IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GEORGE GOINGS,

Petitioner, No. CIV S-08-2135 WBS CHS P

vs.

DENNIS K. SISTO, et al.,

Respondents. FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner George Goings is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the November 8, 2006, decision by the Board of Parole Hearings (hereinafter Board) finding him unsuitable for parole. Upon careful consideration of the record and the applicable law, the undersigned will recommend that this petition for habeas corpus relief be denied.

II. FACTS

The Board recited the facts of the commitment offense as follows:

> PRESIDING COMMISSIONER ENG: The defendant and codefendant Dyetria Lorrayne Jones, D-Y-E-T-R-I-A, Lorrayne, L-O-R-R-A-Y-N-E, last name, J-O-N-E-S, were involved in three robberies in which a knife was used and on the third robbery the victim was killed. In July of 1985 victim Nicholis, N-I-C-H-O-L-

> I-S, Dyer, D-Y-E-R, related to police that he was at his residence at about 10:00 a.m. that codefendant Jones and her male companion, Goings, came to his residence and borrowed $2. Shortly thereafter, about 12 o'clock noon, they returned and defendant Goings placed a knife at his throat and demanded money. Defendant Goings made two small cuts on the victim's neck and struck him on top of the head with the knife handle. The defendant Goings then removed $10 from the victim's wallet and both suspects fled the location. With regard to the second robbery, victim Jay, J-A-Y, Hill, H-I-L-L, indicated to police that on September 3rd, 1985, at approximately 7:00 p.m. that defendant Jones obtained a kitchen knife and placed it at the victim's neck at which time defendant Goings removed $125 from the victim's pocket. The victim stated he received two small superficial knife cuts to his neck during the robbery. With regard to the third robbery in this matter, victim Goethe, G-O-E-T-H-E, was found dead in his apartment on September 5th, 1985, at approximately 8:00 p.m. at 2901 Palmgrove, P-A-L-M-G-R-O-V-E, Avenue in Los Angeles. An examination of the victim's body revealed that he had been stabbed nine times to his chest, two of which were fatal. The victim sustained additional injuries consisting of two superficial knife wounds to the neck, four superficial knife wounds to the right wrist, and blunt force trauma or knife wounds to the top of his head. The resident's telephone cord had been disconnected and was wrapped around the victim's left wrist and neck. A belt was also tied around the victim's neck. A bloodstained steak knife was observed lying between the victim's legs and a butcher knife was observed lying on the couch adjacent to the victim. The residence had been partially ransacked and the victim's television had been taken. The victim's wallet also was lying open on the bedroom dresser and contained no money. There was no forced entry to the residence observed. Subsequent investigation from statements of witnesses and landlord [sic] in this matter revealed that codefendant Jones had befriended victim Goethe and both defendant's landlord had helped them sell the victim's television and clothes they had taken from his residence. Subsequent investigation led to the arrest of both the defendant and codefendant in this case due to statements from witnesses, landlords, and positive identification by the first two victims in this matter.

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Petition at 57-59.

Sometime in 1986 a jury found petitioner guilty of first degree murder, two counts of robbery of an inhabited dwelling, and an enhancement for the use of a deadly weapon. Petition at 46. He received a sentence of 25 years to life, plus eight years and four months. Id.

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III. ISSUES

A. PROCEDURAL BACKGROUND

All issues raised in this petition were exhausted in state court proceedings. Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court on or around April 10, 2007. Answer, Exhibit 1 at 23. That petition was denied in a reasoned opinion on September 21, 2007. Answer, Ex. 2 at 2-5. Petitioner then filed a petition in the California Court of Appeal, Second Appellate District on November 1, 2007. Answer, Ex. 3 at 2. That petition was denied on November 9, 2007. Answer, Ex. 4 at 2. Petitioner then filed a petition in the California Supreme Court on March 21, 2008. Answer, Ex. 5 at 2. That petition was summarily denied on August 27, 2008. Answer, Ex. 6 at 2. Finally, petitioner filed this federal petition on September 11, 2008.

B. CLAIMS

The petition raises five issues as follow, verbatim:

1. Petitioner contends that he is being denied his liberty interest right by the Board of Parole Hearings without some evidence to deny parole to petitioner based upon erroneous parole procedures in violation of the state and federal constitution.

2. The Board of Parole Hearings is charges with determining the parole suitability of prisoners serving indeterminate life term sentences; the Board of Parole Hearings has set forth "guidelines" to aid in its suitability determinations 15 CCR 2281 & 2402.

