U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, case no. 22-55693, BRIAN T. HILL VS. JOSIE GASTELO, decided December 1, 2023

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN T. HILL,

Petitioner-Appellant,

v.

JOSIE GASTELO, Warden,

Respondent-Appellee.

No. 22-55693

D.C. No. 2:20-cv-11015-MWF-JC
Central District of California,
Los Angeles

ORDER

Before: PAEZ and HURWITZ, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Martinez v. Shinn*, 33 F.4th 1254, 1261 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 584 (2023); *Hayward v. Marshall*, 603 F.3d 546, 552-54 (9th Cir. 2010) (en banc) (habeas challenge to parole decision requires a certificate of appealability when underlying conviction and sentence issued from a

state court), *overruled on other grounds by Swarthout v. Cooke*, 562 U.S. 216 (2011).

Any pending motions are denied as moot.

DENIED.

U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, case no. 2:20-CV-11015-MWF-JC, BRIAN T. HILL VS. JOSIE GASTELO, decided April 11, 2022

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN T. HILL, Petitioner, v. JOSIE GASTELO, Respondent.	Case No. 2:20-cv-11015-MWF-JC ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus ("Petition") and accompanying documents, the parties' submissions in connection with the Motion to Dismiss the Petition ("Motion to Dismiss"), and all of the records herein, including the July 15, 2021 Report and Recommendation of United States Magistrate Judge ("Report and Recommendation"), and petitioner's objections thereto filed on September 20, 2021 ("Objections") (Docket No. 29). The Court has further made a *de novo* determination of those portions of the Report and Recommendation to which objection is made. The Court concurs with and accepts the findings, conclusions, and recommendations of the Magistrate Judge reflected in the Report and Recommendation, and overrules the Objections. Petitioner's Objections largely

reargue matters that the Report and Recommendation properly addresses and rejects. The Court nonetheless expressly addresses certain of petitioner's objections below.

Petitioner objects to the Magistrate Judge's determination that the Petition is untimely, arguing, *inter alia*, that gap tolling should apply to the 144-day delay between the August 20, 2019 denial of his Second State Petition by the California Court of Appeal and the January 12, 2020 filing of his Third State Petition in the California Supreme Court. (Objections at 4-6 (asserting that the gap is not 144 days but 132 days because it should be measured from August 23, 2019 – the date petitioner received the order denying the Second State Petition)).[1] Petitioner asserts that he had good cause for this delay and/or should be entitled to equitable tolling to render the Petition timely because petitioner was denied physical access to the prison law library when he was pursuing state habeas relief and he then was proceeding under an understanding that there are no "fixed, determinate deadlines" for filing state habeas petitions. (Objections at 5-6 (citing Robinson v. Lewis, 9 Cal. 5th 883, 890 (2020)). Ordinary prison limitations on a petitioner's access to the law library do not constitute extraordinary circumstances for equitable tolling or make it impossible to file a petition in a timely manner. See Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009) (observing that concluding otherwise would "permit the exception to swallow the rule" that equitable tolling is permissible only where a petitioner shows that "extraordinary circumstances" stood in the way of timely filing a petition); see also Poulain v. Gulick, 700 Fed. App'x 736, 737 (9th Cir. 2017) (reaffirming same). In any event, as the Magistrate Judge explained, even assuming petitioner is entitled to tolling sufficient to render the Petition

///

---

[1]It is not clear how petitioner has counted 132 days between August 23, 2019 and January 12, 2020, which by the Court's calculation is 141 days, but for the sake of argument the Court accepts petitioner's calculation.

timely, the Petition would not merit federal habeas relief as petitioner's claims are not cognizable herein. (Report and Recommendation at 9-15 (discussing same)).

As for the cognizability of petitioner's claims, petitioner devotes a significant portion of his objections to repeating his argument that he was not given notice or an opportunity to be heard to challenge the use of his psychological evaluation in assessing his parole suitability in asserted violation of Johnson v. Shaffer, 2013 WL 5934156, at *13-14 (E.D. Cal. Nov. 1, 2013), report and recommendation adopted, 2014 WL 1309289 (E.D. Cal. Mar. 31, 2014). (Objections at 10-15). The record belies this claim and this Court agrees with the reasoning in the Report and Recommendation disposing of this claim. (Report and Recommendation at 13-14 (discussing due process given in this case)).

Petitioner also objects to the Magistrate Judge's conclusion that his claims are not cognizable herein by alleging an equal protection violation as a "class of one." (Objections at 15-16). Petitioner's general allegations fall far short of stating a viable equal protection claim. The Fourteenth Amendment's equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tx. v. Cleburne Living Center ("Cleburne"), 473 U.S. 432, 439 (1985); Caswell v. Calderon, 363 F.3d 832, 837 (9th Cir. 2004). Equal protection does not require that things that are different in fact be treated the same in law. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981). To allege an equal protection violation, petitioner must allege he was similarly situated to others who received preferential treatment, Cleburne, 473 U.S. at 439; Fraley v. U.S. Bureau of Prisons, 1 F.3d 924, 926 (9th Cir. 1993); Kilgore v. City of South El Monte, 2021 WL 2852127, at *2 (9th Cir. July 8, 2021) (even for "class of one" equal protection claim, claimant must demonstrate differential treatment from others similarly situated) (citation omitted), and petitioner must also allege discriminatory motive or intent for that different treatment. McLean v. Crabtree, 173 F.3d 1176, 1185 (9th Cir. 1999), cert.

denied, 528 U.S. 1086 (2000); Thomas v. Borg, 159 F.3d 1147, 1150 (9th Cir. 1998), cert. denied, 526 U.S. 1055 (1999). Petitioner has not done so here.

