Original

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Keith Robert Lugo,	)
Petitioner,	)
v.	)
	)
R. Fisher, Warden at Valley State Prison,	)
Respondent.	)
	)

PETITION FOR WRIT OF CERTIORARI

From the California State Supreme Court

Keith Robert Lugo
CDCR # E91649 Fb; A3-228L
P.O. Box 96
Valley State Prison
Chowchilla, CA 93610

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Board of Prison Terms Violated Senate Bill 261 for Failing to Apply the Legally Correct Standard of Analysis; and, in Doing so, Failed to Give the Requirement of 'Great Weight to the Diminished Culpability of Juveniles as Compared to Adults as a Youth Offender for Release on Parole Mandated by the Bill, in Violation of the Due Process Clauses Protected Under the State and Federal Constitutions, is an Important Constitutional Issue Requiring Resolution by This Court to Determine a Matrix Differentiating the Standard of Proof for Unsuitability Between a Juvenile and Adult.

2. Whether the Board of Prison Terms Violated the Administrative Procedures Act (APA) Under California Government Code Section 11340.5 In the Instant Case, in Violation of Equal Protection and Due Process as Guaranteed by the State and Federal Constitution, for Applying Criteria not Properly Adopted as a Regulation is a Question of Constitutional Magnitude Worthy of Resolution by this Highest Court?

3. Whether the Board Failed to Meet the Minimum Burden of Proof Required in the Rule of '*Some Evidence*' Under the Provisions Articulated in the Holding of *In re Lawrence* (2008) 44 Cal.4th 1181 when Balanced Against the Legal Criteria of Intent Legislated in Senate Bill 261.

4. Whether Entitlement of Counsel under Penal Code Section 3041.2 Triggers The Constitutional Right to Effective Assistance of Counsel Guaranteed by The Sixth Amendment to the United States Constitution is a Question of Constitutional Magnitude Requiring Resolution by this Court?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT FOR THE UNITED STATES OF AMERICA

Petitioner, Keith Robert Lugo,[1] In Persona Pro Per, respectfully prays that a writ of certiorari issue to review the judgment of the State Supreme Court for the State of California entered on 6/27/18.

OPINION BELOW

On 6/27/18, Case No. S247688 , the Supreme Court for the State of California entered its decision to deny petitioner's Petition for Writ of Habeas Corpus filed with that court pursuant to Penal Code Section 1473. A copy of that decision is attached hereto as Appendix 'C'.

On January 5, 2018, Petitioner, pursuant to the provisions under P.C. Section 1473, submitted a Petition for Writ of Habeas Corpus to the Court of Appeal, Fourth Appellate District, Case No. D073308. On January 12, 2018, that Court denied the petition.[2] A copy of that

[1]There are no parties to the proceedings other than those named in the caption of the petition.

[2]There are no parties to the proceedings other than those named in the caption of the petition.

decision is attached hereto as Appendix 'A', respectively. On 11/6/17, the Superior Court for the County of San Diego, Case. No. HC16986 denied the petition. A copy of that decision is attached hereto as Appendix 'B'.

JURISDICTION

On 6/27/18, Case No. S247688, the Supreme Court for the State of California denied petitioner's Original Petition for Writ of Habeas Corpus, pursuant to the provisions under Penal Code Section 1473. On January 1, 2018, Case No. D073308, Petitioner submitted a Petition for Writ of Review with the State Supreme Court. On February 8, 2018, that Court stated that Petitioner had exceeded the time restraints permitted by the Rules of Court. On November 22, 2018, Petitioner filed a Petitioner for Writ of Habeas Corpus in the Court of Appeals, Case No. HC16986. On January 12, 2018, that Court of Appeals denied the Petition. On October 10, 2017, Case Number HC16986; CR110323, Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court for the County of San Diego. On November 6, 2017, that Court denied the petition. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1). This Petition is filed in a timely fashion as it is submitted within ninety days of the date of denial of the Petition for Writ of Habeas Corpus as provided in Rule 13(3), Rules of the Supreme Court of the United States.

