UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICARDO HERNANDEZ, Petitioner, v. R.J. SUBIA, Warden, Respondent.	CASE NO. 2:07-cv-00839-RSL-JLW REPORT AND RECOMMENDATION

I. SUMMARY

Petitioner Ricardo Hernandez is currently incarcerated at the Mule Creek State Prison in Ione, California. Upon his conviction in 1985 of two counts of second degree murder, and assault with a deadly weapon, he was sentenced to a term of fifteen-years-to-life, with possibility of parole, and a concurrent term of six years on the assault charge.

In 2005, the Board of Parole Hearings of the State of California (the "Board")[1] granted his application for release on parole. But Governor Arnold Schwarzenegger reversed that decision, and denied parole. The same sequence was repeated in 2006: a new hearing, a new grant by the Board, but again a reversal by the Governor. Having exhausted his remedies in the courts of California, petitioner seeks federal habeas corpus relief, under 28 U.S.C.

[1] The Board of Parole Hearings replaced the Board of Prison Terms, which was abolished on July 1, 2005. *See* California Penal Code § 5075(a).

§ 2254.

Petitioner had been in custody for almost twenty years at the time of his 2005 hearing – and over twenty-four years as of this writing.

The Court, having thoroughly reviewed the record and briefing of the parties, finds that petitioner is entitled to the relief requested, and recommends the Court grant the petition.

II. FACTUAL BACKGROUND[2]

In January 1985, the date of the assault offense, petitioner was twenty-one years of age, and lived with his large family in Compton, California. He was associated with a gang, the "Tortilla Flats." Before his 1985 offenses, he had a prior conviction for spray-painting a wall with graffiti, and a misdemeanor conviction for possession of a controlled substance.

On January 11, 1985, petitioner and two co-defendants, both of whom were minors, confronted Pedro Gil at his residence about a prior incident in which Gil nearly ran over petitioner with a car. (*See* Docket 6, Exhibit 3 at 9.) After petitioner allegedly threatened Gil, one of the minors shot Gil in the chest and injured him. (*See id*.) Petitioner later pled guilty to assault with a deadly weapon for his role in this offense.

Petitioner's murder convictions arose from a gang-related shooting that took place on June 16, 1985, about five months later. (*See id*. at 10.) Members of a rival street gang, "the Rebels," drove into petitioner's neighborhood to "settle" a dispute between the two gangs which had taken place earlier that day. (*See id*.) A fight broke out when members of the "Rebels" began throwing bottles and other objects at "Tortilla Flats" gang members. (*See id*.)

[2] The record before this Court includes transcripts of both hearings before the Board. The factual evidence at those two hearings is consistent in all relevant respects, except that the second hearing contains additional evidence as to his employment plans. The transcripts of both hearings were available to the Governor when he denied parole in 2006. This factual summary draws upon facts set forth in both transcripts.

After several members of the "Rebels" tried to scale a fence in order to harm petitioner, who was on the other side, petitioner retrieved a rifle from one of his friends and began firing. According to petitioner, he missed the persons climbing the fence, but hit two other members of the Rebels who were sitting in the back of a pick-up truck. (*Id*.) Petitioner's shooting resulted in the deaths of Andrews Ortega and David Flores. (*See id*. at 10-11.)

Petitioner pled guilty to two counts of second degree murder with the use of a deadly weapon, and one count of assault with a deadly weapon in Los Angeles County Superior Court on December 12, 1985. (*See id*., Ex. 6 at 1.) He received two concurrent terms of fifteen-years-to-life with the possibility of parole for the murder charges, and a six-year term for the assault charge to run concurrently with his life sentence. (*See id*.) His minimum eligible parole date was set for June 24, 1995. (*See id*., Ex. 3 at 1.)

At his parole hearings, petitioner volunteered the fact that he had also been involved in two drive-by shootings during approximately the same period as the offenses for which he was convicted. He was never charged for this conduct, and does not know whether there were any resulting injuries. (*See id*., Ex. 2 at 16-17.)

During his first several years in prison, petitioner continued his gang affiliation. In 1986, an inmate was stabbed on the weight pile at San Quentin. Petitioner was charged as the assailant and given 15 months in the Security Housing Unit ("SHU"), but he steadfastly denies any involvement in the stabbing. (*See id*., Ex. 3 at 69-70.) On a different occasion, petitioner was charged with using force and violence in the yard, but that was later reduced to a less serious infraction. When petitioner was at Chino in 1987, he was disciplined for possession of a double-edged razor blade. He explained, "I was told through gang traditions

that you always have to arm yourself, because you're going to be challenged and you have to meet the challenge … I think the razor blade was found in the cell. It was used for cutting cardboard, but it is dangerous contraband and I took responsibility for it." (*See id*. at 70-71.) He was also disciplined for possession of marijuana, and for possession of an inmate-made metal weapon. All of this occurred during his first four years in prison.

