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

LOWELL E. HAMMONS,

Petitioner,

2: 07 - cv - 1007 - MCE TJB

vs.

D.K. SISTO, et al.,

Respondents.

ORDER, FINDINGS AND  
RECOMMENDATIONS

\_\_\_\_\_ /

I. INTRODUCTION

Petitioner, Lowell E. Hammons, is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently serving a sentence of fifteen years to life imprisonment for second degree murder following a plea in 1993. Petitioner challenges a January 27, 2006 decision by the Board of Parole Hearings (“Board”) which denied him parole. Petitioner presents two claims in this federal habeas petition; specifically: (1) the Board’s denial of parole violated his plea agreement (“Claim I”); and (2) the Board’s denial violated his due process rights because there was a lack of reliable evidence demonstrating his current dangerousness (“Claim II”). Petitioner also requests an order to show cause, the appointment of counsel, reasonable discovery and an evidentiary hearing on his Claims. For the following reasons, Petitioner’s requests are denied and it is recommended that his habeas petition

1 be denied.

2 II. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

3 [O]n October 24<sup>th</sup>, 1992, inmate Hammons and Manuel Macias  
4 were both at a trailer belonging to a man named Billy. Inmate  
5 Hammons had spent the night there with his girlfriend who had run  
6 away from home the night before. When Inmate Hammons awoke  
7 on the date of the offense, Manuel Macias, who goes by the name  
8 of Manny . . . who was staying at Billy, Dawn's (phonetic) and  
9 Brian Konz, the victim – the victim was also at Billy's trailer. At  
10 the time Dawn liked an individual by the name of Art C. (phonetic)  
11 who was the father of her then unborn child. Dawn had been  
12 letting Brian stay with her for the last few weeks because she lived  
13 alone with her two year old child. Dawn and Brian Konz began  
14 sharing a beer when Manuel Macias seemed to become angry about  
15 this because he liked Dawn. Manuel Macias started calling Brian  
16 Konz a snitch and refused to give him a ride to Dawn's apartment  
17 when the victim, Brian Konz, asked him to do so. Manuel Macias  
18 took Dawn to her apartment and Brian Konz went to Art C.'s  
19 residence. Brian Konz called Dawn from Art's place and she got a  
20 ride there from the brother of a friend then they picked up Art and  
21 Brian Konz . . . and returned to Dawn's apartment. At Dawn's  
22 apartment Brian fell asleep on the couch. Manuel Macias called  
23 and asked Dawn who was at her apartment. Dawn told Manuel  
24 Macias that Art and Brian were there.

15 Inmate Hammons had been told by Manuel Macias before the Man  
16 had called Dawn asking her who was at her apartment that Brian  
17 Konz had been calling the man who owned the trailer Billy and  
18 Manuel snitches. Manuel Macias, Inmate Hammons – there's  
19 something missing there but Manuel Macias and Inmate – I don't  
20 know the word is, it reads Manuel Macias, Inmate Hammons that  
21 he wanted to kick the ass of Brian Konz and Inmate Hammons  
22 agreed to go along with him to do so. These two individuals,  
23 Manuel Macias and Inmate Hammons, armed themselves with a  
24 sawed off 12 gauge shotgun and a knife. They began to drive to  
25 Dawn's apartment and Inmate Hammons and Manny Macias  
26 stopped at the residence of James H. At this residence, Inmate  
Hammons asked for and was given shotgun shells by James.  
Manuel Macias then drove down to Dawn's apartment. Inmate  
Hammons and Manny Macias went inside the apartment and  
Hammons, who reportedly had the shotgun at the time, sat on the  
back of the couch where Brian Konz was lying. Manny Macias  
took Dawn to her bedroom and talked to her for about five minutes

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24 <sup>1</sup> The factual background of the commitment offense is taken from the probation report  
25 which was read into the record by the presiding commissioner at Petitioner's January 27, 2006  
26 parole suitability hearing. Petitioner attached this parole suitability hearing transcript to his  
Petition at Exhibit C.

1 telling her the following and Manuel Macias indicated to Dawn  
2 that Brian Konz was in very serious trouble with someone who  
3 wanted to talk to him. Manuel Macias indicates that Inmate  
4 Hammons was going to take Brian to this person in an . . .  
5 unknown location and if Brian Konz refused to go they were going  
6 to quote, do him, in the apartment or they were going to forcibly  
7 take him with them but Dawn did not want to be involved in any  
8 way and she needed to leave the apartment. Dawn then got her  
9 baby and asked her friend Inez (phonetic) to go with her to Inez'  
10 apartment.

11 After these people left the apartment, Inmate Hammons and  
12 Manuel Macias took Brian in their car to a remote area in Dvore.  
13 Manuel Macias stopped his car at a turn out and ordered Brian out  
14 of the car. Another car pulled up so Manuel Macias ordered Brian  
15 Konz back into the back seat of his car and they drove to a place  
16 where Brian Konz was murdered. At that location, Brian Konz  
17 was again ordered from the car and told to lie down in the dirt as  
18 he did and then Inmate Hammons or Manuel Macias shot him in  
19 the back with a shot gun and also hit him three times in the back of  
20 the head with a gun.