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be ... deprived of life, liberty or property without due process of law...

The Ninth Amendment to the United States Constitution provides in pertinent part as follows:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> No State shall...deprive any person of life, liberty...without due process of law; nor deny any person within the jurisdiction the equal protection of the laws.

Article III to the United States Constitution provides in pertinent part as follows:

> Clause 1—The Judges, both of the supreme and inferior Courts, shall hold their Offices in good Behavior.

Clause 2—The judicial power shall extend to all Cases...arising under this Constitution...

Article VI to the United State Constitution provides in pertinent part as follows:

This Constitution...shall be the supreme Law of the Land...

The provisions of Penal Code Section 1473, in effect at the time that petitioner filed his petition for writ of habeas corpus in the State Supreme Court on 3/19/18, are set forth in full in Appendix "D" to this petition. 3/19/18

The provisions of Title 28, Section 2254, in effect at the time that petitioner filed his petition for writ of habeas corpus in the State Supreme Court on 3/19/18, are set forth in full in Appendix "E" to this petition.

STATEMENT OF THE CASE

On March 28, 2017, the Board of Prison Terms conducted petitioner's Initial Parole Hearing under Senate Bill 261 (a youth offender hearing). The Board denied petitioner a parole date on this same day. *(See* Exhibit Electronically filed and lodged with the Court of Appeals, Fourth and Fifth District.).

All right. Any additional documents you'd like to submit? Yes, um, all letters- - we do have letters in terms of letter of support. Uh, in the 10-day packet Mr. Lugo received additional letters that are not in our packet, so I would like to submit those. And, um, this packet is, uh, 20 pages exactly and it includes his write-ups – book report and, um, letters of remorse. And this, I'd like the Panel to consider that he put together, I think his work as an author and the books that were published. [P.H.T. 13].[1]

We way over 40 pages. If I take it then I'm giving – then I'm um – Yeah, leave it there. I can't - - I can't - - if I - - take it then what I'm doing is I'm required to read it and if I read it then - - [P.H.T. 13]. But we may take a gander at hit.

Mr. Lugo, we can only take 20 pages. [P.H.T. 14]

Competing in body building at a young age? Is that true. [P.H.T. 16]. Yes, I began to compete at 15 years old. Use steroids? Yes, steroids. Dr. Kerr and Dr. Walsack started prescribing them to me at 15. [P.H.T. 14].

Did you have a drug problem? I tried some. I tried cocaine. Did you ever use meth? No. [P.H.T. 21-22].

Ever use violence to protect your drug business other than the Life Crime? No. Never? No, never. [P.H.T. 22-23].

So why else were you selling methamphetamine other than to make money? [P.H.T. 23].

Um, just self - - self-image, act like a big shot, act like a reckless stupid kid that didn't know about anything and was just making money, like I was some type of mobster/gangster type of guy. My father always sat there and told me money is power, power is security, and security is happiness. Eventually I found out that that was a complete lie.

So your brother - - your brother turned you in so he could get a lighter sentence? Yes, he ended up serving no time. How do you feel about that? I moved past that a long time ago. [P.H.T. 26].

Why did you murder Timothy Ridgewell and Robert Pharoah? Anger. I got – we were sitting there on the night and everything else – they were -- I was – they were running up steps (should be **debts).** That's why I was under indictment to pressure [sic] (should read the **weight of so much pressure.)** Again, I was sitting trying to talk to 'em and then Robby sits there and goes, "What's your family gonna do when you're gone," and I got mad and shot him. [P.H.T. 27]. After my arrest everybody started getting real paranoid, pointing fingers and everybody was telling on everybody... I was like "It's over." They owed a lot of people a lot of money because they were taking fronts. Everything was shut down completely. There were no drugs. They kept taking fronts from people with the money, but they had no drugs. Everything was Coming back to me and I paid off a lot of people to try to keep the peace because I - - I was just trying to minimize the damage. He's a 20 year old – [P.H.T. 29]. I was 21 years old. I didn't know how to deal with it. I didn't know where to turn. I didn't know where to go [P.H.T. 29].