In 1989, however, petitioner made an abrupt, positive change in his behavior. At the 2006 hearing, the Presiding Commissioner of the Board asked:

> PRESIDING COMMISSIONER GARNER: What happened in 1989 that turned you around? You had a lot of trouble, it seems, adjusting. Was there any one event or revelation that came to you that got you turned around?
>
> INMATE HERNANDEZ: Yes, it did. Having my mother come see me in San Quentin in the SHU, behind a granite wall and through a small window and seeing me in shackles, and seeing the tears fall from her eyes. That day told me that I need to change, because everything that I was doing on the streets I was still doing in prison, and seeing her and the sadness in her eyes led me to the (indiscernible) where I am today.

(*Id*. at 64-65.)

Most significantly, petitioner terminated his gang affiliations. In 1992 he was ordered by members of the "Mexican Mafia" to stab another individual within the prison. Petitioner told the Board that he had no affiliation with the Mexican Mafia. But, "[o]nce you're in a SHU in any prison, the Mexican Mafia runs the SHU. In order for you to stay out of the SHU you have to play by the rules, and I was done after seeing my mom, following those rules. So I refused to do it." (*See id*. at 72-73.) As a result of his refusal, petitioner himself was stabbed in 1992.

Commenting on these two events, the Board observed that "[e]ither of those could be a life altering [event] for [petitioner] and whichever one it was, [it] worked." (*Id*. at 114.)

The record of progress and achievement by petitioner since 1989 fully bears out that observation. He had no significant disciplinary problems starting in 1989, and continuing for at least seventeen years through the 2006 parole hearing. But above and beyond the lack of trouble, he has compiled an exemplary, positive record of achievement.

Petitioner has been involved in a wide variety of "self-help and therapy programming" within the institution. The most significant, for him, has been his extensive involvement with the 12-step Criminal Gangs Anonymous ("CGA") program. (*See id*. at 45 and 112.) Specifically, petitioner has served as a facilitator in the CGA program, and he personally developed the CGA Spanish program in 2003. (*See id*. at 55-56.) During the 2005 hearing he told the Board that, through the CGA program, he developed insight into why he became involved in gang activity:

> I was always a chubby kid and as a little kid – I still am. I'm a chubby man now, but back then the bullying I received at school and as a little kid, it hurt me. And I got to a certain age that I got tired of all the bullying and the laughter. And people used to look at me, I felt, that [sic] looked at me with disgust and I wanted to change that. I tried sports and that didn't help. My family has always been loving to me, you know, and I've always known that, but it wasn't enough. And it wasn't until I joined that gang that it got me what I felt that I needed, the acceptance. You know, people didn't look at me as a fat kid no more. And it wasn't because all the sudden [sic] they loved me, because I became a very violent gang member. And that brought me the acceptance and once I got it, I couldn't stop doing it … See, at that time, I felt that if I didn't do it … that I would lose everything that I had gained, the status.

(*Id*., Ex. 2 at 30-31.)

The CGA program also provided him insight regarding the commitment offense:

> PRESIDING COMMISSIONER GARNER: When did you first come to grips with the commitment offense and have – start having feelings of remorse for what you'd done?
>
> INMATE HERNANDEZ: I removed all those defects in character that didn't allow me to see the enormity of what I did. Because I've always felt justified. A gang member was justified because the other guys were gang members. And when I didn't [sic] remove those defects of character within me and took full responsibility, that's when I saw the enormity of what I had done. I had no shields to see that through, to guide me from that. I seen beyond those two persons being gang members, and I seen them as David and Andres, with families just like I had. Before I didn't allow myself to see that. It helped me to withstand all the time that I been in prison. Once I removed all those defects in character, I saw how I impacted their families.

(*Id*., Ex. 3 at 65-66.)

Petitioner made these comments regarding the commitment offense at his second hearing. But they were an echo of his statements at the first hearing: "[w]hen it happened, my beliefs were that I was defending not only myself, but my neighborhood, the reputation of our neighborhood. Back then, I thought that I was doing the right thing. And back then, I saw the gang members as gang members. And throughout the years, as far as becoming a mature adult and through recovery, I've learned that they were human beings." (*See id*., Ex. 2 at 22.)

Among other activities, petitioner has "worked with the [Enhanced Outpatient Program] organizing sports and talent shows," completed a 60-day workshop on the Benefits of Self-Honesty and Truthfulness with Others, participated in Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA"), and written book reports describing the lessons he learned by reading self-help books during his free-time in prison. (*See id*., Ex. 3 at 44-45, 50-53, and

112.)

The Board also found that petitioner's institutional activities indicate an enhanced ability to function within the law upon release. *See* 15 CCR § 2402(d)(9). For example, petitioner has "what's perceived to be one of the more prestigious jobs that an inmate can get, and that's working as a Clerk. [He has] received excellent work reports…." (Dkt. 6, Ex. 3 at 111.) His vocational accomplishments include completion of the Vocational Electronics Program in 2003, as well as the Furniture Refinishing Program in 1995. (*See id*. at 43.) Petitioner also improved himself educationally by earning his GED in 1989. (*See id*. at 112.)