21 Manuel Macias (indiscernible) himself and Inmate Hammons from  
22 the murder scene to James' house where they had obtained the  
23 shotgun shells. Inmate Hammons gave James the shotgun and told  
24 him it was not working and asked if he could fix it. James then  
25 took the gun, wrapped it in a blanket and told James two of them  
26 would later go together and fix it. Manuel Macias and Inmate  
Hammons then drove to Billy's trailer. They looked excited,  
hyper, nervous and scared going and is roommate Eric [sic]. They  
took Billy to a bathroom and closed the door. Manuel Macias told  
Billy that Brian Konz had been calling Manny and Billy narcs.  
Billy said that they would kick his ass. Inmate Hammons said it's  
been taken care of and they told Billy they had killed Brian. Billy  
asked how they had done and Inmate Hammons told him the  
details of the murder as previously noted in this report.

20 (Pet'r's Pet., Ex. C at p. 11-15.) In 1993, Petitioner pled to second degree murder. He was  
21 sentenced to fifteen years to life imprisonment. On January 27, 2006, the Board conducted a  
22 subsequent parole hearing. The Board concluded that Petitioner was not suitable for parole at  
23 that time because he posed an unreasonable risk of danger to society and a threat to public safety  
24 if released from prison.

25 Petitioner challenged the Board's decision denying parole in the County of San  
26 Bernardino Superior Court via a state habeas petition. That court denied his habeas petition on

1 February 8, 2007 in a written opinion. The California Court of Appeal, Fourth District Division  
2 Two denied Petitioner’s state habeas petition without discussion on March 7, 2007. The  
3 California Supreme Court denied the petition without discussion on May 9, 2007. Petitioner  
4 filed the instant federal habeas petition on May 29, 2007.

### 5 III. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

6 An application for writ of habeas corpus by a person in custody under judgment of a state  
7 court can only be granted for violations of the Constitution or laws of the United States. See 28  
8 U.S.C. § 2254(a); see also Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v.  
9 Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)).  
10 Petitioner filed this petition for writ of habeas corpus after April 24, 1996, thus the Antiterrorism  
11 and Effective Death Penalty Act of 1996 (“AEDPA”) applies. See Lindh v. Murphy, 521 U.S.  
12 320, 326 (1997). Under AEDPA, federal habeas corpus relief is not available for any claim  
13 decided on the merits in the state court proceedings unless the state court’s adjudication of the  
14 claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of,  
15 clearly established federal law, as determined by the Supreme Court of the United States; or (2)  
16 resulted in a decision that was based on an unreasonable determination of the facts in light of the  
17 evidence presented in state court. See 28 U.S.C. 2254(d).

18 If a state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing  
19 court must conduct a *de novo* review of a petitioner’s habeas claims. See Delgadillo v.  
20 Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Additionally, where a state court provides no  
21 reasoning to support its conclusion, a federal habeas court independently reviews the record to  
22 determine whether the state court was objectively unreasonable in its application of clearly  
23 established federal law. See Musladin v. Lamarque, 555 F.3d 830, 835 (9th Cir. 2009); see also  
24 Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000), overruled on other grounds, Lockyer v.  
25 Andrade, 538 U.S. 63 (2003).

26 As a threshold matter, this Court must “first decide what constitutes ‘clearly established

1 Federal law, as determined by the Supreme Court of the United States.” Lockyer, 538 U.S. at 71  
2 (2003) (quoting 28 U.S.C. § 2254(d)(1)). “[C]learly established federal law’ under § 2254(d)(1)  
3 is the governing legal principle or principles set forth by the Supreme Court at the time the state  
4 court renders its decision.” Id. (citations omitted). Under the unreasonable application clause, a  
5 federal habeas court making the unreasonable application inquiry should ask whether the state  
6 court’s application of clearly established federal law was “objectively unreasonable.” See  
7 Williams v. Taylor, 529 U.S. 362, 409 (2000). Thus, “a federal court may not issue the writ  
8 simply because the court concludes in its independent judgment that the relevant state court  
9 decision applied clearly established federal law erroneously or incorrectly. Rather, that  
10 application must also be unreasonable.” Id. at 411. Although only Supreme Court law is binding  
11 on the states, Ninth Circuit precedent remains relevant persuasive authority in determining  
12 whether a state court decision is an objectively unreasonable application of clearly established  
13 federal law. See Clark v. Murphy, 331 F.3d 1062, 1070 (9th Cir. 2003) (“While only the  
14 Supreme Court’s precedents are binding . . . and only those precedents need be reasonably  
15 applied, we may look for guidance to circuit precedents.”).

