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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RUSSELL LANG,

1:08-cv-01407-AWI-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 1]

JERRY BROWN,

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

BACKGROUND¹

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation (CDCR) following his 1974 conviction in Sacramento County Superior Court for conspiracy to commit murder, first degree murder, and possession of a weapon. Petitioner was sentenced to one life term (seven years to life) plus one year.

In the instant petition, Petitioner does not challenge the validity of his conviction; rather, he challenges the Board of Parole Hearings' (Board) October 11, 2006 decision finding him unsuitable for release on parole. Petitioner contends (1) there was not some evidence to support the Board's decision; (2) the Board discriminated against him when compared to his three co-defendants; (3) he is being held for a term that is disproportionate to his crime under the

¹ This information is derived from the Petition, Traverse, and state court documents lodged with this Court.

1 Determinate Sentencing Law (DSL); (4) he is being held for a term that is disproportionate to his
2 culpability under the Indeterminate Sentencing Law (ISL) because he was never provided a
3 hearing under the ISL; and (5) the Board did not state its reasons for finding him unsuitable.

4 In 2007, Petitioner filed a state petition for writ of habeas corpus in the Sacramento
5 County Superior Court challenging the Board's 2006 decision. On August 21, 2007, the superior
6 court denied the petition in a reasoned decision. In finding some evidence supported the Board's
7 denial, the Court stated that "Petitioner's crimes were committed on separate occasions against
8 multiple persons singled out only because of their race. Petitioner was urged to commit such
9 crimes by the Nation of Islam, but the records failed to show why petitioner would be particularly
10 drawn to this group or why, after a relatively short association, he would commit murder for the
11 group. Thus, his motive seems trivial in relationship to the crime." The court declined to "re-
12 assess the Board's reasoning, element by element," because the commitment offense provided
13 some evidence to support the Board's decision.

14 On October 17, 2007, Petitioner filed a petition for writ of habeas corpus in the California
15 Court of Appeal, Third Appellate District. On October 25, 2007, the petition was denied with
16 citation to People v. Duvall, 9 Cal.4th 464, 474 (1995).

17 On December 21, 2007, Petitioner filed a petition for writ of habeas corpus in the
18 California Supreme Court. On June 25, 2008, the California Supreme Court summarily denied
19 the petition.

20 Petitioner filed the instant petition for writ of habeas corpus on September 19, 2008.
21 Respondent filed an answer to the petition on January 21, 2009, and Petitioner filed a traverse on
22 February 6, 2009.

23 STATEMENT OF FACTS²

24 First Shooting

25 Backridge, a white, off duty Sacramento City Police sergeant had purchased gasoline for
26 his automobile at the Quick Stop Market, corner of Franklin Boulevard and Fourth Avenue in
27

28 ² This information is taken from the 2006 Board hearing, which quoted from the appellate court decision.
(Answer, Exhibit 1, Attachment E, Transcript at 12-14.)

1 Sacramento shortly after 10:00 p.m. on the evening of Saturday, April 10th, 1974. After paying
2 for the purchase, he walked back towards his vehicle, heard a loud report from his right and felt
3 that he had been shot in the legs. He called to the store clerk to notify the police. The call was
4 received by the Sacramento Police Department at 10:13 p.m. Backridge had fallen to the ground,
5 did not see the person who shot him, nor any vehicle which he could associate with the incident.
6 There were, however, two witnesses to the shooting, Mac Burcell, riding his bicycle north on
7 Franklin Boulevard toward the market heard the report of a gun shot from the direction of the
8 market, saw Backridge fall to the ground then saw Petitioner run to the west of the intersection
9 and duck into an alley.

10 Second Shooting

11 On April 21, 1974, at approximately 11:30 p.m. Orvelle left the Sea Shanty Bar on
12 Stockton Boulevard in Sacramento and walked toward his home. He had consumed two beers at
13 the bar and was carrying a six pack of beer with him. When approaching Perry Avenue, he felt a
14 force on the back of his head, as if someone had hit him with a baseball bat. He turned around
15 and saw Petitioner approximately 25 feet away from him, crouched with a weapon in his hand,
16 which he believed was a sawed-off shotgun. Petitioner then fired the weapon again, then ran to a
17 vehicle approximately ninety feet away.

