06-55392

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD HAYWARD,
Petitioner-Appellant,

v.

JOHN MARSHALL, Warden,
Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. CV 05-7239-GAF (CT)
The Honorable Gary A. Feess Judge

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

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RONALD HAYWARD,

Petitioner-Appellant,

v.

JOHN MARSHALL, Warden,

Respondent-Appellee.

PRELIMINARY STATEMENT

Respondent seeks panel rehearing or rehearing en banc of the Panel's January 3, 2008 opinion. (A. Kozinski, C.J., D. Friedman, J.[1/], and R. Gould, J; slip opinion attached as Appendix A.)

The Panel's opinion follows a recent line of decisions from this Court that failed to abide by the mandates of the Anti-terrorism and Effective Death Penalty Act (AEDPA). *See Irons v. Carey*, 505 F.3d 846 (9th Cir. 2007); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123 (9th Cir. 2006); *Biggs v. Terhune*, 334 F.3d 910, (9th Cir. 2003). While AEDPA commands that a reviewing

1. Sitting by designation from the Federal Circuit.

court may only reverse a state court decision denying habeas corpus relief where that decision violates clearly established Supreme Court law, these decisions have extended due process protections to California's life-term inmates with no basis in clearly established Supreme Court law for doing so, and imported an evidentiary standard of judicial review that the Supreme Court has never applied in the parole context. Unlike *Irons*, *Sass*, and *Biggs*, in which this Court ultimately concluded that the inmate petitioners *received* adequate due process, the Panel here found that Hayward was entitled to habeas corpus relief because the Governor's parole decision violated his due process rights. Thus, the stakes are great here and the questions presented in this petition are of the utmost importance to protect the principles of comity and federalism.

Additionally, this case presents the opportunity for this Court to reconsider its decision in *Rosas v. Nielsen*, 428 F.3d 1229 (9th Cir. 2005), that an inmate challenging a parole decision need not obtain a certificate of appealability. This decision conflicts with those of several other circuits, and is having a significant impact on the volume of petitions litigated in this Court, and thus a profound impact on judicial economy.

ARGUMENT

I.

THE EN BANC COURT SHOULD RECONSIDER WHETHER CALIFORNIA HAS CREATED A LIBERTY INTEREST IN PAROLE RELEASE.

Due process protections are only implicated if the inmate has a liberty or property interest with which the State has interfered. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). And the question of whether state prisoners enjoy a federally protected liberty interest in parole is a matter of utmost and primary importance because it implicates the courts' subject-matter jurisdiction. 28 U.S.C. § 2254 (federal courts have power to consider habeas corpus claims of state prisoners only in cases where the prisoner is "in custody in violation of the federal laws or Constitution"). The Panel's opinion followed a recent line of this Circuit's decisions holding that California's parole statute has mandatory language that creates a liberty interest in parole release entitling life inmates to federal due process protections. **Slip. op. at 46-47, citing Sass,** 461 F.3d at 1127-28; *see also Irons*, 505 F.3d at 850-51; *Biggs*, 334 F.3d at 914-15. Rehearing en banc should be granted because, first, this Court's application of the mandatory-language analysis set forth in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979) is in

conflict with *Sandin v. Conner*, 515 U.S. 472 (1995), which abandoned the mandatory-language analysis. And second, if the Court maintains that the *Greenholtz* mandatory-language test controls the question, this Court's prior holdings fail to give proper consideration to the California Supreme Court's interpretation of the State's parole scheme.[2/]

A. The Supreme Court Abrogated the Mandatory-Language Test Employed by This Court.

In determining whether a liberty interest in parole exists, this Court has applied the mandatory-language analysis set forth in *Greenholtz*. Slip op. at 46-47; *Sass*, 461 F.3d at 1127; *Irons*, 505 F.3d at 850-51; *Biggs*, 334 F.3d at 914-15; *McQuillion v. Duncan*, 306 F.3d 895, 902-03 (9th Cir. 2002). Under the *Greenholtz* analysis, a state may create a liberty interest in parole if the statutory language mandates release upon the inmate meeting certain substantive predicates, thereby creating an expectation of release. *Greenholtz*, 442 U.S. at 7; *Bd. of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987); *see also Hewitt v. Helms,* 459 U.S. 460, 472 (1983), *overruled in part by Sandin*, 515 U.S. 472.

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2. Respondent raised these arguments in the district court. (CR 16, 17, 19.) At the time of briefing in this case, petitions for rehearing were pending in *Sass* and thus Respondent simply preserved the argument. (Answer Br. at 16.) Hayward responded to the argument in his Reply Brief. (Reply Br. at 3-4.)

The *Greenholtz/Hewitt* analysis was the standard for all prisoner-related actions until the Supreme Court decided *Sandin v. Conner* in 1995. In *Sandin*, the Supreme Court criticized the mandatory language analysis that originated with *Greenholtz* and *Hewitt*, noting that it was "somewhat mechanical" and failed to consider the nature of the loss suffered by the prisoner. *Sandin*, 515 U.S. at 479-80, 482-83. The Court therefore announced that it would abandon the failed mandatory-language approach, and focus instead on the nature of the interest at stake. Under this new approach, constitutional protection is "generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

This Court has rejected the *Sandin* analysis in the parole context, limiting its applicability to cases involving internal prison disciplinary regulations. *McQuillion*, 306 F.3d at 903. But the Supreme Court has never prescribed this same limitation, and Respondent maintains that the "atypical and significant hardship" standard is the controlling standard to analyze whether a state prisoner has a liberty interest in parole release. In fact, after *McQuillion*, the Supreme Court reiterated that *Sandin* "abrogated the methodology of parsing the language of particular regulations." *Wilkinson v. Austin*, 545 U.S. 209, 222

(2005) (*Austin*) (focusing on the nature of the deprivation caused by a transfer to a "Supermax" prison).