IT IS THEREFORE ORDERED that the Motion to Dismiss is granted and the Petition and this action are dismissed.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: April 11, 2022

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN T. HILL,

Petitioner,

v.

JOSIE GASTELO,

Respondent.

Case No. 2:20-cv-11015-MWF-JC

JUDGMENT

Pursuant to this Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus and this action are dismissed.

IT IS SO ADJUDGED.

DATED: April 11, 2022

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, case no. 22-55693, BRIAN T. HILL VS. JOSIE GASTELO, decided February 1, 2024

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 1 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIAN T. HILL, Petitioner-Appellant, v. JOSIE GASTELO, Warden, Respondent-Appellee.	No. 22-55693 D.C. No. 2:20-cv-11015-MWF-JC Central District of California, Los Angeles ORDER

Before: WARDLAW and H.A. THOMAS, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 7).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, case no. 2:20-CV-11015-MWF-JC, BRIAN T. HILL VS. JOSIE GASTELO, decided June 3, 2022

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN T. HILL, Petitioner, v. JOSIE GASTELO, Respondent.	Case No. 2:20-cv-11015-MWF-JC ORDER (1) DENYING PETITIONER'S REQUEST TO ALTER OR AMEND JUDGMENT; AND (2) DENYING A CERTIFICATE OF APPEALABILITY [DOCKET NO. 35]

On December 3, 2020, petitioner Brian T. Hill, a state prisoner proceeding *pro se*, formally filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 with attachments and a separate memorandum of points and authorities (collectively, "Petition"). The Petition challenged a 2017 decision by the California Board of Parole Hearings to deny petitioner parole, raising two claims for relief: (1) petitioner was denied due process and a fair and impartial hearing (Ground One); and (2) petitioner's counsel at the hearing provided ineffective assistance (Ground Two). See Petition at CM/ECF Page ID## 5-14

On February 8, 2021, respondent filed a Motion to Dismiss the Petition ("Motion to Dismiss"), as untimely and for failure to state a cognizable claim for federal habeas relief. On March 11, 2021, petitioner filed an opposition to the Motion to Dismiss. Respondent did not file a reply.

On April 11, 2022, the Court issued an Order Accepting Findings, Conclusion, and Recommendations of United States Magistrate Judge and Judgement was entered dismissing the Petition and this action as time barred and for failure to state a cognizable claim. (Docket Nos. 30-31; see also Docket No. 23 (Magistrate Judge's Report and Recommendation)). The Court concurrently denied petitioner a certificate of appealability. (Docket No. 32).

On May 2, 2022, petitioner filed a request to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) ("Rule 59(e) Motion"), repeating many of the arguments petitioner previously raised and asserting that the Judgment is contrary to, or an unreasonable application of, clearly established Federal law, and was based on an unreasonable determination of the facts in light of the evidence, and that the Court abused its discretion. (Docket No. 35 (citing, *inter alia*, 28 U.S.C. § 2254(d)).

Relief under Rule 59(e) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted) (discussing reconsideration under Fed. R. Civ. P. 59(e)); see also Kaufmann v. Kijakazi, 32 F.4th 843, 850-51 (9th Cir. 2022) (same). District courts have "considerable discretion" when ruling on Rule 59(e) motions. See Turner v. Burlington Northern Santa Fe R.R. Co., 338 F.3d 1058, 1063 (9th Cir. 2003) (citations omitted). Absent "highly unusual circumstances" not present in this case, relief under Rule 59(e) is available only for: (1) a court's clear error of law or fact; (2) "newly discovered or previously unavailable evidence"; (3) a "manifestly unjust" decision; or (4) "an intervening change in the controlling law." Rishor v. Ferguson, 822 F.3d 482, 491-92 (9th Cir. 2016) (citation omitted), cert. denied, 137 S. Ct. 2213 (2017); McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam) (en banc) (citations omitted), cert. denied, 529 U.S. 1082 (2000). "Clear error occurs when the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." Smith v. Clark

County School Dist., 727 F.3d 950, 955 (9th Cir. 2013) (citation and quotation marks omitted). Here, no such clear error has occurred and the Court's dismissal of the action was not "manifestly unjust." Petitioner has offered no newly discovered or previously unavailable evidence or pointed to any intervening change in the controlling law. For the same reasons explained in the Court's April 11, 2022 Order Accepting Findings, Conclusions, and Recommendations of United States Magistrate Judge by which the Court granted the Motion to Dismiss and dismissed the Petition and this action, there is no basis to afford petitioner relief from the judgment under Rule 59(e).

In light of the foregoing, IT IS HEREBY ORDERED that the Rule 59(e) Motion is DENIED.

IT IS FURTHER ORDERED that a certificate of appealability is denied because petitioner has failed to make a substantial showing of the denial of a constitutional right and, under the circumstances, jurists of reason would not disagree with the Court's determinations herein.

IT IS SO ORDERED.

DATED: June 3, 2022

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF CALIFORNIA, case no. S260187, In re Brian T. Hill, decided September 23, 2022

APPENDIX F

S260187

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re BRIAN T. HILL on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence].)

CANTIL-SAKAUYE

Chief Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO, case no. B298888, In re Brian T. Hill, decided August 20, 2019

APPENDIX F

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re

BRIAN TERRELL HILL

on

Habeas Corpus.

B298888

(Super. Ct. No. BA050222 & BH011887)

ORDER

THE COURT:

The court has read and considered the petition for writ of habeas corpus filed July 8, 2019. The petition is denied.

LUI, P.J. CHAVEZ, J. HOFFSTADT, J.

