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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DONALD GREEN,)	Case No. 08cv1803-JLS (BLM)
)	
Petitioner,)	REPORT AND RECOMMENDATION FOR
v.)	ORDER DENYING PETITION FOR
)	WRIT OF HABEAS CORPUS
LARRY SMALL, Warden, et. al.,)	
)	[Doc. No. 1]
Respondents.)	
_____)	

This Report and Recommendation is submitted to United States District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b) and Local Civil Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California.

On September 17, 2008, Petitioner Donald Green, a state prisoner proceeding *pro se* and *in forma pauperis*, filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Doc. No. 1 ("Petition"). On March 17, 2009, Respondents filed an Answer to the Petition. Doc. No. 18 ("Answer"). Petitioner filed a Traverse on April 27, 2009. Doc. No. 20 ("Traverse"). For the reasons set forth below, the Court **RECOMMENDS** that Petitioner's Petition for Writ of Habeas Corpus be **DENIED**.

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1 Background

2 The following facts regarding Petitioner's commitment offense are
3 taken from the Los Angeles County Superior Court's order denying
4 Petitioner's Petition for Writ of Habeas Corpus in In re Donald Green,
5 No. BH005024:

6 The record reflects that on April 29, 1993, several members of
7 the 74 Hoover Crips gang, including petitioner and the victim,
8 were hanging out near a residence. The victim's younger
9 cousin approached the gang in order to join the gang. He was
10 told to prove himself by fighting another member who was
11 petitioner's friend. After five to ten minutes of fighting,
12 the would-be new affiliate ran off. Petitioner began bragging
13 about his friend's victory over the victim's cousin, which in
14 turn led to another physical confrontation that lasted
15 approximately fifteen minutes before the other members broke
16 it up. The victim left with his friends, but then realized he
17 had forgotten his jacket. He sent a friend back to find it.
18 While he waited for his companion to return with the jacket,
19 petitioner approached with a loader revolver. He fired
20 several shots, hitting the victim three times. The victim
21 died as a result. Petitioner claims that he only intended to
22 fire in the air, but that he was drunk and blacked out while
23 shooting.

24 Lodgment 3 at 1.¹ Petitioner was convicted of second degree murder and
25 the use of a firearm and was sentenced to a term of twenty years to life
26 in prison with a minimum eligible parole date of December 2, 2007.
27 Lodgment 2 at 1. On March 14, 2007, the Board of Parole Hearings
28 ("Board") held Petitioner's Initial Parole Consideration Hearing ("the
29 hearing") at Calipatria State Prison. See Lodgment 2.

30 Petitioner was present at the hearing and represented by state-
31 appointed attorney Bill Garled. Id. at 1-2. Petitioner was advised of
32 his rights and the parole procedures. Id. at 6-9. Throughout the
33 hearing, Petitioner was given the opportunity to answer questions,
34

35 ¹This Court presumes the state court's factual determinations to be correct
36 absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); Miller-
37 El v. Cockrell, 537 U.S. 322, 340 (2003); see also Parke v. Raley, 506 U.S. 20, 35-36
38 (1992) (holding findings of historical fact, including inferences properly drawn from
such facts, are entitled to statutory presumption of correctness).

1 present evidence and give affirmative testimony in his favor. See e.g.,
2 id. at 62-71, 87-92. The topics discussed during the hearing included
3 the circumstances surrounding the commitment offense, Petitioner's
4 criminal record, Petitioner's institutionalized behavior and
5 disciplinary record, Petitioner's gang affiliation, Petitioner's social
6 history, Petitioner's physical and psychological health history,
7 Petitioner's work history and education, and Petitioner's future plans
8 for life after release from prison. See generally, id. at 12-92.
9 Petitioner and his attorney gave closing statements arguing for a
10 finding that Petitioner was suitable for parole. Id. at 84-92.

11 After the hearing, the Board determined that Petitioner was not
12 suitable for parole because (1) the offense was carried out in an
13 especially callous and dispassionate manner, (2) the motive for the
14 crime was inexplicable, (3) Petitioner had not accepted full
15 responsibility for his actions, (4) Petitioner had an escalating record
16 of violence, assaultive behavior and unstable social relationships,
17 (5) Petitioner had not demonstrated evidence of participation in self-
18 help programs or evidence of a positive change, and (6) Petitioner had
19 not demonstrated adequate plans for life after prison. Id. at 93-96.
20 The Board commended Petitioner's vocational training and work in the
21 prison's kitchen. Id. at 96-97. However, the Board determined that
22 Petitioner's recent changes in behavior did not outweigh the factors
23 establishing unsuitability for parole. Id. at 97. The Board
24 recommended that Petitioner demonstrate an ability to maintain the
25 positive changes in his behavior by remaining disciplinary free and
26 fully participating in self-help programs. Id. at 99-100. Petitioner
27 was denied parole for five years. Id. at 102.