Respondent acknowledges that *Sandin* and *Austin* addressed prison confinement issues rather than parole release decisions, but both this Court and the Supreme Court have considered *Sandin* in contexts analogous to parole release. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280 (1998) (applying both *Greenholtz* and *Sandin* to find no liberty interest in the clemency review procedures of Ohio's governor); *Jacks v. Crabtree*, 114 F.3d 983, 986 n.4 (9th Cir. 1997) (in rejecting the prisoners' contention that the statute created a liberty interest in the sentence reduction, this Court appeared to consider both *Greenholtz* and *Sandin*: "[n]ot only is [the statute] written in nonmandatory language, but denial of the one-year reduction doesn't 'impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.' [*Sandin*]. In fact, denial merely means that the inmate will have to serve out his sentence as expected.") (internal citation omitted).

Moreover, the First, Third, Fourth, and Eighth Circuits have applied *Sandin* to various types of release decisions including parole determinations. *See Hamm v. Latessa*, 72 F.3d 947, 954 (1st Cir. 1995) (commenting that since *Sandin* "the tectonic plates have shifted" and explicitly holding that the *Sandin*

analysis applies to cases involving state prisoners' challenges to parole decisions); *Kitchen v. Upshaw*, 286 F.3d 179, 185–87 (4th Cir. 2002) (work release); *Asquinth v. Department of Corrections*, 186 F.3d 407, 412 (3rd Cir. 1999) (community release); *Callendar v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 669–70 (8th Cir. 1996) (work release); *Dominique v. Weld,* 73 F.3d 1156 (1st Cir. 1996) (work release).[3/]

Applying the *Sandin* test to this case, the Governor's denial of parole to Hayward, an inmate serving a life-maximum sentence, does not implicate a federal liberty interest because continued confinement under an indeterminate life sentence does not impose an "atypical or significant hardship" that invokes the protections of the Due Process Clause. *See Sandin*, 515 U.S. at 485. A parole denial does not alter an inmate's sentence, impose a new condition of confinement, or otherwise restrict an inmate's liberty. Instead, he continues serving his validly imposed life sentence until his next parole consideration hearing.

Hayward interprets *Sandin* differently. He asserts that if *Sandin* were applied to parole, the question would be "whether the absence of parole

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3. These conditional-release programs, much like traditional parole, go significantly beyond a prison's internal prison disciplinary procedures and implicate prisoners' interests or expectations in being permitted to work or live outside the prison walls.

imposes an atypical and significant departure in the ordinary course of the statutory parole scheme." (Reply Br. at 4, emphasis omitted.) Hayward's position ignores two significant facts. First, Hayward is serving a *life* sentence with the *possibility* of parole. The presumption is that he will serve his maximum sentence - life - unless he is found suitable for early release. In California, life inmates have no right to a term less than the life maximum. *In re Dannenberg*, 34 Cal. 4th 1061, 1097 (2005) (citing *In re Wingo*, 14 Cal. 3d 169, 182-83 (1975) (noting the fundamental principle in California that every indeterminate sentence is for the statutory maximum unless the parole authority fixes a shorter term)). Thus, the denial of parole "merely means that the inmate will have to serve out his sentence as expected." *See Jacks*, 114 F.3d at 986 n.4.

Second, Hayward's position ignores the fundamental principle behind *Sandin* and the Supreme Court's due process jurisprudence, that a liberty interest arises only when the inmate suffers some kind of significant deprivation of his freedom. *See Sandin*, 515 U.S. at 480-84, 497-98 (Breyer, J. dissenting) (noting difference between property interests, which derive from an entitlement created under local law, and liberty interests, which arise when the government interferes with a person's freedom from restraint). Hayward's

lawful conviction has extinguished his liberty interest in his freedom from restraint (*Greenholtz*, 472 U.S. at 11), thus the continuation of his restraint does not create a liberty interest under *Sandin*.

Because this Court's application of the mandatory-language test to determine that California life inmates have a liberty interest in parole is contrary to Supreme Court precedent and conflicts with circuit precedent in this Court and other circuits, rehearing en banc should be granted.

B. Even if the Mandatory-Language Analysis Applies, This Court Should Reconsider Prior Holdings to Give Appropriate Consideration to the California Supreme Court's Interpretation of its Parole Scheme.

Under the *Greenholtz* analysis, a convicted person does not have a federally protected liberty interest in parole release unless the state creates such an interest in parole through the "unique structure and language" of its parole statutes. *Greenholtz*, 442 U.S. at 7, 12. In *In re Dannenberg*, the California Supreme Court concluded that the release-date directives in California Penal Code section 3041 are not mandatory because they do not apply unless and until the Board finds the inmate suitable for parole. *In re Dannenberg,* 34 Cal. 4th 1061, 1080-81, 1084-87 (2005). The California Supreme Court's conclusion that the statutory language of section 3041 is not mandatory and that a suitability finding under the Board's regulations is required before there

is any expectation in a parole release date demonstrates that California's parole scheme does not give rise to a federally protected liberty interest in a finding of parole suitability. *Greenholtz*, 442 U.S. at 11-12; *Bd. of Pardons v. Allen*, 482 U.S. at 371.

Further, by focusing entirely on the statutory language, this Court has failed to address the integral role of the State regulations in the parole process. *See Sass*, 461 F.3d at 1127-28. The regulations reflect the two-step parole process that was recently clarified in *Dannenberg* and specify that the Board "shall first determine whether the life prisoner is suitable for release on parole." Cal. Code Regs. tit. 15, § 2402(a). Significant for purposes of determining whether a liberty interest is created under the mandatory-language analysis, the regulations also direct that "[r]egardless of the length of time served, *a life prisoner shall be found unsuitable for and denied parole if* in the judgment of the panel, the prisoner will pose an unreasonable risk of danger to society if released from prison." Cal. Code Regs. tit. 15, § 2402(b) (emphasis added). The negative inference of the regulations does not create a liberty interest. *Allen*, 482 U.S. at 378 n.10.