LOS ANGELES COUNTY SUPERIOR COURT, case no. BH011887, In re Brian T. Hill, decided March 20, 2019

APPENDIX G

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date:	March 20, 2019				
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk	
	NONE	Bailiff	NONE	Reporter	

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

Nature of Proceedings: MEMORANDUM OF DECISION (Habeas Corpus)

IN CHAMBERS

Petition for Writ of Habeas Corpus by Petitioner Brian Terrell Hill, *pro se*. Respondent, the Secretary of the California Department of Corrections and Rehabilitation ("CDCR"), represented by Deputy Attorney General Jennifer Heinisch. Denied.

In 1993, Petitioner was convicted of first degree murder with the use of a firearm, attempted first degree murder with the use of a firearm, kidnapping for robbery, and kidnapping for ransom. The trial court sentenced Petitioner to an indeterminate term of 36 years to life in state prison. His minimum eligible parole date was November 15, 2017. Petitioner is currently serving his sentence at California Men's Colony, located in San Luis Obispo, California.

On March 2, 2017, the Board of Parole Hearings ("Board") convened Petitioner's initial parole suitability hearing where it found Petitioner unsuitable for parole. The Board found Petitioner unsuitable for parole based on the commitment offense, recent institutional misconduct, lack of institutional programming, and an unsupportive psychological assessment. The Board issued a seven-year denial. (Initial Parole Consideration Hearing Transcript ("HT") dated Mar. 2, 2017, at pp. 91-117.)

On May 7, 2018, Petitioner filed the instant petition for writ of habeas corpus in the sentencing court in Pomona. Petitioner contends (1) that the Board's decision is not supported by some evidence of current dangerousness; (2) that the Board failed to conduct the hearing in a timely manner in relation to his youth offender parole date of April 23, 2014; (3) that the Board foreclosed him from lodging an objection to the contents of the CRA; and (4) that he received ineffective assistance of counsel during his parole hearing.

On May 30, 2018, the Honorable Juan Carlos Dominguez requested Respondent file an informal response. On July 6, 2018, Judge Dominguez transferred the petition to the undersigned pursuant to Local Rule 8.33(a)(3), which provides that petitions for writ of habeas corpus by state inmates seeking relief related to parole matters must be filed in Department 100 in the Central District to be assigned to the judge assigned to the

Date:	March 20, 2019				
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk	
	NONE	Bailiff	NONE	Reporter	

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

Counsel for Petitioner:

On Habeas Corpus

Counsel for Respondent:

Criminal Writ Center. After extensions of time, Respondent filed the informal response on September 10, 2018, and Petitioner filed a reply on November 26, 2018. On December 19, 2018, the court held the petition in abeyance for Petitioner to submit a complete copy of his most recent Comprehensive Risk Assessment ("CRA"). Petitioner filed a copy of the CRA on January 19, 2019.

SUMMARY

Having independently reviewed the record, and giving deference to the broad discretion of the Board in parole matters, the court finds that the record contains "some evidence" to support the determination that Petitioner is not suitable for release on parole because he currently poses an unreasonable risk of danger to society. The court also finds that the Board conducted Petitioner's youth offender hearing within a permissible time period, that Petitioner had an adequate opportunity to challenge the contents of the CRA, and that Petitioner has failed to state a prima facie claim that he received the ineffective assistance of counsel during the parole hearing.

COMMITMENT OFFENSE[1]

In 1990, the victim, Kevin Thomas, was driving his car on the way to buy some marijuana. While stopped in traffic, Thomas noticed Petitioner's co-defendant, a Mr. Simms, standing in the middle of the street. Simms approached Thomas's vehicle and ordered him out of the vehicle at gunpoint. Thomas heard someone else drive his car away. Simms escorted Thomas at gunpoint to a nearby house. Petitioner's other co-defendant, a Mr. Jenkins, was waiting at the house and also pointed a gun at Thomas. When Thomas asked Simms and Jenkins what they were doing, they replied that a rival drug dealer told them to get Thomas so the two could talk. The men ordered Thomas inside the house, handcuffed him, placed tape around his mouth, put him on a couch, and left. Jenkins soon returned with another victim, Randy Burge. Thomas and Burge were friends. Burge had witnessed Thomas being taken from his car at gunpoint, and Simms told Burge that he was "at the wrong place at the wrong time." (CRA at p. 5.) Petitioner and a Mr. Doss then entered the house. Petitioner was quoted as saying "Yeah, we got you." (CRA at p. 5.) Jenkins told Thomas that they were waiting until the drug dealer arrived to talk to Thomas, but that they would let Thomas go if he paid them

[1] The facts of the commitment offense are adopted from the recitation in the Comprehensive Risk Assessment. Petitioner denies all involvement in the commitment offense.

$10,000. Jenkins and Simms released Thomas from the handcuffs in order to call his mother to arrange a meeting to get the money. An unknown female went to Thomas's mother's house and retrieved the money. Meanwhile, Jenkins stripped Thomas of his possessions, including a ring, his keys, and $30 in cash. Burge began questioning the assailants about their motives, and kept demanding answers. To make him stop, Simms shot Burge in the foot and placed tape over his mouth. At some point, Jenkins and Simms left the house, but Petitioner and Doss remained in the house holding Burge and Thomas at gunpoint. Thomas, believing he would soon be killed, bolted from the couch and threw himself out a closed glass window. He landed on his back on the driveway approximately five feet below and the handcuffs broke. Thomas ran down the street with Petitioner and Doss running behind him. Petitioner and Doss shot at Thomas eight to ten times. Thomas was able to escape unharmed into a liquor store where employees called the police for help.

Thomas rode with police as they investigated. Officers observed a burgundy van parked near the house where Thomas was held, and Thomas identified Simms and Jenkins as sitting inside the van. The van drove away, but Simms and Jenkins were apprehended after a short police pursuit. Later that night, a witness heard a single gunshot coming from a park approximately four miles from the house where Burge and Thomas were held. The next morning, a jogger discovered Burge's body in the park. Thomas later identified Petitioner and Doss as the men who shot at him. Petitioner, who was 19 years old at the time of the crimes, denies all involvement in the commitment offense, and contends he was not present for any of the alleged crimes.

