UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY PROTOPAPPAS,	)	
	)	
Petitioner,	)	CASE NO. 2:07-cv-00901-RSL-JLW
	)	
v.	)	
	)	
M. KRAMER, Warden,	)	REPORT AND RECOMMENDATION
	)	
Respondent.	)	
	)	

I. SUMMARY

Petitioner Tony Protopappas is currently incarcerated at the Folsom State Prison in Folsom, California. He was convicted by a jury of three counts of second degree murder in Orange County Superior Court on July 31, 1984, and sentenced to three terms of 15-years-to-life with the possibility of parole, which he is serving concurrently. He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging the 2006 denial of parole by the Board of Parole Hearings of the State of California (the "Board").[1] Respondent has filed an answer to the petition together with relevant portions of the state court record, and petitioner

[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).

has filed a traverse in response to the answer. The briefing is now complete and this matter is ripe for review. The Court, having thoroughly reviewed the record and briefing of the parties, recommends the petition be denied and this action be dismissed with prejudice.

II. BACKGROUND

Prior to the commission of the instant offenses, petitioner was licensed to practice as a dentist and oral surgeon, which included the administration of general anesthesia. (*See* Docket 1 at 2, fn.1; *id.*, Exhibit F at 3.) Petitioner was operating his own dental practice in Costa Mesa, California, when he killed three of his patients by administering lethal overdoses of local and general anesthesia during various dental procedures. (*See id*., Ex. F at 1-3.) The evidence at trial showed that petitioner knew his conduct endangered the life of each victim, but he nevertheless acted with deliberate and conscious disregard for their safety. (*See* Dkt. 10, Ex. 5 at 1.) At the time of the murders, petitioner was also abusing alcohol, cocaine, and opiates on a daily basis. (*See* Dkt. 1, Ex. F at 3.)

Petitioner's Life Prisoner Evaluation report, which was prepared in September 2005, set forth the following relevant facts:

> "On September 30, 1982, Kim M. Andreassen went to the defendant's dental office for dental work and was placed under general anesthetic with a combination of drugs. Several times during the dental procedures, Ms. Andreassen's breathing was noted to be shallow, resulting in oxygen being administered to her by the defendant. Upon completion of the dental work, Ms. Andreassen began gasping for air. Oxygen was administered; paramedics arrived and found her in cardiac arrest. She was transported to Hoag Hospital where she was pronounced dead on arrival.
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> During the investigation it was revealed Ms. Andreassen was under doctor's care and her personal physician had been contacted several days before her scheduled appointment and he advised that only a local anesthetic be administered to her. Reportedly, she insisted on a general anesthetic. An

> employee at the dental office told a police investigator when the defendant was told of [the] patient's insistence, he replied, "If I put her to sleep, that will be her death for sure."
>
> On February 8, 1983, Patricia M. Craven went to the defendant's office for dental work. She was placed under general anesthetic through intravenous administration of a combination of drugs. Ms. Craven stopped breathing, but began breathing again after the defendant administered oxygen.
>
> Dr. Badea, an employee of the defendant[,] performed some dental work on Ms. Craven over the next several hours, during this time additional anesthetics were administered to the patient several times. When Dr. Badea finished her dental work with Ms. Craven, she advised the defendant and he indicated that he would extract Ms. Craven's wisdom teeth. Additional drugs were administered to keep her unconscious.
>
> Upon completion of the dental work, staff members were unable to awaken her. The defendant administered Narcan to her to counteract the anesthetics. One of the defendant's employees wheeled Ms. Craven to her mother's car. She was placed on the front seat of the vehicle. Her mother, Mrs. Russ, drove Ms. Craven to [their] residence. A short time later Mrs. Russ observed her daughter's breathing became shallow and heard a gurgling noise in her throat. Paramedics were summoned: they determined she was in cardiac arrest and transported her to Mission Community Hospital, where she died on February 19, 1983.
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> On February 11, 1983, Mrs. Cathryn Jones went to the defendant's office to have all her teeth removed. She was placed under general anesthetic through the use of intravenous injections of drugs. A short time later, Mrs. Jones' fingernails were turning blue. An assistant noticed the patient's condition, at which time Protopappas became upset and said "this is what happens in this office all the time. You don't know what is blue." The defendant administered oxygen and injected Narcan into Mrs. Jones in an attempt to counteract the effects of the anesthetic. When it was determined that Mrs. Jones had no detectable pulse, paramedics were summoned and found her to be in cardiac arrest. She was transported to Hoag Hospital, where she died on February 13, 1983."