And I - - even my brother, I know how that sounds, cause I made a choice and I was hoping I could somehow fix everything or do something but I was in so - - in so far over my head and there was no out. There was - - there was nothing. Like there was no one I could talk to and everything else about that and I was hoping it was just gonna go away and that's the thought of a kid. That's - - I didn't even know how I got where I was . It was just like - - **Well, you weren't really a kid.** [P.H.T. 75]

Have you been to a rehabilitative class while you've been in prison? No, most of the times I've been on lockdown, just the types of prisons and things. [P.H.T. 40]. What's your job? It's (unintelligible) tutor. I work in the Mental Health Department and I sit there and talk to guys and help em through their troubles and problems in tandem with their clinicians and then I also teach classes for literacy so they can pre-cert and get their GED's. I, on a more personal note, is where I – I get books and I read. I do glean a lot from the books. They seem to be more helpful and it also takes me away from the potential problems that seems to fall out of the people in the groups. [P.H.T. 41]. You said something like you didn't want to go to the classes because you thought these guys were just hypocrites. "I sit and listen and everyone seems disingenuous. It's all an angle. I've had enough ugliness in my life. [P.H.T. 41].
I started to get involved in it when I went SNY. I went to Ironwood and there I was – I got involved in that and I became the Appeals Clerk Coordinator for Medical and Custody. I was the Pro-tem Secretary for the Lifers Group. I get more from books, by talking to and seeing some of the other guys when I talk to them outside (unintelligible) cause a lot of them will come

[1]"P.H.T." refers to Parole Hearing Transcript, followed by page number.

and talk to me and it's just - - it seems like there's more purity in reading the books than actually - - rather than just an interpretation of what they want to do and everything. I read em and a lot of them apply [P.H.T. 42-43].

So it's not just anger. [P.H.T. 50] No, it's a combination of anger, that just - - the - - the pressure - - I couldn't - - I could sit there at my age, I couldn't handle it. I was always expected to handle everything. Solve all the problems - - all family problems - - all their problems. [P.H.T. 51.] It was get some cash and get out and it didn't work out that way. Well, how long were you in it? A year and a half, maybe two. And you were making lots of money? Yes. So it wasn't just get in and get out. [P.H.T. 57]. It wasn't so easy to get out. [P.H.T. 58]. You just angry because you felt they were threatening your family, right? Well, like that was like what it came down to. It was the straw that broke the camel's back. The likelihood of this was very real. [P.H.T. 60]. Because it came down I would always clean up their messes and then I sit there and he had and he's gonna say that to me - - it came down to after everything I had tried to sit there and do and then throw that threat at me. It's like you guys keep making a mess and everything else. It's like you have basically the gall to threaten me and everything else when I'm just trying to sit there and - - [P.H.T. 60]. I was never gonna shoot anybody. I never had any intention to shoot anybody. Tim knew I would never hurt him. Phil knew I'd never hurt him. I never hurt my brother. [P.H.T. 62]. All I wanted him to do was give me the information so I could try to fix it.

My goal was to get to Mule Creek in 93, but I never - - I couldn't get there, and then I went to High Desert. [P.H.T. 69] and that was pretty much just one bout of violence after another, bounced from prison to prison...as a first term prisoner, now over 30 years ago.

All this time I always thought my childhood was normal. It was anything but...I carried on because of that I've been in denial thing I could control everything, trying to take responsibility for everything, to do something. [P.H.T. 73].

I guess I'm curious why you're showing emotion right now. [P.H.T. 72]. I can't fix this. I wish I could.

