently trivial, such that 24 years later, its nature would still suggest
3 that he remained a danger to society. Absent such facts, the "gravity" of petitioner's commitment
4 offense does not constitute some evidence that he is currently unsuitable for parole.

5 2. Minimization of the offense

6 A prisoner's "past or present attitude toward the crime" is another factor properly
7 considered in a parole suitability determination. 15 Cal. Code Regs. § 2402 (b).

8 The court of appeal held, with respect to the Governor's consideration of the
9 commitment offense:

10 The Governor considered Hodge's continuing attempts to
11 minimize the severity of his actions under the rubric of the
12 prisoner's "past and present attitude toward the crime." (§ 2402,
13 subd. (b).) The Governor found Hodge did not understand the
14 magnitude of his crime or appreciate the seriousness of his
15 conduct. The Governor's conclusion is supported by evidence
16 indicating Hodge consistently has minimized his responsibility for
17 Allen's death. The Governor noted Hodge stated his guilt had been
18 "blown out of proportion by the prosecution, and the truth was not
19 brought to light at trial" Hodge also expressed surprise at the
20 jury's verdict stating, "all this over two women fighting." A 1990
21 evaluation of Hodge noted he "tends to minimize the intensity of
22 his attack by claiming the weapon was part of a wooden window
23 frame rather than a bat and that he only struck the victim once."
24 Hodge denied using a baseball bat in the attack for 10 years and
25 stated Allen's death was the result of "just" a fight. In 1999,
26 Hodge told a psychologist he was not violent and did not believe
he was a candidate for the VORG. Even at the current parole
hearing, Hodge continues to minimize his responsibility for Allen's
death.

Finally, although the jury rejected Hodge's claim he attacked Allen
to prevent Allen from harming Hines,⁴ Hodge continues to assert
he struck Allen only in defense of Hines. The Governor cannot be
faulted for taking the jury's view of the evidence, which
demonstrates that Hodge continues to minimize his responsibility
for Allen's murder.

⁴ Petitioner points out that, despite the court of appeal's contention, the jury did not
"reject" his self-defense claim. At trial, petitioner did not present to the jury his claim that he hit
Allen in self-defense or in defense of Hines; rather, he falsely claimed that he had left the scene
and was not there when Allen died.

1 Thus, “some evidence” supports the Governor’s conclusion Hodge
2 does not understand the magnitude of his crime or appreciate the
3 seriousness of his conduct (*In re Rosenkrantz, supra*, 29 Cal.4th at
p. 658.)

4 (B180414 opinion at 14-15.)

5 Contrary to the conclusion of the court of appeal, there is no evidence that
6 petitioner has “consistently” minimized his responsibility or that he otherwise was unsuitable for
7 parole at the time of his hearing in 2003 because of minimization of the offense.

8 The Governor noted with respect to this factor that petitioner had “scribed another
9 eight pages to ‘put the nature of [his] offense in a better perspective, and to show that the degree
10 of [his] guilt was blown out of proportion...’” The pending petition better places this undated
11 written statement of petitioner’s in context, as part of a letter he wrote “to show that the degree of
12 my guilt was blown out of proportion *by the prosecutor* and the truth was not brought to light at
13 trial, *because of my refusal to tell the truth of what really happen (sic) that night* and the false
14 testimonies of Miss Claire Hoff.” (Exhibit 31, Continuation of Letter, undated (emphasis
15 added).) Petitioner then sets forth in the “continuation” facts consistent with what he testified to
16 at the parole hearing: that he went out with the baseball bat to defend Hines from Allen, who was
17 armed with the converted window frame; that Allen swung at him first; that he swung the bat and
18 hit Allen once on the head; and that Allen fell onto the street with a “sickening thud.”

19 Petitioner first told the truth about his use of a bat in the offense in 1988. The record
20 reflects that, since then, his version of the incident has remain unchanged. This appears so,
21 despite the Governor’s reference to “a 1990 evaluation of Hodge” which indicated he “tends to
22 minimize the intensity of his attack by claiming the weapon was part of a wooden window frame
23 rather than a bat and that he only struck the victim once.” This written statement in the 1990
24 evaluation in question (see Exhibit 33, Referral Questions, September 1990) appears to have
25 been based on *prior* statements made by petitioner. As the pending petition points out, a
26 different, more extensive evaluation also dated September 1990 reveals that petitioner had by

1 then admitted to using the bat:

2 [Hines] hit [Hoff] with a lamp. They went outside. About that
3 time, [Allen] returned. [Hines] started hollering. I came out and
4 saw [Allen] swing a picture frame at [Hines]. I told him to knock
5 it off. He said, "Fuck you, punk." I had a bat and I hit him, just
6 once. He fell and hit his head on the concrete. I threw the bat in
7 the yard.

8 (Exhibit 34, Category X Psychiatric Evaluation, September 1990 at 7-8.)

9 Petitioner cannot be required to admit guilt to his crime or some specific element
10 thereof in order to be found suitable for parole. *See* Cal. Penal Code § 5011(b) ("The Board of
11 Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for
12 which an inmate was committed.") Since 1988, petitioner has consistently indicated that Allen
13 intervened in the fight between Hines and Hoff, swinging a large wooden frame at Hines, and
14 that petitioner subsequently hit Allen once with the bat, causing him to fall and hit his head on
15 the ground. Petitioner should not be found unsuitable for parole because he refuses to accept all
16 elements of the prosecution's version of events at trial (i.e., admit that he hit Allen twice).

17 The pending petition further asserts that petitioner's undated written statement
18 regarding his guilt being "blown out of proportion by the prosecutor" likely resulted, in part,
19 from the prosecution's offer of a manslaughter plea bargain before trial. The petition
20 persuasively argues that petitioner should not be found unsuitable for parole simply because he
21 has expressed his belief that the theory of the case presented by the prosecution at trial and during
22 appellate proceedings was overblown or exaggerated in light of the specific facts of the case and
23 the original plea offer he received. Importantly, petitioner blames himself, not the prosecutor, for
24 the fact that his version of events was not placed before the jury. (*See, e.g.*, Exhibit 35,
25 Psychiatric Evaluation, October 3, 1992 ("He said none of these facts had come out at the hearing
26 because of his refusal to admit the crime."))