Because the Panel failed to consider the integral role of the regulations in determining whether California has created a liberty interest in parole release,

and because the regulations demonstrate that California parole officials are not guided by explicitly mandatory language that requires parole release once certain findings are made, the Panel's decision should be reconsidered.

II.

THE PANEL'S APPLICATION OF THE SOME-EVIDENCE STANDARD TO PAROLE DECISIONS IS CLEARLY CONTRARY TO SUPREME COURT AND CIRCUIT COURT AUTHORITY.

AEDPA does not permit this Court to overturn a state decision as contrary to federal constitutional law unless the federal law is "as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). That phrase demonstrates that the only applicable law in the AEDPA context is that of the Supreme Court and not that of federal circuit courts. Indeed, the Supreme Court clarified any confusion in *Carey v. Musladin*, __U.S.__, 127 S. Ct. 649 (2006), that for federal habeas purposes "federal law" refers only to the holdings of the Supreme Court. *Id.* at 653; *see also Crater v. Galaza*, 491 F.3d 1119, 1122-23, 1126 and n.8 (9th Cir. 2007) (citing *Musladin*, this Court acknowledged that decisions by courts other than the Supreme Court are "non-dispositive" under § 2254(d)(1)).

Nonetheless, the Panel here followed a recent line of this Court's holdings and recent California appellate court decisions to find that the Governor

violated Hayward's due process rights because there was not some evidence in the record demonstrating that Hayward's release would unreasonably endanger public safety. Slip op. at 48-57. The Panel's decision clearly contravenes Supreme Court authority.

No Supreme Court case holds that the some-evidence test applies to parole determinations. Two Supreme Court cases, however, indicate the opposite. *See Greenholtz*, 442 U.S. at 1; *Austin*, 545 U.S. at 209. In *Greenholtz*, the Court specifically held that "nothing in the due process clause . . . requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release." *Greenholtz*, 442 U.S. at 15. The Court explained that parole decisions are "necessarily subjective;" thus, "to require the parole authority to provide a summary of the evidence would [incorrectly] tend to convert the process into an adversary proceeding and to equate the parole-release determination with a guilt determination." *Id.* at 15-16. Thus, in *Greenholtz*, the Supreme Court expressly rejected the argument that due process requires a parole decision to be supported by any specific quantum of evidence. *Id.*

In *Austin*, the Supreme Court confirmed the distinction between the due process requirements for the revocation of good time credits through prison disciplinary proceedings and those for requirements for parole proceedings. *Austin*, 545 U.S. at 228-29. There, the Court held that a prison transfer decision is more like a parole decision than a revocation of good-time credits, and therefore only requires the "nonadversary procedures set forth in *Greenholtz*," not the "more formal adversary-type procedures" set forth in *Wolff v. McDonnell,* 518 U.S. 539 (1974). *Id.*

Thus, the Supreme Court continued to maintain the distinction between prison disciplinary and parole decisions. Prison disciplinary decisions are retrospective, looking at whether the inmate has misbehaved. Parole is prospective, looking to whether the inmate, if no longer confined, is likely to misbehave in the future. Retrospective decisions must be based on evidence, while prospective decisions require discretion, judgment, and experience. As the Supreme Court has said, parole decisions are "necessarily subjective in part and predictive in part." *Greenholtz*, 442 U.S. at 13.

The *only* clearly established Supreme Court authority describing the process due when there is a federal liberty interest in parole simply requires that the inmate be given an opportunity to be heard and be advised of the

reasons he was not found suitable for parole. *Greenholtz*, 442 U.S. at 16. The Supreme Court has specifically indicated that these two protections, with nothing more, satisfy the Constitution. *Id.* Thus, the Panel's application of the some-evidence test was improper under AEDPA because it was based on circuit court and state appellate court authority and contradicted Supreme Court authority.

The Panel's decision also contradicts the Supreme Court's recent holdings that under AEDPA, a reviewing court may not transfer a legal test from one factual scenario to another and call it "clearly established federal law." *Musladin,* 127 S. Ct. at 654; *Schriro v. Landrigan*, __ U.S. __, 127 S. Ct. 1933 (2007). These recent Supreme Court opinion clarify why it is error for this Court to apply the some-evidence test to parole matters. The some-evidence test was derived from *Superintendent v. Hill*, 472 U.S. 445 (1985), a case addressing the process due in prison disciplinary proceedings, reasoning that a parole denial and a disciplinary conviction "both directly affect the duration of the prison term." *Sass*, 461 F.3d at 1128. However, this reasoning is irreconcilable with the reasoning of *Musladin* and *Landrigan*

Recent decisions of this Court also emphasize that there can be no clearly established federal law where the Supreme Court has never addressed a

particular issue or applied a certain test to a specific type of proceeding. *Plumlee v. Masto*, __ F.3d __, No. 04-15101 (9th Cir. Jan. 17, 2008) ("[w]hat matters are the holdings of the Supreme Court, not the holdings of lower federal courts"); *Foote v. Del Papa*, 492 F.3d 1026, 1029-30 (9th Cir. 2007) (affirming district court's denial of petition alleging ineffective assistance of appellate counsel based on an alleged conflict of interest because no Supreme Court case has held that such an irreconcilable conflict violates the Sixth Amendment; where state court ruled on an ''open question'' in the Supreme Court's jurisprudence, that ruling is not contrary to, or an unreasonable application of, federal law under AEDPA); *Nguyen v. Garcia*, 477 F.3d 716, 718, 727 (9th Cir. 2007) (holding that state court's decision finding *Wainwright v. Greenfield*, 474 U.S. 284 (1986) did not apply to a state court competency hearing was not contrary to clearly established federal law because Supreme Court had not held that *Wainwright* applied to competency hearings).