And I - - even my brother, I know how that sounds, cause I made a choice and I was hoping I could somehow fix everything or do something but I was in so - - in so far over my head and there was no out. There was - - there was nothing. Like there was no one I could talk to and everything else about that and I was hoping it was just gonna go away and that's the thought of a kind. That's - - I didn't even know how I got where I was It was just like. Well, you weren't really a kid.[P.H.T. 75]. But that's like when I first got mixed up in this stuff at 18 or whatever it just - - everything just snowballed so fast. I'm sorry. Do you know how to diffuse that anger today. I just - - just don't think or even get comfortable and as I sit there even with things and everything else I sit there and say what does it do to get angry? There's no control. Things are just what they are. You just accept it whether it's good or bad, it's not - - just doesn't do good to get angry. It's a choice. There's no control over it and you just accept it for what it is and you work through it. [P.H.T. 76]. The reason why my disciplinary history is as clean as it is because I stood by my convictions that I was not going to hurt anybody again. [P.H.T. 87].

I sit there and go to the bookstore where the foundation of all it comes in the first place, and to where all the classes are taught from the books so I read all the books themselves. You don't think that, um, how - - how is the educational system set up in the United States? They just give you a book and say go read the book? Don't come to class. Don't interact with your

other classmates. Don't - - don't try to listen to lectures. Here's the book, right? Go pick up what you can get. I hope it works out for ya. [P.H.T. 96]. I mean we just don't give people books and say read it, oh, and after you read the book just turn the book in, we're gonna give you your diploma, right? Yeah, K through 12, that's basically - -.

Yeah, and college.

the foundation.

Ms. Akpenyi: Mr. Lugo accepts responsibility, uh, for the life crime and is genuinely remorseful. I'm gonna refer to the psych reports, the current one and the only one on file, on page 11, uh, the last paragraph and I quote, "Uh, he accepted responsibility for his actions and was careful when describing the murder. He said that I'll never forgive myself." And you go to page 12, of the psych report, second paragraph, I quote, "Mr. Lugo presented as remorseful. He was tearful discussing, uh, his role in his victim's murders and did not blame factors outside of his character and thinking deficits. He's emotionally torn apart and he can empathize with what the families and the magnificent - - the magnitude of loss. [P.H.T. 101].

It's not uncommon for a panel to ask an inmate, particularly the ones that are housed at an institution where there are not self help available or they've been, uh, in SHU for years. At that time book reports are acceptable. So I hope this Panel will at least look at the book reports and concentrate on his efforts. He hasn't totally given up on self help books. When possible and if, um, doing it as a group doesn't work for an inmate, um, the Panel will recommend self help books and he hasn't come here without any of those.

REASONS FOR GRANTING THE WRIT

I.

Whether the Board of Prison Terms Violated Senate Bill 261 for Failing to Give the Legal Requirement of 'Great Weight to the Diminished Culpability of Juveniles' as Compared to Adults as announced in the decisions handed down by the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48; and *Roper v. Simmons*, 543 U.S. 551, 569 (2005), is an Important Constitutional Question Requiring Resolution by This Court to Determine a Matrix Differentiating the Standard of Proof for Unsuitability Between a Juvenile and Adult?

Although the Court claimed the Board noted some factors tending to show Lugo was suitable for parole due to his age at the time of the murder(s) (21 years) diminished his culpability, the Court relied that other factors outweighed the age factor. However, neither the Court nor the Board noted that these supposed factors also occurred when Lugo was a juvenile. The alleged substance abuse of steroids transpired primarily under a doctor's direct supervision when Lugo was 15 years old, and he has ingested nothing nefarious since late 1987, excluding

medications for high blood pressure, acid reflux disease, chronic nerve pain in the back/shoulders, and headaches, all of which were caused by the use of steroids decades ago.

Additionally, the Board did ask the question as to whether Lugo knew what causative factors were, and he replied, "Yes." The Board never asked a follow-up question directed at offering a narrative. Had the Board been less cryptic and furnished Lugo a Consultation Hearing, then Lugo would have known that it would not be deemed aggressive to assert an unsolicited dialogue and would have gladly elaborated on the details.