Although the Court of Appeal used the previously referenced September 1990
evaluation titled Referral Questions to conclude that petitioner remained a danger to society

1 because of minimization of his offense, the evaluation itself directly contradicted such a
2 conclusion. Under the heading “Violence Potential,” the evaluator wrote:

3 [H]e is not an innately aggressive or assaultive individual, and this
4 offense appears to be an isolated case. It was a situationally based
5 attempt to protect his pregnant common-law wife, not a predatory
6 act. In almost any other setting or conflict, he would be more
7 inclined to compromise than fight. He has matured in prison, has a
8 constructive marriage, some vocational preparation and this, with
9 his advancing age should predict that he will remain non-violent
10 upon release.

11 (Exhibit 33, Referral Questions, September 1990 at 3.) Despite its reference to what were most
12 likely petitioner’s *previous* statements denying use of a bat, this report in no way suggested that
13 petitioner posed a current risk of danger to society because of minimization of the offense and
14 thus should not be used by the Governor as evidence that petitioner is unsuitable for parole. *See*
15 *In re Weider*, 145 Cal.App.4th at 585 (rejecting reliance on discrete portion of psychological
16 evaluation indicating that inmate had “downplayed” the role of alcohol in his offense where the
17 overall report found that the inmate posed a low risk for future violence).

18 The court of appeal also cited evidence that petitioner had “expressed surprise at
19 the jury’s verdict” stating, “all this over two women fighting.” Petitioner contends that this
20 statement was taken out of context, and that the entire paragraph from the relevant psychological
21 evaluation makes it clear that he was explaining his feelings *at the time of the jury verdict*:

22 He reported that he was offered a plea bargain of manslaughter
23 which he refused and went to trial. He stated that the woman
24 testified against him and that the “whole truth wasn’t told.” He
25 also expressed the opinion that he was not well represented. The
26 jury returned the verdict to which he was surprised, noting “all this
over two women fighting.” When asked what he had learned in the
subsequent years, he stated that he thought many times about what
could have been done differently. He said that probably he should
have stayed in the room and not reacted so quickly to the two
women fighting.

(Exhibit 30, Psychosocial Evaluation for the Board of Prison Terms, March 1999.) It is
undisputed that the offense *did* arise, as an initial matter, out of two women fighting. Petitioner’s

1 statement to that effect could be nothing more than an expression of regret that he involved
2 himself. Petitioner has repeatedly accepted responsibility for the victim's death. His reported
3 statement in 1999, "all this over two women fighting," does not constitute some evidence of
4 future dangerousness.

5 Petitioner's comment regarding the Victim/Offender Reconciliation Program
6 ("VORG"), referenced by both the Governor and the state appellate court, is also troubling at
7 first blush. His indication that "[VORG is] for people with violent problems. I'm not violent"
8 certainly appears to minimize his conviction for second degree murder, which is of course by
9 definition an extremely violent and serious crime. Even this statement, however, considered in
10 its context, is not evidence that petitioner continues to pose an unreasonable risk of danger to the
11 public because of minimization of his offense. It is undisputed that the underlying offense
12 constitutes petitioner's only conviction for a violent crime; further he has no record for violence
13 during his more than two decades in prison. Importantly, petitioner *did* participate in VORG
14 following the 1999 evaluation, and has also completed other programs designed for violent
15 inmates. (Exhibit 36, Approval of VORG Membership, January 25, 2000; Exhibit 22,
16 Psychosocial Evaluation for the Board of Prison Terms, July 21, 2003 at 3 (stating that petitioner
17 "has participated in a number of prosocial activities including Violence Prevention Program,
18 VORG [and] Anger Management".))

19 The court of appeal held: "Even at the current parole hearing, Hodge continues to
20 minimize his responsibility for Allen's death." The Governor, in turn, indicates the following
21 regarding petitioner's statements at the 2003 parole hearing:

22 [W]hen Mr. Hodge was asked by the Board at his 2003 parole
23 hearing why he did not testify truthfully at trial about the murder
24 weapon, Mr. Hodge summed it up as 'a misunderstanding.' Mr.
25 Hodge's 'misunderstanding' continued for nearly 10 years- since it
26 was not until 1988 when he first admitted to using a bat.
Moreover, when the Board questioned Mr. Hodge about his
believability, given the dramatic change in his story since trial, he
responded by saying, '[y]ou can believe it or not.' Mr. Hodge
continues his attempts to evade responsibility and to explain away

1 or dismiss his previous lies.

2 (Exhibit 14, Indeterminate Sentence Parole Release Review at 3.) The quoted portion of the
3 transcript is as follows, in its entirety:

4 PRESIDING COMM: You pled -- you pled not guilty. You were
found guilty by a jury trial.

5 INMATE HODGE: Yes, Sir. Yes, Sir.

6 PRESIDING COMM: I didn't hear that. And also, the guilty
7 verdict was upheld by the Appellate Court.

8 INMATE HODGE: Yes, Sir.

9 PRESIDING COMM: The story that you tell sounds to me like
self-defense. How did you get convicted of murder second degree?

10 INMATE HODGE: Because I wouldn't -- I didn't tell the story. I
11 got up and said -- I told of the fight but up until the part where it
12 got to me, I said, I didn't -- I don't know nothing. I -- we left. I
wouldn't tell.