In addition, the Supreme Court has acknowledged the tension between its decisional law and this Court's AEDPA analysis by remanding two matters for further consideration in light of *Musladin: Patrick v. Smith*, 127 S. Ct. 2126 (Mem) (Apr. 30, 2007); *Knowles v. Mirzayance*, 127 S. Ct. 1247 (Mem) (Feb. 20, 2007). As in this case, the opinions in those matters did not address

Musladin. *Mirzayance v. Knowles*, 175 Fed. Appx. 14 (9th Cir. 2006); *Smith v. Mitchell*, 437 F.3d 884 (9th Cir. 2006).

The Supreme Court's recent jurisprudence presents an interpretation of AEDPA that is irreconcilable with this Court's application of *Hill* to non-disciplinary matters. Therefore, in accordance with the principles outlined in *Musladin*, this Court must conclude that no clearly established federal law, as determined by the Supreme Court, supports any relief under AEDPA.

Panel rehearing or rehearing en banc is necessary to correct the Panel's improper reliance on circuit court and state appellate court decisions to grant Hayward relief.

III.

THE EN BANC COURT SHOULD RECONSIDER THE CIRCUIT'S HOLDING THAT AN INMATE CHALLENGING A PAROLE DECISION NEED NOT OBTAIN A CERTIFICATE OF APPEALABILITY.

The Panel followed this Court's decision in *Rosas v. Nielsen*, 428 F.3d 1229, in rejecting Respondent's contention that Hayward was required to obtain a certificate of appealability to appeal the district court's denial of his habeas corpus petition. Slip Op. at 46 n.6. In light of the contrary opinions from the majority of other circuits and the burden of additional appeals before

this Court, Respondent suggests that the Court sitting en banc should reconsider its holding in *Rosas*.

Under 28 U.S.C. § 2253, a petitioner must obtain a certificate of appealability to appeal the denial of his petition for writ of habeas corpus in the federal district court where "the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A); *Rosas*, 428 F.3d at 1231. Relying heavily on *White v. Lambert*, 370 F.3d 1002 (9th Cir. 2004), this Court held that a habeas corpus challenge to an administrative parole release decision is an attack on the "execution" of the sentence rather than an attack on the "detention arising out of a state court process." *Rosas,* 428 F.3d at 1232. In *White*, the inmate challenged Washington officials' decision to transfer him to another prison. *Id.* This Court concluded that such a complaint did not arise in the state courts and thus no certificate of appealability was required. *White*, at 1012-13. *White* is not dispositive in a parole case, however.

In contrast to a prison transfer decision, which arguably is separate from the detention imposed by the state court as held in *White*, the denial of parole release results in the inmate continuing to serve the sentence imposed by the state court. A habeas challenge to a parole decision is therefore an attack on the detention imposed by the state court. *See In re Roberts*, 26 Cal. 4th 575,

586-87 (2005) (finding that a petition challenging a parole decision is analogous to a challenge to the sentence itself).

This Court's position is in conflict with the Third, Fifth, Sixth, Tenth, Eleventh, and District of Columbia Circuits, which have all concluded that a certificate of appealability is required in similar circumstances. *See Medberry v. Crosby*, 351 F.3d 1049 (11th Cir. 2003) (holding that a certificate is necessary); *Madley v. U.S. Parole Comm.*, 278 F.3d 1306, 1310 (D.C. Cir. 2002) (holding that a certificate is required where the original detention arises from state court process even if later decision denying parole is subject of petition); *Greene v. Tennessee Dep't of Corrs.*, 265 F.3d 369 (6th Cir. 2001); *Coady v. Vaughn*, 251 F.3d 480 (3rd Cir. 2001) (denial of parole is a challenge to inmate's "continued detention" and therefore requires certificate); *accord; Montez v. McKenna*, 208 F.3d 862 (10th Cir. 2000); *Stringer v. Williams*, 161 F.3d 259 (5th Cir. 1998).

In *White*, this Court relied heavily on the Seventh Circuit's interpretation of § 2253. *White*, 370 F.3d at 1012 citing *Walker v. O'Brien*, 216 F.3d 626, 637, 638 (7th Cir. 2000) (holding that the "source" of the detention controls the issue of the necessity for a certificate)). But *Walker* was criticized even within in its own circuit and should be given little weight in light of the overwhelming

contrary authority. *Walker*, 216 F.3d at 643 (Easterbrook, J. dissenting); *Moffat v. Broyles*, 288 F.3d 978, 980 (7th Cir. 2002) (noting that the conflicting authority and disapproval of *Walker's* reasoning by several other circuits "poses the question whether this circuit should continue to walk a lonely path."); *but see Anderson v. Benik*, 471 F.3d 811 (7th Cir. 2007) (finding no reason to deviate from *Walker*).

As the majority of circuits have concluded, the certificate of appealability should be required to appeal the denial of a petition challenging a parole denial because the decision "originates" or "springs" from a state court. *Madley*, 278 F.3d at 1310; *Coady*, 251 F.3d at 486. Because the certificate of appealability requirement is a rule of national applicability, rehearing en banc should be granted to secure uniformity of decisions. Fed. R. App. P. 35(b)(1)(B).

Furthermore, this Court's holding in *Rosas* should be reconsidered in light of the resulting burden on this Court. Before *Rosas*, fewer than a dozen appeals challenging California parole decisions were filed in this Court annually. Since then, however, the number has increased over ten-fold. In the six months following the 2005 *Rosas* decision, approximately eighty appeals were filed in this Court. The following fiscal year -- from July 2006 to June 2007 -- this Court accepted over 100 appeals regarding California parole

decisions. Based on statistics for the first half of this fiscal year, it is anticipated that nearly 150 new appeals will be filed by June 2008.[4/] At least 134 parole appeals are currently before this Court, creating a significant burden on this Court and on the State's limited resources. (Appendix B.)