The Board in its reduction in years for a denial discounted the 15-year denial in that such a lengthy denial did not apply to Petitioner's case. The Board then dismissed the 10-year denial based on no remarkable disciplinary history. Petitioner's education and obvious marketable skills removed the 7-year denial. The Board then wobbled between 7 years 5 years and 3 years, stating that had Petitioner had one group they would have settled for the 3-year denial. Instead, the Board settled on a 5-year denial, the highest term legally allowable under the adult standard in this particular case. The missing element in this calculus is that the Board did not mention the juvenile standard and is no evidence of application to show that the Board considered the standard under Senate Bill 261 for which under Petitioner fell. Strictly speaking, the legalese math utilized by the Board fails to add up.

Penal Code section 3051, subdivision (f) (1), directs that, "In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the Board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

Penal Code section 4801, subdivisions (c), further directs that, "When a prisoner committed his or her controlling offense as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, **shall** give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

When enacting Penal Code sections 3051, subdivision (f) (1) and 4801 (c), the Legislature specifically found and declared that "as stated by the United States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407[1], 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control.' The Legislature recognized that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or

she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gain maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262, and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48 ,and *Miller v. Alabama, supra.* The Fifth and Fourteenth Amendments to the United States Constitution, as guaranteed in the Ninth Amendment of the Bill of Rights not to be construed to deny or disparage others retained by the people.

Although nothing in Senate Bill 261 is intended to undermine the California Supreme Court holding in *In re Lawrence* (2008) 44 Cal.4th 1181, and subsequent cases, it is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established...which mandates that the courts apply the intent of lawmakers...thus establishing a firm balance of power in the three branches of government in accordance to the 'Separation of Powers Doctrine.' (*cf.* Article III Courts)[2].

In re Roderick (2007) 154 Cal.App. 4th 242, the Court rejected the Board's view, stating, *inter alia,* "Certainly, Roderick's responses were unsophisticated and lacked analytical depth, but is his inability to articulate a more insightful explanation as to why he committed multiple crimes some evidence that Roderick poses a danger to public safety?"(cf. *In re Macias,* case no. H033605, decided on November 9, 2010.)[3]. As in the case of Macias, Lugo openly voiced and accepted full responsibility for his monstrous crimes, did not attempt to minimize or place blame on anyone but himself. He demonstrated immense remorse, a deep contrition for all his criminal acts throughout the hearing, so profound that he became emotionally distraught during questioning. These uncontested facts are reflected in the psychologist's Risk Assessment.

Excluding the area in time when Lugo's mother drove him to a sport's doctor for the purpose of getting prescribed steroids, Lugo's criminal history as alleged by the government is not stretched nearly as long as it would lead the Courts to believe—ranging from 19 years old to 21 years old, respectively. He has led a virtually spotless crime-free life since 1987, which departmental documentation supports.

The Supreme Court in *Graham v. Florida,* 560 U.S. at ___ (slip op., at 17).5 reasoned that those findings - - of transient rashness, proclivity for risk, and inability to assess consequences – both lessened the child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "deficiencies will be reformed." Id., at__ (slip op., at 18) (*quoting Roper v. Simmons* (2005) 543 U.S. at page 570,) Because "'[t]he heart of the retribution rationale' relates to an offender's blameworthiness," the case for retribution is not as strong with a minor as with an adult." To the contrary, the Court further noted, "'[o]ur history is

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[1]*Miller v. Alabama; Graham v. Florida* are cases governed as *stare decisis* law under the Federal Constitution. *(Article VI , section 2)*

[2]*Article III,sections 1 & 2).*

replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." (*Quoting Eddings v. Oklahoma,* 455 U.S., at 115-116, and so the Court in *Harmelin* recognized) "death is different," children are different too.