16 The first step in applying AEDPA’s standards is to “identify the state court decision that  
17 is appropriate for our review.” See Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005).  
18 When more than one court adjudicated Petitioner’s claims, a federal habeas court analyzes the  
19 last reasoned decision. Id. (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). The last  
20 reasoned state court decision in this case was from the County of San Bernardino Superior Court  
21 which analyzed Claim II on the merits. While the Superior Court did not discuss Claim I on the  
22 merits, “the California Constitution provides that each of the three levels of state courts -  
23 Superior Court, Courts of Appeal, and the Supreme Court - has ‘original jurisdiction in habeas  
24 proceedings.” Gaston v. Palmer, 417 F.3d 1030, 1036 (9th Cir. 2005) (citing Cal. Const. art. VI,  
25 § 10), modified on other grounds, 447 F.3d 1165 (9th Cir. 2006). As previously stated, the  
26 California Supreme Court denied Petitioner’s petition without discussion. The Ninth Circuit

1 construes this type of “postcard” denial as a decision on the merits. See id. at 1038. Thus, the  
2 record will be independently reviewed with respect to Claim I to determine whether the state  
3 court was objectively unreasonable in its application of clearly established federal law.  
4 See Crittenden v. Ayers, – F.3d –, 2010 WL 3274506, at \*13 (9th Cir. Aug. 20, 2010) (stating  
5 that it will “perform an independent review of the record to ascertain whether the state court  
6 decision was objectively unreasonable, because the state-court adjudication was not reasoned.”)  
7 (internal quotation marks and citation omitted).

#### 8 IV. PETITIONER’S CLAIMS FOR REVIEW

##### 9 A. Claim I

10 In Claim I, Petitioner argues that the Board violated his plea agreement when it denied  
11 him the benefit of his plea. Petitioner asserts that, “the parties agreed that the circumstances of  
12 Petitioner’s conduct would warrant that he has a right to be released upon parole after serving a  
13 minimum term of imprisonment of 15-years minus credit under Penal Code section 190, or a  
14 maximum base term established pursuant to Penal Code section 3041, subd. (A) of either 16-17-  
15 18 years.” (Pet’r’s Pet. at p. 28.)

16 “Plea agreements are contractual in nature and are measured by contract law standards.”  
17 United States v. De la Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993) (citing United States v. Keller,  
18 902 F.2d 1391, 1393 (9th Cir. 1990). Petitioner fails to state a valid claim for federal habeas  
19 relief. Petitioner was sentenced to fifteen years to life imprisonment with the *possibility* of  
20 parole. (See Resp’t’s Answer, Ex. 1 (Abstract of Judgment) (emphasis added); see also Pet’r’s  
21 Pet. at Ex. A at p. 9 (Criminal Minute Order) (“Defendant is committed to State Prison for the  
22 term prescribed by Law as to ct 1 15 yrs to life.”) Petitioner does not show that his plea  
23 agreement was conditioned in any way upon his receipt of the Board’s favorable parole decision  
24 at some point. See, e.g., James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (“Conclusory allegations  
25 which are not supported by a statement of specific facts do not warrant habeas relief.”).  
26 Petitioner must show that he is in custody in violation of the Constitution, laws or treaties of the

1 United States to receive federal habeas relief. See, e.g., Silvia v. Woodford, 279 F.3d 825, 835  
2 (9th Cir. 2002). Petitioner fails to meet this requirement in arguing that the denial of his parole  
3 violated his plea agreement.

4 Petitioner alludes to the fact that he was under medication during the plea proceedings  
5 such that his mental faculties were slightly impaired and that his counsel was ineffective when  
6 counsel purportedly told Petitioner not to inform the trial court about his medications. (See  
7 Pet'r's Pet., Ex. E at ¶ 4-5.) Thus, Petitioner appears to seek to collaterally attack his underlying  
8 conviction in asserting that his plea was not knowing or intelligent. See Brady v. United States,  
9 397 U.S. 742, 748 (1970) ([Guilty pleas] must be knowing, intelligent acts done with sufficient  
10 awareness of the relevant circumstances and likely consequences.”). The statute of limitations  
11 for federal habeas corpus petitions is set forth in 28 U.S.C. § 2244(d)(1) which states:

12 A 1-year period of limitation shall apply to an application for a writ  
13 of habeas corpus by a person in custody pursuant to the judgment  
14 of a State court. The limitation period shall run from the latest of –  
15 (A) the date on which the judgment became final by the  
16 conclusion of direct review or the expiration of the time seeking  
17 such review;  
18 (B) the date on which the impediment to filing an application  
19 created by State action in violation of the Constitution or laws of  
20 the United States is removed, if the applicant was prevented from  
21 filing by such State action;  
22 (C) the date on which the constitutional right asserted was initially  
23 recognized by the Supreme Court, if the right has been newly  
24 recognized by the Supreme Court and made retroactively  
25 applicable to cases on collateral review; or  
26 (D) the date on which the factual predicate of the claim or claims  
presented could have been discovered through the exercise of due  
diligence.

21 Petitioner's conviction occurred in 1993 and he did not appeal nor did he file any habeas  
22 petitions with respect to the judgment of conviction. (See Pet'r's Pet. at p. 1-2.) Because  
23 Petitioner's conviction became final prior to AEDPA's enactment on April 24, 1996, the one-  
24 year statute of limitations began to run on April 25, 1996, and expired one year later, on April 24,  
25 1997 with respect to his argument regarding a purported unknowing and unintelligent plea. See  
26 Malcolm v. Payne, 281 F.3d 951, 955 (9th Cir. 2002) (where state prisoner's conviction became

1 final prior to AEDPA's enactment, AEDPA's one-year statute of limitations begins to run on  
2 April 25, 1996, the day after AEDPA was enacted).