(*See* Dkt. 1, Ex. F at 1-2.)

In an opinion published in part, the California Court of Appeal also set forth a detailed description of petitioner's offenses, which petitioner asserts he "accepts" as

an accurate depiction of the facts. (*See* Dkt. 1, Ex. A at 1-6; *id*., Ex. B at 60.) The California Court of Appeal summarized its factual findings as follows:

> "Petitioner did not supply proper general anesthesia or tailor the dosage to the patient. Without the patient's authorization he substituted surrogate dentists who were neither licensed nor qualified to administer general anesthesia. He instructed them to give improperly preset dosages for extended periods with little or no personal supervision and caused multiple patients to receive ever increasing amounts of general anesthesia at the same time, none of them enjoying his undivided attention. He was also habitually slow in reacting to the resulting overdoses; and in the case of Craven, simply abandoned her."

People v. Protopappas, 201 Cal.App.3d 152, 171-72 (1988).

Petitioner was convicted by a jury of three counts of second degree murder based upon a theory of "implied malice" in Orange County Superior Court on July 25, 1984. (*See* Dkt. 1, Ex. A; Dkt. 10, Ex. 1.) Petitioner's minimum eligible parole date was set for October 22, 1993. (*See* Dkt. 1, Ex. B at 1.) The parole denial which is the subject of this petition took place after a parole hearing held on January 19, 2006. (*See id*.) This was petitioner's fourth parole consideration hearing. (*See id.*, Ex. G.) As of the date of the 2006 parole hearing, petitioner was sixty-years-old, and had been in custody for approximately twenty-one years. (*See id*., Ex. G at 5.)

After denial of his 2006 application, petitioner filed habeas corpus petitions in the Orange County Superior Court, California Court of Appeal, and California Supreme Court. (*See* Dkt. 10, Exs. 5, 6 and 7.) Those petitions were unsuccessful. (*See id.*, Exs. 5, 6 and 7.) This federal habeas petition followed. Petitioner contends the 2006 denial by the Board violated his Fifth and Fourteenth Amendment Due Process rights. Thus, petitioner does not challenge the validity of his conviction, but instead challenges the Board's 2006 decision

finding him unsuitable for parole.

III. STANDARD OF REVIEW

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.), *cert. denied*, 543 U.S. 991 (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 in the State court proceeding." 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 United States 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.

In each case, the petitioner has the burden of establishing 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). 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).

Finally, AEDPA 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 also 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)).

IV. 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 government is 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 Corrs. 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. To similar effect, *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007) 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." 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 e.g., 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); *Sass*, 461 F.3d at 1128-29 (holding the same); *Biggs*, 334 F.3d at 915 (holding the same); *McQuillion*, 306 F.3d at 904 (holding the same).

"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's Statutory and Regulatory Scheme*

In order to determine whether "some evidence" supported the Board's decision with respect to petitioner, this Court must consider the California statutes and regulations that govern the Board's decision-making. *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.
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> (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).

In examining its own statutory and regulatory framework, the California Supreme Court in *In re Lawrence* recently held that the proper inquiry for a reviewing court is "whether some evidence supports the *decision* of the Board … that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." *Id.*, 44 Cal.4th 1181, 1212 (2008). The court also asserted that the Board's 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. As long as the evidence underlying the Board's decision has "some indicia of reliability," parole has not been arbitrarily denied. *See Jancsek*, 833 F.2d at 1390. As the California courts have continually noted, the Board's discretion in parole release matters is very broad. *See Lawrence*, 44 Cal.4th at 1204. 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 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. The penal code, corresponding regulations, and California law clearly support this definition of the issues.

