

1 by due process absent such evidence. Ct. Rec. 15 at 1-2.

2 Respondent opposes the motion.¹ Respondent argues that Brown
3 cannot request reconsideration of a judgment and order, and that his
4 request should be considered as a request to alter the judgment.
5 Respondent contends that Brown does meet the standards under
6 Rule 59(e) because he cannot show that the Court's judgment was
7 clearly erroneous or that there was an intervening change in
8 controlling authority. Respondent concludes the Court should deny
9 Brown's request.

10 In reply to Respondent's opposition, Petitioner argues that the
11 Board, Respondent, and the state courts used the commitment offense
12 as the sole ground for denying parole, and the Board did not set
13 forth a nexus between the facts and current dangerousness.
14 Petitioner argues that under *In re Lawrence*, 44 Cal. 4th 1181 (2008)
15 and the some evidence standard of review, the immutable facts of his
16 commitment offense cannot now, after more than three decades of
17 exemplary conduct, serve as the sole basis for precluding his parole.
18 Due process requires, Petitioner argues, that the Board's decision be
19 set aside. (Ct. Rec. 21 at 2).

20 The Court has considered the parties' briefing on this matter.
21

22 ¹Respondent preserves the argument that the Court did not
23 err in denying Brown federal habeas relief because Brown does not
24 have a federally protected liberty interest in parole under
25 either the mandatory language test in *Greenholtz v. Inmates of*
26 *Nebraska Penal & Correctional Complex*, 442 U.S. 1, 12 (1979), or
the "atypical and significant hardship" test in *Sandin v. Connor*,
515 U.S. 472, 484 (1995). Respondent, however, acknowledges that
in *Sass v. California Board of Prison Terms*, 461 F.3d 1123, 1128
(9th Cir. 2006), the Ninth Circuit held that California's parole
statute creates a federal liberty interest in parole.

1 The Federal Rules of Civil Procedure do not recognize a motion for
2 reconsideration of a judgment and order. *American Ironworks &*
3 *Erectors, Inc. v. North American Const. Corp.*, 248 F.3d 892, 898-99
4 (9th Cir. 2001). Instead, because Brown's request was filed within
5 ten days after the Court's entry of judgment, it should be construed
6 as a motion to alter or amend the judgment under the Federal Rules of
7 Civil Procedure Rule 59(e). *Id.* at 899.

8 A district court may "alter or amend judgment under Rule 59(e)
9 if "(1) the district court is presented with newly discovered
10 evidence, (2) the district court committed clear error or made an
11 initial decision that was manifestly unjust, or (3) there is an
12 intervening change in controlling law." *Duarte v. Bardales*, 526 F.3d
13 563, 567 (9th Cir. 2008). Brown does not contend that there is newly
14 discovered evidence. Instead, Brown contends that he is entitled to
15 an altered judgment because the Court committed clear error when it
16 denied his petition, and there was an intervening change in the law.

17 With respect to Brown's "clear error" and change of law
18 argument, the Court finds it unconvincing. The state court decisions
19 were not contrary to clearly established federal law. The Supreme
20 Court addressing the process due in state parole proceedings,
21 *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442
22 U.S. 1, 12 (1979), held due process is satisfied when the state
23 provides an inmate an opportunity to be heard and a statement of the
24 reasons for the parole decision. *Id.* at 16. "The Constitution does
25 not require more." *Id.*

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1 Brown argues this Court erred because the Court must find some
2 evidence that Brown "currently poses an unreasonable risk of danger
3 to public safety." (Ct. Rec. 15 at 5.) Brown's reliance on the
4 "current risk of danger" standard of review and his citation to state
5 law demonstrates the fundamental flaw with his contention that this
6 Court erred and he is entitled federal habeas relief. The "current
7 risk of danger" standard of review as articulated in recent state
8 court decisions² is not clearly established federal law as determined
9 by the United States Supreme Court.

10 Whether the state courts that adjudicated Brown's claims erred
11 because their decisions do not meet this newly clarified standard of
12 state judicial review does not implicate federal habeas relief. Thus,
13 this Court did not err, as Brown suggests, when it allegedly failed
14 to apply *Lawrence* to his claims. Brown has not argued that federal
15 controlling authority has changed. The state court decision upholding
16 the Board's denial of parole was consistent with clearly established
17 federal law.

18 Accordingly,

19 **IT IS HEREBY ORDERED:**

20 1. Petitioner Barry Austin Brown's Motion For Reconsideration,
21 **Ct. Rec. 15**, filed on May 8, 2009, is **DENIED**.

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23
24 ²*In re Lawrence*, 44 Cal. 4th 1181, 1212 (2008) (relevant
25 inquiry is whether some evidence supports the decision that "the
26 inmate constitutes a current threat to public safety") and *In re*
Shaputis, 44 Cal. 4th 1241, 1254 (2008) ("the proper articulation
of the standard of review is whether there exists 'some evidence'
that an inmate poses a current threat to public safety").