Because the *Rosas* decision conflicts with the majority of other circuits on an issue of nationwide application, and because of the significant burden caused by the lack of the gatekeeping function of 28 U.S.C. § 2253, rehearing en banc should be granted to reconsider this Court's holding in *Rosas*.

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4. These numbers are based on the Attorney General's case-load statistics.

CONCLUSION

Respondent respectfully requests a Panel rehearing or rehearing en banc of these issues.

Dated: January 17, 2008

Respectfully submitted,

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Appeal from a Judgment of the
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Case No. CV 05-7239-GAF (CT)
The Honorable Gary A. Feess, District Judge

ANSWER TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

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RONALD HAYWARD, Petitioner - Appellant, v. JOHN MARSHALL, Warden, Respondent - Appellee.	D.C. No. CV 05-7239-GAF (CT) Central District of California **ANSWER TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

PRELIMINARY STATEMENT

The Warden "seeks panel rehearing or rehearing en banc of the Panel's January 3, 2008 opinion." Petition at 2. FRAP 40, concerning a petition for panel rehearing, provides that "[t]he petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition...." The warden did not specify any fact that the panel overlooked or misapprehended, so that the panel's determination of the facts is not at issue here.

The warden does assert that the panel misapprehended the law in three respects. In at least two of those respects, namely, Arguments I and III, the warden explicitly seeks en banc consideration only. *See, e.g.*, Petition at 4 [Argument I]; Petition at 17 [Argument III]. As to the remaining ground for rehearing, Argument II, the Warden also admitted that "the Panel here followed a recent line of this Court's holdings ...." Petition at 12.

Given the Warden's acknowledgment that the principles of law that the panel utilized in *Hayward* are established Ninth Circuit law, and his lack of argument that the panel in any way misapprehended the facts or misapplied these legal principles in Hayward's individual case, the petition fails on its face to establish a basis for panel rehearing: "A three-judge panel of this court is without authority to overrule a holding of an earlier panel. [Citation.] Only an en banc court has the authority to do so. [Citation.]" *Irons v. Carey*, 505 F.3d 846, 854 n.5 (9th Cir. 2007). Thus, Hayward will confine his answer to the question whether this Court should grant rehearing en banc on the issues specified by the warden.

FRAP 35 (a) provides in pertinent part:

> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

To facilitate consideration of such a petition, FRAP 35 (b)(1) provides:

> The petition must begin with a statement that either:
>
> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
>
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative

decisions of other United States Courts of Appeals that have addressed the issue.

The warden did not began his petition as prescribed by the rule. Nor did he explicitly argue that it met the rule's criteria for en banc determination.[1] Though this disregard of the rules hampers response to the petition, Hayward will demonstrate below that the warden's petition fails to make the extraordinary showing that justifies en banc determination.

ARGUMENT

I.

EN BANC REVIEW IS NOT WARRANTED TO RECONSIDER WHETHER CALIFORNIA HAS CREATED A LIBERTY INTEREST IN PAROLE RELEASE.

"The Panel's opinion followed a recent line of this Circuit's decisions holding that California's parole statute has mandatory language that creates a liberty interest in parole release entitling life inmates to federal due process protections." Petition at 2, citing slip. op at 46-47. As the warden further acknowledged, the "line of this Circuit's decisions" on the point stretched back from *Sass v. California Board of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006) to *Biggs v. Terhune*, 334 F.3d 910, 914 (2003), and forward to *Irons v. Carey,* 505 F.3d 846 (9th Cir. 2007). Petition at 2.

The warden asserts that en banc consideration nevertheless is warranted because these authorities "conflict with *Sandin v. Conner*, 515 U.S. 472 (1995), which abandoned the mandatory-language analysis." Petition at 5. Though the

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[1] With one exception as to Argument III, which will be dealt with in the body of the answer, *post.*

warden "acknowledges that *Sandin* ... addressed prison confinement issues rather than parole release decisions," Petition at 7, he ignores the fact that this Court rejected application of *Sandin* in the parole context for precisely this reason. *See McQuillion v. Duncan,* 306 F.3d 895, 903 (9th Cir. 2002); accord, *Biggs v. Terhune*, 334 F.3d at 914.

This rule of law is so well-established that this Court's most recent confirmation of it was confined to a footnote in *Sass v. California Bd. of Prison Terms*, 461 F.3d at 1127 n.3, to wit: "Despite the government's argument that *Sandin* ... eliminated the 'mandatory language' approach of *Greenholtz* and *Allen*[2], the Supreme Court did not so hold and this court has consistently rejected this argument." Indeed, the issue is now so settled and uncontroversial that it was not even deemed worthy of mention in *Hayward*. The warden's petition for rehearing never confronts this Court's reasons for rejecting *Sandin* in the parole context or offers a principled reason for rejecting the rationale of the Court's decisions on this point.

Moreover, the warden's attempt to establish an inter-circuit conflict fails. *See* Petition at 7-8. The petition overlooks the authorities cited in *McQuillion,* 306 F.3d at 903 for the proposition that "[c]ourts and commentators that have considered the question in the wake of *Sandin* have reached this [same] conclusion."

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[2] *Board of Pardons v. Allen*, 482 U.S. 369 (1987), the Supreme Court case that, along with *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979) recognized that a state creates a constitutionally-protected interest in parole when it mandates parole upon the showing of a specified substantive predicate or permits denial of parole only upon a showing of a specified substantive predicate.

