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

DAVID PRIEST,

No. CIV S-07-1186-JAM-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATIONS

D.K. SISTO,

Respondent.

_____ /

Petitioner, a state prisoner proceeding with appointed counsel, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the 2006 denial of parole decision. Pending before the court are: Petitioner’s petition for writ of habeas corpus (Doc. 1), Respondent’s response to the petition (Doc. 8), Petitioner’s traverse (Doc. 9), Respondent’s supplemental brief (Doc. 11), Petitioner’s supplemental brief (Doc. 12),¹ Petitioner’s second supplemental brief (Doc. 21), Respondent’s second supplemental brief (Doc.

¹ The supplemental briefs were filed pursuant to the court’s request that each party file a brief discussing the effect, if any, the original Ninth Circuit panel decision in Hayward v. Marshall, 512 F.3d 536 (9th Cir. 2008), would have on this case. The panel decision in Hayward was thereafter vacated, and the case was heard en banc. Therefore, the relevant case, as discussed below is the en banc opinion, 603 F.3d 546 (9th Cir. 2010).

1 23), Petitioner's second traverse (Doc. 24), Petitioner's motion for discovery (Doc. 25),
2 Petitioner's motion to expand the record (Doc. 25), Respondent's oppositions thereto (Docs. 27,
3 28), and Petitioner's replies thereto (Docs. 29, 30).

4 **I. BACKGROUND**

5 Petitioner is serving an indeterminate life sentence for a conviction of second-
6 degree murder. Petitioner appeared at a parole suitability hearing in June 2006, at which time he
7 was represented by counsel. In denying parole, the Board of Prison Terms ("Board") stated:

8 Your prior record, although (indiscernible) demonstrate an
9 escalating pattern of conduct, your prior offenses remain property
10 offenses, and alcohol, and drug offenses. So there's no really prior
11 record of violence. It appears what this case illustrates is drugs are
12 a dirty business. (Indiscernible) do bad things to people with those
13 that come in contact with them. And it is apparent that this crime
14 came as a result of drug activities that you were involved in at the
15 time. And thus, the primary reason for our concern in your denial
16 today, although in many ways you've been an ideal inmate, you've
17 been relatively disciplinary-free, you've programmed well, this 115
18 in 2000 is disturbing to us. Your history - - Your criminal history
19 relates to the abuse of drugs. This crime relates to the abuse of
20 drugs. Everything that you have done in a programming sense, it's
21 discounted when we see that 115. We think it is important that you
22 continue to demonstrate that - - we understand that you deny
23 culpability in that offense, but we're required to accept as true
24 those findings, and it's important that you continue by your
25 conduct to distance yourself from that 115. So we really have no
26 other comments other than to continue along the line that you are
traveling. You appear to have viable parole plans. You've
programmed well. But for that disciplinary-free, you would have
been given serious consideration today. We have considered the
psychological report, the input from the District Attorney, and the
input from the victims. . . .

21 Petitioner challenged the decision with a petition for writ of habeas corpus filed in
22 the San Joaquin County Superior Court. In denying relief, the court stated:

23 The transcript of the hearing reveals that petitioner's prior
24 criminality, including the life crime, all involved the abuse of
25 illegal drugs or alcohol. Petitioner admits that he had been using
26 methamphetamine before the murder. In 2000, while incarcerated
at Folsom Prison, petitioner was found guilty of a rules violation
involving methamphetamine. While petitioner denies that he was,
in fact, guilty of the violation, a 115 issued and a finding of guilt

1 was made. The panel indicated its concern with this 115 given the
2 circumstances surrounding the life crime and petitioner's prior
3 offenses. It therefore denied parole for one year and
4 recommended, among other things, that petitioner remain
disciplinary free. The rules violation report constitutes "some
evidence" and is sufficient to uphold the Board's decision.

5 The California Court of Appeals and California Supreme Court both summarily denied relief.

6 II. STANDARDS OF REVIEW

7 Because this action was filed after April 26, 1996, the provisions of the
8 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are presumptively
9 applicable. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Calderon v. United States Dist. Ct.
10 (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 522 U.S. 1099 (1998). The AEDPA
11 does not, however, apply in all circumstances. When it is clear that a state court has not reached
12 the merits of a petitioner's claim, because it was not raised in state court or because the court
13 denied it on procedural grounds, the AEDPA deference scheme does not apply and a federal
14 habeas court must review the claim de novo. See Pirtle v. Morgan, 313 F.3d 1160 (9th Cir.
15 2002) (holding that the AEDPA did not apply where Washington Supreme Court refused to reach
16 petitioner's claim under its "re-litigation rule"); see also Killian v. Poole, 282 F.3d 1204, 1208
17 (9th Cir. 2002) (holding that, where state court denied petitioner an evidentiary hearing on
18 perjury claim, AEDPA did not apply because evidence of the perjury was adduced only at the
19 evidentiary hearing in federal court); Appel v. Horn, 250 F.3d 203, 210 (3d Cir.2001) (reviewing
20 petition de novo where state court had issued a ruling on the merits of a related claim, but not the
21 claim alleged by petitioner). When the state court does not reach the merits of a claim,
22 "concerns about comity and federalism . . . do not exist." Pirtle, 313 F. 3d at 1167.