Petitioner poses to this Court and prays that it will take Judicial notice that the Board and its not so wild belief that it has unchecked powers to capriciously deny a long term 'Lifer' prisoners parole—who has proved a model prisoner for decades and is no longer a threat for future dangerousness—in order to maintain a ridiculously high prison population to increase job security and secure the strength of the Prison Guard Union (CCPOA) for the purpose of keeping financial influence over the political machine here in California that houses prisoners by the tens of thousands. Commissioner Peck's statements that he was a prison captain at Calipatria State Prison decades ago and his apparent bitterness toward prisoners in general should give pause for this Court to wonder as to whether this alleged fair and impartial alter ego of the sovereign was functioning as a member of the Board or an angry prison guard from an extremely violent prison from days past.

The Board's decision is not only void of any real evidence to deny parole, but makes the juvenile standard of "Great Weight" nothing more than a sham.

Even Lugo's attempt to prove himself worthy of a second chance to prove suitability in a Petition to Advance a parole hearing per suggestions made by the commissioners was denied with evident mockery and ridicule by the Board. It should be noted that all self-help groups are laced with substance abuse issues relevant to matters included within the curriculum.

In the instant case before this Court, the record clearly indicates that not only did the Board voice unequivocally its state of mind that petitioner was not a kid at the time of these horrible crimes, but also that the members never had any intention of following the rule of law as legislated by Congress or respecting petitioner's Due Process and Equal Protection Rights under the law.

II.

Whether the Board of Prison Terms Violated the Administrative Procedures Act (APA) Under California Government Code Section 11340.5 in the Instant Case, in Violation of Equal Protection and Due Process as Guaranteed by the State and Federal Constitution, for Applying Criteria not Properly Adopted as a Regulation is a Question of Constitutional Magnitude Worthy of Resolution by this Highest Court?

California Penal Code Section 4801(c) requires that when considering parole for a prisoner who committed his life crime before the age of 23, "the board...shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark feature of youth,

and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."

Nevertheless, despite mandatory language utilized by the legislature in enacting this juvenile standard, nothing in current statutes or decisional law provides a true definition or a litmus test as to its undefined application of "Great Weight", the concept of "Diminished Capacity", the "Hallmark of Youth", or Subsequent Growth and Increased Maturity." (*see Graham v. Florida* (2010) 130 S.Ct. 2011; with *Miller v. Alabama* (2012) 132 S.Ct. 2455; *People v. Caballero* (2012) 55 Cal.4th 262; *and People v. Franklin* (2016) 63 Cal.4th 261.)

Therefore, if the Board has applied this elusive criteria with no actual definition in law, the question facing this Court is whether the Board for the State of California, with the silent blessing of the governor, has violated the Administrative Procedures Act. (*See* California Government Code Section 11340.5, which states in pertinent part: ("No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in section 11351.6, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this Chapter.").

Clearly, after reading the record of the petitioner's hearing, this is exactly the illegal act the Board applied to Petitioner to deny him liberty from prison. Nothing in the record contradicts the violation of these assertions.

Thusly, if this agency has violated the (APA) to deny a prisoner a liberty interest, i.e. parole from prison, does this not constitute a violation of both State and Federal Constitutional Rights to Due Process and Equal Protection? (*U.S. States Constitutional Amendments 5,9, 14).*

III.

Whether the Board Failed to Meet the Minimum Burden of Proof Required in The Rule of *'Some Evidence'* Under the Provisions Articulated in the Holding of *In re Lawrence* (2008) 44 Cal.4th 1181, when Balanced Against the Legal Criteria of Intent Legislated in *Senate Bill 261*, is an Important Constitutional Question of Law Requiring Resolution by This Court to Determine a Quantifiable Matrix That Differentiates Minors from Adults?

