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05 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
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MARTIN A. KILLINGSWORTH,	)	
Petitioner,	)	CASE NO. 2:07-cv-01333-RSL-JLW
v.	)	
BOARD OF PAROLE HEARINGS,	)	REPORT AND RECOMMENDATION
Respondent.	)	

12

I. SUMMARY

Petitioner Martin Killingsworth is currently incarcerated at the California State Prison, Solano in Vacaville, California. He was convicted by a jury of attempted murder in the first degree and assault with a firearm in Sacramento County Superior Court on June 15, 1994, and sentenced to an indeterminate term of life with the possibility of parole. (*See* Docket 9, Exhibit 1 at 1-2.) Petitioner was also subsequently convicted of possession of a controlled substance for sale with a weapons enhancement on July 21, 1994. (*See id.* at 2.) Petitioner 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]

[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).

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01 Respondent has filed an answer to the petition together with relevant portions of the state
02 court record, and petitioner has filed a traverse in response to the answer. The briefing is now
03 complete and this matter is ripe for review. The Court, having thoroughly reviewed the
04 record and briefing of the parties, recommends the petition be denied and this action be
05 dismissed with prejudice.

06 II. BACKGROUND

07 During the hearing, the Board relied upon the description of the offense set forth by
08 the California Court of Appeal. (*See* Dkt. 1, Ex. A at 7.) The victim in this case, David
09 Jones, was at the Sutter Memorial Hospital in Sacramento to receive treatment for his hand,
10 which had been injured in a fight at his house the day of the shooting. (*See id.* at 8.) The
11 victim's girlfriend, Diane Matteson, and the estranged girlfriend of the defendant, Marie Bell,
12 accompanied the victim to the hospital. (*See id.*) Matteson and Jones were also acquainted
13 with petitioner. (*See id.*) Petitioner arrived at the hospital and began arguing with Bell, at
14 which time the victim told petitioner to leave because he was troubling Matteson. (*See id.*)
15 Outside the emergency room, Bell hid from petitioner in some bushes while the victim and
16 Matteson called security for help. (*See id.*) The hospital security guard responded, and as he
17 drove to the emergency room he saw a man in the hospital parking lot pushing a white Toyota
18 Celica through the lot. (*See id.*) The security guard got a good look at the man from
19 approximately five to eight feet away, and he identified him at trial as petitioner. (*See id.*)
20 When the guard found Bell hiding in the bushes, she asked him, in a panic, whether he had
21 seen a man pushing a car. (*See id.*) The guard then drove Bell to Matteson's car. (*See id.*)
22

01 As the victim, Matteson, and Bell drove away from the hospital together, Bell hid
02 from petitioner by lying down in the backseat. (*See id.* at 8-9.) Petitioner was sitting in his
03 car at the end of the street, waiting for Matteson's car to exit the hospital parking lot. (*See id.*
04 at 9.) A chase ensued, and then ended when petitioner blocked Matteson's car from entering
05 an intersection. (*See id.*) The victim got out of Matteson's car and approached petitioner's
06 vehicle. (*See id.*) According to Matteson's testimony at trial, she saw petitioner point a
07 handgun at the victim and fire. (*See id.*) After the victim fell to the ground, and started to
08 crawl away, while holding his chest, petitioner fired two or three more shots at the victim.
09 (*See id.*) The victim's testimony confirmed Matteson's account of the crime. (*See id.*) On
10 the night of the shooting, Bell also told a Sacramento Police Officer that petitioner had shot
11 the victim. (*See id.*) At trial, however, after Bell had reconciled with petitioner and started
12 living with him, she denied having lifted her head up from the backseat. (*See id.* at 9-10.)
13 Petitioner denied having shot the victim, and testified that he was out of town on the night of
14 the shooting. (*See id.* at 10.)
15 Petitioner, through counsel, declined to discuss the details of the offense with the
16 panel during the hearing. (*See id.* at 4-5.) The Board, however, read into the record an
17 account of the crime given by petitioner during an interview on April 13th, 2004. (*See id.* at
18 10-13.) Petitioner stated that he was trying to locate Bell on the day of the shooting, and was
19 told that Bell had driven the victim to the hospital. (*See id.* at 11.) Earlier that day, the victim
20 had come to petitioner's home and accused him of pouring acid on Bell. (*See id.*) After
21 petitioner "[s]hined them on," the victim allegedly threatened to "take out" petitioner in the
22 future. (*See id.*) At the hospital that evening, after petitioner searched and waited for Bell,
Matteson and the victim cut off petitioner's vehicle as he attempted to exit the hospital