3           However, Petitioner does not only assert that his plea was not knowing and intelligent  
4 because of his medication and due to his counsel's purported ineffectiveness due to statements  
5 made to him regarding his medication. Additionally, Petitioner asserts:

6           That at the time of the negotiated plea of no contest I was under the  
7 reasonable belief that upon rehabilitating myself, and that upon  
8 conforming to prison rules and regulations, and that upon good  
9 behavior and program participation I would be released upon  
10 parole at the completion of the minimum of 10 years of  
11 imprisonment; Furthermore, that I reasonably understood that the  
12 "life" portion of the sentence meant life on parole, and not life in  
13 prison; that had I been so informed that I would be serving a life  
14 sentence of imprisonment, that I would not have entered into the  
15 negotiated plea of no contest[.]

16 (Pet'r's Pet., Ex. E at ¶ 10.) Thus, to the extent that the factual predicate underlying this  
17 argument could not have been discovered until after Petitioner had been incarcerated for ten  
18 years, see 28 U.S.C. § 2244(d)(1)(D), the claim would still be time-barred under AEDPA  
19 because Petitioner would have discovered the facts at least by 2003 when he was not released on  
20 parole. Nevertheless, Petitioner did not file this federal habeas petition until 2007, well beyond  
21 AEDPA's one-year statute of limitations.

22           Therefore, for the foregoing reasons, Petitioner is not entitled to federal habeas relief on  
23 Claim I.

24           B. Claim II

25           In Claim II, Petitioner asserts that the Board's decision violated his federal due process  
26 rights because there was a "lack of reliable evidence demonstrating current unreasonable  
dangerousness." (Pet'r's Pet. at p. 4.) The Due Process Clause of the Fourteenth Amendment  
prohibits state action that deprives a person of life, liberty, or property without due process of  
law. A person alleging a due process violation must first demonstrate that he or she was  
deprived of a protected liberty or property interest, and then show that the procedures attendant

1 upon the deprivation were not constitutionally sufficient. See Ky. Dep't of Corr. v. Thompson,  
2 490 U.S. 454, 459-60 (1989).

3 A protected liberty interest may arise either from the Due Process Clause itself or from  
4 state laws. See, e.g., Bd. of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States  
5 Constitution does not, in and of itself, create a protected liberty interest in the receipt of a parole  
6 date. See Jago v. Van Curen, 454 U.S. 14, 17-21 (1981). However, if a state's statutory parole  
7 scheme uses mandatory language, it "creates a presumption that parole release will be granted"  
8 when or unless certain designated findings are made, thereby giving rise to a constitutional  
9 liberty interest. McQuillion v. Duncan, 306 F.3d 895, 901 (9th Cir. 2002) (quoting Greenholtz v.  
10 Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 12 (1979)).

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

17 As a matter of state law, denial of parole to California inmates must be supported by at  
18 least "some evidence" demonstrating current dangerousness. See Hayward v. Marshall, 603 F.3d  
19 546, 562-63 (9th Cir. 2010) (en banc) (citing In re Rosenkrantz, 29 Cal. 4th 616, 128 Cal. Rptr.  
20 2d 104, 59 P.3d 174 (2002); In re Lawrence, 44 Cal. 4th 1181, 82 Cal. Rptr. 3d 169, 190 P.3d  
21 535 (2008); In re Shaputis, 44 Cal. 4th 1241, 82 Cal. Rptr. 3d 213, 190 P.3d 573 (2008)).  
22 "California's 'some evidence' requirement is a component of the liberty interest created by the  
23 parole system of the state." Cooke v. Solis, 606 F.3d 1206, 1213 (9th Cir. 2010) (per curiam).  
24 Thus, a reviewing court such as this one must "decide whether the California judicial decision  
25 approving the [Board's] decision rejecting parole was an 'unreasonable application' of the  
26 California 'some evidence' requirement or was it 'based on an unreasonable determination of the

1 facts in light of the evidence.”<sup>2</sup> Hayward, 603 F.3d at 562-63.

2 The analysis of whether some evidence supports denial of parole to a California state  
3 inmate is framed by the state’s statutes and regulations governing parole suitability  
4 determinations. See Irons v. Carey, 505 F.3d 846, 851 (9th Cir. 2007), overruled in part on other  
5 grounds, Hayward, 603 F.3d 546. This court “must look to California law to determine the  
6 findings that are necessary to deem a prisoner unsuitable for parole, and then must review the  
7 record to determine whether the state court decision holding that these findings were supported  
8 by ‘some evidence’ . . . constituted an unreasonable application of the ‘some evidence’  
9 principle.” Id.

10 California Penal Code section 3041 sets forth the state’s legislative standards for  
11 determining parole for life-sentenced prisoners. Section 3041(a) provides that, “[o]ne year prior  
12 to the inmate’s minimum eligible release date a panel . . . shall again meet with the inmate and  
13 shall normally set a parole release date.” Cal. Penal Code § 3041(a). However, subsection (b)  
14 states an exception to the regular and early setting of a life-sentenced prisoner’s term, if the  
15 Board determines “that the gravity of the current convicted offense or offenses, or the timing and  
16 gravity of current or past convicted offense or offenses, is such that the consideration of public  
17 safety requires a more lengthy period of incarceration for this individual.” Cal. Penal Code §  
18 3041(b).