Petitioner asserts that the Board's reasoning that led to its decision to deny petitioner a parole date is fundamentally flawed and completely lacks empirical evidence to support its unreasonable conclusion of 'future dangerousness'. Nothing in the record or petitioner's history of long incarceration, which spans thirty years—well over thirty years from when the crime(s) occurred—operates to show a proclivity toward current or future lawlessness, let alone

dangerousness. The record clearly demonstrates the exact opposite; specifically that he is not currently and will not in the near or distant future pose a threat to public safety. (*In re Lawrence*

The Board's interpretation of the evidence must be "reasonable" in the sense that it meets two imperatives: it must reflect "due consideration" of the relevant statutory factors and, also, it must not be "arbitrary", meaning that its analysis must be supported by at least a "modicum of evidence, not mere guesswork." (Id. At pp. 212, 219, 221). If the court concludes that the Board's decision violates due process, the court must grant the petition and remand the matter to the Board for further proceedings pursuant to *In re Prather* (2010) 50 Cal.4th 238, to determine whether or not petitioner is suitable for parole.

The Board failed to consider the heightened level of stress Petitioner was under, in accordance to statutory factors. The Board's stance that he knew he was going to prison served as some sort of panacea completely misses the point of what petitioner testified to several times during the course of the hearing. His stress levels at the time exceeded the capabilities of any adult, let alone juvenile, to handle. That's why I was under so much pressure. [P.H.T. 27]. I didn't know how to deal with it. I didn't know where to turn. I didn't know where to go [P.H.T. 29]. No, it's a combination of anger, that just - - the - - pressure - - I couldn't - - I could sit there at my age, I couldn't handle it. I was always expected to handle everything. Solve all the problems - - all the family problems - - all their problems. [P.H.T. 51.] Well, like that was like what it came down to. It was the straw that broke the camel's back. [P.H.T. 60.]. Under all the mounting pressure that Petitioner had carried for months, the threat against his family had upturned the emotional cart.

Failure to Consider Petitioner's Parental Abuse when a Child:

The Board failed to consider and weigh the terrible physical, emotional, mental, and verbal abuse suffered by petitioner. *In re Lawrence, supra,* 44 Cal.4th, 1181 (2008). *In re Young* 204 Cal.App.4th 288 (2012); *Prather, supra,* 50 cal.4th at pp. 251, 255. Specifically, the Board and the Court failed to recognize that the Psychologist did aver that Petitioner demonstrated tearful remorse, possessed deep contrition, and took full responsibility. (*See In re Lawrence,* stating in pertinent part, "This is insight!"). (Compare *In re Macias, supra,*Case No. H033605, decided on

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[3](See In re Roderick (2007) 154 Cal.App. 4th at pg. 277 [although the record indicated the petitioner had a long criminal history, court required the Board to hold a new hearing, noting inmate's age and "the immutability of [his] past criminal history and its diminishing predictive value for future conduct"]; In re Elkins (2006) 144 Cal.App.4th at pg. 498-499 [recognizing that the predictive value of the commitment offense may be very questionable after a long period of time, and concluding that "[g]iven the lapse of 26 years and the exemplary rehabilitative gains made by the petitioner over that time, continued reliance on these aggravating facts of the crime no longer amounts to 'some evidence' supporting denial of parole"]; In re Lee (2006) 143 Cal.App.4th at pg. 1412 [court concluded that the petitioner's crimes had "little, if any, predictive value for future criminality," because the crimes committed 20 years ago had "lost much of their usefulness in predicting the likelihood of future offenses:]

November 9, 2010.). So distraught did Lugo become that the Board member questioned the reason why he was so emotional.

In addition, the Board failed to interpolate the necessary weight of petitioner being a Youth Offender (also a first term offender) as mandated by Senate Bill 261 and articulated by The Supreme Court in *Graham v. Florida*, 560 U.S. at ___ (slip op., at 17)(2010) 560 U.S. 48.

Perhaps the most difficult question facing this Court is a fair and just calculus that harmonizes the Hallmark Standard of Youth as legislated by Congress and the 'some evidence' rule announced in Lawrence. If the 'some evidence' remains fixed by the adult standard, does that not render the language utilized by congressional intent as meaningless; thereby treating those legally deemed children the same as an adult?