28 On May 30, 2007, Petitioner filed two formal complaints in regards

1 to the hearing and the performance of his state-appointed attorney.
2 Lodgment 1 at 13.² On August 9, 2007, Petitioner filed a Petition for
3 Writ of Habeas Corpus with the Los Angeles County Superior Court. Id.
4 at 1. The petition was denied on February 5, 2008. Lodgment 3 at 1.
5 The Petitioner then filed a Petition for Writ of Habeas Corpus with the
6 California Court of Appeal, Second Appellate District on May 15, 2008.
7 Lodgment 4 at 1. The California Court of Appeal summarily denied the
8 Petition. Lodgment 5 at 1. On June 6, 2008, Petitioner filed a
9 Petition for Review with the California Supreme Court, which was also
10 summarily denied. Lodgment 6 at 1; Lodgment 7 at 1. Finally,
11 Petitioner filed the instant Petition for Writ of Habeas Corpus on
12 September 17, 2008. Doc. No. 1.

13 Legal Standard

14 Title 28 of the United States Code, section 2254(a), sets forth the
15 following scope of review for federal habeas corpus claims:

16 The Supreme Court, a Justice thereof, a circuit judge, or a
17 district court shall entertain an application for a writ of
18 habeas corpus in behalf of a person in custody pursuant to
19 the judgment of a State court only on the ground that he is
in custody in violation of the Constitution or laws or
treaties of the United States.

20 28 U.S.C. § 2254(a).

21 The Petition was filed after enactment of the Anti-terrorism and
22 Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110
23 Stat. 1214. Under 28 U.S.C. § 2254(d), as amended by the AEDPA:

24 (d) An application for a writ of habeas corpus on behalf of
25 a person in custody pursuant to the judgment of a State court
26 shall not be granted with respect to any claim that was
27 adjudicated on the merits in State court proceedings unless
the adjudication of the claim—

28 ²Where the Petition and lodgments are not consecutively paginated, the Court has
cited page numbers by counting pages through the document.

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

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

9 28 U.S.C. § 2254(d). Summary denials do constitute adjudications on the
10 merits. See Luna v. Cambra, 306 F.3d 954, 960 (9th Cir. 2002). Where
11 there is no reasoned decision from the state's highest court, the Court
12 "looks through" to the underlying appellate court decision. Ylst v.
13 Nunnemaker, 501 U.S. 797, 801-06 (1991).

14 A state court's decision is "contrary to" clearly established
15 federal law if the state court: (1) "arrives at a conclusion opposite
16 to that reached" by the Supreme Court on a question of law; or
17 (2) "confronts facts that are materially indistinguishable from a
18 relevant Supreme Court precedent and arrives at a result opposite to
19 [the Supreme Court's]." Williams v. Taylor, 529 U.S. 362, 405 (2000).

20 A state court's decision is an "unreasonable application" of clearly
21 established federal law where the state court "identifies the correct
22 governing legal principle from this Court's decisions but unreasonably
23 applies that principle to the facts of the prisoner's case." Lockyer
24 v. Andrade, 538 U.S. 63, 75-76 (2003). "[A] federal habeas court may
25 not issue a writ simply because the court concludes in its independent
26 judgment that the relevant state-court decision applied clearly
27 established federal law erroneously or incorrectly Rather, that
28 application must be *objectively unreasonable*." (emphasis added)
(internal quotation marks and citations omitted). Clearly established
federal law "refers to the holdings, as opposed to the dicta, of [the
United States Supreme] Court's decisions." Williams, 529 U.S. at 412.

1 Finally, habeas relief is also available if the state court's
2 adjudication of a claim "resulted in a decision that was based on an
3 unreasonable determination of the facts in light of the evidence
4 presented in state court." 28 U.S.C. § 2254(d)(2). A state court's
5 decision will not be overturned on factual grounds unless this Court
6 finds that the state court's factual determinations were "objectively
7 unreasonable in light of the evidence presented in the state court
8 proceeding." See Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); see
9 also Rice v. Collins, 546 U.S. 333, 341-42 (2006) (the fact that
10 "[r]easonable minds reviewing the record might disagree" does not render
11 a decision objectively unreasonable). This Court will presume that the
12 state court's factual findings are correct, and Petitioner may overcome
13 that presumption only by clear and convincing evidence. 28 U.S.C.
14 § 2254(e)(1).