19 Title 15, Section 2402 of the California Code of Regulations sets forth various factors to  
20 be considered by the Board in its parole suitability findings for murderers. “The regulation is  
21 designed to guide the Board’s assessment of whether the inmate poses ‘an unreasonable risk of  
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23 <sup>2</sup> To the extent that the Respondent argues that Petitioner’s claim is not cognizable on  
24 federal habeas review under AEDPA or that Petitioner does not have a federally protected  
25 interest in parole, the Ninth Circuit has specifically held that “due process challenges to  
26 California courts’ application of the ‘some evidence’ requirement are cognizable on federal  
habeas review under AEDPA,” and that “California’s ‘some evidence’ requirement is a  
component of the liberty interest created by the parole system of that state.” Cooke, 606 F.3d at  
1213 (citing Hayward, 603 F.3d at 561-64).

1 danger to society if released from prison,' and thus whether he or she is suitable for parole." In  
2 re Lawrence, 44 Cal. 4th at 1214, 82 Cal. Rptr. 3d 169, 190 P.3d 535. The Board is directed to  
3 consider all relevant, reliable information available regarding:

4 the circumstances of the prisoner's social history; past and present  
5 mental state; past criminal history, including involvement in other  
6 criminal misconduct which is reliably documented; the base and  
7 other commitment offenses, including behavior before, during and  
8 after the crime; past and present attitude toward the crime; any  
9 conditions of treatment or control, including the use of special  
10 conditions under which the prisoner may safely be released to the  
11 community; and any other information which bears on the  
12 prisoner's suitability for release.

13 15 Cal. Code Regs. § 2402(b). The regulation also lists several specific circumstances which  
14 tend to show suitability or unsuitability for parole. Id. § 2402(c)-(d).<sup>3</sup> The overriding concern is

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15 <sup>3</sup> Circumstances tending to indicate unsuitability include:

16 (1) Commitment Offense. The prisoner committed the offense in an especially  
17 heinous, atrocious or cruel manner. The factors to be considered include:

18 (A) Multiple victims were attacked, injured or killed in the same or  
19 separate incidents.

20 (B) The offense was carried out in a dispassionate and calculated manner,  
21 such as an execution style murder.

22 (C) The victim was abused, defiled or mutilated during or after the  
23 offense.

24 (D) The offense was carried out in a manner which demonstrates an  
25 exceptionally callous disregard for human suffering.

26 (E) The motive for the crime is inexplicable or very trivial in relation to  
the offense.

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or  
attempted to inflict serious injury on a victim, particularly if the prisoner  
demonstrated serious assaultive behavior at an early age.

(3) Unstable social history. The prisoner has a history of unstable or tumultuous  
relationships with others.

(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted  
another in a manner calculated to inflict unusual pain or fear upon the victim.

(5) Psychological Factors. The prisoner has a lengthy history of severe mental  
problems related to the offense.

(6) Institutional Behavior. The prisoner has engaged in serious misconduct in  
prison or jail.

15 Cal. Code Regs. § 2402(c).

Circumstances tending to indicate suitability include:

1 public safety and the focus is on the inmate's *current* dangerousness. See In re Lawrence, 44  
2 Cal. 4th at 1205, 82 Cal. Rptr. 3d 169, 190 P.3d 535. Thus, the proper articulation of the  
3 standard of review is not whether some evidence supports the reasons cited for denying parole,  
4 but whether some evidence indicates that the inmate's release would unreasonably endanger  
5 public safety. See In re Shaputis, 44 Cal. 4th at 1254, 82 Cal. Rptr. 3d 213, 190 P.3d 573. There  
6 must be a nexus between the facts relied upon and the ultimate conclusion that the prisoner  
7 continues to be a threat to public safety. In re Lawrence, 44 Cal. 4th at 1227, 82 Cal. Rptr. 3d  
8 169, 190 P.3d 535. As to the circumstances of the commitment offense, the Lawrence court  
9 concluded that while:

10 the Board and the Governor may rely upon the aggravated  
11 circumstances of the commitment offense as a basis for a decision  
12 denying parole, the aggravated nature of the crime does not in and  
13 of itself provide some evidence of current dangerousness to the  
14 public unless the record also establishes that something in the  
15 prisoner's pre- or post-incarceration history, or his current  
16 demeanor or mental state, indicates that the implications regarding

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15 (1) No Juvenile Record. The prisoner does not have a record of assaulting others  
16 as a juvenile or committing crimes with a potential of personal harm to victims.

16 (2) Stable Social History. The prisoner has experienced reasonably stable  
17 relationships with others.

17 (3) Signs of Remorse. The prisoner performed acts which tend to indicate the  
18 presence of remorse, such as attempting to repair the damage, seeking help for or  
19 relieving the suffering of the victim, or indicating that he understands the nature  
20 and magnitude of the offense.

19 (4) Motivation for Crime. The prisoner committed his crime as the result of  
20 significant stress in his life, especially if the stress has built over a long period of  
21 time.

21 (5) Battered Woman Syndrome. At the time of the commission of the crime, the  
22 prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b),  
23 and it appears the criminal behavior was the result of that victimization.