Petitioner's "maturation, growth, and … greater understanding," as well as his signs of remorse, were also cited by the Board as factors indicating petitioner's suitability for parole. (*See id*. at 113-114.) *See* 15 CCR § 2402(d)(3) and (7). The Board observed that petitioner is "older, [although he is certainly not] an advanced age. [He has] got a lot of time left to make good. [He has] got a very reduced probability of recidivism." (Dkt. 6, Ex. 3 at 113.) It also noted that his actions indicate the presence of "remorse, and [that he] understand[s] the nature and the magnitude of the offense, and [he] accept[s] … responsibility for [his] behavior, and [his] desire to change toward good citizenship." (*Id*. at 114.)

The Governor acknowledged petitioner's participation in "self-help and therapy, including Alcoholics Anonymous and Narcotics Anonymous, Special Recovery, Honesty & Truthfulness, Grief Ministry Group, Amer-i-can program, and Criminal & Gang Members Anonymous. He has earned numerous laudatory chronos, and has received favorable reports, inclusive of some low risk assessments, from correctional and mental-health professionals." (*Id*., Ex. 5 at 2.) Furthermore, the Governor noted petitioner's ability to maintain close

relationships with others, as well as his "confirmed plans to reside [in Mexico] with a family friend [and] work at a friend's hardware store" upon his release. (*Id*.) The Board's 2006 decision noted that petitioner has experienced reasonably stable relationships with others, because he managed to maintain "extremely close family ties" with his "very large" and "very successfully family" throughout his incarceration. (*See id.*, Ex. 3 at 113.) *See* 15 CCR § 2402(d)(2). The Board observed that petitioner's family has expressed "their willingness to help [petitioner] spiritually, financially, [with] pretty much anything [he] need[s]. Not many people are blessed with that, and [petitioner is] lucky to have it." (Dkt. 6, Ex. 3 at 113.)

Petitioner's 2004 psychological evaluation assessed his "violence potential in the free community" as "minimal," and asserted that petitioner will "use [his] insight and leadership skills in a pro-social way" upon his release from prison. (*Id*. at 114-15.) His 2001 psychological evaluation also asserted that if petitioner is released into the free community, he will "maintain [his] current non-violent character … what appears to be an excellent ability to get along with others, and a genuine willingness to work directly and honestly with the problems." (*Id*. at 57-62 and 115.)

The applicable regulations require the Board to consider a prisoner's "understanding and plans for the future," including a prisoner's "realistic plans for release or … marketable skills that can be put to use upon release" as a factor tending to indicate suitability for parole. *See* 15 CCR § 2402(d)(8). Petitioner is a Mexican national; and while he alleges his presence in this country has been legal, he acknowledges it is very likely he will be deported or removed to Mexico if he is released on parole. Accordingly, at both Board hearings, petitioner and his counsel presented evidence as to how, where, and by whom he would be

employed upon his return to Mexico.

In reviewing the 2005 Board decision, the Governor found petitioner had not shown his employment plans were "viable or realistic." (Dkt. 6, Ex. 4 at 2.) During the 2006 parole hearing, however, petitioner provided the Board with detailed documentation of his employment plans in Mexico. (*See id*., Ex. 3 at 26-39.) As a result, the Governor's 2006 decision noted that "[a]s a Mexican national subject to deportation upon release, [petitioner] has made confirmed plans to reside there with a family friend, and plans to work at a friend's hardware store. He also has made alternate plans, in case he is paroled to California…." (*See id*., Ex. 5 at 2.) The Governor then concluded that petitioner's parole plans constituted a factor "supportive of Mr. Hernandez's release from prison." (*Id.*) Thus, there were some defects in petitioner's 2005 parole plans, although these defects may not have been fatal. Regardless, these defects were cured in 2006. For purposes of this court's review, there remains no issue as to whether petitioner has shown acceptable employment plans.

III. DECISIONS BY THE BOARD; REVERSALS BY THE GOVERNOR

Petitioner's sixth and seventh overall parole consideration hearings were held on January 21, 2005, and January 19, 2006, respectively. (*See id*., Exs. 2 and 3.) At both hearings, the Board concluded that petitioner was suitable for parole and would not pose an unreasonable risk of danger to society or threat to public safety if released from prison. (*See id*., Ex. 2 at 90; *id*., Ex. 3 at 111.) The Board in 2005 characterized it as a "tough decision" because of the seriousness of gang violence, and public concerns about it. But the Board concluded, "it appears that you have made significant turnarounds and we feel that, listening to your testimony and reading your files, it sounds that you're genuinely repentant. Not only

that, it appears that you have tried to make some amends for what you did and you're trying to become productive. And the bottom line is, a good citizen. While imprisoned, we feel that you've enhanced your ability to function within the law upon release by participating in educational programs." (*Id*., Ex. 2 at 90-91.) The Presiding Commissioner added, "We also looked at maturation. Because of maturation, growth, greater understanding and advanced age, we feel that that [sic] have reduced your probability of recidivism. We do feel that you have realistic parole plans, which include a job offer. However, we are going to make it a special condition of parole that you not reside in Compton, California … We are going to approve your parole plans for Mexico." (*Id*. at 93-94.)