15 Discussion

16 Petitioner presents three grounds for habeas relief. First,
17 Petitioner contends that the Board deprived him of his "liberty interest
18 in parole" and violated his right to due process under the Fifth and
19 Fourteenth Amendments by failing to comply with California Penal Code
20 Section 3041(a). Petition at 14. Second, Petitioner argues that the
21 Board violated his right to due process by failing to comply with
22 California Code of Regulations, Title 15, Section 2403(a). Id. at 40.
23 Third, Petitioner claims that his Sixth Amendment right to effective
24 assistance of counsel was denied by his attorney's prejudicial
25 performance at the hearing. Id. at 43-44.

26 **A. First Claim for Relief: Due Process Violation**

27 The Due Process Clause prohibits the government from depriving an
28 inmate of a liberty interest without adequate procedural safeguards.

1 See U.S. Const. amends. V, XIV. Therefore, in analyzing whether an
2 inmate's due process rights were violated, courts must look at two
3 distinct elements: (1) whether the inmate was deprived of a
4 constitutionally protected liberty interest, and (2) "whether the
5 procedures attendant upon that deprivation were constitutionally
6 sufficient." Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989);
7 Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1127 (9th Cir. 2006).

8 **1. Liberty Interest in Parole**

9 The United States Supreme Court established in Greenholtz v.
10 Inmates of Nebraska Penal, 442 U.S. 1 (1979), and Board of Pardons v.
11 Allen, 482 U.S. 369 (1987) that:

12 while there is no constitutional or inherent right of a
13 convicted person to be conditionally released before the
14 expiration of a valid sentence, a state's statutory scheme,
15 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.

16 Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003)(quoting McQuillion
17 v. Duncan, 306 F.3d 895, 901 (9th Cir. 2002)). The Ninth Circuit
18 explicitly has held that California's statutory parole scheme uses the
19 mandatory language contemplated by Greenholtz and Allen and thereby
20 "creates in every inmate a cognizable liberty interest in parole which
21 is protected by the procedural safeguards of the Due Process Clause."
22 Biggs, 334 F.3d at 914. Specifically, the Ninth Circuit compared the
23 language of California's parole statute³ to the state parole statutes

24
25 ³California Penal Code § 3041(b) states, in relevant part:

26 The panel or the board, sitting en banc, shall set a release date unless
27 it determines that the gravity of the current convicted offense or
28 offenses, or the timing and gravity of current or past convicted offense
or offenses, is such that consideration of the public safety requires a
more lengthy period of incarceration for this individual, and that a
parole date, therefore, cannot be fixed at this meeting.

Cal. Penal Code § 3041(b) (emphasis added).

1 at issue in Greenholtz and Allen⁴ and found that California's parole
2 statute "clearly parallels the language used in the Nebraska and Montana
3 statutes addressed in Greenholtz and Allen, respectively." Id. Like
4 the statutes at issue in Greenholtz and Allen, the Ninth Circuit found
5 that California's parole statute creates a presumption that parole
6 release will be granted when or unless certain findings are made. Id.
7 Therefore, California prisoners similarly possess a liberty interest in
8 parole release. Id.

9 Respondents recognize this jurisprudence, but maintain that the
10 current state of clearly established federal law recognizes no such
11 liberty interest for California prisoners. Answer at 7. Respondents
12 argue that Sandin v. Connor, 515 U.S. 472, 484 (1995), and Wilkinson v.
13 Austin, 545 U.S. 209, 229 (2005), abrogated Greenholtz's methodology for
14 establishing a liberty interest in parole. Id. However, the Ninth
15 Circuit expressly rejected this argument in Sass v. California Board of
16 Prison Terms. 461 F.3d at 1125. The court again held in Sass that
17 "California's parole scheme gives rise to a cognizable liberty interest
18 in release on parole . . . [and] this liberty interest is created, not
19 upon the grant of a parole date, but upon the incarceration of the
20 inmate." Id. at 1127 (internal quotations omitted). Accordingly, the
21 Court finds that Petitioner possesses a liberty interest in parole.