3. Petitioner's positive efforts overt twenty one years supports suitability for parole and outweigh all negative factors of unsuitability for parole.

4. Petitioner's life sentence has been altered by the Board to resemble a sentence of life without the possibility of parole or death, thus constitutes an ex-post facto application of the law.

5. Response to superior court denial of habeas corpus the state court decision contradict [sic] the only clearly established federal law addressing the federal protections for inmates in the parole process.

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IV. APPLICABLE STANDARD OF HABEAS CORPUS REVIEW

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,

861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). The court looks to the last reasoned state court decision as the basis for the state court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).

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V. DISCUSSION[1]

A. Ex Post Facto

1) Description of Claim

Petitioner argues that by denying him parole the Board has "altered" his sentence, from life with the possibility of parole, to life without the possibility of parole. Petition at 5. He argues this is an "ex-post facto application of the law." Id.

2) Applicable Law and Analysis

Petitioner's claim fails for multiple reasons. First, Article I of the United States Constitution provides that neither Congress nor any state shall pass an ex post facto law. U.S. Const. Art. I, § 9, cl. 3, Art. I, § 10, cl. 1. Hence, the Ex Post Facto Clause, by definition, applies to the Legislative Branch, not to the courts or an administrative body, such as the Board of Parole Hearings. See Rogers v. Tennessee, 532 U.S. 451, 460 (2001) (holding "[t]he Ex Post Facto Clause, by its own terms, does not apply to courts"); Marks v. United States, 430 U.S. 188, 191 (1977) (holding "[t]he Ex Post Facto Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.") (citations omitted)); Lagrand v. Stewart, 133 F.3d 1253, 1260 (9th Cir. 1998) (holding "[t]he Ex Post Facto Clause does not apply to court decisions construing statutes."), cert. denied, 525 U.S. 971 (1998).

Moreover, the Board has not increased petitioner's punishment. The Ex Post Facto Clause prohibits the retrospective application of criminal statutes that change the definition of a crime or enhance the punishment for a criminal offense. See Collins v. Youngblood, 497 U.S. 37, 41 (1990) ("Although the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' it has long been recognized ... that the constitutional

[1] The petition raises five issues. All issues except issue four rely on a claim of the denial of Constitutional due process. Those issues will therefore be combined and analyzed as one issue. Issue four will be analyzed separately.

prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them.") Petitioner was sentenced to a term of 25 years to life, plus eight years and four months. While petitioner might have hoped or expected to be released sooner, the maximum duration of his commitment was set at life in prison long before he appeared before the Board. The Board's decision to deny him a parole release date therefore did not enhance or otherwise alter his punishment.

The Board's decision denying petitioner parole did not violate the Ex Post Facto Clause and his claim should be denied.

B. Due Process

1) Description of Claim

Petitioner argues that the Board's denial is without "some evidence" to support it and therefore is a violation of his liberty interest in parole. Petition at 5. He argues that in reaching its determination the Board failed to reference the necessary guidelines and that his positive efforts "outweigh all negative factors of unsuitability." Id.

2) State Court Opinion

The Los Angeles County Superior Court rejected petitioner's claim finding "some evidence to support the Board's findings that petitioner pose[d] an unreasonable risk of danger to society and, [was] therefore, unsuitable for parole." Answer, Ex. 2 at 3.

3) Applicable Law And Discussion

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 due process violations must first demonstrate that he or she was deprived of a liberty or property interest protected by the Due Process Clause and then show that the procedures attendant upon the deprivation were not constitutionally sufficient. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459-60 (1989); McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir. 2002).

A protected liberty interest may arise from either the Due Process Clause of the United States Constitution or state laws. Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The United States Constitution does not, of its own force, create a protected liberty interest in a parole date, even one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981). However, "a state's statutory scheme, if it uses mandatory language, 'creates a presumption that parole release will be granted' when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest." McQuillion, 306 F.3d at 901 (quoting Greenholtz v. Inmates of Nebraska Penal, 442 U.S. 1, 12 (1979)). In this regard, it is clearly established that California's parole scheme provides prisoners sentenced in California to a state prison term that provides for the possibility of parole with "a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." Irons v. Carey, 505 F.3d 846, 850-51 (9th Cir. 2007) (citing Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003); McQuillion, 306 F.3d at 903; and Allen, 482 U.S. at 377-78 (quoting Greenholtz, 442 U.S. at 12)). Accordingly, this court must examine whether the deprivation of petitioner's liberty interest in this case violated due process.