APPLICABLE LEGAL PRINCIPLES

The Board is an executive branch agency within the CDCR tasked by the Legislature with the authority to grant parole and set release dates for prisoners serving an indeterminate term. (Pen. Code, §§ 3040, 5075 & 5075.1; Gov. Code, §§ 12838 & 12838.4; *In re Prather* (2010) 50 Cal.4th 238, 249.) The Board's parole decisions are governed by Penal Code section 3041 and section 2402 of Title 15 of the California Code of Regulations.[2] The Board is required to grant parole unless it determines that public safety requires a lengthier period of incarceration. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204 (*Lawrence*); Pen. Code, § 3041, subd. (b).) A life inmate will be found unsuitable for and denied parole, however, if in the judgment of the Board, the inmate will pose an unreasonable risk of danger to society if paroled. (§ 2402, subd. (a).)

[2]All further statutory references are to title 15 of the California Code of Regulations, unless otherwise specified.

Date:	March 20, 2019		
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk
	NONE	Bailiff	NONE	Reporter

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

Counsel for Petitioner:

On Habeas Corpus

Counsel for Respondent:

The Board may consider all relevant reliable information in determining an inmate's suitability for parole. (§ 2402, subd. (b).) Factors tending to show unsuitability include the nature of the commitment offense, a previous record of violence, an unstable social history, sadistic sexual offenses, psychological factors, and institutional behavior constituting serious misconduct. (§ 2402, subd. (c).) Factors tending to show suitability include a lack of a juvenile record, a stable social history, signs of remorse, the crime was committed due to significant life stress, the criminal behavior was the result of battered woman syndrome, a lack of a history of violent crime, the inmate's current age reduces the probability of recidivism, the inmate has realistic plans for release or marketable skills that can be utilized upon release, and the inmate's institutional behavior indicates an enhanced ability of be law-abiding upon release. (§ 2402, subd. (d).) The weight and importance of these factors are left to the judgment of the Board. (§ 2402, subds. (c) & (d).) The Board's discretion in parole matters has been described as "'great'" and "'almost unlimited'". (*Lawrence*, *supra*, 44 Cal.4th at p. 1204, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.)

Courts are authorized to review the Board's decision to deny parole because due process requires that such decisions be supported by some evidence in the record. (*In re Prather*, *supra*, 50 Cal.4th at p. 251; *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 664; *Lawrence*, *supra*, 44 Cal.4th at p. 1191.) "The relevant inquiry is whether some evidence supports the decision of the Board . . . that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.) Typically, only a modicum of evidence is required. (*In re Shaputis* (2011) 53 Cal.4th 192, 221 ("*Shaputis II*"); *Lawrence*, *supra*, 44 Cal.4th at p. 1226.)

However, the Court of Appeal recently ruled in *In re Palmer* (2018) 27 Cal.App.5th 120 (*Palmer*), that when the inmate was 25 years of age or younger at the time the controlling offense was committed, there must be "*substantial evidence*, not merely *some evidence*, of countervailing considerations indicating the offender is unsuitable for release." (*Palmer*, *supra*, at p. 145; Pen. Code, § 4801, subd. (c).)

Penal Code section 4801, subdivision (c), states that at parole suitability hearings for youth offenders, the Board is required to give "great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity . . . ." In holding that a "substantial evidence" standard applied in *Palmer*, the Court of Appeal purported to define the meaning of the

phrase "great weight" in Penal Code section 4801, subdivision (c). (*Palmer, supra,* 27 Cal.App.5th at p. 125.) However, the holding in *Palmer* appears to conflict with established California Supreme Court precedent in *Lawrence* and *Shaputis II,* holding that a "some evidence" standard of judicial review applies for petitions challenging parole suitability, discussed *ante*. (*Lawrence, supra,* 44 Cal.4th at p. 1212; *Shaputis II, supra,* 53 Cal.4th at pp. 209–210.)

The court notes that since the filing of this petition, a petition for review and a request for depublication of *Palmer* have been granted by the California Supreme Court. (Case No. S252145.) The court cannot cite to or rely on a case that has not be certified for publication. (Cal. Rules of Court § 8.1115.) Additionally, express legislative intent favors applying the "some evidence" standard, as the first section of Senate Bill 260, which amended Penal Code section 4801 to provide for consideration of the factors of youth at parole suitability hearings, states: "Nothing in this act is intended to undermine the California Supreme Court's holdings in *In re Shaputis* (2011) 53 Cal.4th 192, *In re Lawrence* (2008) 44 Cal.4th 1181, and subsequent cases." (Sen. Bill No. 260 (2013-2014 Reg. Sess.), ch. 312, § 1.)

Therefore, for the reasons discussed *ante*, this court concludes that California Supreme Court precedent is controlling over the seemingly inconsistent First District Court of Appeal's opinion in *Palmer*. (*Auto Equity Sales, Inc. v. Superior Court (Hesenflow)* (1962) 57 Cal.2d 450, 455.) Therefore, the court applies the "some evidence" standard. The court may not reweigh the circumstances indicating suitability or unsuitability for parole. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260–1261; *In re Reed* (2009) 171 Cal.App.4th 1071, 1083.) The resolution of any conflicts in the evidence and the weight to be given to the evidence are within the Board's broad authority. (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 656.) Unless a petitioner can demonstrate that there is no evidence to support the Board's conclusion that the inmate is a current danger to public safety, the petition fails to state a prima facie case for relief and may be summarily denied. (*People v. Duvall* (1995) 9 Cal.4th 464, 475.)