13 PRESIDING COMM: Well, why -- did you testify in court?

14 INMATE HODGE: Yes.

15 PRESIDING COMM: And you didn't tell them that story?

16 INMATE HODGE: No, Sir.

17 PRESIDING COMM: And why is that?

18 INMATE HODGE: I don't know myself.

19 PRESIDING COMM: Were you represented by Counsel?

20 INMATE HODGE: Yes. And I was offered a manslaughter.

21 PRESIDING COMM: Did you -

22 INMATE HODGE: And I refused that too.

23 PRESIDING COMM: Did your Counsel know the true story? Did
you tell your counselor about the-

24 INMATE HODGE: No.

25 PRESIDING COMM: Your legal counsel about (inaudible).

26 INMATE HODGE: No, no. Mr. Stanton, I believe was his name.

1 PRESIDING COMM: Why should we believe that story today if
2 you didn't bring it up initially at the trial?

3 INMATE HODGE: (Inaudible) you want. You can believe it or
4 not.

5 PRESIDING COMM: I'm merely in a quandary to try to
6 understand why you wouldn't bring that story forward, since it
7 would indicate to me that it could be a possibility of self-defense.

8 INMATE HODGE: Because there ain't nobody to really see it.
9 There ain't nobody to see what happened, nobody but me.

10 PRESIDING COMM: Well, didn't the girl see it?

11 INMATE HODGE: No, she had run down the street
12 (indiscernible). I had to call her back. And when she went to the
13 arraignment, she told that -- she told what she saw. But after she
14 had got arrested before for assault, (indiscernible) some kind of
15 deal with her or something that she saw everything. You know,
16 but I'm not going to argue the situation. I can't blame her for
17 saying what she said.

18 [...]

19 PRESIDING COMM: Do you remember your statements about the
20 rape and robbery that you made to your probation officer?

21 INMATE HODGE: No. What (inaudible)? That was a long time
22 ago.

23 PRESIDING COMM: You are Mr. Arbie Hodge, are you not?

24 INMATE HODGE: Yes, I am.

25 PRESIDING COMM: Page seven of the Probation Officer's report
26 -- actually, it's page eight, starting on line one, Counsel. Did you
testify in court about the baseball bat?

INMATE HODGE: Yes.

PRESIDING COMM: (Indiscernible) lines 12 and 13, Mr. Ramos.
Okay, I want to get this straight now because we have an extreme
variance obviously, in the stories you gave -- are giving today and
the one that was contained in the POR. Did you read your
Probation Officer's report?

INMATE HODGE: Yes, I did.

PRESIDING COMM: You read that.

1 INMATE HODGE: I've got one. There ain't nothing in that, what
2 you just said, I don't think.

3 PRESIDING COMM: Well, I'll tell you, and I will read it.

4 INMATE HODGE: Will you read it too?

5 PRESIDING COMM: This will be the defendant's statement and
6 you are the defendant. And this says he knows nothing about a
7 baseball bat.

8 INMATE HODGE: Repeat it?

9 PRESIDING COMM: He knows nothing about a baseball bat.

10 INMATE HODGE: On whatever -- what subject are we talking
11 about? A baseball bat or a rape and robbery?

12 PRESIDING COMM: Well, both, because it says up here that she
13 then left, went up to store. She got back and got into a fight. She
14 came back with nothing (indiscernible). She then returned and said
15 she had been raped and robbed.

16 INMATE HODGE: Oh yeah, because she said that.

17 PRESIDING COMM: Well, I asked you a moment ago, what about
18 that, and you said you don't know anything about that.

19 INMATE HODGE: I don't . But that's what she said.

20 PRESIDING COMM: Okay. How about the baseball bat?

21 INMATE HODGE: Yeah. I had a baseball bat. At court I said no,
22 I didn't.

23 PRESIDING COMM: That's what I'd asked you. Had you
24 admitted having the baseball bat in court.

25 INMATE HODGE: I told them no, I didn't have the baseball bat.
26 A misunderstanding somewhere.

PRESIDING COMM: Yes, a major misunderstanding.

INMATE HODGE: Okay.

(Ex. 13, Subsequent Parole Consideration Hearing, September 25, 2003 at 18-22.)

The two comments identified by the Governor from the above excerpt, "you can believe it or not" and "a misunderstanding somewhere," do not show on petitioner's part an

1 “attempt[] to evade responsibility and to explain away or dismiss his previous lies.” Petitioner
2 repeatedly acknowledged at the parole hearing that he had lied to the jury. He explained his
3 motivation to do so, but did not attempt to justify his perjury. The context of these two
4 statements shows that the Governor’s conclusions based thereon are highly unreliable. In
5 particular, petitioner’s comment regarding “a misunderstanding somewhere” clearly referred to
6 repeated misunderstandings between the commissioner and petitioner, during their discussion of
7 factual issues. Petitioner did not indicate that he viewed his lack of truthfulness before the jury
8 as a “misunderstanding.”

9 Moreover, the portion of the parole hearing relied upon by the Governor did not
10 actually include any questions about acceptance of responsibility or minimization of culpability.

11 Thus,

12 the answers upon which the Governor relies were taken out of their
13 proper context. It so happened at the hearing that a Commissioner
14 asked petitioner certain very fact-bound questions to which
15 petitioner responded. The questions were not directly, or even
16 subtly, seeking to elicit petitioner's conclusion about his
17 responsibility for the killing, but were designed to clear up some
18 factual issues in the Commissioner's mind.

16 *Tolliver v. Carey*, 2006 WL 3497670, 9 (E.D.Cal. 2006). Here, petitioner’s responses to the
17 Commissioner’s factual questions in no way showed that he posed a current risk of danger based
18 on his past or present attitude toward his life crime and should not be relied upon by the
19 Governor, out of context, as evidence that petitioner is unsuitable for parole.

20 In contrast to the Governor’s conclusion, which was in turn recited by the court of
21 appeal, the conclusion reached by psychological professionals is that “Mr. Hodge accepted
22 culpability for his commitment offense.” (Exhibit 22, Psychological Evaluation for the Board of
23 Prison Terms, July 21, 2003; *see also, e.g.*, Exhibit 25, Life Prisoner Evaluation Report, August
24 2003 (“He understood the seriousness of his actions”); Exhibit 21, Life Prisoner Evaluation
25 Report, January 1993 (“He appears to have realized the consequences of his actions and has
26 demonstrated a maturation in judgment and emotion”).) The record reveals no evidence to

1 support the Governor's suspicion that, despite the conclusions of professional evaluators,
2 petitioner has still not fully accepted responsibility.