23 Where AEDPA is applicable, federal habeas relief under 28 U.S.C. § 2254(d) is
24 not available for any claim decided on the merits in state court proceedings unless the state
25 court's adjudication of the claim:

26 ///

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

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

7 Under § 2254(d)(1), federal habeas relief is available only where the state court’s decision is
8 “contrary to” or represents an “unreasonable application of” clearly established law. Under both
9 standards, “clearly established law” means those holdings of the United States Supreme Court as
10 of the time of the relevant state court decision. See Carey v. Musladin, 549 U.S. 70, 74 (2006)
11 (citing Williams, 529 U.S. at 412). “What matters are the holdings of the Supreme Court, not
12 the holdings of lower federal courts.” Plumlee v. Mastro, 512 F.3d 1204 (9th Cir. 2008) (en
13 banc). Supreme Court precedent is not clearly established law, and therefore federal habeas
14 relief is unavailable, unless it “squarely addresses” an issue. See Moses v. Payne, 555 F.3d 742,
15 753-54 (9th Cir. 2009) (citing Wright v. Van Patten, 552 U.S. 120, 28 S. Ct. 743, 746 (2008)).
16 For federal law to be clearly established, the Supreme Court must provide a “categorical answer”
17 to the question before the state court. See id.; see also Carey, 549 U.S. at 76-77 (holding that a
18 state court’s decision that a defendant was not prejudiced by spectators’ conduct at trial was not
19 contrary to, or an unreasonable application of, the Supreme Court’s test for determining prejudice
20 created by state conduct at trial because the Court had never applied the test to spectators’
21 conduct). Circuit court precedent may not be used to fill open questions in the Supreme Court’s
22 holdings. See Carey, 549 U.S. at 74.

23 In Williams v. Taylor, 529 U.S. 362 (2000) (O’Connor, J., concurring, garnering a
24 majority of the Court), the United States Supreme Court explained these different standards. A
25 state court decision is “contrary to” Supreme Court precedent if it is opposite to that reached by
26 the Supreme Court on the same question of law, or if the state court decides the case differently
than the Supreme Court has on a set of materially indistinguishable facts. See id. at 405. A state
court decision is also “contrary to” established law if it applies a rule which contradicts the

1 governing law set forth in Supreme Court cases. See id. In sum, the petitioner must demonstrate
2 that Supreme Court precedent requires a contrary outcome because the state court applied the
3 wrong legal rules. Thus, a state court decision applying the correct legal rule from Supreme
4 Court cases to the facts of a particular case is not reviewed under the “contrary to” standard. See
5 id. at 406. If a state court decision is “contrary to” clearly established law, it is reviewed to
6 determine first whether it resulted in constitutional error. See Benn v. Lambert, 283 F.3d 1040,
7 1052 n.6 (9th Cir. 2002). If so, the next question is whether such error was structural, in which
8 case federal habeas relief is warranted. See id. If the error was not structural, the final question
9 is whether the error had a substantial and injurious effect on the verdict, or was harmless. See id.

10 State court decisions are reviewed under the far more deferential “unreasonable
11 application of” standard where it identifies the correct legal rule from Supreme Court cases, but
12 unreasonably applies the rule to the facts of a particular case. See Wiggins v. Smith, 539 U.S.
13 510, 520 (2003). While declining to rule on the issue, the Supreme Court in Williams, suggested
14 that federal habeas relief may be available under this standard where the state court either
15 unreasonably extends a legal principle to a new context where it should not apply, or
16 unreasonably refuses to extend that principle to a new context where it should apply. See
17 Williams, 529 U.S. at 408-09. The Supreme Court has, however, made it clear that a state court
18 decision is not an “unreasonable application of” controlling law simply because it is an erroneous
19 or incorrect application of federal law. See id. at 410; see also Lockyer v. Andrade, 538 U.S. 63,
20 75-76 (2003). An “unreasonable application of” controlling law cannot necessarily be found
21 even where the federal habeas court concludes that the state court decision is clearly erroneous.
22 See Lockyer, 538 U.S. at 75-76. This is because “[t]he gloss of clear error fails to give proper
23 deference to state courts by conflating error (even clear error) with unreasonableness.” Id. at 75.
24 As with state court decisions which are “contrary to” established federal law, where a state court
25 decision is an “unreasonable application of” controlling law, federal habeas relief is nonetheless
26 unavailable if the error was non-structural and harmless. See Benn, 283 F.3d at 1052 n.6.