DISCUSSION

Parole Suitability

The court finds that there is some evidence to support the Board's decision Petitioner poses an unreasonable risk of danger to society, and if released, a threat to public safety due to the heinousness of the

commitment offense, his institutional misconduct, lack of institutional programming, and unsupportive psychological assessment.

Commitment Offense

The Board partially based its decision on Petitioner's commitment offense, finding that the crime was "particularly atrocious." (HT at p. 99.) A commitment offense that is perpetrated in an especially heinous, atrocious or cruel manner is a circumstance tending to show unsuitability for parole. (§ 2402, subd. (c)(1).) The commitment offense may be considered especially heinous, atrocious or cruel when: (A) multiple victims were attacked, injured or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled or mutilated during or after the offense; (D) the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense. (§ 2402, subd. (c)(1)(A)-(E).)

Here, Petitioner and his co-defendants kidnapped two men and held them for ransom. The two victims were handcuffed, held at gunpoint, gagged with clothing items, and their mouths were taped shut. One victim was shot in the foot and then, hours later, shot and killed at a park. In light of the fact that the multiple victims were attacked, injured or killed, the court finds that the commitment offense was especially heinous, atrocious or cruel and is some evidence supporting the Board's decision that on parole, Petitioner would pose an unreasonable risk of danger to society. (§ 2402, subd. (c)(1)(A).)

Institutional Misconduct

The Board also based its conclusion on Petitioner's record of institutional misconduct. (HT at p. 101.) An inmate engaging in institutional behavior constituting serious misconduct is another circumstance tending to indicate unsuitability for parole. (§ 2402, subd. (c)(6).)

Petitioner has received sixteen serious rules violation reports ("RVR") during his incarceration, including delaying a peace officer, disobeying orders, mutual combat, and battery on an inmate. Petitioner's

Date:	March 20, 2019				
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk	
	NONE	Bailiff	NONE	Reporter	

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

most recent RVRs were for participating in a riot and destruction of state property in 2015, and possession of a cell phone in 2013. The Board indicated that Petitioner's pattern of impetuous or impulsive acts before the life crime has been repeated through impetuous or impulsive acts in prison, resulting in disciplinary action. (HT at p. 102.) The psychologist conducting Petitioner's most recent psychological assessment also noted that Petitioner's recent institutional misconduct reflects "problems with behavioral instability, supervision compliance and treatment responsiveness." (CRA at p. 10.) Additionally, the psychologist noted that Petitioner's recent disciplinary infractions present "doubt regarding the inmate's self-control and capacity to comply with supervision in the community." (CRA at p. 11.)

Petitioner's institutional misconduct, even the minor misconduct, indicates that Petitioner is either unable or unwilling to conform to the requirements of the law and may constitute some evidence that Petitioner is a current danger to public safety and therefore unsuitable for parole. (See *In re Reed, supra*, 171 Cal.App.4th at pp. 1084-1085; *In re Montgomery* (2012) 208 Cal.App.4th 149, 164.) Even after a substantial period of time has passed, past rules violations may be some evidence of a current danger and risk of recidivism. (*In re Rozzo* (2009) 172 Cal.App.4th 40, 60; accord, *In re Hare* (2010) 189 Cal.App.4th 1278, 1293 [a discipline for possession of dangerous contraband, received seven years prior to the Governor's decision is not too remote to remain probative of current dangerousness].) The court finds Petitioner's record of institutional misconduct is some evidence supporting the Board's finding that Petitioner poses a present risk of danger to society. (§ 2402, subd. (c)(6).)

Psychological Assessment

The Board also relied on Petitioner's 2017 psychological evaluation. (HT at p. 108.) An inmate's psychological evaluation of his risk of future violence directly bears on his suitability for parole, but such assessment does not dictate the Board's parole decision. (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.)

The psychologist conducting Petitioner's most recent comprehensive risk assessment found Petitioner to be a *high* risk of violence. (CRA at p. 12.) The psychologist noted that Petitioner has had problems with violence and antisocial behavior well into adulthood, including a "pervasive pattern of disregard for and violation of the rights of others" and a "failure to conform to social norms with respect to lawful behaviors."

Date:	March 20, 2019				
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk	
	NONE	Bailiff	NONE	Reporter	

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

Counsel for Petitioner:

On Habeas Corpus

Counsel for Respondent:

(CRA at pp. 7-8.) The psychologist noted that Petitioner presents with "pervasive antisociality characterized by poor impulse control, recklessness, and consistent irresponsibility and he presents with deceitfulness, entitlement, callousness or coldness, interpersonal dominance, hostility or meanness, or antagonism." The psychologist also diagnosed Petitioner with Antisocial Personality Disorder. (CRA at pp. 8, 10.) Petitioner's high risk rating was due in part to his recent institutional misconduct, record of problems with compliance and submission to authority, and lack of recent or limited participation in self-help programming. (CRA at p. 12.)

Petitioner's unfavorable elevated psychologist risk assessment is some evidence to support the Board's finding that paroling Petitioner would pose an unreasonable risk of danger to society. (E.g., *In re Stevenson* (2013) 213 Cal.App.4th 841, 869-870; *In re Bettencourt* (2007) 156 Cal.App.4th 780, 806.)

Insufficient Rehabilitative Programming

The Board also based its denial on Petitioner's lack of institutional programming while incarcerated. Although there is no specific amount of programming required before an inmate is found suitable for parole,[3] an inmate's institutional activities that indicate an enhanced ability to function within the law upon release is a factor supporting parole suitability. (§ 2402, subd. (d)(9).) The Board found that due to a lack of programming, Petitioner lacks the necessary skill sets and coping mechanisms to abate his criminal mindset. The Board suggested Petitioner take classes on victim awareness, anger management, and classes related to avoiding defensive tendencies and a criminal mindset. (HT at pp. 105-106.)