01 parking lot. (*See id.* at 12.) Matteson and the victim exited their car, and the victim began
02 hitting petitioner in his car with a metal rod. (*See id.*) After the two alleged assailants got
03 back in their vehicle and drove towards the hospital, petitioner started towards his home. (*See*
04 *id.*) While stopped at an intersection in his vehicle, Matteson's car pulled up behind his and
05 the rear window of his vehicle shattered. (*See id.*) Thinking that the victim had fired a gun at
06 him, he fired three rounds through the window at Matteson's vehicle and drove home. (*See*
07 *id.*) He later discovered that the window had been shattered by a baseball bat, and turned
08 himself in to police with an attorney. (*See id.*) Petitioner also claimed he would have turned
09 himself in to police earlier, but at the time of the offense he was in possession and under the
10 influence of marijuana. (*See id.* at 13.)

11 Petitioner was convicted by a jury of attempted murder in the first degree and assault
12 with a firearm with two weapons enhancements on June 15, 1994, in the Sacramento County
13 Superior Court. (*See* Dkt. 9, Ex. 1 at 1.) He was sentenced to an indeterminate term of life
14 with the possibility of parole. (*See id.*) Petitioner was also subsequently convicted of
15 possession of a controlled substance for sale with a weapons enhancement on July 21, 1994,
16 and given a two-year sentence that runs concurrently with his life sentence. (*See id.* at 2.)
17 Petitioner's minimum eligible parole date was set for January 28, 2001. (*See* Dkt. 1, Ex. A at
18 1.) The parole denial which is the subject of this petition took place after a parole hearing
19 held on May 31, 2006. (*See id.*) This was petitioner's fourth parole consideration hearing.
20 (*See id.* at 3.) As of the date of the 2006 parole hearing, petitioner was forty-six-years-old,
21 and had been in custody approximately eleven years. (*See id.*, Ex. E at 1.)

22 After denial of his 2006 application, petitioner filed habeas corpus petitions in the
Sacramento County Superior Court, California Court of Appeal, and California Supreme

01 Court. (*See* Dkt. 9, Exs. 6-8.) Those petitions were unsuccessful. (*See id*.) This federal
02 habeas petition followed. Petitioner contends the 2006 denial by the Board violated his Fifth
03 and Fourteenth Amendment Due Process rights. Thus, petitioner does not challenge the
04 validity of his conviction, but instead challenges the Board's 2006 decision finding him
05 unsuitable for parole.

06 III. STANDARD OF REVIEW

07 The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this
08 petition because it was filed after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S.
09 320, 326-27 (1997). Because petitioner is in custody of the California Department of
10 Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive
11 vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir.), *cert.*
12 *denied*, 543 U.S. 991 (2004) (providing that § 2254 is "the exclusive vehicle for a habeas
13 petition by a state prisoner in custody pursuant to a state court judgment, even when the
14 petitioner is not challenging his underlying state court conviction."). Under AEDPA, a habeas
15 petition may not be granted with respect to any claim adjudicated on the merits in state court
16 unless petitioner demonstrates that the highest state court decision rejecting his petition was
17 either "contrary to, or involved an unreasonable application of, clearly established Federal
18 law, as determined by the Supreme Court of the United States," or "was based on an
19 unreasonable determination of the facts in light of the evidence presented in the State court
20 proceeding." 28 U.S.C. § 2254(d)(1) and (2).