The Board's 2005 decision became final on May 21, 2005. (*See id*. at 105.) The Governor, however, exercised his authority pursuant to Article V, Section 8, Subdivision (b) of the California Constitution to reverse the Board's decision. (*See id*., Ex. 4). *See also* Cal. Penal Code § 3041.2. The Governor relied primarily upon the facts of the commitment offense, but also cited petitioner's prior criminal history, his disciplinary record in prison, and the Los Angeles District Attorney's opposition to parole. (*See* Dkt. 6, Ex. 4 at 1-3.) He also asserted that petitioner's parole plans were insufficient, because the record did not indicate whether petitioner's employment plans if deported and paroled to Mexico were "viable or even realistic at this time." (*Id*. at 2.) The factors discussed in the Governor's decision are among those listed as unsuitability and suitability factors in § 2402(b), (c) and (d) of title 15 of the California Code of Regulations. The Governor concluded that evidence of petitioner's progress in prison did not outweigh evidence of his unsuitability for parole. (*See* Dkt. 6, Ex. 4 at 3.)

The procedural history in 2006 was very similar. After a new hearing, conducted on January 19, 2006, the new Board reached the same conclusion: "you're suitable for parole and you wouldn't pose an unreasonable risk of danger to society or a threat to public safety if you're released from prison." (*Id*., Ex. 3 at 111.) The Board cited many of the positive things petitioner had done while in prison, and the laudatory letters the Board had received in his support. They found his employment and housing plans in Mexico were "intact." (*See id*. at 112.) Relying in part upon the positive psychological reports, the Board found, "You've got a very reduced probability of recidivism." (*Id*.)

The Board's 2006 decision became final on May 19, 2006. (*Id*. at 119.) But less than thirty days later, the Governor again reversed. (*See id*., Ex. 5.) Although the Governor noted petitioner's positive achievements while in prison, he reversed the grant of parole for reasons which were basically the same as in the 2005 reversal, except that the Governor noted with approval petitioner's plans for employment in Mexico. (*See id.* at 1-3.)

At the time of the Governor's 2006 reversal, petitioner was forty-two-years-old, and had been in custody approximately twenty-one years. (*See id*., Ex. 3 at 11.)

IV. EXHAUSTION OF STATE COURT REMEDIES

Following the Governor's reversal of the Board's 2005 parole grant, petitioner filed a habeas corpus petition in the Los Angeles County Superior Court. (*See id*., Ex. 7.) On June 9, 2006, while petitioner's superior court petition was still pending, the Governor also reversed the Board's 2006 parole grant. (*See id*., Ex. 5; *id*., Ex. 7 at 1.) Petitioner then amended his superior court petition to include both the Governor's 2005 and 2006 parole denials. (*See id*., Ex. 7.) Although the superior court expressly considered the habeas petition

"filed on December 27, 2005, as amended on July 7, 2006," its order provided, "This order is limited to petitioner's challenge to the Governor's decision dated May 31, 2005," and denied the request for habeas relief. (*Id*. at 1.)

Petitioner filed habeas petitions in the California Court of Appeal and California Supreme Court challenging the Governor's 2005 and 2006 parole reversals, but both petitions were summarily denied. (*See id*., Exs. 8 and 9.) This federal habeas petition followed. Respondent admits that petitioner's habeas petition was timely, and petitioner properly exhausted each of his claims before the California Supreme Court. (*See* Dkt. 6 at 4.)

V. PARTIES' CONTENTIONS

Petitioner contends that the Governor violated his state and federal due process rights by finding him unsuitable for parole in 2005 and 2006 without any evidence that he poses an unreasonable risk of danger to society if released from prison.[3] (*See* Dkt. 1 at 5.) Specifically, petitioner claims the Governor erred by finding him unsuitable based upon immutable factors that "will never change," such as his commitment offense and prior criminal conduct, without establishing "a rational nexus" between those immutable factors and a finding of current dangerousness as required by California law. (*See id*. at 4.) In addition, petitioner argues that the Governor's reliance upon his disciplinary violations committed in prison over seventeen years ago failed to support the Governor's finding of current dangerousness. (*See id*. at 5.) Finally, petitioner claims that the Governor's parole denials have "converted [petitioner's] 15 years to life sentence into a sentence of life without

[3] We do not reach petitioner's claim that his state due process rights were violated, as state claims are not cognizable in a federal habeas petition. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (asserting that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

any possibility of parole, which is clearly a prohibited result in light of the California parole statutes and current state and federal case law regarding release on parole." (*See id*. at 6.)

Respondent argues that petitioner does not have a constitutionally protected liberty interest in being released on parole, and that the "some evidence" standard is inapplicable in this context. (*See* Dkt. 6 at 4-5 and 8-11.) Even if he does have a protected liberty interest, respondent contends that the Governor adequately predicated his denial of parole on "some evidence." (*See id*. at 11-13.) Accordingly, respondent asserts that petitioner's due process rights were not violated by the Governor's 2005 and 2006 decisions.

VI. STANDARD OF REVIEW AND REQUIRED SHOWINGS

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this petition because it was filed after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Because petitioner is in custody of the California Department of Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir. 2004) (providing that § 2254 is "the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying state court conviction."). Under AEDPA, a habeas petition may not be granted with respect to any claim adjudicated on the merits in state court unless petitioner demonstrates that the highest state court decision rejecting his petition was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented...." 28 U.S.C. § 2254(d)(1) and (2).