V. PARTIES' CONTENTIONS

Petitioner contends that the Board violated his state and federal due process rights by finding him unsuitable for parole without some evidence that he poses an unreasonable risk of danger to society if released from prison.[2] (*See* Dkt. 1 at 2 and 14-45.) Petitioner also argues that what he calls "the Dannenberg standard," as well as the "heinous, atrocious, and cruel" standard set forth by the regulations in section 2402(c)(1), are unconstitutionally vague on their face and as applied to him. (*See id*. at 46-55.) Finally, petitioner asserts that his First and Fourteenth Amendment rights were violated when the Board denied him a parole date because he refused to participate in state-sponsored religious self-help programs, such as Alcoholics Anonymous ("AA") or Narcotics Anonymous ("NA"). (*See id*. at 55-60.)

[2] 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.").

Respondent claims that petitioner does not have a constitutionally protected liberty interest in being released on parole, that the "some evidence" standard is inapplicable in this context, and that even if he does have a protected liberty interest, the Board adequately predicated its denial of parole on "some evidence." (*See* Dkt. 10 at 4-9.) Accordingly, respondent argues that petitioner's due process rights were not violated by the Board's 2006 decision, and the Orange County Superior Court's Order upholding the Board's 2006 parole denial was not an unreasonable application of clearly established federal law. (*See id*. at 9.) Finally, respondent asserts that the Board did not mandate petitioner's participation in AA or NA, and therefore petitioner's First and Fourteenth Amendments rights were not violated by the Board's denial of a parole date. (*See id*.)

VI. ANALYSIS OF RECORD IN THIS CASE

A. *State Court Proceedings*

Petitioner's habeas petitions filed in the California Court of Appeal and California Supreme Court contained the same claims as his Orange County Superior Court petition, and both petitions were summarily denied. (*See* Dkt. 10, Exs. 5-7.) The parties agree that petitioner has properly exhausted his state court remedies, and timely filed the instant petition. (*See* Dkt. 1 at 3; Dkt. 10 at 3.) This Court reviews the Orange County Superior Court's Order upholding the Board's decision to determine whether it meets the deferential AEDPA standards, as it is the last reasoned state court decision. *See Ylst*, 501 U.S. at 803-04.

In a reasoned decision denying petitioner's request for habeas relief, the Orange County Superior Court asserted that based upon its review of the record, the Board adequately considered all of the suitability and unsuitability factors required by law. (*See* Dkt. 10, Ex. 5

at 3.) The superior court noted, however, that the Board "found that the positive factors did not outweigh the factors of unsuitability." (*See id*.) After summarizing the Board's findings, the superior court concluded that "[t]he Board's determination of unsuitability was supported by 'some evidence', and constitutes neither an abuse of discretion nor a denial of due process." (*See id*.) In addition, the superior court found that "[p]etitioner's claim that the Board may not continue to rely on the commitment offense is … without merit," because the Board's findings "conform[ed] to the present state of the law." (*See id*. at 4.)

Regarding petitioner's claim that the Board's self-help recommendation effectively mandated his participation in a religiously-based program in violation of the First Amendment, the superior court concluded that petitioner's contention was unsupported by the record. (*See id*.) The superior court asserted, "First, the Board made clear that it did not mandate NA or AA attendance. Second, the record reflects that other types of programs are available in prison. While the Board noted that NA and AA are the most readily available programs of this type, it stated that other programs are periodically made available to inmates." (*See id*.) Finally, the superior court stated that petitioner's "failure to attend self-help programs was only one of several reasons which the Board gave for its two-year denial. Because the other reasons independently support the two-year denial, his First Amendment claim, even if meritorious, would not change the result." (*See id*.)