The psychologist did note that Petitioner participated in two self-help programs in 2014, but Petitioner indicated he was not currently participating in any self-help programming, and that he was on waiting lists. (CRA at p. 8.) The psychologist indicated that Petitioner's "limited participation in self-help and personal

[3] See *In re Ryner* (2011) 196 Cal.App.4th 533, 551 ["We find nothing in the governing regulations that require any minimum quantity of rehabilitative programming"]; see also *In re Morganti* (2012) 204 Cal.App.4th 904, 918-922 [Petitioner's involvement in Alcoholics Anonymous and Narcotics Anonymous for more than 17 years constituted sufficient programming, warranting granting parole]; but see *In re Dunaway* (Oct. 23, 2017, C079664, C082381) [nonpub. opn.] [2017 WL 4769386], at pp. 1-5 [Petitioner's participation in over 40 self-help programs over 22 years did not constitute sufficient programming, warranting a denial].

growth opportunities presents doubt regarding his motivation to participate in similar opportunities in the future or to utilize effecting coping resources while on parole." (CRA at p. 11.)

The record shows that Petitioner has not meaningfully engaged in programming or self-help groups to address his character defects or ability to avoid the criminal mindset in the future. This lack of meaningful programming is some evidence supporting the Board's finding that Petitioner poses an unreasonable risk of danger to society if released on parole.

Weighing of the Evidence

The Board acknowledged that Petitioner showed signs of remorse even though he has denied involvement in the crime, that he lacked a significant history of violent crime, and that he has made realistic plans for release. (HT at pp. 98-99, 104-105.) The Board also noted that Petitioner was 19 years old at the time of the crime, and gave great weight to the mitigating attributes of Petitioner's youth. (HT at pp. 94-97.) The Board ultimately concluded, however, that the positive factors were outweighed by circumstances not supportive of his suitability for parole. This court is not entitled to reweigh the evidence before the Board; rather, it is tasked with determining whether the record contains some evidence in support of the Board's conclusion. (*In re Rosenkrantz, supra*, 29 Cal.4th at pp. 656, 665-677.) The court finds it does, and that there is a rational nexus between the evidence in the record and the Board's determination of Petitioner's current dangerousness.

Timeliness of Youth Offender Parole Hearing

Next, Petitioner contends the Board erred in giving him a youth offender hearing more than one year after his Youth Offender Parole Date of April 23, 2014. The youth offender parole system was first created in 2013, with the passage of Senate Bill ("SB") 260. The purpose in enacting that bill was to establish an early parole mechanism for offenders serving sentences for crimes committed when they were under the age of 18. (Sen. Bill No. 260 (2013-2014 Reg. Sess.) § 1.) In 2013, the Legislature enacted Senate Bill 260, which added sections 3051 and 4081 to the Penal Code. In 2015, the Legislature enacted Senate Bill 261, which extended eligibility for youth offender parole consideration to inmates who were under 23 at the time of their crimes.

Date:	March 20, 2019				
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk	
	NONE	Bailiff	NONE	Reporter	

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

Counsel for Petitioner:

On Habeas Corpus

Counsel for Respondent:

(Stats. 2015, ch. 471.) Then, in 2017, the Legislature enacted Senate Bill 394, which extended eligibility for youth offender parole consideration to inmates who were 25 years of age or younger at the time of their crimes. (Stats. 2017, ch. 684; see also Pen. Code, § 3051.)

Petitioner was 19 years old at the time of the commitment offense, and received an indeterminate life sentence. Thus, Petitioner became eligible for a youth offender parole hearing with the passage of Senate Bill 261, which extended the eligibility for youth offender parole hearings to inmates who were under 23 at the time of their crimes. The Board was required to conduct youth offender parole hearings for newly eligible inmates, like Petitioner, by July 1, 2017. (§ 3051, subd. (i)(2)(A).) The Board conducted Petitioner's consultation, unrelated to his youth offender parole hearing, on October 27, 2015, and his youth offender parole suitability hearing on March 2, 2017. Thus, Petitioner's youth offender parole hearing was held according to the applicable deadlines. The court also notes that Petitioner did not become eligible for a youth offender parole hearing until Senate Bill 261 became effective in January 1, 2016, so it would have been impossible for the Board to conduct a youth offender parole hearing for petitioner within one year of his April 23, 2014 youth offender parole date. In sum, the Board did not err in conducting Petitioner's youth offender parole hearing in March 2017.

Challenge to Comprehensive Risk Assessment

Next, Petitioner contends the Board failed to give him notice and opportunity to challenge the validity of the CRA. Petitioner also challenges the Board's reliance on the psychologist's conclusions in the CRA, contending the Board accepted the conclusions as truth "despite it being false and fabricated." (Petn. at p. 5.)

The Board is required by regulation to consider a life inmate's past and present mental state in its parole suitability decision. (§ 2402, subd. (b).) A psychological assessment like the CRA is one of the factors the Board must consider during the parole suitability hearing. (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) The inmate and his attorney may rebut or challenge any specific findings contained in a CRA during the inmate's parole suitability hearing. (§ 2240, subd. (d).) The hearing panel, however, has sole discretion as to what evidentiary weight to give the psychological reports. (*Ibid.*)

Date:	March 20, 2019				
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk	
	NONE	Bailiff	NONE	Reporter	

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

Counsel for Petitioner:

On Habeas Corpus

Counsel for Respondent:

Contrary to Petitioner's assertion, it appears he did have the opportunity to challenge the CRA during the hearing. Preliminarily, Petitioner attaches an exhibit to the petition entitled "My Opposition to David S. Wildman's [Psychological] Report of Dec. 19, 2016." The document is dated February 26, 2017, which was a few days before his March 2, 2017 parole hearing. Petitioner also attaches a letter from a Board of Parole Hearings staff attorney indicating that the Board did not receive the objection letter until after Petitioner's hearing was completed. Thus, the Board had no way to review the objection letter prior to the hearing.