3 3. Lack of remorse

4 Remorse is factor that tends to show suitability for parole where the inmate by
5 word and/or deed has shown remorse for the commitment crime. 15 Cal. Code Regs. §
6 2402(d)(3). Remorse is demonstrated by acts "such as attempting to repair the damage, seeking
7 help for or relieving suffering of the victim, or indicating that he understands the nature and
8 magnitude of the offense." *In re Scott*, 119 Cal.App.4th at 897.

9 The California Court of Appeal noted with respect to this factor:

10 The Governor took issue with the Board's finding Hodge had
11 demonstrated remorse. The Governor noted Hodge's claim of
12 remorse was unsupported by any source other than Hodge and that
13 Hodge had not taken any action reflecting his acceptance of
14 responsibility or acknowledgment of his part in the murder. The
15 Governor compared Hodge's very brief letter to Allen's family in
16 1996 to the numerous versions of the incident Hodge had given,
17 and the "continuation" written by Hodge at or about the same time
18 as the letter to the Allen family. In addition to Hodge's comments
19 mentioned by the Governor, Hodge noted in the continuation that
20 Allen could have survived on a respirator but, "because of the lack
21 of money [Allen's family] determined that he be disconnected from
22 the system." This statement also is inconsistent with remorse for
23 causing Allen's demise.

24 Thus, "some evidence" supports the Governor's finding Hodge has
25 not shown remorse for the life crime. (*In re Rosenkrantz, supra*,
26 29 Cal.4th at p. 658.)

(B180414 opinion at 15-16.)

21 The court of appeal's statement that petitioner "had not taken any action reflecting
22 his acceptance of responsibility or acknowledgment of his part in the murder" is plainly
23 inaccurate. As the court of appeal notes in its very next sentence, petitioner wrote a letter to
24 Allen's family. Although characterized as "very brief" by the Governor and court of appeal, in
25 reality the letter is two full handwritten pages, and appears to be a heartfelt expression of
26 remorse:

1 To: The Allen family,

2 What can I say or do on my behalf to express the regret that I have
3 felt over these many years. I must admit, that I am so ashamed of
4 the way I acted on that horrible day of January 14, 1979. If only, I
5 could turn back the clock and prevent my emotions from affecting
6 my behavior that day. But I know that's impossible and sadly
7 realize that I have hurt the Allen family. How can I expect the
8 Allen family to understand my actions, moreover, how can I ask
9 the family for forgiveness? I feel hopelessly lost. My one prayer is
10 that, somehow, somewhere within your hearts, you all, will find the
11 last ounce of hope which I pray exists and use it to heal the grave
12 wound I inflicted by my thoughtlessness and impulsive behavior on
13 that early morning. I'll not attempt to minimize my actions, but I
14 sincerely want the Allen family and his loved ones to know that I
15 am very sorry for the pain I have caused your family by causing the
16 death of Mr. Thurman Allen.

17 I have asked for God's forgiveness, and I feel in my heart and soul
18 that I must seek forgiveness from his family and love (sic) ones, if
19 that's possible.

20 In closing this letter I can only hope and pray that God, the Allen
21 family and society will find it permissible to forgive me for my
22 actions on that morning of January 14, 1979. Once again, I am
23 truly sorry. I realize it has caused years of grieve (sic) for you, and
24 years of trying to correct the wrong I've done by being incarcerated
25 in prison.

26 Thank you for taking the time to read this letter.

Respectfully,

Mr. Arbbie M. Hodge

19 (Exhibit 38, Letter to the Allen Family from Arbbie Hodge, December 6, 1996.) To the extent
20 the Governor simply doubts, without any support in the record, that petitioner's expressed
21 remorse is genuine, that does not constitute evidence of future dangerousness.

22 The court of appeal further cited as evidence that petitioner lacked remorse his
23 written statement that "because of the lack of money [Allen's family] determined that he be
24 disconnected from the system." This written statement was taken from the undated
25 "continuation" petitioner wrote explaining in great detail the events leading up to his offense, the
26 offense itself, and also its aftermath. In the continuation, petitioner set forth the following

1 chronology:

2 ...[W]e left before the police arrived, out on Pacific Coast Highway
3 in Long Beach we rented a motel room for the rest of the night and
4 we hung around Long Beach for a few days until [Hine's] brother
5 informed her that an assault to commit great bodily injury
6 warr[a]nt was put out on the both of us. That same day we went to
7 San Diego, CA and lived in motels and hotels until February 11,
8 1979, when I was arrested for shoplifting in Chula Vista by the
9 Chula Vista Police Department. After my arrest I informed the
10 Chula Vista police of the warr[a]nt in Long beach, CA. After a
11 check they transferred me to San Diego County Jail. The next day,
12 2-12-79, a Mr. Miller and another policeman from the Long Beach
13 Police Department came and questioned me about the incident of
14 January 14, 1979. I told him that I didn't commit a murder. A
15 short time later that night [Hines] and myself [were] transferred to
16 the city jail in Long Beach, CA. The next morning on February 13,
17 1979 we [were] arraigned.

18 Oh, yes, on January 18, 1979 the assault to commit great bodily
19 injury warr[a]nt was drop (sic) and a murder warr[a]nt was issued
20 after Thurman Allen was taking off (sic) the life supporting system.
21 Dr. Harris, said that Allen, would remain alive as long as he was on
22 the respirator. But, because of the lack of money, the family
23 members determined that he be disconnected from the system...

24 (Exhibit 31, "Continuation," undated at 7-8.)

25 Petitioner's statement regarding the respirator is indeed a bit off-putting,
26 especially as it is set forth in the Governor's decision, outside the context of the detailed
27 chronology. The relevant question, however, is whether it constitutes some evidence that
28 petitioner remained an unreasonable risk of danger to society, if paroled, at the time of the 2003
29 parole hearing. The record does not support such a conclusion.