As a threshold matter, this Court must ascertain whether relevant federal law was "clearly established" at the time of the state court's decision. To make this determination, the Court may only consider the holdings, as opposed to dicta, of the U.S. Supreme Court. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). In this context, Ninth Circuit precedent remains persuasive but not binding authority. *See id.* at 412-13; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

The Court must then determine whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. At all times, a federal habeas court must keep in mind that it "may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be [objectively] unreasonable." *Id.* at 411. It is the petitioner's burden to establish that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254; *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

AEDPA also requires federal courts to give considerable deference to state court decisions, and state courts' factual findings are presumed correct. *See* 28 U.S.C. § 2254(e)(1). Federal courts are bound by a state's interpretation of its own laws. *See Murtishaw v. Woodford*, 255 F.3d 926, 964 (9th Cir. 2001) (citing *Powell v. Ducharme*, 998 F.2d 710, 713 (9th Cir. 1993)). This deference, however, is accorded only to a "reasoned decisions" by the state courts. To determine whether the petitioner has met this burden, a federal habeas court looks to the last reasoned state court decision because subsequent unexplained orders upholding that judgment are presumed to rest upon the same ground. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007).

In this case, after the Los Angeles County Superior Court denied petitioner's habeas petition on the merits, petitioner filed petitions in the California Court of Appeal and California Supreme Court. (*See* Dkt. 6, Exs. 8 and 9.) Both appellate courts denied the petitions summarily. (*See id*.) Even the order of the Los Angeles County Superior Court, upholding the Governor's decisions, fits only in part the description of a "reasoned decision" addressing petitioner's claims. While acknowledging that petitions challenging both reversals (2005 and 2006) were pending before it, the superior court (for reasons which are not apparent) explicitly limited its order to the challenge to the 2005 reversal. (*See id*., Ex. 7 at 1.) But all of the reasons expressed by the Governor for his 2006 reversal were repeats of reasons he had expressed in 2005; and the Superior Court considered each of them in reviewing the 2005 reversal. This court should therefore regard the superior court decision as the last reasoned decision of the state courts upholding the Governor's reversals, and should accord that decision the deference required by AEDPA.

VII. FEDERAL HABEAS CHALLENGES TO STATE PAROLE DENIALS

A. *Due Process Right to be Released on Parole*

Under the Fifth and Fourteenth Amendments to the United States Constitution, the federal and state governments are prohibited from depriving an inmate of life, liberty or property without the due process of law. U.S. Const. amends. V, XIV. A prisoner's due process claim must be analyzed in two steps: the first asks whether the state has interfered with a constitutionally protected liberty or property interest of the prisoner, and the second asks whether the procedures accompanying that interference were constitutionally sufficient. *Ky. Dep't of Corrections. v. Thompson*, 490 U.S. 454, 460 (1989); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006).

Accordingly, our first inquiry is whether petitioner has a constitutionally protected liberty interest in parole. The Supreme Court articulated the governing rule in this area in *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482 U.S. 369 (1987). *See McQuillion v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002) (applying "the 'clearly established' framework of *Greenholtz* and *Allen"* to California's parole scheme). The Court in *Greenholtz* determined that although there is no constitutional right to be conditionally released on parole, if a state's statutory scheme employs mandatory language that creates a presumption that parole release will be granted if certain designated findings are made, the statute gives rise to a constitutional liberty interest. *See Greenholtz*, 442 U.S. at 7, 12; *Allen*, 482 U.S. at 377-78.

As discussed *infra*, California statutes and regulations afford a prisoner serving an indeterminate life sentence an expectation of parole unless, in the judgment of the parole

authority, he "will pose an unreasonable risk of danger to society if released from prison." Title 15 Cal. Code Regs., § 2402(a). The Ninth Circuit has therefore held that "California's parole scheme gives rise to a cognizable liberty interest in release on parole." *McQuillion*, 306 F.3d at 902. Similarly, *Irons v. Carey* held that California Penal Code § 3041 vests all "prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." 505 F.3d 846, 850 (9th Cir. 2007). This "liberty interest is created, not upon the grant of a parole date, but upon the incarceration of the inmate." *Biggs v. Terhune*, 334 F.3d 910, 915 (2003). *See also Sass*, 461 F.3d at 1127.

Because the Board's denial of parole interfered with petitioner's constitutionally-protected liberty interest, this Court must proceed to the second step in the procedural due process analysis and determine whether the procedures accompanying that interference were constitutionally sufficient. "[T]he Supreme Court [has] clearly established that a parole board's decision deprives a prisoner of due process with respect to this interest if the board's decision is not supported by 'some evidence in the record.'" *Irons*, 505 F.3d at 851 (citing *Superintendent v. Hill*, 472 U.S. 445, 457 (1985) (holding the "some evidence" standard applies in prison disciplinary proceedings)). The "some evidence" standard requires this Court to determine "whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Hill*, 472 U.S. at 455-56. Although *Hill* involved the accumulation of good time credits rather than release on parole, later cases have held that the same constitutional principles apply in the parole context because both situations

directly affect the duration of the prison term. *See Jancsek v. Or. Bd. of Parole,* 833 F.2d 1389, 1390 (9th Cir. 1987) (adopting the "some evidence" standard set forth by the Supreme Court in *Hill* in the parole context). *Accord*, *Sass*, 461 F.3d at 1128-29; *Biggs,* 334 F.3d at 915; *McQuillion,* 306 F.3d at 904.