21 As a threshold matter, this Court must ascertain whether relevant federal law was
22 "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

01 Court. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). In this context, Ninth Circuit
02 precedent remains persuasive but not binding authority. *See id.* at 412-13; *Clark v. Murphy*,
03 331 F.3d 1062, 1069 (9th Cir. 2003).

04 The Court must then determine whether the state court's decision was "contrary to, or
05 involved an unreasonable application of, clearly established Federal law." *See Lockyer v.*
06 *Andrade*, 538 U.S. 63, 71 (2003). "Under the 'contrary to' clause, a federal habeas court may
07 grant the writ if the state court arrives at a conclusion opposite to that reached by [the
08 Supreme] Court on a question of law or if the state court decides a case differently than [the]
09 Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13.
10 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the
11 state court identifies the correct governing legal principle from [the] Court's decisions but
12 unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. At all
13 times, a federal habeas court must keep in mind that it "may not issue the writ simply because
14 [it] concludes in its independent judgment that the relevant state-court decision applied clearly
15 established federal law erroneously or incorrectly. Rather that application must also be
16 [objectively] unreasonable." *Id.* at 411.

17 In each case, the petitioner has the burden of establishing that the state court decision
18 was contrary to, or involved an unreasonable application of, clearly established federal law.
19 *See* 28 U.S.C. § 2254; *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). To determine
20 whether the petitioner has met this burden, a federal habeas court looks to the last reasoned
21 state court decision because subsequent unexplained orders upholding that judgment are
22 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

01 made, the statute gives rise to a constitutional liberty interest. *See Greenholtz*, 442 U.S. at 7,
02 12; *Allen*, 482 U.S. at 377-78.
03 As discussed *infra*, California statutes and regulations afford a prisoner serving an
04 indeterminate life sentence an expectation of parole unless, in the judgment of the parole
05 authority, he "will pose an unreasonable risk of danger to society if released from prison."
06 Title 15 Cal. Code Regs., § 2402(a). The Ninth Circuit has therefore held that "California's
07 parole scheme gives rise to a cognizable liberty interest in release on parole." *McQuillion*,
08 306 F.3d at 902. To similar effect, *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007) held
09 that California Penal Code § 3041 vests all "prisoners whose sentences provide for the
10 possibility of parole with a constitutionally protected liberty interest in the receipt of a parole
11 release date, a liberty interest that is protected by the procedural safeguards of the Due
12 Process Clause." This "liberty interest is created, not upon the grant of a parole date, but
13 upon the incarceration of the inmate." *Biggs v. Terhune*, 334 F.3d 910, 915 (2003). *See also*
14 *Sass*, 461 F.3d at 1127.
15 Because the Board's denial of parole interfered with petitioner's constitutionally-
16 protected liberty interest, this Court must proceed to the second step in the procedural due
17 process analysis and determine whether the procedures accompanying that interference were
18 constitutionally sufficient. "[T]he Supreme Court [has] clearly established that a parole
19 board's decision deprives a prisoner of due process with respect to this interest if the board's
20 decision is not supported by 'some evidence in the record.'" *Irons*, 505 F.3d at 851 (citing
21 *Superintendent v. Hill*, 472 U.S. 445, 457 (1985) (holding the "some evidence" standard
22 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

01 gravity and magnitude with respect to their threat to the public, as well as comply with
02 applicable sentencing rules. Subsection (b) of this section requires that the Board set a release
03 date "unless it determines that the gravity of current convicted offense or offenses, or the
04 timing and gravity of current or past convicted offense or offenses, is such that consideration
05 of the public safety requires a more lengthy period of incarceration." *Id.*, § 3041(b). Pursuant
06 to the mandate of § 3041(a), the Board must "establish criteria for the setting of parole release
07 dates" which take into account the number of victims of the offense as well as other factors in
08 mitigation or aggravation of the crime. The Board has therefore promulgated regulations
09 setting forth the guidelines it must follow when determining parole suitability. *See* 15 CCR
10 § 2402, *et seq*.