B. *Petitioner's Due Process Claim*

The Board based its decision that petitioner was unsuitable for parole primarily upon his three commitment offenses, but also cited his unstable social history, insufficient participation in self-help programming, unfavorable psychological evaluation, and law

enforcement's continued opposition to petitioner's release on parole. (*See* Dkt. 1, Ex. B at 69-71.) The Board's findings tracked the applicable unsuitability and suitability factors listed in § 2402(b), (c) and (d) of title 15 of the California Code of Regulations. After considering all reliable evidence in the record, the Board concluded that evidence of petitioner's positive behavior in prison did not outweigh evidence of his unsuitability for parole. (*See id*. at 72.)

The Board primarily relied upon the circumstances of petitioner's three commitment offenses to find petitioner unsuitable for parole. (*See id.*, at 69.) The Board found that "multiple victims were killed in separate incidents," because petitioner killed three of his female patients on different dates. (*See id*.) Specifically, he killed a twenty-three-year-old woman, a thirty-one-year-old woman, and a thirteen-year-old girl. (*See id*.) In addition, petitioner's "offenses were carried out in a manner which demonstrates an exceptionally callous disregard for human suffering in that these victims were extremely vulnerable and unsuspecting. They had gone in for dental work and trusting themselves and their well being to the inmate as a professional dentist and subsequently lost their lives when administered faulty doses [of] anesthesia…." (*See id*. at 69-70.) *See also* 15 CCR § 2402(c)(1)(A) and (D). The circumstances surrounding petitioner's three commitment offenses provides "some evidence" to support the Board's conclusion that petitioner would present a danger to society if released from prison.

The second unsuitability factor relied upon by the Board was petitioner's unstable social history, including his long term abuse of narcotics and alcohol. (*See* Dkt. 1, Ex. B at 23-24 and 70.) The Board based its finding upon evidence in the record regarding petitioner's abuse of alcohol, cocaine, and opiates, as well as his statements during the hearing. (*See id*. at

23-24 and 70.) Petitioner also admitted to the panel that he was abusing alcohol and narcotics at the time of the commitment offense, which "contributed to [his] bad judgment.…" (*See id.* at 23-24.) Because the Board could reasonably conclude that petitioner's long history of drug and alcohol abuse could make him unpredictable and a threat to others, especially in light of his failure to complete any kind of alcohol or drug treatment program in prison, the Board's finding was supported by "some evidence" in the record. (*See id*., at 84.)

The third factor relied upon by the Board to deny parole was petitioner's insufficient participation in "beneficial self-help programs" in prison, including any kind of substance abuse programming. (*See id*. at 55 and 70.) Although petitioner has been incarcerated for over two decades, he has only participated in two self-help programs, and he completed both programs in 2003. (*See id*. at 54-55.) Specifically, petitioner completed a personal growth seminar and a seven-part video lecture series on dealing with conflict and confrontation. (*See id*.) The Board noted that although several panels in the past have asked petitioner to participate in additional self-help programs and substance abuse programs because of his long history of "self-professed substance abuse," petitioner has declined to participate because programs like AA or NA involve "substantial religious content" and "for some reason I can't participate in something that has a – I don't like to be told how to practice my faith." (*See id.* at 49.) Petitioner claims that he has "tried to do [his] own self realization type of program." (*See id*.) He asserts, "I'm trying to be honest with myself [regarding] what the causes were [of the crimes] so I've engaged in my own self-realization program and I think that I've been pretty good about it." (*See id*. at 50.)

In its decision, the Board recommended that "if available, [petitioner] participate in self-help programming … [although] this is in no way a mandate for AA or NA." (*Id*. at 73.) The Board explained that it recommended those two substance abuse programs because at any point in time "NA and AA are readily available in the institution as well as on the outside." (*Id*. at 73-74.) The Board also reminded petitioner, however, that "[t]here are other self-programs that come and go, depending on budget issues and things like that," and petitioner should take advantage of those programs when they are available. (*See id*. at 73.) The Board concluded that "we need to be as sure as humanly possible that [your drug and alcohol abuse] is not going to come up again … you have to be able to assure the board that your plan is in place and that you have a fall back system." (*See id*. at 74.) Because the Board could reasonably conclude that petitioner's own assessment that he has engaged in sufficient self-reflection to prevent himself from relapsing into drug and alcohol abuse or other criminal behavior is insufficient evidence that he would not pose a present danger to society if released on parole, the Board's finding was supported by "some evidence."