It has been clearly established by the United States Supreme Court "that a parole board's decision deprives a prisoner of due process with respect to this interest if the board's decision is not supported by 'some evidence in the record,' Sass, 461 F.3d at 1128-29 (citing Superintendent v. Hill, 472 U.S. 445, 457 (1985)); see also Biggs, 334 F.3d at 915 (citing McQuillion, 306 F.3d at 904), or is "otherwise arbitrary," Hill, 472 U.S. at 457.

"The 'some evidence' standard is minimally stringent," and a decision will be upheld if there is any evidence in the record that could support the conclusion reached by the fact-finder. Powell v. Gomez, 33 F.3d 39, 40 (9th Cir. 1994) (citing Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987)); Toussaint v. McCarthy, 801 F.2d 1080, 1105 (9th Cir. 1986). However, "the evidence underlying the [ ] decision must have some indicia of reliability."

Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987). See also Perveler v. Estelle, 974 F.2d 1132, 1134 (9th Cir. 1992). Determining whether the "some evidence" standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or the weighing of evidence. Toussaint, 801 F.2d at 1105. The question is whether there is any reliable evidence in the record that could support the conclusion reached. Id.

In finding petitioner unsuitable for parole, the Board relied upon: a) the circumstances of the commitment offense, b) his escalating pattern of criminal conduct, c) his institutional behavior, and d) his lack of adequate parole plans.

a) Circumstances of The Commitment Offense

> With respect to the circumstances of the commitment offense the Board stated: The commitment offense, the offense was carried out in [an] especially cruel and/or callous manner. Multiple victims were attacked, injured and/or killed in the same or separate incidence, and this is based on the three separate counts, the two robberies and then the murder. The offense was carried out in a dispassionate and/or calculated manner such as an execution style murder, the victim was abused, defiled and/or mutilated during or after the offense. The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. The motive for the crime was inexplicable or very trivial in relation to the offense.

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Petition at 127. The Los Angeles County Superior Court found that some evidence supported this finding. Answer, Ex. 2 at 3.

The circumstances of the commitment offense are one of fifteen factors relating to an inmate's unsuitability or suitability for parole under California law. Cal. Code. Regs., tit. 15, § 2402(c)(1)-(d). When denial is based on these circumstances the California courts have stated that:

> A prisoner's commitment offense may constitute a circumstance tending to show that a prisoner is presently too dangerous to be found suitable for parole, but the denial of parole may be predicated on a prisoner's commitment offense only where the Board can "point to factors beyond the minimum elements of the

> crime for which the inmate was committed" that demonstrate the inmate will, at the time of the suitability hearing, present a danger to society if released. [In re] Dannenberg, 34 Cal.4th [1061] at 1071, 23 Cal.Rptr.3d 417, 104 P.3d 783 (Cal.2005). Factors beyond the minimum elements of the crime include, inter alia, that "[t]he offense was carried out in a dispassionate and calculated manner," that "[t]he offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering," and that "[t]he motive for the crime is inexplicable or very trivial in relation to the offense." Cal. Code. Regs., tit. 15 § 2402(c)(1)(B), (D)-(E)."

Irons, 505 F.3d at 852-53; see also In re Weider, 145 Cal.App.4th 570, 588 (2006) (to support denial of parole, the "factors beyond the minimum elements of the crime" "must be predicated on "some evidence that the particular circumstances of [the prisoner's] crime-circumstances beyond the minimum elements of his conviction-indicated exceptional callousness and cruelty with trivial provocation, and thus suggested he remains a danger to public safety.")

Such circumstances may include "rehearsing the murder, executing of a sleeping victim, stalking," id., or evidence that the defendant "acted with cold, calculated, dispassion, or that he tormented, terrorized or injured [the victim] before deciding to shoot her; or that he gratuitously increased or unnecessarily prolonged her pain and suffering." In re Smith, 114 Cal.App.4th 343, 367 (2003).

The relevant inquiry however "is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are probative to the central issue of current dangerousness when considered in light of the full record before the Board or the Governor." In re Lawrence, 44 Cal.4th 1181, 1221 (Cal. 2008); In re Dannenberg, 34 Cal.4th 1061, 1070-71 (Cal. 2005).

Petitioner committed two robberies and a murder over a two month period. Petition at 128. During the first two robberies petitioner used a knife to make superficial cuts to each victim's neck. Id. The murder victim was found bound with a telephone cord and with a belt around his neck. Id. The victim had been stabbed nine times in the chest and had several other superficial and blunt force injuries. Id. The victim's residence had been partially

ransacked and his television had been stolen. Id. Petitioner claimed the victim was alive and standing after the stabbing, yet he never sought aid for the victim.