18 Third Shooting/Murder

19 On April 24, 1974, at approximately 1:00 a.m., Frank Belmore and his friend Michael
20 Nuwyaka were sitting in the front room of Belmore's parents' home. There was a gap in the
21 window drapes approximately 12 to 15 inches and someone looking in the window from the
22 outside could ascertain that Belmore was white. Nuwyaka heard a blast through the window and
23 then Belmore slumped in his chair. Belmore was shot in the head and was bleeding. He died as
24 a result of a shotgun wound to the cervical spine and brain stem.

25 DISCUSSION

26 I. Standard of Review

27 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
28 of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its

1 enactment. Lindh v. Murphy, 521 U.S. 320 (1997), *cert. denied*, 522 U.S. 1008 (1997); Jeffries
2 v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997), *quoting* Drinkard v. Johnson, 97 F.3d 751, 769 (5th
3 Cir.1996), *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by* Lindh v. Murphy,
4 521 U.S. 320 (1997) (holding AEDPA only applicable to cases filed after statute's enactment).
5 The instant petition was filed after the enactment of the AEDPA; thus, it is governed by its
6 provisions.

7 Petitioner is in custody of the California Department of Corrections and Rehabilitation
8 pursuant to a state court judgment. Even though Petitioner is not challenging the underlying state
9 court conviction, 28 U.S.C. § 2254 remains the exclusive vehicle for his habeas petition because
10 he meets the threshold requirement of being in custody pursuant to a state court judgment. Sass
11 v. California Board of Prison Terms, 461 F.3d 1123, 1126-1127 (9th Cir.2006), *citing* White v.
12 Lambert, 370 F.3d 1002, 1006 (9th Cir.2004) (“Section 2254 ‘is the exclusive vehicle for a
13 habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the
14 petition is not challenging [her] underlying state court conviction.’”).

15 The instant petition is reviewed under the provisions of the Antiterrorism and Effective
16 Death Penalty Act which became effective on April 24, 1996. Lockyer v. Andrade, 538 U.S. 63,
17 70 (2003). Under the AEDPA, an application for habeas corpus will not be granted unless the
18 adjudication of the claim “resulted in a decision that was contrary to, or involved an
19 unreasonable application of, clearly established Federal law, as determined by the Supreme Court
20 of the United States” or “resulted in a decision that was based on an unreasonable determination
21 of the facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C.
22 § 2254(d); *see* Lockyer, 538 U.S. at 70-71; Williams, 529 U.S. at 413.

23 “[A] federal court may not issue the writ simply because the court concludes in its
24 independent judgment that the relevant state court decision applied clearly established federal
25 law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411.
26 A federal habeas court making the “unreasonable application” inquiry should ask whether the
27 state court’s application of clearly established federal law was “objectively unreasonable.” Id. at
28 409. Petitioner has the burden of establishing that the decision of the state court is contrary to

1 or involved an unreasonable application of United States Supreme Court precedent. Baylor v.
2 Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the
3 states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a
4 state court decision is objectively unreasonable. See Clark v. Murphy, 331 F.3d 1062, 1069 (9th
5 Cir.2003); Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir.1999).

6 II. Review of Petition

7 There is no independent right to parole under the United States Constitution; rather, the
8 right exists and is created by the substantive state law which defines the parole scheme.
9 Hayward v. Marshall, 603 F.3d 546, 559, 561 (9th Cir. 2010) (en banc) (citing Bd. of Pardons v.
10 Allen, 482 U.S. 369, 371 (1987); Pearson v. Muntz, No. 08-55728, 2010 WL 2108964, * 2 (9th
11 Cir. May 24, 2010) (citing Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d
12 174 (2005)); Cooke v. Solis, No. 06-15444, 2010 WL 2330283, *6 (9th Cir. June 4, 2010).

13 “[D]espite the necessarily subjective and predictive nature of the parole-release decision, state
14 statutes may create liberty interests in parole release that are entitled to protection under the Due
15 Process Clause.” Bd. of Pardons v. Allen, 482 U.S. at 371.

16 In California, the Board of Parole Hearings’ determination of whether an inmate is
17 suitable for parole is controlled by the following regulations:

18 (a) General. The panel shall first determine whether the life prisoner is suitable for
19 release on parole. Regardless of the length of time served, a life prisoner shall be found
20 unsuitable for a denied parole if in the judgment of the panel the prisoner will pose an
unreasonable risk of danger to society if released from prison.