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

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

01 parole may contribute to a pattern which results in a finding of unsuitability.

02

03 15 CCR § 2402(a) and (b). Subsections (c) and (d) also set forth suitability and unsuitability
04 factors to further assist the Board in analyzing whether an inmate should be granted parole,
05 although "the importance attached to any circumstance or combination of circumstances in a
06 particular case is left to the judgment of the panel." 15 CCR § 2402(c).

07 In examining its own statutory and regulatory framework, the California Supreme
08 Court in *In re Lawrence* recently held that the proper inquiry for a reviewing court is
09 "whether some evidence supports the *decision* of the Board … that the inmate constitutes a
10 current threat to public safety, and not merely whether some evidence confirms the existence
11 of certain factual findings." *Id.*, 44 Cal.4th 1181, 1212 (2008). The court also asserted that
12 the Board's decision must demonstrate "an individualized consideration of the specified
13 criteria, but "[i]t is not the existence or nonexistence of suitability or unsuitability factors that
14 forms the crux of the parole decision; the significant circumstance is how those factors
15 interrelate to support a conclusion of current dangerousness to the public." *Id*. at 1204-05,
16 1212. As long as the evidence underlying the Board's decision has "some indicia of
17 reliability," parole has not been arbitrarily denied. *See Jancsek*, 833 F.2d at 1390. As the
18 California courts have continually noted, the Board's discretion in parole release matters is
19 very broad. *See Lawrence*, 44 Cal.4th at 1204. Thus, the penal code, corresponding
20 regulations, and California law clearly establish that the fundamental consideration in parole
21 decisions is public safety and an assessment of a prisoner's current dangerousness. *See id.*,
22 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 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. (*See* Dkt. 1 at10-27.) Specifically, petitioner claims there was no evidence to support the Board's finding that he lacked insight or remorse for the offense. (*See id*. at 15-17.) Petitioner also argues that the Board has systematically released prisoners who committed attempted murders similar to petitioner's offense, which amounts to inconsistent application of the parole guidelines in violation of the Equal Protection Clause. (*See id*. at 13-15.) Finally, petitioner asserts that the Board violated "the *Rutherford* decision [which] held that the BPH may not deny further parole consideration for more than one year in the case of prisoners who have formerly been denied for one year, absent a significant change in circumstances which must be clearly stated on the record." (*See id*. at 21-22.)

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

01 context, and that even if he does have a protected liberty interest, the Board adequately
02 predicated its denial of parole on "some evidence." (*See* Dkt. 9 at 6-11.) Accordingly,
03 respondent argues that petitioner's constitutional rights were not violated by the Board's 2006
04 decision, and the Sacramento County Superior Court's Order upholding the Board's 2006
05 parole denial was not an unreasonable application of clearly established federal law. (*See id.*
06 at 10-11.)

07 VI. ANALYSIS OF RECORD IN THIS CASE

08 A. *State Court Proceedings*

09 Petitioner's habeas petitions filed in the California Court of Appeal and California
10 Supreme Court contained the same claims as his Sacramento County Superior Court petition,
11 and both petitions were summarily denied. (*See id.*, Exs. 6-8.) The parties agree that
12 petitioner has properly exhausted his state court remedies, and timely filed the instant petition.
13 (*See* Dkt. 1 at 6; Dkt. 9 at 4.) This Court reviews the Sacramento County Superior Court's
14 Order upholding the Board's decision to determine whether it meets the deferential AEDPA
15 standards, as it is the last reasoned state court decision. *See Ylst*, 501 U.S. at 803-04.

16 B. *Petitioner's Due Process Claim*

17 The Board based its decision that petitioner was unsuitable for parole primarily upon
18 his commitment offense, but also cited his criminal history, unstable social history, and failure
19 to demonstrate insight and remorse. (*See* Dkt. 1, Ex. A at 57-65.) The Board's findings
20 tracked the applicable unsuitability and suitability factors listed in § 2402(b), (c) and (d) of
21 title 15 of the California Code of Regulations. After considering all reliable evidence in the
22 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 57.)