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25 ⁴The Nebraska statute at issue in Greenholtz states, in relevant part, that
26 whenever a prisoner is considered for parole the Board "shall order his release unless
27 it is of the opinion that his release should be deferred . . ." Neb. Rev. Stat. § §
28 83-1, 114(1) (1976) (emphasis added).

29 The Montana statute at issue in Allen states, in relevant part, that the Board
30 "shall release on parole . . . any person confined in the Montana state prison or the
31 women's correction center . . . when in its opinion there is reasonable probability that
32 the prisoner can be released without detriment to the prisoner or to the community."
33 Mont. Code Ann. § 46-23-201 (1985) (emphasis added).

1 **2. Adequate Procedural Protections**

2 Because Petitioner has a liberty interest in parole, the Court must
3 determine whether Petitioner received adequate procedural protections
4 for his due process rights. The United States Supreme Court has stated
5 that due process "is flexible and calls for such procedural protections
6 as the particular situation demands." Greenholtz, 442 U.S. at 12
7 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). A proper
8 parole consideration hearing "affords an opportunity to be heard, and
9 when parole is denied it informs the inmate in what respects he falls
10 short of qualifying for parole; this affords the process that is due
11 under these circumstances. The Constitution does not require more."
12 Greenholtz, 442 U.S. at 16.

13 In his Traverse, Petitioner argues that his parole hearing did not
14 meet these due process standards. Traverse at 4. However, a review of
15 the record reveals that the hearing satisfied and even exceeded these
16 minimal procedural due process requirements. In particular, Petitioner
17 was present at the hearing and was represented by counsel. Lodgment 2
18 at 1-2. He was informed of his rights at the outset of the hearing.
19 Id. at 6-9. Petitioner and his counsel were given the opportunity to
20 present arguments and introduce evidence in favor of a finding of
21 suitability for parole. See e.g., id. at 62-71, 87-92. Petitioner
22 answered questions about the commitment offense, his vocational training
23 during incarceration, and his plans for parole, among other things. See
24 generally, id. at 12-92. Petitioner and his counsel delivered closing
25 arguments. See id. at 84-92. After the hearing, the Board informed
26 Petitioner that it relied upon the following factors in denying his
27 parole: (1) Petitioner carried out the commitment offense in an
28 especially callous and dispassionate manner, (2) Petitioner's motive for

1 the crime was inexplicable, (3) Petitioner has not accepted full
2 responsibility for his actions, (4) Petitioner has an escalating record
3 of violence, assaultive behavior and unstable social relationships,
4 (5) Petitioner has not demonstrated evidence of participation in self-
5 help programs or evidence of a positive change, and (6) Petitioner has
6 not demonstrated adequate plans for life after prison. Lodgment 2 at
7 93-96. In sum, the Court finds that Petitioner's parole hearing
8 contained adequate procedural protections under the Due Process Clause.

9 3. Sufficiency of the Evidence

10 Under clearly established federal law, the Due Process Clause also
11 requires that a decision to deny parole satisfy the United States
12 Supreme Court's "some evidence" standard.⁵ Superintendent, Mass. Corr.
13 Inst., Walpole v. Hill, 472 U.S. 445, 454-57 (1985); Sass, 461 F.3d at
14 1128-29. Although this minimal standard "might be insufficient in other
15 circumstances, '[t]he fundamental fairness guaranteed by the Due Process
16 Clause does not require courts to set aside decisions of prison
17 administrators that have some basis in fact.'" Sass, 461 F.3d at 1129
18 (quoting Hill, 472 U.S. at 456).

19 Petitioner claims that the Board failed to meet the "some evidence"
20 standard in his case and, therefore, deprived him of his liberty
21 interest in parole. Petition at 24-26. In evaluating the merits of
22 Petitioner's claims, the Court must look through to the last reasoned
23 state court decision. See Ylst, 501 U.S. at 801-06. Petitioner

24
25 ⁵Respondents deny that the "some evidence" standard is clearly established
26 federal law. Answer at 8. Rather, they contend that the "some evidence" standard was
27 developed in the context of prison disciplinary hearings and is not applicable to
28 parole hearings. Id. at 10. However, the Ninth Circuit has held that the standard
applies to federal habeas review of parole board decisions that deny a prisoner's
parole release. Biggs, 334 F.3d at 915 (citing Jancsek v. Oregon Bd. of Parole, 833
F.2d 1389, 1390 (9th Cir. 1987)). This Court may look to Ninth Circuit case law for
assistance in determining what constitutes the applicable "clearly established federal
law." See Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000).