30 Importantly, petitioner did not make the respirator statement in response to
31 questions about his responsibility for or role in Allen's death. The statement in its context does
32 not show that he lacks remorse for causing Allen's demise. The Governor's unsupported
33 conclusion that petitioner lacked remorse also contradicted the finding of the Board, which,
34 unlike the Governor, had opportunity to observe petitioner directly. *See In re Roderick*, 154
35 Cal.App.4th at 272 n.26 ("Just like trial judges, parole hearing commissioners are in the best
36 position to evaluate both the credibility and the attitude of the inmate in the course of the

1 hearing.”).

2 Moreover, the Governor’s finding that petitioner lacked remorse contradicted,
3 without explanation, multiple conclusions in the record made by psychologists and other trained
4 professionals. (*See, e.g.*, Exhibit 25, Life Prisoner Evaluation Report, August 2003 Calendar, at
5 1 (“Hodge states that when the victim died, his whole world shattered. He understood the
6 seriousness of his actions and feels remorseful that the situation resulted as it did.”); Exhibit 24,
7 Psychosocial Evaluation for the Board of Prison Terms, October 2000 (“He feels sad that the
8 crime happened and bemoans the fact that he cannot change the circumstances of it, but can only
9 make the future better.”); Exhibit 37, Life Prisoner Evaluation, 1990 Calendar (“Mr. Hodge’s
10 expression of remorse for the committing offense appears to have been genuine. It appears the
11 first serious introspection Mr. Hodge has experienced recently has been as a result of his
12 participation in Category X program...”)).

13 Thus, there is ample evidence, some dating all the way back to 1990, that
14 petitioner has demonstrated remorse. The Governor’s conclusion to the contrary lacks
15 evidentiary support in the record and does not constitute some evidence that he is unsuitable for
16 parole. *See In re Roderick*, 154 Cal.App.4th at 272 (declining to attribute significance to Board’s
17 pronouncement of an inmate’s lack of insight when it ignored the evidence presented by trained
18 experts). The Governor’s citation to petitioner’s previous statements, taken out of context in the
19 manner set forth above, does not constitute reliable evidence probative to a determination of his
20 future dangerousness. Accordingly, the Governor’s skepticism regarding whether petitioner’s
21 remorse is genuine does not support the denial of parole in this case.

22 4. Parole plans

23 A prisoner’s understanding and plans for the future, specifically where the
24 prisoner “has made realistic plans for release or has developed marketable skills that can be put
25 to use upon release,” is a factor tending to indicate suitability for parole. *See* 15 Cal. Code Regs.
26 §2402(d)(8).

1 Here, the court of appeal held as follows with respect to the Governor's
2 conclusion that petitioner's plans for parole were insufficient:

3 The Governor disagreed with the Board's finding that Hodge had
4 reasonable plans for parole. The record revealed Hodge planned to
5 reside at the Harbor House in Long Beach and that he had
6 marketable laundry skills but that he had not obtained a job offer.

7 The Governor noted Hodge had no employment history prior to the
8 commitment offense, he does not expect to receive social security
9 benefits or financial assistance upon his release from prison, he has
10 no friends or family in the State of California to assist him and he
11 had not obtained a job offer. The Governor reasoned it was more
12 likely Hodge would return to his lifestyle of crime and gambling if
13 he were paroled without means of support. The Governor properly
14 could conclude Hodge had made insufficient efforts to secure job
15 offers or develop a concrete job search strategy and that, absent
16 employment, Hodge is likely to resort to criminality to support
17 himself.

18 Given Hodge's unstable lifestyle prior to the commitment offense,
19 "some evidence" supports the Governor's finding Hodge would
20 present a risk to public safety if released on parole without concrete
21 plans for his support. (*In re Rosenkrantz, supra*, 29 Cal.4th at p.
22 658.)

23 (B180414 opinion at 16.)

24 Once again, the conclusion of the Governor regarding petitioner's parole plans is
25 not supported by "some evidence."

26 First, the Governor's concern that petitioner "would return to his lifestyle of crime
and gambling if he were paroled without means of support" is unfounded. Despite the court of
appeal's reference only to Harbor House, petitioner affirmatively demonstrated that he had two
viable options for his residence after parole. The record reflects that both options would have
provided ample "means of support." First, petitioner had been accepted by Harbor House Clean
and Sober Living in Long Beach, California, a "structured sober living house." (Exhibit 40,
Letter from Assistant Director Jim Knutson to Board of Prison Terms, May 29, 2003.) Petitioner
also demonstrated that the Salvation Army in Los Angeles "continues to extend its invitation for
Mr. Hodge, to enter the Bell Shelter or Harbor Light Facility once released." (Exhibit 41, Letter

1 from Bridget Williams at the Salvation Army to Ms. Carol Daly, Chairperson, September 9,
2 2003.) The Bell Shelter “is designed to serve self-motivated men and women who strongly
3 intend to commit themselves to a structured self-help program” and offers “education,
4 counseling, vocational training and on-the-job training” with the goal of “achieving employment
5 and permanent housing.” In his decision, the Governor does not explain why such programs,
6 which are specifically designed to transition inmates back into society, were not viable parole
7 plans for petitioner. *See Irons*, 358 F.Supp.2d at 944 (half-way house considered a realistic plan
8 for parole).

9 Moreover, there is no requirement that an inmate obtain a formal job offer in
10 order to be found suitable for parole. It is not surprising that petitioner was unable to secure a
11 firm offer of employment given his age, the fact that he is incarcerated, has no release date, and
12 has no certainty of *ever* being released. His failure to obtain a firm job offer does not, by itself,
13 mean that he has not made realistic plans for release. *See generally In re Andrade*, 141
14 Cal.App.4th 807, 817 (2006) (holding that “fool proof plans” are unnecessary; “The plain
15 language of the regulation supports the opposite conclusion. By referring to “realistic” parole
16 plans, the regulation does not contemplate iron-clad and unrealistic plans.”) (overruled on
17 another ground by *In re Lawrence*, 44 Cal.4th at 1208).