1 **III. DISCUSSION**

2 Petitioner argues that the Board’s decision was not based on some evidence of his
3 current dangerousness, but rather was arbitrary and capricious. Specifically, he argues there is no
4 evidence in the record to support the Boards decision or the finding of unsuitability, especially
5 where he meets eight of the nine circumstances tending to show suitability. He also argues the
6 Board failed to consider those relevant suitability factors. In addition, Petitioner moves the court
7 to allow discovery and to expand the record. Petitioner claims the discovery is necessary to
8 obtain a copy of the Board’s formal or informal policy relating to the use of rules violation
9 reports in determining parole suitability and a copy of an investigation report from the San
10 Joaquin District Attorney’s Office. Petitioner’s request to expand the record is for the purpose of
11 including in the record the investigation report, as well as supportive letters and declarations.

12 Respondent argues that Petitioner does not have a federally protected liberty
13 interest in parole, and that even if the “some evidence” standard applies, the factors cited by the
14 Board and state court meet this standard. In response to Petitioner’s request for discovery,
15 Respondent argues no good cause has been shown, disputes the existence of any formal or
16 informal policy regarding consideration of rules violation reports, and argues any investigation
17 by the San Joaquin District Attorney (who is not a party to this action) occurred after the 2006
18 parole hearing and would have no bearing on the review of the decision. Respondent also
19 contends the court should deny the motion to expand the record because the documents referred
20 to were not part of the state court record and bear no relation to the parole consideration decision
21 at issue.

22 Rule 6(a) of the Federal Rules Governing Section 2254 cases states “[a] judge
23 may, for good cause, authorize a party to conduct discovery” Rule 7 allows the court to
24 expand the record though the submission of additional materials relating to the petition.

25 _____ In Hayward v. Marshall, the Ninth Circuit sitting en banc held that there is no
26 federal stand-alone substantive due process right to parole. See 603 F.3d 546, 555 (9th Cir.

1 2010) (en banc). Any substantive due process interest in parole arises solely from state law
2 creating the right. See id. The Ninth Circuit overruled its prior decisions in Biggs v. Terhune,
3 334 F.3d 910, 915 (9th Cir. 2003), Sass v. Bd. of Prison Terms, 461 F.3d 1123 (9th Cir. 2006),
4 and Irons v. Carey, 505 F.3d 851 (9th Cir. 2007), “[t]o the extent [they]. . . might be read to
5 imply that there is a federal constitutional right regardless of whether state law entitles the
6 prisoner to release” Hayward, 603 F.3d at 555.

7 Turning to whether California’s parole scheme creates any substantive due
8 process rights, the Ninth Circuit stated: “Although the due process clause does not, by itself,
9 entitle a prisoner to parole in the absence of some evidence of future dangerousness, state law
10 may supply a predicate for that conclusion.” Id. at 561. The court then discussed California law,
11 including the California Supreme Court’s decisions in In re Lawrence, 44 Cal.4th 1181 (2008),
12 and In re Shaputis, 44 Cal.4th 1241 (2008), and noted that “as a matter of state law, ‘some
13 evidence’ of future dangerousness is indeed a state *sine qua non* for denial of parole in
14 California.” Id. at 562. The court then provided the following instructions for resolving parole
15 claims in the context of AEDPA:

16 Since the “some evidence” requirement applies without regard to
17 whether the United States Constitution requires it, we in this case, and
18 courts in this circuit facing the same issue in the future, need only decide
19 whether the California judicial decision approving the . . . decision
20 rejecting parole was an “unreasonable application” of the California “some
21 evidence” requirement, or was “based on an unreasonable determination of
22 the facts in light of the evidence.”

23 Id.

24 The en banc court concluded that Hayward had properly been denied parole because the nature of
25 the commitment offense combined with an unfavorable psychological evaluation provided “some
26 evidence” under California law of future dangerousness. See id.