1 presented this claim to the state courts in all three of his habeas
2 petitions. Lodgments 1, 4 and 6. Because the California Supreme Court
3 and the Court of Appeal summarily denied Petitioner's petitions
4 [Lodgments 5 and 7], the last reasoned state court decision on this
5 issue came from the Los Angeles County Superior Court [Lodgment 3]. The
6 Los Angeles County Superior Court applied the "some evidence" standard
7 and concluded that the record contained sufficient evidence to support
8 the Board's finding that Petitioner was unsuitable for parole. Lodgment
9 3 at 1. The Superior Court stated:

10 The Board concluded that petitioner was unsuitable for
11 parole and would pose an unreasonable risk of danger to
12 society and a threat to public safety. The Board based its
13 decision on several factors, including his commitment
14 offense.

15 The nature of the commitment offense may indicate that a
16 prisoner poses an unreasonable risk of danger to society
17 when the offense is especially heinous, atrocious or cruel.
18 In this case, the Board found that the commitment offense
19 was especially heinous because the motive was very trivial
20 in relation to the offense. . . . To the extent that there
21 was a motive in this case, the motive appears to be based on
22 an earlier fight between the victim's cousin and
23 petitioner's friend for gang initiation. There appears to
24 be no reason for the shooting at all other than bravado.
25 The Board was justified in finding that this motive was
26 materially less significant than those which conventionally
27 drive people to commit murder. A person whose motive for
28 murder cannot be explained is unusually unpredictable and
dangerous. Therefore, there is some evidence that
petitioner poses an unreasonable risk of danger to society.

In determining whether a prisoner poses a risk of danger to
society, the Board may consider his institutional
behavior[,] as well as many psychological factors. Since
entering prison, petitioner has received nineteen CDC 115's
many of which are for serious misconduct such as mutual
combat and battery. His most recent violent 115's were for
battery on an inmate and attempted battery on a peace
officer in April of 2000. Petitioner's psychological
evaluation agreed, listing him as a moderate risk of danger
if released. The psychologist also diagnosed him with a
personality disorder [and] with antisocial personality
disorder. Additionally, there is some evidence that
petitioner is unsuitable for parole based on his previous
history of violence. At the age of sixteen petitioner was

1 convicted of attempted murder after he shot at his step-
2 father following a heated argument over unauthorized use of
3 his sister's bicycle. . . . He became a member of the Hoover
4 Crips when he was fourteen years old and continued to
5 affiliate with the gang until 2001, although he has never
6 formally debriefed. Based on these factors, the Court finds
7 that there is some evidence to support the Board's
8 determination that petitioner is unpredictable and poses an
9 unreasonable risk of danger to society if released on
10 parole.

11 Lodgment 3 at 1-2 (internal citations omitted).

12 This Court agrees with the reasoning of the Superior Court. In
13 assessing whether or not there is "some evidence" supporting the Board's
14 denial of parole, courts must consider the regulations guiding the
15 Board's decision. See Biggs, 334 F.3d at 915. The California Code of
16 Regulations provides that at initial parole consideration hearings, the
17 Board "shall first determine whether the life prisoner is suitable for
18 release on parole. Regardless of the length of time served, a prisoner
19 shall be found unsuitable for and denied parole if in the judgment of
20 the panel the prisoner will pose an unreasonable risk of danger to
21 society if released from prison." Cal. Code Regs. tit. 15
22 § 2402(a)(2009); see also Irons v. Carey, 479 F.3d 658, 662-63 (9th Cir.
23 2007). The Board must consider "all relevant, reliable information
24 available." Cal. Code Regs. tit. 15 § 2402(b)(2009).

25 The Regulations also list factors tending to indicate whether or
26 not an inmate is suitable for parole. Factors tending to show
27 suitability for parole include: (1) no juvenile record, (2) stable
28 social history, (3) signs of remorse, (4) commitment offense was
committed as a result of stress which built up over time, (5) Battered
Woman Syndrome, (6) lack of criminal history, (7) age is such that it
reduces the possibility of recidivism, (8) plans for future including
development of marketable skills, and (9) institutional activities that

1 indicate ability to function within the law. Id. at § 2402(d). On the
2 other hand, factors tending to show unsuitability for parole include:
3 (1) the commitment offense was committed in an especially heinous,
4 atrocious or cruel manner, (2) previous record of violence, (3) unstable
5 social history, (4) sadistic sexual offenses, (5) psychological factors
6 such as a lengthy history of severe mental problems related to the
7 offense, and (6) prison misconduct. Id. at § 2402(c). The factors
8 listed are merely guidelines and "the importance attached to any
9 circumstance or combination of circumstances in a particular case is
10 left to the judgment of the panel." Id. at § 2402(c)-(d).