22 (6) Lack of Criminal History. The prisoner lacks any significant history of violent  
23 crime.

23 (7) Age. The prisoner's present age reduces the probability of recidivism.

24 (8) Understanding and Plans for Future. The prisoner has made realistic plans for  
25 release or has developed marketable skills that can be put to use upon release.

25 (9) Institutional Behavior. Institutional activities indicate an enhanced ability to  
26 function within the law upon release.

26 Id. § 2402(d).

1 the prisoner's dangerousness that derive from his or her  
2 commission of the commitment offense remain probative to the  
3 statutory determination of a continuing threat to public safety.

4 Id. at 1214, 82 Cal. Rptr. 3d 169, 190 P.3d 535.

5 i. 2006 Board Decision

6 The panel of the Board that presided over Petitioner's 2006 parole suitability hearing  
7 considered the factors bearing on Petitioner's suitability for parole and weighed those factors  
8 against releasing Petitioner on parole. The Board stated the following in deciding to deny  
9 Petitioner parole:

10 [T]he panel has reviewed all the information presented here at the  
11 hearing, we've reviewed your files, we listened to the arguments of  
12 counsel and reviewed the letters submitted and we rely upon all of  
13 the above in concluding that you remain unsuitable for parole and  
14 that you would continue to pose an unreasonable risk of danger to  
15 society and a threat to public safety if released from prison. Our  
16 analysis starts with a review of your commitment offense which  
17 was, we find, carried out in an especially cruel and callous manner. It  
18 was carried out in a manner which demonstrated an exceptionally  
19 callous disregard for human suffering and the motive for the crime  
20 was inexplicable or it's hard to understand or if we do understand  
21 it and if it was because you were mad or because – or somebody  
22 was mad because what you believe somebody else was saying [sic].  
23 It was certainly a very trivial reason and those conclusions derive  
24 from the factual circumstances in which you and your crime  
25 partner determined that the victim needed to be dealt with and your  
26 way of dealing with him was to arm yourself with a shotgun and  
obtain separately the shells, because apparently you didn't have  
them and a knife, take the victim to a remote location where he was  
shot and beaten. We recognize, as discussed and pointed out, that  
according to the court transcript and the records you were not – the  
use clause was stricken as to you so you were not the shooter  
however, that really does not absolve yourself of responsibility for  
this. It's hard to accept your explanation that you just went there  
for the fight in light of the tools that you took to go there. A fight  
does not need a shotgun and shotgun shells and so by arming  
yourself in that fashion it's certainly reasonable to conclude and the  
offense for which you were convicted would confirm what you do  
was to – what your intent was is to do exactly what you did and  
that was the common result of both you and your crime partner. So  
the panel accepts as – accepts your responsibility as being equal  
with that of your crime partner.

This offense was proceeded by and represented an escalating  
pattern of criminal conduct and you failed the prior attempts by the

1 juvenile justice system to correct problems that you had.  
2 Obviously you have a tumultuous upbringing, whether it was a lack  
3 of ability of your father to provide the guidance that you needed or  
4 the persons that you hung around with, it's difficult to ascertain all  
5 the reasons why but you had a history of involvement with the  
6 juvenile court starting at age 12 and that involvement continued  
7 constantly up until the time of this commitment offense with  
8 putting you into court, putting you into group homes, being  
9 exposed to all the resources of the juvenile court which obviously  
10 did not avoid – it wasn't successful in avoiding this commitment  
11 offense.

12 In the institution, in many ways, you've done well. You've worked  
13 to improve yourself educationally and vocationally. Certainly your  
14 involvement with the optical lab and courses that you have taken  
15 are positive factors that we recognize. You seem to have the  
16 ability to apply yourself but it was notably the opposite to that  
17 positive record was your disciplinary history and most notably the  
18 recent disciplinary. Although not great in number, the totals  
19 indicated that you have counseling chrono or minor disciplinary,  
20 that being back in December of '96 for participation. You have  
21 four equivalent of CDC 115's, three of those in the youth authority,  
22 for serious disciplinary behaviors. Most important, most  
23 noticeable was the last one was last year in March of '05 for  
24 fighting and you had one earlier one for fighting and when you  
25 describe you [sic] difficulties as what was your problems as a  
26 young in the juvenile system, just your problem with your  
surrounding. I was the smallest kid and, you know, I had to prove  
myself. That is the same kinds of behavior patterns, they look like  
get repeated when you continually get involved in fights.

You need to understand that the most basic level of evaluation is  
how you do in your disciplinary behavior in the institution and all  
of the other good things that we say, when you look at the classes  
you've taken in alternative to violence or violence prevention, well  
it's fine to sit in class and learn all those things but if you into a  
situation where you can't avoid fights, all that seems to go for not.  
You don't need me to lecture you, sir, and I'm not going to do that  
but you need to understand that that's the first level of analysis. If  
you haven't been disciplinary free for an extended period of time,  
you're not going to get a date and you need to understand that  
reality.

We have looked at your psychological report dated April 23<sup>rd</sup>, 2002  
by John Rouse. That was not totally supportive of release, it  
describes you as being – level dangerousness as being average for  
similar inmates incarcerated in this facility, perhaps less than  
average with inmates including those in facilities that had a higher  
or more serious level of dangerous inmate. However, I was  
prepared without consideration most recent disciplinary [sic].