The warden's assertion that *Hamm v. Latessa*, 72 F.3d 947, 954 (1st Cir. 2005) "explicitly [held] that the *Sandin* analysis applies to cases involving state prisoners' challenges to parole," Petition at 8, is greatly overstated. There, the court held that the state statute in question, as interpreted by the state courts, simply did not give the prisoner the right to a parole consideration hearing at the time that he asserted it did. The other circuit cases applying *Sandin* cited by the warden concerned work release — "prisoners being denied permission to leave jail in order to work," *Kitchen v. Upshaw*, 286 F.3d 179, 187 (4th Cir. 2002) — a classic prison administration issue oversight of which would "involv[e] the federal courts in the day-to-day management of prisons." *Sandin*, 515 U.S. at 473 & 482. Such a prison management issue cannot be equated, as the warden asserts (Petition at 8 n. 3), with a California parole determination.[3]

The warden's attempt to bolster his reliance on *Sandin* with *Wilkinson v. Austin,* 545 U.S. 209 (2005), Petition at 6 & 13, backfires on him. *Austin* addressed a prison management issue as well, for it concerned "the nature of the deprivation caused by a transfer to a 'Supermax' prison." Petition at 7. Even so, in *Austin* the Court found "a liberty interest in avoiding assignment to" that prison, in part because such "placement disqualifies an otherwise eligible inmate for parole consideration." *Id.* at 224; c.f., *Sandin*, 515 U.S. at 487, incl. n.10 (pointing out that the prison classification decision there at issue had no direct impact on and "did not inevitably affect the duration of his sentence"). In contrast, deprivation of parole directly and necessarily affects the duration of a

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[3] One case cited by the warden, *Asquith v. Department of Corrections*, 186 F.3d 407 (3rd Cir. 1999), Petition at 8, concerned community release rather than work release. In that case, the community release program provided a form of "institutional confinement" with "no implicit promise that Asquith's limited freedoms might not be arbitrarily revoked." *Id.* at 411. This is very different than California's parole scheme.

prisoner's confinement, and may effectively condemn him to a slow death in prison.

Sandin aside, the warden argues, California's statute does not give rise to a protected liberty interest under *Greenholtz* and *Allen*. Again, this Court long has held otherwise. *See McQuillion v. Duncan*, 306 F.3d at 902; *Biggs v. Terhune*, 334 F.3d at 914-915:

The warden argues these holdings did not "give appropriate consideration to the California Supreme Court's interpretation of its parole scheme" in *In re Dannenberg*, 34 Cal.4th 1061 (2005). Petition at 10 (boldness and capitalization in heading deleted). But that was the exact argument this Court soundly rejected in *Sass*, 461 F.3d at 1127-1128. Again, the warden never confronts this holding or its reasoning. Rather, he simply asserts the same tired arguments of no due process liberty interest in parole that the Court has repeatedly rejected. *See* slip opn. at 46-47. No basis exists to reconsider this Court's rulings on the settled point that a California prisoner's interest in parole is a protected liberty interest under the Due Process Clause.

II.

EN BANC REVIEW IS NOT WARRANTED TO RECONSIDER WHETHER SOME EVIDENCE MUST SUPPORT DEPRIVATION OF A PRISONER'S LIBERTY INTEREST IN PAROLE.

The warden asserts that this Court should reconsider its requirement of "some evidence" to support parole deprivations. Petition at 12. The warden claims AEDPA error in this Court's importation to the parole context of the "some evidence" incident of due process that the Supreme Court in *Superintendent v. Hill*, 472 U.S. 445 (1985) employed in the prison disciplinary hearing context. Petition at 15. But again, "the Panel here followed a ... line of this Court's

holdings" in requiring that the parole deprivation be founded on some evidence. Petition at 12. Although the warden characterizes that line as "recent," Petition at 12, in fact it dates back more than twenty years. *See McQuillion*, 306 F.3d at 904, citing *Jancsek v. Oregon Bd. of Parole,* 833 F.2d 1389 (9th Cir. 1987). The Court has reiterated that the least burdensome standard of review that due process requires for supporting evidence —"some evidence" — applies to parole deprivations. *Biggs v. Terhune*, 334 F.3d at 915. Likewise, the same AEDPA argument raised here was rejected in *Sass*, 461 F.3d at 1128-1129.

The warden asserts that "the Supreme Court's recent holdings" in *Carey v. Musladin*, __ U.S. __, 127 S.Ct. 649 (2006) and *Schriro v. Landrigan*, __ U.S. __, 127 S.Ct. 1933 (2007), "are irreconcilable with" this Court's application to parole decisions of the "some evidence" standard that *Hill* found applied to prison disciplinary decisions. Petition at 15. Not so.

To begin with, *Irons*, which was decided after *Musladin* and applied the some-evidence standard of review, did not find that this Circuit's reliance on *Hill* was implicated in the least by *Musladin*. *See Irons v. Carey*, 505 F.3d at 851. Moreover, the argument does not withstand scrutiny. In *Musladin*, the Supreme Court found that the state court had no guidance from it on when private spectator courtroom conduct deprived a defendant of a fair trial. The wide divergence among lower courts in gauging the prejudice from spectator misconduct claims, which Justice Thomas cited to indicate the "lack of guidance from this Court," *Musladin*, 127 S.Ct. at 654, is completely absent here. California state courts and federal courts have unanimously applied the some-evidence standard of review to parole deprivations, and the warden cites no conflicting authority on that point. *Schriro* does not change the analysis, for that was a situation in which "a client interfere[d] with counsel's efforts to present mitigating evidence to a sentencing

court," a very different question of ineffective assistance of counsel than the Court had ever ruled on. *Schriro*, 127 S.Ct. at 1942.