While it is true that the continued reliance over time on unchanging factors such as the circumstances of the commitment offense may result in a due process violation, a parole denial based solely on unchanging factors can initially satisfy due process requirements. Biggs, 334 F.3d at 916. In Irons, the Ninth Circuit explained that Biggs represents the law of the circuit that continued reliance on a prisoner's commitment offense or conduct prior to imprisonment could result in a due process violation over time. Irons, 505 F.3d at 853. Nevertheless, the court held that, given the egregiousness of the commitment offense, due process was not violated when the Board deemed a prisoner unsuitable for parole prior to expiration of his minimum term. Id. at 846.

Under the most favorable calculation of petitioner's sentence, beginning on the date of his incarceration and applying only his 25 year term, the minimum term of his sentence will not expire until 2011. The November 8, 2006 hearing was in fact petitioner's first. Petition at 46.

Conversely, petitioner's commitment offense involved multiple robberies and a murder. As a result there were multiple victims. The murder victim was bound, mutilated and executed, demonstrating an exceptionally callous disregard for human suffering. Given the egregiousness of his commitment offense, and the fact that this was petitioner's initial parole consideration hearing, due process was not violated when the Board deemed him unsuitable for parole prior to the expiration of his minimum term.

Further, the Board's conclusions regarding the circumstances of the commitment offense are supported by evidence. More importantly, the identified facts were probative to the central issue of petitioner's then current dangerousness when considered in light of the full record before the Board. That record included his escalating pattern of criminal conduct, his institutional behavior and his lack of adequate parole plans.

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b) Escalating Pattern of Criminal Conduct

In finding petitioner unsuitable for parole, the Board cited his escalating pattern of criminal conduct. Petition at 128-29. The Los Angeles County Superior Court found some evidence to support that finding. Answer, Ex. 2 at 3.

The Board found that petitioner had "a litany of adult convictions and arrests" stating:

> I think I had counted approximately 18 years or yeah, about 18 years of arrests that [in] total looks like about 16 different incidences over an 18 year period from 1968 through 1986. And basically, we see, like starting in October of 1968, robbery in the first, and then burglary, possession of dangerous drugs. You were arrested for forgery of a U.S. Treasury Checks, but no disposition. Possession of stolen mail, this was in January of 1970, you were arrested for possession of stolen mail and placed on two years probation. And then a few months later on March 26, 1970, you were arrested by [the] Los Angeles Police Department for possession of dangerous drugs, no disposition, 1970 was a busy year for you. And then again in June you were arrested by the Los Angeles Sheriff's Office for grand theft auto, however, you were released. Then in January of 1971 you were arrested by LAPD for burglary, and I don't - -doesn't state a disposition on that one. Then in May, five months later, you were arrested due to the Bureau of Identification in Sacramento for - - maybe that was it - - for Penal Code 211 robbery in the first. And at that time you were sentenced to State Prison for five years to life; however, you were paroled to Los Angeles County on March 20th of 1973. A few months later on July 14th of '73, you were arrested again by LAPD for forgery, but there wasn't any disposition in that case. A little over a year later, November '74, you were again arrested by LAPD for possession of drugs for sale, but the prosecution rejected the case. Then in January of '95[[sic] arrested by LAPD for receiving stolen property, D.A. rejected the case. Then quite a few years before you had June 17th of 1983 you were arrested by [the] Long Beach Police Department for trespassing; you were subsequently convicted and sentenced to 12 months probation and a fine. Then on June 28th, 1984, about a year later, you were arrested by Norwalk Sheriff's Office for [being] under the influence of a controlled substance and failure to appear. Apparently, you were convicted of a Health and Safety 11550(A.) The proceedings were suspended and the case was diverted. Then in [sic] September of [sic] 25th of '85 you were arrested for robbery, Penal Code 211, by the LAPD and that led to your subsequent conviction of murder in the first and then the two robbery of the inhabited dwelling

> charges, and then the use of a deadly weapon, where you ended up being sentenced again to 25 years to life plus eight years four months for the enhancements.

Petition at 64-66.

Under California law, the Board is authorized to consider "any other information which bears on the prisoner's suitability for release." Cal. Code. Regs., tit. 15, § 2402(b). A criminal history showing sixteen different incidents involving numerous crimes, including possession of dangerous drugs, possession of stolen mail, burglary and robbery, is relevant information bearing upon a prisoner's suitability for release. That information is particularly relevant when these incidents resulted in previous prison terms, and failed grants of probation and/or parole.