1 We considered the input of the District Attorney of San Bernardino  
2 County. We also considered the letter submitted by the Sheriff's  
3 Department of San Bernardino County and you might consider the  
4 next time you talk to your counselor's reporter, it's difficult in  
5 looking at the description of this commitment offense, I don't  
6 know if it was the way it was written or what, it's difficult to get a  
7 clear picture of the facts and perhaps the short, succinct description  
8 in that letter from the Dan Bernardino Sheriff's Department gives  
9 you all the information that you need but anyway it was difficult  
10 for us to get through it with that.

11 Because of the seriousness of the offense and because you're recent  
12 disciplinary history and the need for an extended period of  
13 disciplinary free behavior in a separate decision, the hearing panel  
14 finds it's not reasonable to expect that parole would be granted at  
15 hearing during the following four years and we deny you for that  
16 period. Three years ago you were given a denial of three years and  
17 they told you to remain disciplinary free and that didn't happen so  
18 the period is not going to be shorter, it's going to be longer. Take  
19 that to heart. If you want a parole date you have to be absolutely  
20 disciplinary free. You seem to be going in the right direction in  
21 other areas, we recognize and commend you for that. Your parole  
22 plans has [sic] developed up to this point are reasonable, we have  
23 quarrel with that [sic]. Use the next years to upgrade yourself  
24 educationally forward. You have the ability to do that. Put your  
25 time to good use in a positive direction so when you return you can  
26 show them not only a positive level of achievement in those senses  
but that you have no disciplinaries.

(Pet'r's Pet., Ex. C at p. 49-55.)

ii. 2007 Superior Court Decision

On state habeas corpus review, the San Bernardino County Superior Court denied  
Petitioner's request for habeas relief. In denying the state habeas petition, the Superior Court  
stated the following:

The Petition of Lowell Hammons for Writ of Habeas Corpus was  
filed in this Court on January 19, 2007.  
Therein, Petitioner contends that;  
1) The decision of the parole board to deny him parole, on January  
27, 2006, was arbitrary and unreasonable and not supported by the  
evidence.  
Pursuant to the record of the suitability hearing it is evident that the  
board considered the following factors:  
1. Case factors:  
Petitioner agreed to accompany Manuel Macias to go "kick the  
ass" of the murder victim. They armed themselves with a sawed

1 off 12 gauge shotgun and a knife. Petitioner stopped off along the  
2 way to obtain shotgun shells. Petitioner took the shotgun into the  
3 victim's residence. When there, they threatened the kidnap the  
4 victim at gunpoint. They took the victim to a remote area, and  
5 murdered him, by shotgunning and bludgeoning him to death, as an  
6 execution. Petitioner then disposed of the shotgun by giving it to a  
7 friend. Petitioner denied that he used the shotgun.

8 2. Pre-Commitment Factors:

9 His juvenile record was horrendous, including multiple firearms  
10 charges, starting at age 12.

11 3. Family background.

12 4. Drug use, alcohol use.

13 5. Parole plans.

14 6. His behavior within the institution.

15 Petitioner started his prison term in 1999. Prior to that he had been  
16 in the Youth Authority. His record in prison has been generally  
17 good with several educational and vocational accomplishments.  
18 However, he has violated prison rules.

19 7. Psychological reports.

20 The board found the Petitioner unsuitable for parole based on the  
21 horrendous circumstances of the crime and the pattern of serious  
22 criminality from an early age. Furthermore, Petitioner's discipline  
23 record while in prison did not indicate that he would not be a threat  
24 to the community if released.

25 Clearly, the board's decision was based upon evidence and was  
26 justified by that evidence.

(Resp't's Answer, Ex. 4.)

iii. Analysis of Claim II

The issue with this Claim is whether there is "some evidence" that indicates that  
Petitioner's release would unreasonably endanger public safety. See In re Shaputis, 44 Cal. 4th  
at 1254, 82 Cal. Rptr. 3d 213, 190 P.3d 573. With respect to the commitment offense, the issue  
is whether there is something in Petitioner's pre or post-incarceration history of his current  
demeanor or mental state that supports the inference of current dangerousness. See Hayward,  
603 F.3d at 562.

The record includes "some evidence" to support an inference of Petitioner's current  
dangerousness beyond the circumstances of the commitment offense such that the denial of his  
parole as the 2006 Board hearing did not violate his due process rights. For example, both the  
state court and the Board specifically noted Petitioner's disciplinary infractions while

1 incarcerated, including being cited for mutual combat with the use of force in March 2005, less  
2 than one year prior to the January 2006 parole suitability hearing at issue in this case.  
3 Furthermore, the state court and the Board both cited to Petitioner's prior juvenile record.  
4 Petitioner's juvenile record included firearm and burglary offenses. (See Pet'r's Pet., Ex. C at p.  
5 18-24.); see also 15 Cal. Code Regs. §§ 2402(c)(2) & 2402(d)(1). This evidence cited by the  
6 state court (and the Board) establishes a modicum of evidence to create a nexus between the facts  
7 relied upon and the ultimate conclusion that the prisoner continues to be a threat to public safety.  
8 See In re Lawrence, 44 Cal. 4th at 1226, 82 Cal. Rptr. 3d 169, 190 P.3d 535 (stating that the  
9 deferential standard of review requires credit to be given to the findings if they are supported by a  
10 modicum of evidence).