In order to preserve time and scarce judicial resources, petitioner respectfully request that this Court incorporate the arguments in ground one, *supra.*

This Court should grant Review to determine and clarify the intent and application of Senate Bill 261, in order to define and harmonize this law with preexisting precedent handed down by this Court and the lower Courts subject to its judicial mandates. *Graham v. Florida* (2010) 560 U.S. 48 ,and *Miller v. Alabama, supra.* The Fifth and Fourteenth Amendments to the United States Constitution, as guaranteed in the Ninth Amendment of the Bill of Rights not to be construed to deny or disparage others retained by the people.

IV.

Whether Entitlement of Counsel under Penal Code Section 3041.2 Triggers the Constitutional Right to Effective Assistance of Counsel Guaranteed by The Sixth Amendment to the United States Constitution is a Question of Constitutional Magnitude Requiring Resolution by this Court?

The purpose of the Constitutional Right to Counsel must require that counsel to be informed enough to provide not only accurate advice but actual assistance. Otherwise, the Right is as meaningless as the erroneous advice provided. (*See* Pen. Code sec. 3041.7). It stands to reason that the first thing Counsel would review is what criteria, if anything, the Board had suggested/advised during a consultation hearing to check and ascertain as to whether his or her client had done as instructed to show compliance and suitability. The question facing this whether a statutory right to counsel triggers the right to effective assistance of said counsel under the Sixth Amendment to the U.S. Constitution. If so, then the question must stretch as to whether counsel's failure to familiarize herself with the pertinent facts fells well below an objective standard of reasonableness that the Right protects. Petitioner asserts the prejudice involved is manifest when counsel completely abandoned Petitioner, leaving him left to flounder without any experience or guidance as to how the Board operates. Had Petitioner known that he was free to offer an open-ended narrative without first being asked a specific question pertaining to articulated reasons for suitability, the outcome would have been vastly different. (*Strickland v. Washington*, 466 U.S. 668 (1986). The undeniable fact that petitioner's

counsel did not know that petitioner had never received a consultation hearing until after the parole hearing had already commenced clearly demonstrates counsel's failure to properly review and prepare for the hearing, constituting a complete breakdown in effective assistance of counsel. Nothing on record exists that can excuse such a blunder, other than indifference to the constitutional standard guaranteed to a parolee. Had counsel discovered such a structural error in the process, a viable argument could have been made that the Board was attempting to circumvent its duty to inform petitioner of expectations for suitability prior to a meaningful hearing. (Senate Bill 230, Penal Code Section 4, 3041.5(a) (3)).

Additionally, had counsel recognized that Petitioner never had a consultation, then perhaps counsel would have been equipped with the knowledge that Petitioner was entering unfamiliar territory and should not wait for the Board to ask specific questions about 'connecting the dots' of psychological traits/aspects/traumas beginning from youth until reaching maturity. Had Petitioner received proper instruction that he should take the initiative and speak directly on what he had learned from all the books he had read over the past thirty years without one of the members specifically asking (The Boards statement, "We want to know if you can learn," supports Petitioner's stance) the outcome would have been vastly different.

Petitioner asserts that the statutory authority entitling a prisoner to counsel requires much more than a warm body seated silent at the same table; otherwise, the legislative intent is meaningless as to competent counsel.

Additionally, the Courts have applied the Sixth Amendment to sentencing, declaring loudly that it is a critical stage of the proceedings. (*cf. Mempa v. Rhay* 386 U.S. 907 (1967); *with Gideon v. Wainwright*, 372 U.S. 335 (1963); *Townsend v. Burke* 334 U.S. 736 (1948).

Finally, petitioner poses to this Court that if sentencing in a critical stage to the proceedings would not a Parole Hearing not also be deemed as critical to a defendant attempting to prove his suitability?

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgments of the California Supreme Court and all lesser Courts within that Court's jurisdiction

I declare under the penalty of perjury under the laws of the United States and the State of California is true and correct to the best of my knowledge

Dated: 1st of August.

Respectfully submitted,

KEITH ROBERT LUGO
In Persona Pro Se