Still, the Board did allow Petitioner the opportunity to discuss his concerns about the accuracy of the CRA during the hearing. (HT at pp. 16-17.) The Board reviewed the CRA and the psychologist's conclusions in detail. (HT at pp. 64-77.) The Board then gave Petitioner an opportunity to highlight areas where he disagreed with the psychologist's conclusions. (HT at p. 73.) Petitioner voiced his concerns and noted certain conclusions that he felt were incorrect. (HT at pp. 73-77.) Thus, the record reflects that Petitioner did have an opportunity to challenge aspects of the CRA. Ultimately, however, the Board has the discretion to determine what weight to give to the conclusions in the psychological assessment. (§ 2240, subd. (d).) The Board weighed the CRA accordingly and found that the psychologist's ultimate conclusion that Petitioner posed a high risk of violence was a factor supporting unsuitability. To the extent Petitioner challenges the Board's allocation of weight to the available evidence, the court rejects this contention because such determination is clearly within the Board's discretion. (§ 2240, subd. (d).)

Right to Counsel

Lastly, Petitioner contends he received ineffective assistance of counsel during his parole hearing. Preliminarily, the Sixth Amendment right to counsel does not apply in parole proceedings. (*People v. Ojeda* (1986) 186 Cal.App.3d 302, 305.) The constitutional right to the effective assistance of counsel applies only in the context of a criminal *prosecution*. (U.S. Const., 6th Amend. [applying to "all criminal prosecutions"]; Cal. Const., art. I, § 15 [applying to any "criminal cause"].) A parole hearing is administrative in nature; "there is no right to the appointment of counsel in proceedings of the Adult Authority to determine whether and under what conditions a prisoner should be granted parole." (*In re Schoengarth* (1967) 66 Cal.2d 295, 304; accord, *In re Tucker* (1971) 5 Cal.3d 171, 177.) Petitioner does not have a constitutional right to state-appointed counsel at his parole suitability hearing, let alone the effective assistance of counsel. Without a constitutional right to

Date:	March 20, 2019				
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk	
	NONE	Bailiff	NONE	Reporter	

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

counsel, there can be no claim of ineffective assistance of counsel. (*Coleman v. Thompson* (1991) 501 U.S. 722, 752.)

Even assuming, however, that Petitioner had a constitutional right to the effective assistance of counsel at his parole suitability hearing, he fails to satisfy his burden to allege, much less establish, that counsel's performance was deficient, and that but for counsel's purported deficiency, there is a reasonable probability he would have received a more favorable result at the hearing. (See *Strickland v. Washington* (1984) 466 U.S. 668, 692-694.)

Based upon the record before the court, Petitioner has failed to establish that he received the ineffective assistance of counsel at his parole hearing. The record demonstrates that Petitioner's counsel agreed that all of Petitioner's rights had been met before continuing with the hearing. (HT at p. 8.) Towards the end of the hearing, knowing the Board had concerns with Petitioner's defensiveness and potential lack of remorse, Petitioner's attorney asked Petitioner to articulate to the Board how he feels about the victim and the commitment offense. (HT at p. 82.) The Board then commended Petitioner's attorney for asking Petitioner to share this information, saying, "That was a good question, Counsel." (HT at p. 83.) Petitioner's counsel then gave a thorough closing statement arguing for Petitioner's suitability. (HT at pp. 85-88.) On this record, Petitioner fails to allege facts to support his contention that counsel's performance fell below an objective standard of reasonableness.

Additionally, Petitioner has failed to allege that but for counsel's purported deficiency, there is a reasonable probability he would have received a more favorable result at the hearing. Petitioner provides no evidence that the Board would have given a shorter denial, or even that the Board would have found Petitioner suitable for parole, in light of the evidence presented at the hearing. Petitioner "must plead adequate grounds for relief by petition, which should state fully and with particularity the facts on which relief is sought. Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing. [Citation.]" (*In re Marquez* (2007) 153 Cal.App.4th 1, 11, citing *People v. Duvall* (1995) 9 Cal.4th 464, 474.) Petitioner has not satisfied his burden of presenting facts warranting habeas corpus relief; accordingly, his ineffective assistance of counsel claim must be summarily denied. (*Ibid.*)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date:	March 20, 2019				
Honorable:	WILLIAM C. RYAN	Judge	J. CASTELLANOS	Deputy Clerk	
	NONE	Bailiff	NONE	Reporter	

BH011887

(Parties and Counsel checked if present)

In re,
BRIAN TERRELL HILL,

Petitioner,

Counsel for Petitioner:

On Habeas Corpus

Counsel for Respondent:

DISPOSITION

For all the foregoing reasons, the petition for writ of habeas corpus is DENIED.

The Clerk is ordered to serve a copy of this order upon Petitioner, and upon Deputy Attorney General Jennifer Heinisch, as counsel for Respondent, the Secretary of the California Department of Corrections and Rehabilitation.

The court order is signed and filed this date.

A true copy of this minute order is sent via U.S. Mail to the following parties:

Brian T. Hill, #H67149
California Men's Colony
P.O. Box 8101
San Luis Obispo, CA 93409-8101

Jennifer L. Heinisch, Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Attorney for Respondent

Minutes Entered
03-20-19
County Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS CONTINUED

APPENDIX I

This Court has already acknowledged that California State Statutory Scheme has created a "Protected liberty Interest" to "Parole", Greenholtz V. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1,7; Board of Pardons V. Allen (1987) 482 U.S. 369, 373 so how could California's State Statutory Scheme not Create the Constitutional Right to Board of Parole Hearing Counsel and such a Right be guaranteed by the Due process Clause of the federal Constitution?