11 Accordingly, under Hayward/Lawrence, there was a nexus of the facts relied upon and  
12 Petitioner's current dangerousness. There was a modicum of evidence in the record that  
13 supported the Board's ultimate determination that Petitioner posed a current risk of danger to  
14 society such that Petitioner's constitutional rights were not violated by the denial of his parole at  
15 the 2006 suitability hearing. Petitioner is not entitled to federal habeas relief on Claim II.

## 16 V. PETITIONER'S REQUESTS

### 17 A. Request for an Order to Show Cause

18 Petitioner requests "an order to show cause" in his petition. (Pet'r's Pet. at p. 39.)  
19 Respondent answered the Petition on September 7, 2007. Accordingly, Petitioner's request for  
20 an order to show cause is denied as moot.

### 21 B. Request for the Appointment of Counsel

22 Petitioner also requests the appointment of counsel. There currently exists no absolute  
23 right to the appointment of counsel in habeas proceedings. See, e.g., Nevius v. Sumner, 105 F.3d  
24 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at  
25 any stage of the case "if the interests of justice so require." In the present case, the interests of  
26 justice do not so require to warrant the appointment of counsel. Accordingly, Petitioner's request

1 for the appointment of counsel is denied.

2 C. Request for Discovery

3 Next, Petitioner requests “reasonable discovery.” (Pet’r’s Pet. at p. 39.) Parties to a  
4 habeas proceeding are not entitled to discovery as a matter of course. See Bracy v. Gramley, 520  
5 U.S. 899, 904 (1997). Rather, “[a] judge may, for good cause, authorize a party to conduct  
6 discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.”  
7 Rule 6(a), Rules Governing § 2254 Cases; see also Bracy, 520 U.S. at 904. Good cause is shown  
8 “where specific allegations before the court show reason to believe that the petitioner may, if the  
9 facts are fully developed, be able to demonstrate that he is . . . entitled to relief.” Id. at 908-09  
10 (internal quotation marks and citation omitted); see also Pham v. Terhune, 400 F.3d 740, 743  
11 (9th Cir. 2004). A request for discovery “must also include any proposed interrogatories and  
12 requests for admission, and must specify any requested documents.” Rule 6(b), Rules Governing  
13 § 2254 Cases.

14 In this case, Petitioner failed to show good cause to warrant granting his request for  
15 discovery and he has not shown reason to believe that he would be entitled to relief if facts are  
16 more fully developed.

17 D. Request for an Evidentiary Hearing

18 Finally, Petitioner requests an evidentiary hearing on his Claims. Pursuant to 28 U.S.C. §  
19 2254(e)(2), a district court presented with a request for an evidentiary hearing must first  
20 determine whether a factual basis exists in the record to support a petitioner’s claims and, if not,  
21 whether an evidentiary hearing “might be appropriate.” Baja v. Ducharme, 187 F.3d 1075, 1078  
22 (9th Cir. 1999); see also Earp v. Ornoski, 431 F.3d 1158, 1166-67 (9th Cir. 2005). A petitioner  
23 requesting an evidentiary hearing must also demonstrate that he has presented a “colorable claim  
24 for relief.” Earp, 431 F.3d at 1167 (citations omitted). To show that a claim is “colorable,” a  
25 petitioner is “required to allege specific facts which, if true, would entitle him to relief.” Ortiz v.  
26 Stewart, 149 F.3d 923, 934 (9th Cir. 1998) (internal quotation marks and citation omitted).

1 In this case, an evidentiary hearing is not warranted. Petitioner failed to demonstrate that  
2 he has a colorable claim for federal habeas relief for the reasons stated in supra Part IV.

3 VI. CONCLUSION

4 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 5 1. Petitioner’s request for an order to show cause is DENIED AS MOOT;
- 6 2. Petitioner’s request for the appointment of counsel is DENIED;
- 7 3. Petitioner’s request for leave to conduct discovery is DENIED; and
- 8 4. Petitioner’s request for an evidentiary hearing is DENIED.

9 IT IS HEREBY RECOMMENDED that Petitioner’s Petition for writ of habeas corpus be  
10 DENIED.

11 These findings and recommendations are submitted to the United States District Judge  
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
13 after being served with these findings and recommendations, any party may file written  
14 objections with the court and serve a copy on all parties. Such a document should be captioned  
15 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
16 shall be served and filed within seven days after service of the objections. The parties are  
17 advised that failure to file objections within the specified time may waive the right to appeal the  
18 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In any objections he  
19 elects to file, petitioner may address whether a certificate of appealability should issue in the  
20 event he elects to file an appeal from the judgment in this case. *See* Rule 11, Federal Rules  
21 Governing Section 2254 Cases (the district court must issue or deny a certificate of appealability  
22 when it enters a final order adverse to the applicant).

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1 DATED: November 12, 2010

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TIMOTHY J BOMMER  
UNITED STATES MAGISTRATE JUDGE