01 The Board primarily relied upon the circumstances of petitioner's commitment offense
02 to find petitioner unsuitable for parole. (*See id.* at 57-58.) The Board found that "[m]ultiple
03 victims were attacked; one was injured during the incident. It was carried out with a callous
04 disregard for human suffering and the motive for the crime is – is inexplicable from our
05 standpoint." (*Id.* at 57-58.) *See* 15 CCR § 2402(c)(1)(A), (D) and (E). Based upon the
06 statement of facts provided by the Court of Appeal, it appeared petitioner was stalking his
07 girlfriend when he sought to confront her at the hospital, and his actions caused her great
08 apprehension. (*See* Dkt. 1, Ex. A at 58.) After she got in a car to try to escape, "[petitioner]
09 then followed that car, cut them off and then the circumstances which ultimately resulted in
10 the shooting occurred." (*Id.*) The Board noted that although some details of the offense may
11 not be clear, the Court of Appeal clearly found that petitioner was "the initiator in this action,"
12 and the confrontation was "the result of [petitioner's] continuing to either get at [his]
13 girlfriend because she was breaking up with him or because [petitioner] thought something
14 was going on with her and her friends." (*Id.*) The circumstances surrounding petitioner's
15 commitment offense provides "some evidence" to support the Board's conclusion that
16 petitioner would present an unreasonable risk of danger to society if released from prison.
17 The second unsuitability factor relied upon by the Board was petitioner's criminal
18 history. The Board is required to consider prisoners' "past criminal history, including
19 involvement in other criminal misconduct which is reliably documented…." 15 CCR §
20 2402(b). The Board asserted that although petitioner had a "minimal if any criminal history"
21 documented by law enforcement, his "drug offense, weapons offense and the description of
22 the circumstances surrounding that offense, indicated [that petitioner] was in possession of
significant quantities of controlled substances," and was therefore substantially involved in

other criminal activity prior to the commitment offense. (*See id*. at 58-59.) The Board noted petitioner had "[p]araphernalia which indicated [he] had those controlled substances for sale, the amount of cash [he] had at the time certainly reasonably leads to the supposition that [he was] in the drug distribution business at that point." (*Id*. at 59.) Thus, there was "some evidence" in the record to support the Board's conclusion that due to petitioner's criminal history, he was unsuitable for parole.

The third factor relied upon by the Board was petitioner's unstable social history. The Board based its finding entirely upon petitioner's abuse of illegal drugs, such as petitioner's use of controlled substances at the time of the offense. (*See id*. at 59.) An "unstable social history," however, is defined as a "history of unstable or tumultuous relationships with others." *See* 15 CCR § 2402(c)(3). By contrast, a "stable social history" is defined as "reasonably stable relationships with others" and is a factor tending to show parole suitability. *See id.*, § 2402(d)(2). Petitioner's history of drug abuse, without more, does not appear to satisfy the definition of an "unstable social history." *See id.*, § 2402(c)(3). There is other evidence in the record, however, which does indicate that petitioner has a history of "unstable or tumultuous relationships with others," such as his relationship with his estranged girlfriend, Bell. The Court of Appeal found that petitioner was stalking Bell at the time of the commitment offense, and the Board's decision noted that "this crime smacks of domestic – potential domestic violence…." (*See* Dkt. 1, Ex. A at 58 and 62.) Thus, there was "some evidence" in the record to support the Board's finding that petitioner has an unstable social history, albeit on a different basis.

The fourth and fifth factors relied upon by the Board to deny parole were petitioner's failure to demonstrate insight and remorse regarding the commitment offense. (*See id*. at 60-

62.) The Board explained the basis for its findings at length during the hearing.