 Interpreting the en banc decision in Hayward, the Ninth Circuit in Person v.
Muntz stated: “By holding that a federal habeas court may review the reasonableness of the state
court’s application of the ‘some evidence’ rule, Hayward, necessarily held that compliance with

1 the state requirement is mandated by federal law, specifically the Due Process Clause.” 606 F.3d
2 606, 609 (9th Cir. 2010) (per curiam). The court observed that “[t]he principle that state law
3 gives rise to liberty interests that may be enforced as a matter of federal law is long-established.”
4 Id.

5 As has been clearly stated by the Ninth Circuit, California law provides the
6 contours of the substantive due process right to parole at issue in this case. Under California law,
7 one year prior to an inmate’s minimum eligible parole release date, the Board will set a date for
8 an eligibility hearing. See Cal. Penal Code § 3041(a). A release date shall be set unless release
9 currently poses an unreasonable risk of danger to society. See Cal. Penal Code § 3041(b). The
10 paramount concern in determining parole suitability in California is public safety. See In re
11 Dannenber, 34 Cal.4th 1061 (2005). This requires an assessment of the inmate’s current
12 dangerousness. See In re Lawrence, 44 Cal.4th at 1205. Such an assessment requires more than
13 “rote recitation of the relevant factors with no reasoning establishing a rational nexus between
14 those factors and the necessary basis for the ultimate decision – the determination of current
15 dangerousness.” Id. at 1210.

16 California regulations set forth various circumstances which tend to show
17 suitability and others which tend to show unsuitability. See Cal. Code Regs., tit 15 § 2402(c)-(d).
18 Under § 2402(c), circumstances tending to show unsuitability include: (1) the facts of the
19 commitment offense, where the offense was committed in an especially heinous, atrocious, or
20 cruel manner; (2) the prisoner’s previous record of violence; (3) a history of unstable
21 relationships with others; (4) commission of sadistic sexual offenses; (5) a lengthy history of
22 severe mental problems related to the offense; and (6) serious misconduct while in prison.
23 Circumstances tending to show suitability include: (1) lack of a juvenile record; (2) reasonably
24 stable relationships with others; (3) the prisoner has shown remorse; (4) lack of significant
25 history of violent crimes; (5) realistic plans for release; and (6) participation in institutional
26 activities indicating an enhanced ability to function within the law upon release. See Cal. Code

1 Regs., tit. 15 § 2402(d). The regulations are designed to guide the Board's assessment regarding
2 whether the inmate poses an “unreasonable risk of danger to society if released from prison,” and
3 thus whether he or she is suitable for parole. In re Lawrence, 44 Cal.4th at 1202. There must be
4 a rational nexus between the facts cited by the Board and the ultimate conclusion on
5 dangerousness. See id. at 1227.

6 Regarding reliance on the facts of the commitment offense, the denial of parole
7 may be predicated on the commitment offense only where the Board can point to factors beyond
8 the minimum elements of the crime that demonstrate that, at the time of the suitability hearing,
9 the inmate will present an unreasonable risk of danger to society if released. See In re
10 Dannenberg, 34 Cal.4th at 1071. While the Board cannot require an inmate to admit guilt in
11 order to be found suitable for parole, see Cal. Penal Code § 5011(b); 15 Cal Code Regs., tit. 15,
12 § 2236, the Board must consider the inmate’s past and present attitude toward the crime and any
13 lack of remorse or understanding of the nature and magnitude of the offense, see 15 Cal. Code
14 Regs., tit. 15, §§ 2402(b), 2402(d)(3). “Lack of insight” is probative of unsuitability only to the
15 extent that it is both demonstrably shown by the record and rationally indicative of the inmate’s
16 current dangerousness. See In re Calderon, 184 Cal. App. 4th 670, 690 (2010).

17 In light of the precedents outlined above the court concludes that petitioner has a
18 protected liberty interest in parole arising from state law. The court also concludes that the
19 contours of the substantive guarantee required to protect that liberty interest are defined by state
20 law and that under California law parole may not be denied unless there is “some evidence” of
21 the inmate’s dangerousness at the time of the parole eligibility hearing. Respondent’s arguments
22 to the contrary are rejected.

23 Applying the “some evidence” standard to the facts of this case, the court finds
24 that the state court’s decision was neither an unreasonable application of that test nor based on an
25 unreasonable determination of the facts. As set forth above, the San Joaquin County Superior
26 Court denied Petitioner’s habeas petition stating “The panel indicated its concern with this 115

1 given the circumstances surrounding the life crime and petitioner's prior offenses. . . . The rules
2 violation report constitutes 'some evidence' and is sufficient to uphold the Board's decision."