11 As the Superior Court noted in its opinion, the record contains
12 considerable evidence supporting the Board's finding that Petitioner
13 poses an unreasonable risk of danger to society. Lodgment 3 at 1-2.
14 Here, as previously stated, the Board appropriately cited the following
15 factors for its decision: (1) Petitioner carried out the commitment
16 offense in an especially callous and dispassionate manner, (2)
17 Petitioner's motive for the crime was inexplicable, (3) Petitioner has
18 not accepted full responsibility for his actions, (4) Petitioner has an
19 escalating record of violence, assaultive behavior and unstable social
20 relationships, (5) Petitioner has not demonstrated evidence of
21 participation in self-help programs or evidence of a positive change,
22 and (6) Petitioner has not demonstrated adequate plans for life after
23 prison. Lodgment 2 at 93-96. Although the Ninth Circuit previously has
24 cautioned against undue reliance on an unchanging factor, such as the
25 commitment offense, the Board relied heavily on post-commitment evidence
26 in this case, including Petitioner's nineteen disciplinary citations.
27 See Hayward v. Marshall, 512 F.3d 536, 545 (9th Cir. 2008) (citing Biggs,
28 334 F.3d at 916); Lodgment 2 at 94. Petitioner's substantial post-

1 commitment disciplinary record alone provides the requisite "some
2 evidence" establishing that Petitioner would pose an unreasonable risk
3 to society if released on parole. See Penn v. Ayres, 2008 WL 1930661,
4 at *7-8 (N.D. Cal. 2008) (reasoning that an inmate's two post-conviction
5 disciplinary reports undermined his argument that he had been
6 rehabilitated and was suitable for parole).

7 In spite of this evidence, Petitioner argues that the Board
8 misapplied the "some evidence" standard to his case and impermissibly
9 denied parole. Petition at 24-26. First, Petitioner argues that the
10 "test is not whether some evidence supports the reasons the [Board]
11 cites for denying parole, but whether some evidence indicates a
12 parolee's release unreasonably endangers public safety." Id. at
13 26(citing Hayward v. Marshall, 512 F.3d 536, 543 (9th Cir. 2008)).
14 However, the Board followed the language of Hayward cited by Petitioner
15 and properly evaluated whether some evidence indicated that Petitioner's
16 release would unreasonably endanger public safety. Lodgment 2 at 93.
17 Second, Petitioner suggests that the Board ignored the factors weighing
18 in his favor when applying the some evidence test, including his
19 vocational training and work record in the prison's kitchen. Petition
20 at 16-17. Yet, the Board explicitly noted that it took these factors
21 into consideration and commended Petitioner for his progress in these
22 areas. Lodgment 2 at 96-97. After weighing the factors for and against
23 Petitioner's suitability for parole, the Board reasonably determined
24 that the "positive aspects of [Petitioner's] behavior do not outweigh
25 the factors for unsuitability." Id. at 97.

26 Because ample evidence in the record supports the Board's decision
27 to deny parole, this Court finds that the Superior Court's decision to
28 deny Petitioner's claims on the merits was reasonable and consistent

1 with clearly established federal law. Accordingly, this Court
2 **RECOMMENDS** that Petitioner's first ground for relief be **DENIED**.

3 **B. Second Claim for Relief: Due Process Violation**

4 Petitioner argues that his federal right to due process also was
5 violated by the Board's failure to establish a uniform term of
6 imprisonment under the matrix of base terms set forth in California Code
7 of Regulations, Title 15, Section 2403. Petition at 40-41. Because the
8 Los Angeles County Superior Court did not review the merits of this
9 claim, this Court reviews the issue *de novo*. See Lodgment 2; Pirtle v.
10 Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002) ("[W]hen it is clear that
11 a state court has not reached the merits of a properly raised issue, we
12 must review it *de novo*").

13 As previously discussed, the Court's first step in analyzing
14 whether an inmate's due process rights were violated is to determine
15 whether the inmate was deprived of a constitutionally protected liberty
16 interest. Ky. Dep't of Corr., 490 U.S. at 460. Petitioner frames his
17 second claim as a federal due process issue, but in essence, his second
18 claim challenges the Board's application of California law. See
19 Petition at 40-43; Traverse at 4. Federal habeas corpus review is not
20 available for violations of state law. See 28 U.S.C. § 2254(a); Estelle
21 v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a
22 federal habeas court to reexamine state-court determinations on state-
23 law questions. In conducting habeas review, a federal court is limited
24 to deciding whether a conviction violated the Constitution, laws, or
25 treaties of the United States."). Accordingly, this Court is without
26 authority to grant federal habeas relief on Petitioner's second claim.