> You've taken numerous self-help classes and when we seek to determine the effect – the beneficial effect of those self-help classes … [we reach] a stopping point because it is clear to the Panel that despite your utilization of the words, "I have remorse; I accept responsibility for what happened," that when we look at the varying versions of [the offense] you've told, that your credibility in this regard is significantly lacking and you start out by denying your crime and by giving various versions at various times during the course of your incarceration. We're not talking about different nuances of explaining this because one consistency that runs through all of these descriptions is not your acceptance of responsibility but your evasion of responsibility. First clearly by your denial and then at each subsequent telling by insisting that your actions were in response to the actions of others … so to the extent that we're called upon to consider … [whether] remorse is reflected by understanding of the circumstances that involved you in this crime … [t]he evidence there is completely lacking.

(*See id.* at 60-61.)

The Board acknowledged that petitioner's psychological evaluations have all been favorable, including the most recent report, which was completed on August 9, 2005. (*See id.* at 61.) Because all the evaluations "accept without question [petitioner's] version of what occurred," however, the Board found them unreliable. (*Id.* at 61.) "[I]t is the Panel's belief that those opinions are not supported by an in-depth evaluation of the facts and circumstances of the offense so to the extent that we're supposed to affirmatively consider remorse or understanding – those factors are absent." (*Id.*) Finally, the Board commented that "this crime smacks of domestic – potential domestic violence … [it] has those markings, stalking, drug induced paranoia … but those [possibilities] haven't been addressed there either by any of the psychologists or most importantly by [petitioner] and that's our concern." (*Id.* at 62.)

01 Based upon the drastic discrepancies between petitioner's version of the events
02 leading up to and culminating in the attempted murder, and the facts set forth by the
03 Court of Appeal, the Board could reasonably conclude that petitioner has failed to
04 demonstrate insight and remorse in a credible manner.

05 Petitioner's argument that the Board's findings were improper because his
06 credibility is irrelevant to the Board's suitability determination is incorrect. (*See* Dkt.
07 1 at 17.) A prisoner's credibility is a key aspect of the Board's consideration of "all
08 relevant, reliable information … [including a prisoner's] past and present attitude
09 toward the crime," in order to make a judgment about whether that prisoner would
10 pose an unreasonable risk of danger to society if released. *See* 15 CCR § 2402(a) and
11 (b). As the superior court asserted, "the BPH acted well within their authority when
12 they evaluated the credibility of [petitioner's statements] and concluded that, based on
13 his various versions of the offense and failure to accept full responsibility, petitioner
14 actually lacked remorse and insight. Contrary to petitioner's belief, credibility is
15 always an issue that must be considered by a decision-maker in weighing the facts
16 before him/her." (*See* Dkt. 1, Ex. O at 3.) During the hearing, the Board provided
17 petitioner with ample opportunity to clarify the discrepancies between his prior
18 versions of the commitment offense, as well as respond to the Board's concern that
19 these discrepancies call petitioner's credibility into question. (*See id*., Ex. A at 27-36.)
20 The Board's finding that petitioner failed to demonstrate insight and remorse in a
21 credible manner was therefore supported by "some evidence" in the record.

22 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 has performed "admirably" as an inmate. (*See* Dkt. 1 at 20-21; *id.*; Ex. A at 59.) The Board commended petitioner for being discipline-free during the entire period of his incarceration, and for his development of marketable skills and a commendable work record. (*See id.*, Ex. A at 59.) The Board also noted that petitioner has stable parole plans, and good family connections and support. (*See id*. at 62.) 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 parole suitability factors. (*See* Dkt. 1 at 15-21.) 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. It ultimately concluded, however, that petitioner remains an unreasonable risk of danger to society, and these findings were supported by "some evidence" in the record. (*See* Dkt. 1, Ex. A at 57.)