"The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact," however. *Hill*, 472 U.S. at 456. Similarly, the "some evidence" standard is not an invitation to examine the entire record, independently assess witnesses' credibility, or re-weigh the evidence. *Id.* at 455. Instead, it is there to ensure that an inmate's loss of parole was not arbitrarily imposed. *See id.* at 454. The Court in *Hill* added an exclamation point to the limited scope of federal habeas review when it upheld the finding of the prison administrators despite the Court's characterization of the supporting evidence as "meager." *See id.* at 457.

B. *California Law Governing the Grant or Denial of Parole*

In order to determine whether "some evidence" supported the Governor's decisions with respect to petitioner, this Court must consider the California statutes, regulations and case law which govern decision-making by the Board and by the Governor. *See Biggs*, 334 F.3d at 915. Under California law, the Board is authorized to set release dates and grant parole for inmates with indeterminate sentences. *See* Cal. Penal Code § 3040 and 5075, *et seq*. Section 3041(a) requires the Board to meet with each inmate one year before the expiration of his minimum sentence and normally set a release date in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, as well as comply with applicable sentencing rules. Subsection (b) of this

section requires that the Board set a release date "unless it determines that the gravity of current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration." *Id.*, § 3041(b). Pursuant to the mandate of § 3041(a), the Board must "establish criteria for the setting of parole release dates" which take into account the number of victims of the offense as well as other factors in mitigation or aggravation of the crime. The Board has therefore promulgated regulations setting forth the guidelines it must follow when determining parole suitability. *See* 15 CCR § 2402, *et seq*.

Accordingly, the Board is guided by the following regulations in making a determination whether a prisoner is suitable for parole:

> (a) General. The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.
>
> (b) Information Considered. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.

15 CCR § 2402(a) and (b). Subsections (c) and (d) also set forth suitability and unsuitability factors to further assist the Board in analyzing whether an inmate should be granted parole, although "the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." 15 CCR § 2402(c).

Under the California Constitution, any parole decision made by the Board regarding prisoners sentenced to indeterminate sentences based upon a conviction of murder is subject to review by the Governor within thirty days. *See* Cal. Const. Art. V § 8(b). Although the Governor may only affirm, modify, or reverse the Board's decision based upon the same factors which the Board is required to consider, the Governor undertakes an independent, *de novo* review of the inmate's suitability for parole. *See In re Lawrence*, 44 Cal.4th 1181, 1204 (2008). If the Governor decides to reverse or modify the Board's decision, he or she must "send a written statement to the inmate specifying the reasons for his or her decision." 15 CCR § 3041.2(b).

In examining its own statutory and regulatory framework, the California Supreme Court in *In re Lawrence* held that the proper inquiry for a court reviewing a parole decision by the Board or Governor is "whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." 44 Cal.4th at 1212. The court also asserted that a parole decision must demonstrate "an individualized consideration" of the specified criteria, but "[i]t is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; *the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public."*

Id. at 1204-05, 1212 (emphasis added). Although the discretion of the Board and the Governor in parole matters is very broad, they must offer "more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision – the determination of current dangerousness." *Id*. Thus, the penal code, corresponding regulations, and California law clearly establish that the fundamental consideration in parole decisions is public safety and an assessment of a prisoner's current dangerousness. *See id.* at 1205-06.

C. *Summary of Governing Principles*

By virtue of California law, petitioner has a constitutional liberty interest in release on parole. The parole authorities, in this case, the Governor, may decline to set a parole date only upon a finding that petitioner's release would present an unreasonable present risk of danger to society if he is released from prison. Where the parole authorities deny release, based upon an adverse finding on that issue, the role of a federal habeas court is narrowly limited. It must deny relief if there is "some evidence" in the record to support the parole authority's finding of present dangerousness. That is the determinative issue in this case.

VIII. WAS THERE "SOME EVIDENCE" TO SUPPORT THE FINDING OF CURRENT DANGEROUSNESS?

Petitioner certainly *did, at one time*, pose an unreasonable risk of danger to society and a threat to public safety. The facts of the two murders, and his related activities, amply support that conclusion. He readily admitted that, in 1989, he was "a very violent gang member." (Dkt. 6, Ex. 2 at 30.) Even after his conviction and incarceration, for the first four years or so, he continued his gang affiliation, and (in his words), "everything that I was doing on the streets I was still doing in prison…." (*See id*., Ex. 3 at 65.)

These facts, which lie at the heart of the Governor's reversals, would provide more than ample support for his conclusions and would require this court to deny the petition; *but only if this evidence is not vitiated by the passage of seventeen years and by evidence that petitioner has radically changed in the meantime.*

It would not avail petitioner – at least not in a federal habeas court – if his remarkable progress in the past seventeen years can only be *weighed against* the violence in his past. The federal habeas court is not permitted, under the applicable Supreme Court authorities, to second-guess the Governor's weighing of suitability evidence against evidence of unsuitability. If petitioner's violent past remained probative of his current dangerousness, as clarified by *Lawrence*, then the Governor could properly consider it, and this habeas petition must be denied.