Finally, a governing legal principle can be applied to a set of facts different from those of the case in which the principle was announced. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). It is sufficient if the Supreme Court "has ... set forth a working constitutional standard by which to evaluate" the petitioner's claim. *Fisher v. Roe*, 263 F.3d 906, 915 (9th Cir. 2001). It has done so here by virtue of its precedent distinguishing when the standard of review of "some evidence" should be employed rather than a higher standard.

The lowest possible standard of review that can be applied to determine if a decision complies with due process is the some-evidence standard, for that standard upholds deprivatory state action as long as there is *any* evidence to support the action. *Superintendent v. Hill*, 472 U.S. at 455 (a decision meets the some-evidence standard of review "if there is any evidence in the record that could support the conclusion" reached). If the state action is not based on any evidence, then it is whimsical and capricious — the epitome of arbitrariness. "A finding without evidence is arbitrary and baseless.... Such authority ... is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercises of power." *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91 (1913). The need for at least some evidence thus inheres in any protected liberty interest; it is only where a prisoner has no interest in his liberty protected by due process that the state may deprive him of it "for whatever reason or for no reason at all." *Meachum v. Fano*, 427 U.S. 215, 228 (1976). At bottom, the warden's claim that a California prisoner may be deprived of parole without any evidence that his parole would pose an unreasonable risk to public safety would permit the parole authority to leave a trail of arbitrary parole denials in its wake, a

trail of fundamental unfairness beyond the reach of this Court to remedy under the Due Process Clause. That claim is untenable, since it is given that California prisoners are entitled to the protection of that clause when considered for parole.

The Supreme Court has clearly established that at the very least some evidence must support *any* action depriving an individual of a liberty interest protected by due process, particularly one so consequential to the individual as the denial of parole. As it noted in *Superintendent v. Hill*, 472 U.S. at 455: "In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. *See, e.g., Douglas v. Buder,* 412 U.S. 430, 432, 93 S.Ct. 2199, 2200, 37 L.Ed.2d 52 (1973) (*per curiam*) (revocation of probation); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957) (denial of admission to bar); *United States ex rel. Vajtauer v. Commissioner of Immigration,* 273 U.S. 103, 106, 47 S.Ct. 302, 303, 71 L.Ed. 560 (1927) (deportation)." Parole is just one more context where a bare minimum of evidence satisfies due process, as opposed to a greater amount. *See, e.g., Superintendent v. Hill*, 472 U.S. at 456 ("We decline to adopt a more stringent evidentiary standard as a constitutional requirement.").

In any event, this Court overwhelmingly denied en banc consideration of this same issue in *Irons v. Carey*, 506 F.3d 951 (9th Cir. 2007). License to deprive an individual of a protected liberty interest without any evidence justifying such action simply is inconsistent with the Due Process Clause's protection against arbitrary state action. The two dissenters who would have granted en banc consideration of *Irons* on this ground nevertheless concluded:

> In addition to the predictive, empirical concern with recidivism, states may have a moral concern with parole of prisoners who have committed especially savage crimes. Even if there is not

> "some evidence" of likely recidivism, and even if parole boards are satisfied that there is no likelihood of recidivism, states may justifiably deny parole. States are free to take the view that vindication of principles of right and wrong, and a decent respect for the victims of crime, require denial of parole to especially vicious criminals. States are entitled to deny parole and require prisoners to serve their full sentences less "good time," even without "some evidence" beyond the crimes for which the sentences were imposed.

Irons v. Carey, 506 F.3d at 956.

That is all very true. Indeed, California has taken that view by providing for life imprisonment without the possibility of parole in certain circumstances. *See, e.g.*, Cal. Penal Code §§ 190, subd. (c), 190.03, 190.05 & 190.2. What a state cannot do, however, is transform a sentence of life with parole into lone of life without the possibility of parole. A state may not establish a parole system whereby a grant of parole is dependent upon "the predictive, empirical concern with recidivism," but implement that parole system by denying parole not due to a public safety concern, but "a moral concern with parole of prisoners who have committed especially savage crimes" or a perceived "vindication of principles of right and wrong, and a decent respect for the victims of crime." While those concerns may legitimately animate the length of time the parole authority determines a parolable prisoner must serve as proportionate and punishment for his offense after finding that his release would not risk public safety, *see* Cal. Pen. Code § 3041 (a), they have no place in the parole suitability determination. Indeed, the requirement of "some evidence" of an unreasonable risk to public safety is the very hedge that protects against parole denials based upon illegitimate considerations such as those the two dissenters promoted in *Irons*.

California expresses its citizenry's "moral concern" with those "who have committed especially savage crimes" and its "vindication of principles of right and

wrong," as well as its "respect for the victims of crime," by the laws it duly enacts. The evil here is the parole authority's substitution of its own morality and sense of justice for that of the law's. The federal courts thus play a special role in ensuring the protection of the liberty interest in parole that California has granted murderers, a most disfavored and disenfranchised class. An elected or appointed body's "responsivity to political pressures poses a risk that it may be tempted to use [its power] as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994).

The executive's replacement of the legal standards for parole with its own personal and political ones thus goes to the core of our constitutional democracy. "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1866); *see also United States v. Lee*, 106 U.S. 196, 220 (1882)("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law and are bound to obey it.")

In sum, nothing warrants reconsideration of the Court's application of the some-evidence standard to review of deprivations of parole in California for arbitrariness.

III.

EN BANC REVIEW IS NOT WARRANTED TO RECONSIDER WHETHER A CERTIFICATE OF APPEALABILITY IS REQUIRED DEPRIVATION OF A PRISONER'S LIBERTY INTEREST IN PAROLE MUST BE SUPPORTED BY SOME EVIDENCE.