C. *Petitioner's Equal Protection Claim*

Petitioner also contends that his right to equal protection under the Fourteenth Amendment was violated when the Board found him unsuitable for parole. (*See* Dkt. 1 at 13-14.) Specifically, he asserts that the parole consideration guidelines have been applied in an inconsistent manner, as demonstrated by the fact that "numerous prisoners committed similar attempted murders, yet have systematically been released [after] serving less time [than petitioner]." (*Id.*) The petition offers little analysis in support of his claim, and respondent fails to address this issue on the merits. (*See id*. and Dkt. 9). California law does not require the Board to conduct a comparative analysis of the period of confinement served by other prisoners with similar crimes, nor does it require it to refer to the sentencing matrices. *See In*

01 *re Dannenberg*, 34 Cal.4th 1061, 1083-84 (2005) (holding whether an inmate poses a current
02 danger is not dependent upon whether his commitment offense was more or less egregious
03 than other, similar crimes). Instead, the Board is required to review the specific facts of each
04 case and to make an individualized determination of whether that prisoner is suitable for
05 parole. *See Law*rence, 44 Cal.4th at 1221. Petitioner's allegations, without more, fail to
06 establish an equal protection violation. The Court therefore finds "some evidence" in the
07 record to support the Board's decision and finds no constitutional violation occurred.

08 D. *Petitioner's* Rutherford *Claim*

09 Petitioner claims that the Board violated his due process rights by denying him another
10 parole consideration hearing for two years without describing a "significant change in
11 circumstances" on the record during his 2006 hearing. (*See* Dkt. 1 at 21; *id*., Ex. A at 63-65.)
12 Specifically, he asserts that "[t]he *Rutherford* decision held that the BPH may not deny further
13 parole consideration for more than one year in the case of prisoners who have formerly been
14 denied for one year, absent a significant change in circumstances which must be clearly stated
15 on the record." (*See* Dkt. 1 at 21.) As explained below, petitioner's arguments are
16 unavailing, and the California Court of Appeal has reversed the decision upon which
17 petitioner relies.

18 This court is aware of no decision of the U.S. Supreme Court holding that a decision
19 by a parole board to defer further parole consideration for two years, instead of one, is a
20 violation of federal due process rights. Petitioner cites no such decision. "The *Rutherford*
21 decision" to which petitioner refers was a decision of the Marin County Superior Court in a
22 case involving a life-term inmate at the San Quentin State Prison. He filed a habeas corpus
petition contending that the Board failed to conduct his subsequent parole consideration

hearing in a timely manner in violation of his due process rights and the requirements of California Penal Code § 3041.5(b)(2). *See In re Inez Tito Lugo*, 164 Cal.App.4th 1522, 1529 (2008).[2] The trial court sustained an argument that the Board should not issue multi-year denials in cases in which inmates had previously received a one-year parole denial absent a statement of a "significant change in circumstances" on the record. *See id.* at 1532.

The Court of Appeal reversed, however, finding that the trial court's order "violated the separation of powers and intrudes upon the inherent discretion afforded to the Board to decide parole matters." *Id.* at 1540. After summarizing the requirements set forth by § 3041.5, the Court of Appeal observed that "[t]he statute contains no requirement that the Board must find a significant change in circumstances justifying a multi-year denial following a one-year denial."[3] *Id.* at 1537. "The Board's decision to defer annual parole consideration hearings is guided by the same criteria used to determine parole suitability … [and the] reasons for postponing the next scheduled parole hearing need not be completely different from the reasons for denying parole suitability." *Id.* Furthermore, "the Board need not point to additional evidence supporting its departure from the discretionary decisions of earlier panels." *Id.* at 1539, fn.9.

Because the requirements of procedural due process impose some limitations upon the executive branch's broad discretionary powers in parole matters, the Court of Appeal held that "[t]he 'some evidence' standard of review governs consideration of a Board decision to

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[2] An order entered by the Marin County Superior Court on May 5, 2006, appointed Inez Tito Lugo as the class representative in place of the original petitioner, Jerry Rutherford, who died after this lawsuit commenced. *See id.* at 1532.