18 The relevant regulation actually states that a factor indicating suitability for parole
19 is that “[t]he prisoner has made realistic plans for release *or* has developed marketable skills that
20 can be put to use upon release.” 15 Cal. Code Regs. § 2402(c)(8). It is undisputed that petitioner
21 has developed marketable vocational skills while incarcerated. At the time of the hearing, he had
22 amassed nearly 10,000 documented hours as a Laundry Machine Tender. (Exhibit 42, PIA
23 Certificate of Proficiency, June 6, 2003). The PIA Laundry Superintendent wrote:

24 Mr. Hodge has maintained a professional and courteous attitude.
25 His willingness to come in and work and giving that extra effort
26 during lockdowns, fog line, or situations out of our control, is
 greatly appreciated... Specifically, Mr. Hodge has used his skills in
 operating our Steam EM. D’Hooge Flat Iron, Jensen Constellation

1 folder and the String Tier/Pak Tyer. I would like to commend him
2 for a job well done. By maintaining this approach, I am sure that
3 Mr. Hodge will have success in his life when released from
4 incarceration.

5 (Exhibit 43, General Chrono, June 12, 2003.) Thus, the parole plans factor relied upon by the
6 Governor tends to show petitioner's *suitability* for parole, not his unsuitability.

7 5. Unstable lifestyle

8 The court of appeal held as follows with respect to the Governor's consideration
9 of petitioner's social history and pre-prison conduct:

10 Hodge's criminal history commenced at the age of 13 years. He
11 was placed on probation [at] the age of 14 years and was sent to a
12 reform school at the age of 15. Hodge failed to complete high
13 school and supported himself by playing pool and engaging in theft
14 related offenses. Hodge was addicted to heroin until 1977 and
15 continued to abuse illegal drugs and alcohol until his arrest. Hodge
16 was arrested numerous times as an adult and sustained seven
17 convictions prior to his arrest for the instant offense. He
18 previously had been granted parole on three different occasions and
19 Hodge was on probation in Ohio at the time he committed the
20 instant offense. Hodge admits numerous marriages and children
21 and Hodge appears to have lacked a permanent address for many
22 years prior to the murder. Hodge was living unstably with his
23 pregnant girlfriend in the residence of others who were involved in
24 a criminal lifestyle at the time of the commitment offense.

25 The Governor also disagreed with the Board's finding Hodge had
26 maintained close family ties, finding instead Hodge had not
maintained direct contact with many family members. Indeed, the
record reveals Hodge was in contact with none of his children.
The Governor noted Hodge had been described as a sociopath in
1998 and a psychological evaluation indicated he might present a
risk to the public if he returns to the use of drugs and alcohol.
However, Hodge last attended AA and NA in 2001.

Thus, "some evidence" supports the Governor's determination to
consider Hodge's unstable lifestyle prior to incarceration a
circumstance that demonstrated unsuitability for parole. (*In re*
Rosenkrantz, supra, 29 Cal.4th at p. 658; § 2402, subd. (c)(3).)

(B180414 opinion at 15-16.)

An "unstable social history" in the context of the state regulatory scheme means
"[t]he prisoner has a history of unstable or tumultuous relationships with others" and, where

1 present, is another factor tending to show that an inmate is unsuitable for parole. 15 Cal. Code
2 Regs. § 2402(c)(3). In his written decision, the Governor referenced petitioner’s “numerous
3 marriages and children” and noted that petitioner was not in contact with any of his children.
4 The fact that petitioner has been party to multiple failed marriages does not necessarily mean that
5 any of those relationships were unstable or tumultuous. Similarly, despite not being in contact
6 with any of his children, there is no evidence that petitioner has had an unstable or tumultuous
7 relationship with any of them. *See In re Roderick*, 154 Cal.App.4th at 268 (“The record shows
8 an *absence* of any relationship with his natural parents, not any unstable or tumultuous
9 relationships.”) (emphasis in original).

10 Both the Board and Governor noted that petitioner had maintained other family
11 ties during his incarceration. (Exhibit 13, Subsequent Parole Consideration Hearing transcript,
12 September 25, 2003 at 58 (panel member stating “[y]ou have maintained close family ties while
13 imprisoned via letters, visits, and phone calls”); Exhibit 14, Indeterminate Sentence Parole
14 Release Review, February 20, 2004 at 2 (“he has maintained ties with several siblings and
15 cousins and has established other relationships via letters”).) In August 2000, it was noted that
16 petitioner “appears reasonably socially connected.” (Exhibit 24, Psychosocial Evaluation for the
17 Board of Prison Terms, August 2000). In addition, during the entire time he has been
18 incarcerated there has been no evidence of unstable or tumultuous relationships with other
19 prisoners or staff members. In sum, petitioner has no history of unstable or tumultuous
20 relationships which make him currently unsuitable for parole.

21 In further discussing petitioner’s “unstable lifestyle,” the court of appeal appeared
22 to be analyzing his criminal history, as opposed to his social history. An inmate’s criminal
23 history tends to show unsuitability for parole insofar as it reveals that he “on previous occasions
24 inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner
25 demonstrated serious assaultive behavior at an early age.” 15 Cal. Code Regs. §2402(c)(2).
26 Conversely, the fact that a prisoner “does not have a record of assaulting others as a juvenile or

1 committing crimes with a potential of personal harm to victims” is a factor tending to indicate
2 suitability for parole. 15 Cal. Code Regs. § 2402(d)(1). Although petitioner’s criminal history,
3 including his juvenile record, could be fairly characterized as substantial, it is undisputed that the
4 commitment offense is his only known episode of violence. Accordingly, the fact that he has no
5 criminal record of violence is a parole suitability factor, not an unsuitability factor.