The fourth factor relied upon by the Board was petitioner's most recent psychological evaluation, which was prepared by a senior psychologist in December 2005. (*See id.* at 52 and 71.) The Board noted that following three negative psychological evaluations in 1987, 1990, and 1992, petitioner declined to participate in future evaluations until December 2005. (*See id*. at 53-54.) The 2005 psychological evaluation also recommended against petitioner's release on parole. (*See id*. at 71.) Specifically, the 2005 report described petitioner's daily habit of abusing alcohol, cocaine, and opiates prior to his incarceration, and asserted that petitioner's "significant risk factors or precursors to violence … include history of substance

abuse, lack of insight into factors leading to the life crime and lack of genuine remorse for the victims." (*Id*. at 54.) As a result, the psychologist concluded that petitioner "needs to pursue the additional self-help programming which is essential to his adjustment and needs additional time to gain such programming." (*Id*. at 73.)

During the hearing, the panel acknowledged petitioner's argument that his December 2005 interview lasted only 45 minutes, which petitioner felt was an insufficient period of time. (*See id*. at 52-53.) Although the Board asserted that it developed a greater "understanding of the inmate's level of remorse and insight [through] our conversation" during the hearing, it concluded that the 2005 psychological evaluation was still a factor weighing against a finding of suitability. (*See id*. at 71.) Especially in light of the fact that all of petitioner's psychological evaluations during his two decades of incarceration have recommended against a finding of suitability for parole, petitioner's 2005 psychological evaluation provided "some evidence" to support the Board's conclusion.

Finally, the Board considered the Orange County District Attorney's statement of opposition to petitioner's parole. (*See id*. at 72.) Pursuant to California Penal Code Regulation § 3041.7, a prosecutor may attend a parole hearing to represent "the interests of the people." In the absence of other reliable evidence of unsuitability in the record, 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) (providing that where a district attorney and sheriff's department opposed parole based solely upon the gravity of the commitment offense, their opposition did not constitute "some evidence" because it was "merely cumulative" of the

Board's findings regarding the offense). Because the Board relied upon other reliable evidence of petitioner's unsuitability for parole, however, its additional consideration of law enforcement's opposition was not arbitrary and capricious. *See id*.

Contrary to petitioner's argument that the Board failed to consider or give appropriate weight to the parole suitability rules which favored petitioner, the Board acknowledged that petitioner "does not have a juvenile record, does not have an adult record [or] a record of violence or any arrests or convictions." (*See* Dkt. 1, Ex. B at 23, 25 and 70.) The Board noted that petitioner has "numerous offers of residential plans [as well as] acceptable employment plans either as a dental technician in the dental field, not as a dentist, and also in the legal field as evidenced by numerous letters of offers of employment as well as residence…." (*See id*. at 71.) The Board also commended petitioner for being discipline free for 19 years, and for his "work in the dental lab as well as other numerous laudatory chromos." (*See id*. at 72.)

It is therefore an inaccurate characterization of the record to say that the Board failed to provide petitioner with an "individualized consideration of all relevant factors." (*See* Dkt. 1 at 25.) As mentioned above, the Board has broad discretion to determine how suitability and unsuitability factors interrelate to support its conclusion of current dangerousness to the public. *See Lawrence*, 44 Cal.4th at 1212. Despite petitioner's recent gains, the Board determined that he remains an unreasonable risk of danger to society if released on parole, and these findings were supported by "some evidence" in the record. (*See id*., Ex. B at 69 and 72.)