27 In any event, Petitioner's claim fails on the merits. California
28 Code of Regulations, Title 15, Section 2403(a) clearly states that the

1 Board "shall set a base term for each life prisoner *who is found*
2 *suitable for parole.*" Cal. Code Regs. tit. 15 § 2403(a) (emphasis
3 added). Likewise, California Penal Code, Section 3041(b) provides that
4 the Board shall set a release date *unless* it determines that the
5 prisoner is not suitable for parole. Cal. Penal Code § 3041(b)
6 (emphasis added); see also In re Dannenberg, 34 Cal.4th 1061, 1098-99
7 (Cal. 2005) (confirming that the Board need not set a base term if the
8 prisoner is deemed unsuitable for parole). Here, the Board made the
9 determination that Petitioner is not suitable for parole. Lodgment 2
10 at 93. Thus, the Board's decision to not set a uniform term of
11 imprisonment did not violate California law. Accordingly, this Court
12 **RECOMMENDS** that Petitioner's second claim for relief be **DENIED**.

13 **C. Third Claim for Relief: Ineffective Assistance of Counsel**

14 Petitioner alleges that his Sixth Amendment right to effective
15 assistance of counsel was denied by his attorney's prejudicial
16 performance at the hearing. Petition at 43-45. Because the Los Angeles
17 County Superior Court did not review the merits of this claim, the Court
18 reviews the issue *de novo*. See Lodgment 3; Pirtle, 313 F.3d at 1167
19 ("[W]hen it is clear that a state court has not reached the merits of
20 a properly raised issue, we must review it *de novo*.").

21 Petitioner is not entitled to habeas relief on this claim because
22 the United States Supreme Court has not "clearly established" that the
23 Sixth Amendment right to counsel applies to parole hearings, or that due
24 process requires inmates to be represented by counsel at such hearings.
25 See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("[T]he right to
26 appointed counsel extends to the first appeal of right, and no
27 further."); Greenholtz, 442 U.S. at 16 (due process is satisfied if the
28 opportunity to be heard is provided and the inmate is given notice of

1 the reasons for denial of parole); Dorado v. Kerr, 454 F.2d 892, 896
2 (9th Cir. 1972) (due process does not entitle California state prisoners
3 to counsel at parole hearings). Although the California Penal Code
4 provides that a "prisoner shall be entitled to be represented by
5 counsel" at an initial parole consideration hearing, see Cal. Penal Code
6 § 3041.7, the "denial of state-created procedural rights is not
7 cognizable on habeas corpus review unless there is a deprivation of a
8 substantive right protected by the Constitution." Bonin v. Calderon,
9 59 F.3d 815, 842 (9th Cir. 1995). Therefore, despite Petitioner's
10 statutory right, his ineffective assistance of counsel claim cannot
11 provide the basis for habeas relief. Bonin, 59 F.3d at 842; see also
12 Leque v. Brown, 2007 WL 4219392 at *2 (N.D. Cal. 2007).

13 Even if Petitioner had a constitutionally guaranteed right to
14 counsel at his parole hearing, the Court finds that his claim fails on
15 the merits. For ineffective assistance of counsel to provide a basis
16 for habeas relief, Petitioner must satisfy a two-prong test. First, he
17 must show that counsel's performance was deficient. Strickland v.
18 Washington, 466 U.S. 668, 687 (1984). "This requires a showing that
19 counsel made errors so serious that counsel was not functioning as the
20 'counsel' guaranteed the defendant by the Sixth Amendment." Id. The
21 "[r]eview of counsel's conduct is highly deferential and there is a
22 strong presumption that counsel's conduct fell within the wide range of
23 reasonable representation." Hensley v. Crist, 67 F.3d 181, 184 (9th
24 Cir. 1995); Strickland, 466 U.S. at 689. Second, Petitioner must
25 establish counsel's deficient performance prejudiced the defense.
26 Strickland, 466 U.S. at 687. This requires a showing that counsel's
27 errors were so serious they deprived Petitioner "of a fair trial, a
28 trial whose result is reliable." Id. To satisfy the test's second

1 prong, Petitioner must show a reasonable probability that the result of
2 the proceeding would have been different but for the error. Williams,
3 529 U.S. at 406; Strickland, 466 U.S. at 694.