The issue of what evidence remains probative of current dangerousness in a California parole hearing is governed by California law. The California Supreme Court recently addressed this issue at length in *Lawrence.* This 2008 decision was filed after all of the relevant decisions in this case: the two reversals by the Governor, and the state court denials of habeas relief.

In *Lawrence,* the majority held:

> In sum, the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as the inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. (Regs., §2281, subd. (a)). Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when

> considered in light of the full record before the Board or the Governor.

Lawrence, 44 Cal.4th at 1221.

Applying that rule, the court in *Lawrence* held, "Accordingly, even as we acknowledge that some evidence in the record supports the Governor's conclusion regarding the gravity of the commitment offense, we conclude that there does not exist some evidence supporting the conclusion that petitioner *continues* to pose a threat to public safety." *Id*. at 1225.

In the present case, the record overwhelmingly establishes that all of the negative conduct upon which the Governor relied was directly related to petitioner's active participation in a gang. His gang involvement lay at the foundation of the murders, and of his misconduct during his first four years in prison. The record is also overwhelming and uncontradicted that petitioner terminated all involvement with gangs in 1989. In fact, his refusal to do what he was directed to do as a gang member (i.e., stab another person) put his own life at risk in 1992. Through his years of participation in the CGA program within the institution, he has worked to assist others to understand why they became involved in gangs, and why it is crucial that they withdraw. He has also committed to continue this work with others after his release, even in Mexico.

In *Lawrence*, the California Supreme Court recognized that "the possibility of parole acts as an incentive – encouraging good behavior and discouraging misconduct by confined prisoners. Failure to consider a prisoner's postconviction behavior when evaluating suitability for parole would undermine the practical institutional benefits of this regulatory incentive." *Id.* at 1220, n.19. The court added: "[t]he Legislature considered the passage of

time - and the attendant changes in a prisoner's maturity, understanding, and mental state - to be highly probative to the determination of current dangerousness." *Id*. at 1219-20.

The manifest change in petitioner's outlook, and in his behavior, severs the probative link between his past gang-related conduct and any determination of his dangerousness, as of 2006. For the reasons set forth in *Lawrence*, the circumstances of petitioner's commitment offenses, and his conduct during his first four yours in prison, did not constitute "some evidence" of his dangerousness in 2006.

In denying release, the Governor also noted the Los Angeles County District Attorney's opposition. (Dkt. 6, Ex. 4 at 3; *id*., Ex. 5 at 2.) During petitioner's 2005 Board hearing, the district attorney argued that his office's opposition was based entirely upon petitioner's "life crime and the other crime." (*See id*., Ex. 2 at 76.) Specifically, the district attorney urged the Board to "keep in mind the degree of violence, the fact that we have multiple victims and [petitioner's] role in these crimes that were carried on over a period of time." (*Id*. at 78.) Even while opposing petitioner's release, however, the district attorney admitted, "I would again indicate that I believe [petitioner has] made as much progress as any inmate I've seen since I've been doing these parole hearings. Both in terms of advancing educationally, doing the self-help and also setting up very solid parole and probation plans." (*Id*.)

During the 2006 Board hearing, the Los Angeles District Attorney again argued that petitioner should be found unsuitable for parole, and based his recommendation upon petitioner's commitment offense, prior criminal record, and disciplinary violations in prison. (*See id*., Ex. 3 at 88-95.) Despite his recommendation, the district attorney admitted to the

panel that petitioner was "as impressive an individual as I have seen in terms of evidencing a changed attitude by an admitted hard core gang member…." (*See id*. at 88.) He also observed that petitioner demonstrates "remarkable insight," and stated he believes petitioner's statements to the panel were "sincere." (*See id*.)

In making a suitability determination, the Board and Governor must "take into account all pertinent information and input about the particular case from the inmate's victims, the officials familiar with his or her criminal background, and other members of the public who have an interest in the grant or denial of parole to this prisoner." *In re Dannenberg,* 34 Cal.4th 1061, 1086 (2005). California law provides that a prosecutor may attend a parole hearing to represent "the interests of the people," and may "comment on the facts of the case and present an opinion about the appropriate disposition." *See* Cal. Penal Code § 3041.7; 15 CCR § 2030. Thus, the Governor's consideration of the district attorney's statements was appropriate, and was not arbitrary and capricious.

In the absence of other reliable evidence of unsuitability in the record, however, opposition by law enforcement based upon the nature of the commitment offense does not constitute "some evidence" to support parole denial. *See Rosenkrantz v. Marshall,* 444 F. Supp. 2d 1063, 1080 n.14 (C.D. Cal. 2006) (holding that "some evidence" did not support the Board's denial of parole where it "simply noted the opposition" by the district attorney, and such opposition was "merely cumulative" of the Board's own determination). With petitioner's conduct up until 1989 eliminated from consideration, the opposition by the district attorney stands alone. Without more, the district attorney's opposition to petitioner's release on parole does not constitute "some evidence" that petitioner would have posed an

unreasonable risk of danger to society if released on parole.