The Board's conclusion regarding petitioner's escalating pattern of criminal conduct is supported by evidence.

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c) Institutional Behavior

In support of its finding of unsuitability the Board cited petitioner's institutional behavior. Petition at 130. The Board noted that petitioner had ten 128(A) counseling chronos, the most recent one coming in 2002.[2] More importantly petitioner had received two 115 disciplinary reports.[3] Id. While the most recent one dated back to 1993, that 115 was the result of a physical altercation with a weapon. Id.

Under California law, institutional behavior that evidences "serious misconduct" at any time is a circumstance tending to show unsuitability. See Cal. Code Regs. tit. 15, § 2402(c)(6). While petitioner's institutional record has been free of 115s since 1993, a physical

[2] A 128 is issued when similar minor misconduct recurs after verbal counseling or if documentation of minor misconduct is needed. Cal. Code Regs. tit. 15, § 3312(a)(3).

[3] A 115 "Rules Violation Report" documents misconduct "believed to be a violation of law or [that] is not minor in nature ." Cal. Code Regs. tit. 15, § 3312(a)(3).

altercation with a weapon is serious misconduct. Based on that misconduct, and the ten 128s, the Board's finding with respect to petitioner's institutional behavior is supported by evidence.

d) Parole Plans

The Board found that petitioner lacked realistic parole plans, stating:

> Regarding your parole plans, sir, we feel that you lack realistic parole plans at this point in time, in that you do not have viable residential plans, you also do not have acceptable employment plans, and that you do not have a marketable skill. And again, it's a new skill that would be appropriate to your current physical and health condition that would be more appropriate. And again, we discussed this earlier how important it is to make sure that you really take a look and document the different areas that are most realistic for you to be able to do in terms of, you know, residential, very specific letters. Okay? Financial support. In terms of your employment, even though you've had a lot of years with the Teamsters to go back and be a truck driver may not be physically possible for you to so, so what are the alternatives for you possibly within the, you known [sic], still being in the union and for you to possibly explore other areas. Again, cover as many options as you can.

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Petition at 131-32.

Petitioner informed the Board that during his incarceration he never completed any vocational program. Id. at 78. He stated that his decision was based on the fact that he had already worked in many trades prior to his incarceration, including working as a molder, painter, tow operator and truck driver. Id. at 79-82. Upon his release petitioner hoped to return to the Teamsters, however he also indicated that he was "getting old" and "falling apart." Id. at 82, 97.

With respect to a residence, petitioner planned to "rely mostly on the Veterans Administration and [his] daughter," as well as "friends, associates" he can seek help from. Id. at 94. Petitioner did not however have a confirmed residence with the Veterans Administration and he was unable to live at his daughter's home. Id. at ,100.

While the lack of adequate parole plans is not a stated factor indicating unsuitability, under California law the Board may consider "any other information which bears on the prisoner's suitability for release." Cal. Code. Regs., tit. 15 § 2402(b). At the time of the

hearing, petitioner had not completed any vocational training programs and was without a confirmed residence. The challenges an inmate faces upon parole are tremendous. Those challenges are likely insurmountable if the inmate does not have a strong path to employment or a confirmed residence.

The Board's finding that petitioner's parole plans were inadequate is supported by evidence.

V. CONCLUSION

The facts of petitioner's commitment offense were probative to his current dangerousness when considered in light of the full record before the Board. That record included his escalating pattern of criminal conduct, his institutional behavior and his lack of adequate parole plans.

Petitioner had a lengthy criminal history involving possession of dangerous drugs, forgery, stolen mail, burglary and robbery. His criminal behavior escalated until the commitment offense which involved multiple robberies and murder. The murder victim was bound, beaten, stabbed multiple times, and left without aid.

While incarcerated petitioner's behavior appears to have improved. Nevertheless he was involved in a physical altercation with a weapon in 1993 and failed to complete any vocational training. His parole plans were inadequate, lacking reliable employment or a confirmed residence.

Based on this record there was evidence to support the Board's conclusion that at the time of the hearing petitioner was unsuitable for parole. The state court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law and petitioner is not entitled to relief on his due process claim.

Further the Board's decision did not enhance or otherwise alter his punishment. Accordingly, the Board's decision did not violate the Ex Post Facto Clause. Petitioner is therefore not entitled to relief on his ex post facto claim.

Accordingly, IT IS RECOMMENDED that petitioner's petition for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: December 3, 2009

Charlene H. Sorrentino

CHARLENE H. SORRENTINO
UNITED STATES MAGISTRATE JUDGE