4 Petitioner contends that counsel failed to (1) set goals for the
5 suitability hearing, (2) prepare a memorandum to introduce the points
6 in his favor, (3) address prior suitability hearings, (4) make an
7 opening statement, and (5) make a closing statement. Petition at 44-45.
8 Because of these alleged failures, Petitioner argues that counsel's
9 performance "fell below an objective standard of reasonableness" and
10 resulted in an unreliable and "fundamentally unfair" parole hearing.
11 Id.

12 The Court has reviewed the record in its entirety and finds that
13 counsel's performance was reasonable under the circumstances. See
14 Strickland, 466 U.S. at 688 (there are no "specific guidelines" or
15 requirements so long as an attorney's performance falls within an
16 "objective standard of reasonableness"). The constitutional right to
17 counsel does not require counsel to articulate his goals or submit a
18 memorandum of points prior to a parole hearing. Id. Furthermore,
19 counsel's alleged failure to address prior suitability hearings is
20 completely immaterial in this case as the hearing at issue was
21 Petitioner's first parole consideration hearing. Lodgment 2 at 1.
22 While the failure to make an opening or closing statement may fall below
23 an objective standard of reasonableness in other situations, counsel's
24 performance here was entirely reasonable. At the outset of the hearing,
25 the Presiding Commissioner and Petitioner's attorney discussed whether
26 an opening statement was necessary. Id. at 11-12. The record reflects
27 that opening statements are not customary and that Petitioner's attorney
28 did not think there were any unusual facts or circumstances in this case

1 that would warrant an opening statement. Id. Contrary to Petitioner's
2 allegations, counsel delivered a thorough closing statement. Lodgment
3 2 at 84-87. Although Petitioner may take issue with counsel's strategy
4 in hindsight, the Court concludes that counsel's performance falls well
5 within "the wide range of reasonable professional assistance." See
6 Strickland, 466 U.S. at 689.

7 Even assuming that trial counsel's performance could be considered
8 deficient, Petitioner fails to demonstrate that absent counsel's
9 performance, there is a reasonable probability that he would have been
10 granted parole. See Strickland, 466 U.S. at 696. Given the strength
11 of the evidence weighing against parole in this case as previously
12 discussed, the Court cannot find that counsel's actions deprived
13 Petitioner of a fair hearing. Accordingly, the Court concludes that
14 Petitioner fails to meet the Strickland ineffective assistance of
15 counsel standard. Thus, the Court **RECOMMENDS** that Petitioner's third
16 ground for relief be **DENIED**.

17 **4. Evidentiary Hearing**

18 Finally, Petitioner requests an evidentiary hearing in his
19 Traverse, but fails to specify the nature of the facts he seeks to
20 present or their relevance to his claims. Traverse at 4. An
21 "evidentiary hearing is not required on issues than can be resolved by
22 reference to the state record." Totten v. Merkle, 137 F.3d 1172, 1176
23 (9th Cir. 1998)(citing United States v. Birtle, 792 F.2d 846, 849 (9th
24 Cir. 1986) (an evidentiary hearing is not required "if the 'motion and
25 the files and the records of the case conclusively show that Petitioner
26 is entitled to no relief'")). Here, there are no new relevant facts to
27 discover and Petitioner has not proffered any. Accordingly, the Court
28 finds that an evidentiary hearing is not warranted in this case. Thus,

1 Petitioner's request is **DENIED**.

2 **CONCLUSION AND RECOMMENDATION**

3 For the reasons set forth above, this Court **RECOMMENDS** that
4 Petitioner's Petition for Writ of Habeas Corpus be **DENIED**.

5 **IT IS HEREBY ORDERED** that any written objections to this Report
6 must be filed with the Court and served on all parties **no later than**
7 **September 4, 2009**. The document should be captioned "Objections to
8 Report and Recommendation."

9 **IT IS FURTHER ORDERED** that any reply to the objections shall be
10 filed with the Court and served on all parties **no later than**
11 **September 25, 2009**. The parties are advised that failure to file
12 objections within the specified time may waive the right to raise
13 those objections on appeal of the Court's order. See Turner v.
14 Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

15 **IT IS SO ORDERED.**

16
17 DATED: August 14, 2009

18 

19 BARBARA L. MAJOR
20 United States Magistrate Judge