C. *Petitioner's "Vagueness" Claim Regarding "the* Dannenberg *Standard"*

Petitioner contends that "the *Dannenberg* standard, 'that the violence or viciousness of the inmate's crime must be more than minimally necessary to convict him of the offense for which he is confined,' is unconstitutionally vague because there is no set of 'minimally necessary circumstances' set forth in the law, [the standard] is unreviewable, and can be arbitrarily and capriciously applied to every murder." (*See* Dkt. 1 at 46-50.) *See also In re Dannenberg*, 34 Cal.4th 1061, 1071 (2005) (providing that "the Board must point to factors beyond the minimum elements of the crime for which the inmate was committed" to deny a parole date). Petitioner asserts that his Fourteenth Amendment due process rights were violated when "the *Dannenberg* standard" was applied to his case, because it "allowed the Board to arbitrarily and capriciously apply § 2402(c)(1)(A) [multiple victims] and § 2402(c)(1)(D) [exceptionally callous disregard for human suffering] to petitioner's case based entirely on their subjective personal opinions to deny parole." (*See id*. at 50.) Thus, petitioner argues "the *Dannenberg* standard" is unconstitutionally vague on its face, and as applied to him. (*See id*. at 46.)

Since the Orange County Superior Court issued its decision denying petitioner's request for habeas relief, the California Supreme Court clarified its holding in *Dannenberg*. Specifically, the California Supreme Court explained in *Lawrence* that the relevant inquiry is no longer whether "the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense … [but] whether the circumstances of the commitment offense, when considered in light of the other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the

offense." *See Lawrence*, 44 Cal.4th at 1221. During petitioner's 2006 hearing, the Board clearly found that petitioner's commitment offenses continued to be predictive of his current dangerousness based on the suitability and unsuitability factors as discussed *supra* in section VI, subsection B. (*See* Dkt. 1, Ex. B at 69.) Even though the Orange County Superior Court applied "the *Dannenberg* standard" and held that petitioner's level of disregard for human suffering exceeded the minimum elements of a second degree murder offense, its conclusion was correct. (*See* Dkt. 10, Ex. 5 at 4.) The circumstances surrounding the commitment offense, together with the facts in the record, support a finding of current dangerousness. The United States Supreme Court has long held that where a trial court's decision is correct, it must be upheld upon review, even though the court relied upon the wrong ground. *See Brown v. Allen*, 344 U.S. 443, 458-59 (1953). Accordingly, petitioner's contentions are unavailing.

D. *Petitioner's "Vagueness" Claim Regarding Section 2402(c)(1)*

Petitioner contends that section 2402(c)(1), which contains the "especially heinous, atrocious, or cruel" standard, is unconstitutionally vague on its face and as applied to his case. (*See* Dkt. 1 at 50-55.) He also claims that subdivisions (A) and (D), which the Board found applied to petitioner's offenses, are unconstitutionally vague. (*See id*. at 50-51 and 54-55.)

Petitioner primarily relies upon the United States Supreme Court decision *Maynard v. Cartwright*, 486 U.S. 356 (1988), as support for his assertions. (*See id*.) The *Maynard* court asserted that "[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand … [and] judged on an as-applied basis." *Maynard*, 486 U.S. at 361. The Supreme Court then held that Oklahoma's "aggravating circumstance" statute, which included the language "especially heinous, atrocious, or cruel"

and set forth factors rendering a defendant convicted of first degree murder eligible for the death penalty, was unconstitutionally vague. *See id.* at 363-64. Specifically, the Supreme Court asserted that the Oklahoma statute failed to guide and channel jury discretion, as an ordinary person could believe every unjustified and intentional taking of life was "especially heinous," and the appellate court had failed to apply a limiting construction that would have eliminated the constitutional problem. *See id.* at 363-65.