The warden seeks en banc consideration of the question whether an inmate seeking to appeal a denial of a petition for writ of habeas corpus challenging a parole decision needs to obtain a certificate of appealability ("COA"). Petition at 17-18. As the panel noted, however, "in *Rosas v. Nielsen,* 428 F.3d 1229, 1232 (9th Cir. 2005), we explicitly held that AEDPA does not require a petitioner to obtain a certificate of appealability when the federal claim underlying the petition is that the petitioner was unconstitutionally denied parole." Slip opn. at 46 n.6. Again, the question is so well settled in this circuit that the panel consigned the issue to a footnote.

The warden nevertheless persists in contesting the Court's holding in *Rosas* by tracing back its antecedents. As explained in *Rosas v. Nielsen*, 428 F.3d at 1231:

> A habeas petitioner must secure a certificate of appealability where "the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A). The Ninth Circuit construed this language in *White v. Lambert,* 370 F.3d 1002 (9th Cir.2004), *cert. denied,* --- U.S. ----, 125 S.Ct. 503, 160 L.Ed.2d 379 (2005), to hold that a certificate of appealability "is not required when a state prisoner challenges an administrative decision regarding the execution of his sentence." *Id.* at 1010. Thus, the district court looks at who made "the detention decision complained of by the state prisoner," an administrative body or a judicial one, in determining whether a certificate of appealability is required. *Id.*

The warden asserts that "*White* is not dispositive in a parole case" because "[a] habeas challenge to a parole decision is ... an attack on the detention imposed by the state court." Petition at 18. Not so. Far from a challenge to the court's judgment, such a habeas petition seeks to *enforce* the judgment by obtaining compliance with the law by the administrative body responsible for execution of that judgment.

The warden relies on *In re Roberts,* 26 Cal.4th 575, 586-87 (2005) to support its claim, but that decision is inapposite. As that court itself stated, "we merely decide here the appropriate venue in which to adjudicate a challenge to th[e] denial" of parole." *Id.* at 589. That state venue determination was informed by "practical considerations," *id.* at 591, that have nothing to do with the meaning of the federal statute here at issue. Indeed, in that case all parties and the court recognized "the Board's status as an executive agency rather than a judicial entity ...." *Id.* at 1130. That the Governor and the Board are part of the executive branch charged with carrying out the sentence is dispositive of the statutory question here.

Recognizing an inter-circuit conflict on this issue, the warden asserts that "[b]ecause the certificate of appealability requirement is a rule of national applicability, rehearing en banc should be granted to secure uniformity of decisions." Petition at 20, citing FRAP Rule 35. Circuit Rule 35-1, implementing that rule of appellate procedure, however, provides: "When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application *in which there is an overriding need for national uniformity*, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc." (Italics added.) The warden fails to demonstrate any "overriding need for national uniformity on the rule." Indeed, the

rule concerns a matter of peculiar concern only to each circuit — i.e., management of its own caseload.

In this regard, the warden urges that "this Court's holding in *Rosas* should be reconsidered in light of the resulting burden on this Court." Petition at 20. The warden's argument is based on facts outside the record and never made the subject of a proper motion for judicial notice that would enable Hayward to determine those facts. Although the warden asserts there is an increasing number of appeals challenging state decisions depriving an inmate of his liberty interest in parole as arbitrary, Petition at 20-21, he makes no showing that that is because of a lack of a COA requirement as opposed to an increasing number of arbitrary deprivations of parole. Indeed, the state courts have ascribed the increasing number of challenges to parole deprivations to the phenomenon that "California parole authorities are losing sight of the fact that 'release on parole is the rule, rather than the exception.' [Citation.]" *In re Andrade*, 141 Cal.App.4th 807, 823 (2006) (Pollak, J., concurring & dissenting). "[T]he State's limited resources," Petition at 21, would best be conserved by adherence of its parole authority to the Constitution.

Finally, this case, in which this Court has joined the judicial chorus decrying arbitrary and capricious deprivations of parole, would be a particularly poor vehicle for reconsideration of the need for a COA. The Court would be deciding a purely academic question, for if Hayward needed a COA to prosecute his appeal surely the Court would issue him one. *See, e.g., Stokes v. Schriro,* 465 F.3d 397, 401 n.5 (9th Cir. 2006) (court treated the petitioner's opening brief raising uncertified issues as a request for a COA on those issues, and issued a COA on one of the uncertified issues to reverse the judgment on that issue). In any event, "this court should rehear a case in banc [only] when it is both of exceptional importance *and* the decision *requires correction*." *Newdow v. U.S.*

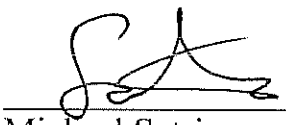
Congress, 328 F.3d 466, 469 (9th Cir. 2003) (as amended) (Reinhardt, J., concurring in denial of rehearing in banc), *rev'd on other grounds by Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004). Because the panel's holding was correct on this point, it does not require en banc review.

CONCLUSION

For these reasons, the Court should deny the warden's petition.

Dated: February 9, 2008

Respectfully submitted,



Michael Satris

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD HAYWARD, Petitioner - Appellant, v. JOHN MARSHALL, Warden, Respondent - Appellee.	No. 06-55392 D.C. No. CV 05-7239-GAF (CT) Central District of California **CERTIFICATE OF COMPLIANCE** **Pursuant to Circuit Rules 35-4 and 40-1**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Answer to Petition for Panel Rehearing and Rehearing en banc is: (check appropriate option)

_____ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (petitions and answers must not exceed 4,200 words),

or

_____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

__X__ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Michael Satris

Attorney for Petitioner-Appellant
RONALD HAYWARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD HAYWARD, Petitioner - Appellant, v. JOHN MARSHALL, Warden, Respondent - Appellee.	No. 06-55392 D.C. No. CV 05-7239-GAF (CT) Central District of California **PROOF OF SERVICE BY MAIL**

I am a citizen of the United States and a resident of Marin County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 337, Bolinas CA.

On February 11, 2008, I served the within **ANSWER TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 11, 2008.

Sabine Jordan