IX. LOS ANGELES COUNTY SUPERIOR COURT DECISION

As discussed in Part III *supra*, "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." It now appears the Los Angeles Superior Court correctly recognized the standard under *Hill*; but did not foresee the holding of *Lawrence*, that under the facts of this case, the conduct of Hernandez through 1989 was no longer probative of his current dangerousness. Therefore, his continued incarceration was a violation of the federal principles announced in *Hill*. For the reasons discussed above, *Lawrence* requires the conclusion that there was not "some evidence" to support the Governor's finding of petitioner's dangerousness in 2006.

It is worth noting that another district court recently reached the same conclusion in a similar context. Specifically, the Central District of California asserted in *Delaplane v. Marshall* that "a federal court's application of the *Hill* 'some evidence' standard is informed by the California Supreme Court's explication in *Lawrence* of what evidence is necessary under California law to support the Board's or the Governor's decision that an inmate is unsuitable for parole." 2009 WL 3806261, *1 (C.D. Cal. November 12, 2009). Because "in *Lawrence*, the California Supreme Court made clear that it was merely clarifying existing California law … it is irrelevant that *Lawrence* was handed down after the Governor issued his decision regarding Petitioner's suitability for parole, and after the state court applied the 'some evidence' standard to the Governor's decision." *Id*. at *2. "When a court has

concluded that the record does not contain 'some evidence' to support the Governor's determination that an inmate is unsuitable for parole, a remand to the Governor would not serve any purpose, and the proper disposition is to reinstate the Board's decision…." *Id*. at *1.

Finally, this Court is aware that *Hayward v. Marshall*, a case pending for decision before a limited en banc panel in the U.S. Court of Appeals for the Ninth Circuit, presents issues sufficiently similar to those in this case that it seems likely the en banc decision will have significant implications for the resolution of petitioner's case. 512 F.3d 536 (9th Cir. 2008), *reh'g en banc granted*, 527 F.3d 797 (9th Cir. 2008). If *Hayward* is decided while this Report and Recommendation is pending before the presiding U.S. District Judge, he will be able to take that decision into account in ruling upon this case.

X. "CONVERSION OF SENTENCE" CONTENTION WITHOUT MERIT

Petitioner's remaining argument is that the Governor's parole denials have "converted [petitioner's] 15 years to life sentence into a sentence of life without any possibility of parole, which is clearly a prohibited result in light of the California parole statutes and current state and federal case law regarding release on parole." (*See* Dkt. 1 at 6.) In support of his contention, petitioner cites two decisions by the California Court of Appeal and § 2402(a) of title 15 of the California Code of Regulations. (*See id*.)

Even construed liberally, the federal constitutional basis of petitioner's claim is unclear. In this Circuit, petitioners must "make the federal basis of the claim explicit either by specifying particular provisions of the federal Constitution or statutes, or by citing to federal case law." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (citing *Lyons*

v. Crawford, 232 F.3d 666, 668, 670 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001)). According, petitioner's argument is unavailing.

XI. CONCLUSION

For the reasons stated above, this Court finds that there was no evidence that as of June 9, 2006, the date of the Governor's 2006 parole decision, petitioner would have posed an unreasonable risk of danger to society or threat to public safety if released from prison. Accordingly, petitioner's federal due process rights were violated, and the California Supreme Court's April 16, 2007, decision upholding the Governor's parole denial was an unreasonable application of clearly established federal law. It is therefore recommended that the District Court issue an order (1) approving and adopting this Report and Recommendation; (2) directing that Judgment be entered granting a writ of habeas corpus; and (3) directing the Board, within thirty days after the Judgment in this case becomes final, to set a date on which petitioner shall be released from prison and begin his period of parole supervision. In calculating his period of parole supervision, the Board shall give petitioner credit for time spent in prison when he would not have been incarcerated, but for the Governor's decision in 2006.

This Report and Recommendation is submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty (20) days after being served with this Report and Recommendation, respondent may file written objections with this Court. Those objections may, if respondent chooses, be accompanied by a properly documented factual showing, setting forth new, relevant and reliable evidence of petitioner's conduct in prison or change in mental status subsequent to the January 19, 2006,

parole consideration hearing sufficient to support a finding that petitioner *currently* poses an unreasonable risk of danger to society if released on parole.[4] Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendation," and respondent shall serve a copy on all parties. Failure to file objections within the specified time may waive the right to appeal the District Court's Order. *See Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this Report and Recommendation.

DATED this 1st day of March, 2010.

JOHN L. WEINBERG
United States Magistrate Judge

[4] This Court is aware that petitioner appeared before the Board for a subsequent parole consideration hearing on July 2, 2007, and was found unsuitable for parole. (*See* Dkt. 7 at 25 fn.3.) This Court has not reviewed the evidence presented to the Board during the 2007 hearing, however, as the issue in this case is whether the state courts properly found "some evidence" to support the Governor's 2005 and 2006 parole denials. Furthermore, as of the date of this Report and Recommendation, there is no indication in the record that petitioner has filed a federal habeas petition challenging the Board's 2007 decision.