In Morrisey V. Brewer (1972) 408 U.S. 471, 489, this Court ruled that "WE do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent" and at page 491 acknowledged that "The only question open under our precedents is whether counsel must be furnished the parolee if he is indigent."

In justice Douglas dissent in this case at pages 496-497, this Justice wrote that "A parolee, like a prisoner, is a person entitled to constitutional protection, including procedural due process" and that "At the state level, the construction of parole statutes and regulations is for the states alone, save as they implicate the federal Constitution in which event the Supremecy Clause controls."

In Gagnon V. Scarpelli (1973) 411 U.S 778, 789-790, this Court ruled in part th~~a~~t "The differences between criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer. Without denying that there is some force in this argument, we think it sufficient answer that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime."

This Court continued, "We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness- - the touchstone of due process- - will require that the state provide at its expense counsel for indigent probationers or parolees."

Despite the fact that this Court's prior rulings' has not indicated that an indigent prisoner thats appearing before the Board of Parole Hearings, a violator of parole or probation has the constitutional right to counsel, the Ninth Circuit Court of Appeals in Bonin V. Calderon (9th Cir. 1995) 59 F.3d 815, 841-842 ruled that "A protected liberty interest may be created by state law, but only in limited circumstances. (cases cited) In order to create a liberty interest protected by due process, the state law must contain: (1) "substantive predicates" governing official decisionmaking, and (2) "explicitly mandatory language" specifying the outcome that must be reached if the substantive predicates have been met. (cases cited) In order to contain the requiste "substantive predicate", the state law at issue "must provide more than merely procedure; it must protect some substantive end." (case cited) Indeed, we have drawn a careful distinction between procedural protections created by state law and the substantive liberty interests those procedures are meant to protect. (cases cited) The denial of state-created procedural rights is not cognizable on habeas corpus review unless there is a deprivation of a substantive right protected by the constitution. (case cited) "The state may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the state does not create an independent substantive right."

In this case, the Petitioner has been systematically deprived of substantive constitutional rights, not only as a Protected Class Member of a Class Action Lawsuit that was filed against BPH Officials, but during this BPH Hearing period such as the rights' to due process of law regarding the right to a timely BPH Hearing, to Notice of the Pendency of this Class Action lawsuit, to a jury trial on the allegations raised in this lawsuit, to Equal Protection of the Law as a Class of One, to a Fair and Impartial board of parole hearing Panel, etc...

Such deprivations' of a multitude of constitutional rights in conjunction with California's State Statutory Scheme regarding the appointment of counsel at parole board hearings created the constitutional right to board counsel and the guarantees of such a right by the Due process Clause of the Federal Constitution, and if not, such questions' of law warrants this Court's resolution.

In Village of Willowbrook V. Olech (2000) 528 U.S. 562, 564, this Court ruled that "Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. (cases cited) In so doing, we have explained that " '[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper excution through duly constituted agents." (cases cited)

And in Zadvydas V. Davis (2001) 533 U.S. 678, 690, this Court ruled that "The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person... of...liberty...without due process of law." Freedom from imprisonment- from government custody, detention, or other forms of physical restraint- lies at the heart of the liberty that clause protects. (case cited) And this Court

has said that government detention violates that clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, (case cited), or, in certain special and "narrow" non-punitive "circumstances," (case cited) where a special justification, such as harm- - threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." " (case cited)

In the Petitioner's case, Respondent and Counsel never set-forth any facts, evidence, and or laws, whether by affidavit, declaration, exhibit, etc... demonstrating that the Petitioner was not disciminated against by not being afforded a timely Youth offender/initial Parole Consideration Hearing, a Fair and Impartial board panel, by being denied Notice, the oppertunity to be heard as to this Class Action Lawsuit that was filed against BPH Officials, the Option to Opt-out of said Lawsuit, to Acquiesce in the Settlement of this matter, to Demand a Jury Trial regarding the allegations' raised, etc... demonstrating this invidious violation of the Petitioner's constitutional Rights to Equal protection of the Law and Due Process of Law, etc... due unto there being no rational basis in law or fact for such treatment warrating this Court's Resolution.

As this Court ruled in Richards V. Jefferson County (1996) 517 U.S. 793, 799, "We begin by noting that the parties to the Bedington case failed to provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights. That failure is troubling because, as we explained in Mullane V. Central Hanover bank Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950), the right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." (cases cited)

And in Ross V. Bernhard (1970) 396 U.S. 531, 533, this Court ruled that "The Seventh Amendment preserves to litigants the right

to jury trial in suits at common law- -" not merely suits, when the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equittable remedies were administered.... In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admirally jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." (case cited)

This Court continued at pages 537-538, that "Under those cases, where equitable and legal claims are joined in the same action, there is a right to jury trial on legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." (case cited)

In the Petitionert's case, its hard to decipher how the Ninth Circuit court of Appeals arrived at its ruling, but such a ruling is in conflict with this Court's precedents' as to the petitioner having a Constitutional right to a jury trial in a Class Action lawsuit that the Petitioner wasn't given Notice of, the right to acquiesce in the settlement of, to opt-out, to request a jury trial, etc... in which is not only a violation of the Seventh Amendment of the United States Constitution, but the fifth Amendment's due process clause as well that warrants this Court's resolution.

CONTINUING TABLE OF AUTHORITIES

APPENDIX H

TABLE OF AUTHORITIES CONTINUED