6 The Governor and court of appeal also discussed petitioner’s history of drug
7 abuse. Drugs did not play a role in petitioner’s life crime, however, he was addicted to heroin
8 until two years prior to the offense. As the Board noted, “a prisoner’s prior addiction is not an
9 appropriate consideration in determining parole suitability.” *In re Smith*, 109 Cal.App.4th 489,
10 505 (2nd Dist. 2003). There is no evidence that petitioner is presently addicted to drugs, nor any
11 evidence that he used drugs or alcohol at any time during his incarceration. In fact, the notion
12 that petitioner risks returning to a life of drugs and alcohol if paroled is wholly speculative and
13 unsupported in the record.

14 Petitioner has participated in treatment for drug and alcohol abuse. (*See, e.g.*,
15 Exhibit 20, Psychological Evaluation for the Board of Prison Terms, February 1998 at 1 (“He
16 established a good track record in attendance at self-help programs, showing a preference for NA
17 over AA but doing both.”); Exhibit 24, Psychosocial Evaluation for the Board of Prison Terms,
18 October 2000 at 4 (“He has participated at length in Narcotics Anonymous.”).) A chrono
19 reflecting petitioner’s participation in 1998 and 1999 indicated he “demonstrated a willingness to
20 share openly with the group” and “made a commitment to himself to work the steps and the
21 traditions.” (Laudatory & (Good) Informative Chrono, 1999.)

22 As previously noted, petitioner’s parole plans included residence at a sober living
23 home. In addition, the special conditions of his parole included that he not use or possess
24 alcoholic beverages, and that he submit to testing for alcohol, THC and narcotics. The Board
25 also indicated he would be required to participate in a substance abuse program such as AA or
26 NA.

1 The statement in the Governor’s decision that a psychological report indicated that
2 petitioner might be “unpredictable” if he returned to drugs was from 1986. (Exhibit 46,
3 Psychiatric Consultation, September 26, 1986 at 2.) Since then, his prognosis for avoiding future
4 substance abuse improved, according to evaluators. (Exhibit 47, Category X Psychiatric Council,
5 September 27, 1990 (“The council is in agreement that the subject appears highly unlikely to re-
6 offend insofar as violent crime is concerned. His prior involvement with heroin remains of some
7 concern but he has had no difficulty remaining abstinent during incarceration and would probably
8 not have a serious problem on release... The subject’s age and current level of maturation appear
9 to make a return to his earlier lifestyle rather unlikely.”); Exhibit 35, Psychiatric Evaluation,
10 October 3, 1992 at 2-3 (noting that petitioner’s offense was not related to his chemical abuse
11 problem and stating additionally that his “impulse control is excellent”).)

12 On this record, petitioner’s history of drug abuse does not constitute some
13 evidence that he is currently unsuitable for parole. *See In re Smith*, 114 Cal.App.4th at 371
14 (“Consequently, we conclude that Smith’s *past* desire for and use of drugs does not by itself
15 reasonably establish current unsuitability because there is no additional evidence to complete a
16 chain of reasoning between his past drug use and a finding that because of it he currently poses
17 an unreasonable risk of danger if released. In other words, in the absence of some evidence to
18 support a reasonable belief that Smith *might* start using drugs again, the fact that he used drugs
19 extensively more than 20 years ago does not by itself represent some evidence that he is currently
20 dangerous.”) (emphasis in original). Here, like the inmate in *Smith*, petitioner has a history of
21 drug abuse, although he was not under the influence when he committed his crime. Due to his
22 demonstrated rehabilitation in this area and the lack of evidence to the contrary, petitioner cannot
23 be found *currently* unsuitable because of his *past* drug use.

24 In discussing this factor the Governor and court of appeal also referenced an
25 evaluator’s comment referring to petitioner as a “sociopath.” The context of the evaluator’s
26 comment was as follows:

1 Impression and Recommendations:

2 This inmate seems to present the not unusual picture of a sociopath
3 who simply matures into a new orbit of relative conformity and
4 responsibility. If this is to happen, it most often takes place in the
5 middle or late thirties. Sociopaths who try to work their act on an
6 unstable inmate population tend to come up fairly quickly either in
7 administrative trouble or badly injured. This inmate, further, does
8 not look to be highly susceptible to violence, since the single
9 known violent episode in his career is the commitment offense.

10 Staff comments are very nearly all positive in nature. The inmate
11 expresses strong hope to get on track and to apply his new skills in
12 a conforming life style in the community. If given an opportunity,
13 I expect he would do so.”

14 (Exhibit 20, Psychological Evaluation for the Board of Prison Terms, February 1998 at 2.) The
15 same evaluator also wrote in this report that “[p]rison adjustment has been exemplary,” and
16 “[d]iagnostically, his behavior fits no criteria for any Axis I or Axis II psychiatric disorder. By
17 history he has been... a heavy substance abuser and personality disorder. Neither of these
18 categories now applies.”

19 Thus, the 1998 evaluation cited by the Governor as a negative factor is actually
20 positive with its prediction for petitioner to have a successful parole. Moreover, to the extent the
21 Governor relied on the 1998 reference to petitioner as a “psychopath who simply matures into a
22 new orbit of relative conformity and responsibility,” he simply ignored more recent evaluations
23 addressing the same point:

24 Mr. Hodge has no diagnosed psychopathology which is related to
25 his life crime. He has never been diagnosed as having a severe
26 mental disorder, nor has he made any complaints of a mental
27 disorder. As related above, Mr. Hodge has a limited history of
28 violent type behavior and the life crime appears to have been
29 situationally related. Thus, in the opinion of this examiner, any
30 future parole considerations that the board would foresee for this
31 inmate should be related to factors of his parole, rather than any
32 mental health issues.

33 (Exhibit 22, Psychological Evaluation for the Board of Prison Terms, July 2003 at 4; *see also*
34 Exhibit 24, Psychosocial Evaluation for the Board of Prison Terms, October 2000 at 4 (“He has
35 carried a diagnosis of Antisocial Personality Disorder, but currently evidences few symptoms of

1 this, albeit in this controlled environment, and age and maturity have likely ameliorated aspects
2 of this personality style.”.)