The Oklahoma "aggravating circumstances" statute at issue in *Maynard* resembled California's "aggravating" or "special circumstance" statute in certain respects. *See People v. Lewis*, 43 Cal.4th 415, 516 fn.27 (2008) (noting that "aggravating circumstances" under Oklahoma's capital scheme are analogous to California's "special circumstances," but holding that California's "lying-in-wait" special circumstance was not unconstitutionally vague); *People v. Superior Court (Engert)*, 31 Cal.3d 797, 801-03 (1982) (holding that section 190.2(a)(14) of the California Penal Code, which listed "especially heinous, atrocious or cruel" murders as a "special circumstance," was unconstitutionally vague). Section 2402(c)(1) of title 15 of the California Code of Regulations, however, governs parole suitability determinations, and is part of an entirely distinct regulatory framework than capital punishment schemes like the one at issue in *Maynard*. Petitioner's attempt at drawing comparisons between these very different laws, simply because both contain the words "especially heinous, atrocious or cruel," is unconvincing. (*See* Dkt. 1 at 51-53.)

Furthermore, California courts recently considered whether section 2402(c)(1) is

unconstitutionally vague in *In re Lewis*, 172 Cal.App.4th 13 (2009).[3] In *Lewis*, the Santa Clara County Superior Court held evidentiary hearings for three days, and considered expert analysis of 2,690 parole suitability hearing transcripts conducted by the Board during thirteen randomly-selected months between July 31, 2002, and June 30, 2006. *See Lewis*, 172 Cal.App.4th at 17. At the conclusion of the hearings, the superior court concluded that section 2402(c)(1) was not unconstitutionally vague on its face, because the "factors in subdivisions (A)-(E) provide … clear limiting construction to the term 'especially heinous, atrocious, or cruel'…." *Id*. at 24. The superior court found the regulations unconstitutionally vague "as applied," however, because "[i]n every case, the Board had determined at some point in time that every inmates' crime was 'especially heinous, atrocious or cruel' [under section 2402(c)]." *Id*. at 24. "[A]n as applied challenge assumes that the statute or ordinance violated is valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional." *Id*. at 27-28 (*quoting Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1089 (1995)). The superior court reasoned that because the Board could not have found that 100% of cases involved "especially heinous, atrocious and cruel" offenses, the Board's decision in every hearing which resulted in the denial of parole must not have been based upon the requisite individualized consideration. *See id*. at 24-25. As a result, the superior court concluded the Board was applying the regulations arbitrarily, and the regulations were void

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[3] The California Court of Appeal's caption for this case is "In re Donald Ray Lewis, on Habeas Corpus. [And four other cases.]" The four other case names, which are included in a footnote, are *In re Morris Leon Bragg* (No. H032045, Super.Ct. No. 108543), *In re Viet Mike Ngo* (No. H032046, Super.Ct. No. 127611), *In re Donnell Eugene Jameison* (No. H032047, Super.Ct. No. 71194), and *In re Arthur S. Criscione* (No. H032048, Super.Ct. No. 71614).

for vagueness. *Id*. at 25.

On appeal, the California Court of Appeal reversed, citing the lower court's failure to construe the applicable regulations as a whole. *See id*. at 27-28. Specifically, the Court of Appeal asserted that "[i]f the Board's analysis of an inmate's parole suitability depended solely upon a finding that the inmate's commitment offense was 'especially heinous, atrocious or cruel' and the Board routinely made such a finding, this would present compelling evidence that the Board was undertaking a formulaic application of the parole suitability regulations in violation of inmates' due process rights." *Id*. at 29. The applicable regulations, however, "direct the Board to consider many factors before determining whether or not a particular inmate is suitable for parole – whether or not the commitment offense was or was not 'especially heinous, atrocious or cruel' is but one of those factors." *Id*. Because the relevant determination for the Board is whether, based upon an evaluation of each of the statutory factors, an inmate remains a danger to public safety, "the Board's findings that certain suitability or unsuitability factors, e.g., whether or not the commitment offense was 'exceptionally heinous, atrocious, or cruel,' exist in a particular case are secondary to the Board's analysis and explanation of how those factors combine to support its ultimate decision to either grant or deny parole to a particular inmate." *Id.* at 28. *See also Lawrence*, 44 Cal.4th at 1227. Thus, the California Court of Appeal concluded that in order to review an "as applied" challenge, a court must "[review] the Board's decision … [to determine] whether or not the Board's conclusion that a particular inmate poses a current danger to society is supported by the Board's analysis of the various unsuitability and suitability factors…." *Lewis*, 172 Cal.App.4th at 29. The "salient question" is whether the Board "fail[ed] to

demonstrate how all the applicable regulatory factors interrelate to supports its conclusion that the inmate is currently dangerous to society?" *Id*. at 29.