3 The undersigned notes that the Board acknowledged Petitioner's institutional
4 behavior had been good, with the exception of the 2000 disciplinary, noting that in many ways
5 Petitioner had been an ideal prisoner, and that Petitioner had programmed well, had viable parole
6 plans, and a positive psychological report. However, the Board was very disturbed by the
7 disciplinary in 2000, wherein Petitioner was found guilty of possession of methamphetamine, as
8 it was significantly related to the commitment offense as well as Petitioner's prior history as all
9 of those offenses were related to drug and/or alcohol use or abuse. Specifically, Petitioner's
10 commitment offense was committed while Petitioner was under the influence of
11 methamphetamine. While Petitioner disputes his guilt relating to that disciplinary and maintains
12 his innocence, he did not provide to the Board, the state courts or this court any showing that the
13 disciplinary action was overturned. As the Board stated, even though Petitioner denies
14 culpability in the offense, the Board was required to accept the findings as true.

15 In addition, the Board considered the facts of the crime, including the statement
16 by Petitioner's ex-wife regarding Petitioner's state of mind at the time. Petitioner's request to
17 expand the record to include his ex-wife's statement therefore fails to add anything to the record.
18 The Board was aware of the facts as set forth in Ms. Bertoldi's statement, and considered them.
19 Similarly, his request to include the investigation which occurred after the parole determination
20 hearing would have no impact in this court's review of the decision. Petitioner acknowledges
21 that the investigation occurred following the hearing, and fails to show how the results of that
22 investigation would have any impact in this case. While he argues his subsequent parole
23 determination hearings were also erroneous, those subsequent determinations are not presently
24 before this court. The undersigned offers no opinion as to whether the District Attorney's
25 investigation would be admissible or relevant in relation to a review of any subsequent parole
26 determination. However, as the investigation was not completed prior to the instant parole

1 consideration hearing, nor were the results of that investigation before the Board, it is not
2 relevant to the court's review of the Board's 2006 decision. The request to conduct discovery to
3 obtain a copy of the investigation report should therefore be denied.

4 Petitioner also requests discovery in order to obtain information regarding any
5 formal or informal policy the Board has as to what consideration is given to a rules violation
6 report. In support of his request, Petitioner points to a 2007 Board decision wherein the Board
7 stated to him: "It's commonly agreed by most commissioners that a five-year rule of having five
8 years between and you the (sic) 115 is a good indicator and I think you'll generally find that most
9 commissioners would use that." This statement was made not at the hearing currently before the
10 court, but at a subsequent hearing. However, even if it was relevant to the court's review of the
11 current decision, the undersigned is not persuaded that such a policy would render the Board's
12 decision arbitrary, as Petitioner contends. Petitioner argues the above quoted statement indicates
13 the existence of either a formal or informal policy that after five years, a rules violation report
14 would have no impact on a prisoner's parole suitability. The undersigned is not persuaded.
15 According to Petitioner, the commissioner stated that it is "commonly agreed by most
16 commissioners" that a disciplinary action older than five years "is a good indicator" Even if
17 most commissioners believe that after five years a disciplinary action has less impact, that does
18 not eliminate the duty of the Board to make a determination as to each prisoner's suitability for
19 parole, including each prisoner's current level of dangerousness. It also does not diminish the
20 finding by the current Board that because Petitioner's disciplinary action was related to drugs,
21 and his commitment offense was related to drugs, it tends to show unsuitability. It is the Board's
22 duty to weigh the evidence before it in determining parole suitability. Therefore, even if there is
23 a policy that five year old disciplinary actions would have less of an impact, that does not
24 diminish the Board's finding in this case that a six year old disciplinary action negatively impacts
25 Petitioner's suitability, especially where the disciplinary action relates to the same type of
26 circumstances involved in the commitment offense, such as the use and/or possession of drugs.

1 The existence of such a policy is therefore immaterial to this court's review of the Board's
2 determination, and the request to conduct discovery to obtain proof of such policy should be
3 denied.

4 **IV. CONCLUSION**

5 The undersigned finds that state court's decision is neither contrary to nor an
6 unreasonable application of clearly established United States Supreme Court law.

7 Based on the foregoing, the undersigned recommends that:

- 8 1. Petitioner's petition for a writ of habeas corpus (Doc. 1) be denied;
9 2. Petitioner's motion for discovery (Doc. 25) be denied; and
10 3. Petitioner's motion to expand the record (Doc. 26) be denied.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court. Responses to objections shall be filed within 14 days after service of
15 objections. Failure to file objections within the specified time may waive the right to appeal.

16 See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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18 DATED: September 29, 2010

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21 **CRAIG M. KELLISON**
22 UNITED STATES MAGISTRATE JUDGE
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