3 The Governor is not authorized to engage in such cherry-picking of the record:

4 [T]he Governor’s reliance on a 1991 evaluation was irrational
5 because he inexplicably ignored a much more current
6 psychological evaluation in the record. The Governor did not
7 indicate that he considered the 2002 evaluation, that he found any
8 problems in it or that he rejected it; instead, he simply ignored it.
9 When deciding whether an inmate poses a danger if paroled in
2002, reliance on a 1991 psychological evaluation when a 2002
psychological evaluation is available and not flawed in any
identified way supports an inference that the decision was arbitrary
and the outcome predetermined.

10 *Thomas v. Brown*, 513 F.Supp.2d 1124, 1133-34 (N.D. Cal. 2006). The immutable
11 circumstances of petitioner’s pre-prison lifestyle, including his criminal history, do not support
12 the denial of parole in this case.

13 6. Opposition by the Long Beach and Los Angeles Police Departments

14 The court of appeal noted the following with respect to the Governor’s
15 consideration of opposition to petitioner’s parole expressed by the Long Beach Police
16 Department and the Los Angeles County District Attorney’s Office:

17 Here, a letter from the City of Long Beach Police Department
18 opposed Hodge’s request for parole. It concludes by [] stating:
19 “Due to the merciless nature of the murder inmate Hodge
20 committed in the blatant disregard for human life he displayed, it is
21 the opinion of the Long Beach Police Department that inmate
22 Hodge has not served sufficient time to ensure rehabilitation and
23 should remain incarcerated for the term of imprisonment as
prescribed by the sentencing court. Inmate Hodge murdered victim
Allen while on probation for burglary, proving he is incapable of
self-governing. Inmate Hodge was not a productive member of
society prior to his first-degree murder⁵ conviction and he would
no doubt be a detriment and a liability to society [i]f he were
granted parole.”

24 Also, a representative of the District Attorney of Los Angeles
25 County attended Hodge’s parole hearing and expressed opposition

26 ⁵ Petitioner’s conviction is for second degree murder, not first degree murder.

1 to the request.

2 (B180414 opinion at 17.)

3 Law enforcement's opposition to petitioner's parole was properly considered by
4 the Governor (*see* Cal. Pen. Code, § 3046(c)), however, it does not constitute some evidence of
5 petitioner's unsuitability. *See In re Dannenberg*, 173 Cal.App.4th at 256 n.5 ("The District
6 Attorney's 'opinion' ... is not evidence, and therefore does not constitute 'some evidence'
7 supporting the Governor's decision.").

8 Moreover, the opinion of the Long Beach Police Department was based on the
9 gravity of the commitment offense and petitioner's other pre-prison conduct, factors which have
10 already been considered herein and rejected as no longer probative to a determination of his
11 current or future dangerousness. The Long Beach Police Department additionally made clear its
12 view that petitioner "will never have served sufficient time to ensure rehabilitation and should
13 remain incarcerated for the term of life imprisonment..." (Exhibit 49, Letters from Sergeant
14 Oliver to CSP-Solano, March 13, 2002, June 11, 2002 and June 25, 2002.) Given the liberty
15 interest that flows from the mandatory language in California's statutory parole scheme, such
16 reasoning would clearly violate petitioner's right to due process if used to indefinitely deny him
17 parole.

18 As for the opposition by the Los Angeles District Attorney's Office, the statement
19 by the representative at the parole hearing was, in full, as follows:

20 I think what the prisoner is doing at this point, is developing the
21 final version of the story, which I believe is going to end up being
22 the baseball bat was used to commit the murder. And if so, that
23 was a brutal murder indeed. He has a previous record that is
24 horrendous. I keep flipping through the pages and see a lot of
25 arrests and many convictions. So his performance on probation
26 was unsatisfactory. I think the inmate needs a little bit more time
to fully reflect on what exactly happened, take full responsibility,
and also, I haven't heard any parole plans. I would submit that
based on these facts, we would deny parole at this time.

(Exhibit 13, Subsequent Parole Consideration Hearing, September 25, 2003 at 52-53.) Thus, the

1 district attorney's opposition also appeared to be based mostly on the immutable circumstances
2 of petitioner's offense and criminal history. The conclusion that petitioner needs more time to
3 "fully reflect on what exactly happened" and "take full responsibility" appears to be based on the
4 incorrect notion that petitioner was admitting for the first time that he used a bat to commit the
5 offense. This, of course, is not the case since petitioner had consistently reported use of a bat
6 since 1988. Finally, although the representative stated he had not "heard any parole plans,"
7 petitioner's plans for parole were in fact discussed in detail at the hearing. (*See* Exhibit 13,
8 Subsequent Parole Consideration Hearing, September 25, 2003 at 26-28.)

9 F. Resolution

10 "All murders represent the basest form of human behavior. [California] laws,
11 however, provide for mechanisms by which even murderers, in limited circumstances, are
12 entitled to be paroled." *In re Lee*, 143 Cal.App.4th 1400, 1414 (2nd Dist. 2006). "Release on
13 parole is said to be the rule, rather than the exception." *In re Vasquez*, 170 Cal.App.4th 370,
14 379-80 (4th Dist. 2009). The "overarching consideration in the suitability determination is
15 whether the inmate is currently a threat to public safety." *In re Weider*, 145 Cal.App.4th at 589.
16 Nevertheless, the Governor failed to identify any reliable evidence in the record that petitioner
17 poses a current or future threat to public safety. Instead, the available evidence plainly
18 demonstrates a contrary conclusion. Because of the overwhelming evidence that petitioner no
19 longer poses a threat to public safety, and because of the lack of *any* evidence to support the
20 Governor's reversal of the Board of Prison Terms' grant of parole, the writ must issue.

21 V. CONCLUSION

22 For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's
23 application for writ of habeas corpus be GRANTED.

24 These findings and recommendations are submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
26 days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
3 shall be served and filed within ten days after service of the objections. The parties are advised
4 that failure to file objections within the specified time may waive the right to appeal the District
5 Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: April 27, 2010

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8 CHARLENE H. SORRENTINO
9 UNITED STATES MAGISTRATE JUDGE
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