[3] Text amendments to § 3041.5(b)(2) became effective on November 5, 2008, approximately four months after the Court of Appeal's July 21, 2008, decision in *Lugo*. The amended version of § 3041.5 also omits such a requirement. *See* Cal. Penal Code § 3041.5(b)(2).

postpone the next scheduled parole hearing by issuing a multi-year denial." *Id*. at 1537. Therefore, a reviewing court might be justified in closely scrutinizing a decision issuing a multi-year denial in the case of an inmate who has "consistently received one-year denials of parole and then received a multi-year denial" to ensure that the Board's decision was supported by "some evidence" in the record, but that reviewing court must remain mindful that "some evidence is all that is required." *Id*. at 1539, fn.9.

Assuming *arguendo* the length of time between parole hearings implicates federal due process rights, this Court must determine whether there was "some evidence" in the record to support the Board's decision to postpone petitioner's next parole hearing for two years, even though he received one-year denials at prior hearings. During petitioner's 2006 hearing, the Board explained that a multi-year denial was appropriate "[b]ased upon the enormity of the offense and the length of time that [the Board's concerns] have been discussed with [petitioner] in one form or another" by previous panels, but not addressed appropriately by petitioner before the next hearing. (*See* Dkt. 1, Ex. A at 63.) The Board therefore issued a separate decision finding it "not reasonable to expect that parole would be granted at a hearing during the following two years…." (*Id*. at 63-64.) During this portion of the panel's decision, petitioner got up and walked out of the hearing, which the Board interpreted as a signal that petitioner was unwilling to listen to the Board's recommendations. (*See id*. at 64-65.) Based upon the Board's reasoning as described in its decision, there was "some evidence" in the record to support the Board's finding that a multi-year denial of parole was appropriate in petitioner's case.

E. *Sacramento County Superior Court's Decision*

In a reasoned decision denying petitioner's request for habeas relief, the Sacramento County Superior Court carefully summarized and addressed each of petitioner's claims. (*See id*., Ex. O at 1-2.) With respect to petitioner's federal due process claim, the superior court found that there was "some evidence" in the record to support the Board's finding that petitioner was unsuitable for parole. (*See id*. at 2-3.) The fact that petitioner happens to disagree with "the Appellate Court's description of the circumstances surrounding the offense, the statement of facts relied on by the BPH in denying parole, is irrelevant." (*Id*. at 3.) In addition, the superior court upheld the Board's finding that petitioner lacked remorse or insight into the crime because the panel members "acted well within their authority when they evaluated the credibility of [petitioner's statements] and concluded that, based on his various versions of the offense and failure to accept full responsibility, petitioner actually lacked remorse and insight [because] credibility is always an issue that must be considered by a decision-maker in weighing the facts before him/her." (*Id*.) Specifically, "[i]n contradiction to the evidence presented at trial, petitioner tried to paint himself as more of a reactive participant who merely fired at the victim in self-defense, rather than the aggressive stalker who initiated the final confrontation and shooting." (*Id*. at 4.) The superior court further held that petitioner's Equal Protection Claim is unavailing, because "*Dannenberg* rejected petitioner's argument that comparative proportionality analysis should have been conducted at his parole hearing…." (*Id*. at 2.) Finally, the court asserted that petitioner's *Rutherford* claim lacks merit under the express requirements of California Penal Code § 3041.5(b)(2). (*See id*. at 4.)

01 VII. CONCLUSION

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

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

17 This Report and Recommendation is submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days
19 after being served with this Report and Recommendation, any party may file written
20 objections with this Court and serve a copy on all parties. Such a document should be
21 captioned "Objections to Magistrate Judge's Report and Recommendation." Failure to file
22 objections within the specified time may waive the right to appeal the District Court's Order.

01 *See Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this

02 Report and Recommendation.

03 DATED this 25th day of August, 2009.

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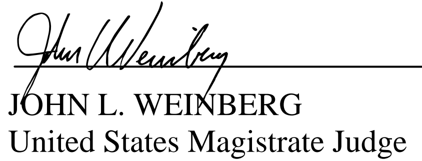
05 

06 JOHN L. WEINBERG
United States Magistrate Judge

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