Application of the California Court of Appeal's decision in *Lewis* to petitioner's case reveals that his vagueness challenges are unavailing. California courts have found that section 2402(c)(1) survives a facial challenge for unconstitutional vagueness because the "factors in subdivisions (A)-(E) provide … clear limiting construction to the term 'especially heinous, atrocious, or cruel'…." *Id*. at 24. Petitioner also fails to cite any authority that supports his claim that subdivisions (A) and (D), which reference the existence of multiple victims and an offense "carried out in a manner which demonstrates an exceptionally callous disregard for human suffering," are unconstitutionally vague. (*See* Dkt. 1 at 54-55.) In addition, petitioner's claim that section 2402(c)(1) is unconstitutionally vague "as applied" to his case lacks merit, because the Board did not "fail to demonstrate how all the applicable regulatory factors interrelate to supports its conclusion that the inmate is currently dangerous to society" during his 2006 hearing. *Lewis*, 172 Cal.App.4th at 29. The Board analyzed multiple suitability and unsuitability factors on the record, and relied upon petitioner's three commitment offenses, unstable social history, insufficient participation in self-help programming, unfavorable psychological evaluation, and opposition by law enforcement to find petitioner unsuitable for parole because the "positive aspects of [petitioner's] behavior do not outweigh the factors [of] unsuitability…." (*See* Dkt. 1, Ex. B at 69-72.) Accordingly, petitioner failed to meet his burden of demonstrating that section 2402(c)(1) was unconstitutionally vague, either on its face or as applied.

E. *Petitioner's First and Fourteenth Amendment Claim*

With respect to petitioner's First and Fourteenth Amendment claim, this Court agrees with the reasoning set forth by the Orange County Superior Court in its Order. (*See* Dkt. 10, Ex. 5 at 4.) The Board did not mandate petitioner's participation in AA or NA. (See Dkt. , Ex. B at 73.) Rather, the Board indicated that petitioner should take advantage of the other types of self-help or substance abuse programs which become available in Folsom State Prison, and put some kind of drug relapse prevention plan in place because of his long history of drug abuse. (*See id*. at 73-75.) Finally, petitioner's First Amendment claim, even if meritorious, would not affect this Court's consideration of his habeas petition because petitioner's insufficient self-help programming was only one of several sufficient reasons given by the Board to support its unsuitability finding. (*See id*. at 69-75; Dkt. 10, Ex. 5 at 4.)

VII. CONCLUSION

As stated above, it is beyond the authority of a federal habeas court to determine whether evidence of suitability outweighs the circumstances of the commitment offense, together with any other reliable evidence of unsuitability for parole. The Board has broad discretion to determine how suitability and unsuitability factors interrelate to support its conclusion of current dangerousness to the public. *See Lawrence*, 44 Cal.4th at 1212. Although the Board praised petitioner's good behavior and progress in prison, it determined that petitioner remains an unreasonable risk of danger to society if released on parole. Because the state court decision upholding the Board's findings satisfies the "some evidence" standard, there is no need to reach respondent's argument that another standard applies.

Given the totality of the Board's findings, there is "some evidence" that petitioner currently poses a threat to public safety, and the Orange County Superior Court's Order upholding the Board's decision was not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of facts. I therefore recommend that the Court find that petitioner's due process rights were not violated, and that it deny his petition and dismiss this action with prejudice.

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 days after being served with this Report and Recommendation, any party may file written objections with this Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendation." 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 30th day of July, 2009.

JOHN L. WEINBERG
United States Magistrate Judge