21 (b) Information Considered. All relevant, reliable information available to the
22 panel shall be considered in determining suitability for parole. Such information shall
23 include the circumstances of the prisoner's social history; past and present mental state;
24 past criminal history, including involvement in other criminal misconduct which is
25 reliably documented; the base and other commitment offenses, including behavior before,
26 during and after the crime; past and present attitude toward the crime; any conditions of
treatment or control, including the use of special conditions under which the prisoner may
safely be released to the community; and any other information which bears on the
prisoner's suitability for release. Circumstances which taken alone may not firmly
establish unsuitability for parole may contribute to a pattern which results in a finding of
unsuitability.

27 Cal. Code Regs. tit. 15, §§ 2402(a) and (b). Section 2402(c) sets forth circumstances tending to
28

1 demonstrate unsuitability for release. "Circumstances tending to indicate unsuitability include:

2
3 (1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

4 (A) Multiple victims were attacked, injured or killed in the same or separate incidents.

5 (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

6 (C) The victim was abused, defiled or mutilated during or after the offense.

7 (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

8 (E) The motive for the crime is inexplicable or very trivial in relation to the offense.

9
10 (2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

11 (3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.'

12
13 (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

14 (5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

15
16 (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.

17
18 Cal. Code Regs. tit. 15, § 2402(c)(1)(A)-(E),(2)-(9).

19 Section 2402(d) sets forth the circumstances tending to show suitability which include:

20 (1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.

21 (2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.

22 (3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense.

23 (4) Motivation for Crime. The prisoner committed his crime as a result of significant stress in his life, especially if the stress has built over a long period of time.

24 (5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.

1 (6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.

2 (7) Age. The prisoner's present age reduces the probability of recidivism.

3 (8) Understanding and Plans for Future. The prisoner has made realistic plans for release
4 or has developed marketable skills that can be put to use upon release.

5 (9) Institutional Behavior. Institutional activities indicate an enhanced ability to function
6 within the law upon release.

6 Cal. Code Regs. tit. 15, § 2402(d)(1)-(9)

7 The California parole scheme entitles the prisoner to a parole hearing and various
8 procedural guarantees and rights before, at, and after the hearing. Cal. Penal Code § 3041.5. If
9 denied parole, the prisoner is entitled to subsequent hearings at intervals set by statute. *Id.* In
10 addition, if the Board or Governor find the prisoner unsuitable for release, the prisoner is entitled
11 to a written explanation. Cal. Penal Code §§ 3041.2, 3041.5. The denial of parole must also be
12 supported by "some evidence," but review of the Board's or Governor's decision is extremely
13 deferential. *In re Rosenkrantz*, 29 Cal.4th 616, 128 Cal.Rptr.3d 104, 59 P.3d 174, 210 (2002).

14 Because California's statutory parole scheme guarantees that prisoners will not be denied
15 parole absent some evidence of present dangerousness, the Ninth Circuit Court of Appeals
16 recently held California law creates a liberty interest in parole that may be enforced under the
17 Due Process Clause. *Hayward v. Marshall*, 602 F.3d at 561-563; *Pearson v. Muntz*, 2010 WL
18 2108964, at *4. Therefore, under 28 U.S.C. § 2254, this Court's ultimate determination is
19 whether the state court's application of the some evidence rule was unreasonable or was based on
20 an unreasonable determination of the facts in light of the evidence. *Hayward v. Marshall*. 603
21 F.3d at 563; *Pearson v. Muntz*, 2010 WL 2108964, at *2-3.

22 The applicable California standard "is whether some evidence supports the *decision* of
23 the Board or the Governor that the inmate constitutes a current threat to public safety, and not
24 merely whether some evidence confirms the existence of certain factual findings." *In re*
25 *Lawrence*, 44 Cal.4th 1181, 1212 (2008) (emphasis in original and citations omitted). As to the
26 circumstances of the commitment offense, the *Lawrence* Court concluded that

27 although the Board and the Governor may rely upon the aggravated circumstances
28 of the commitment offense as a basis for a decision denying parole, the aggravated
nature of the crime does not in and of itself provide some evidence of current

1 dangerousness to the public unless the record also establishes that something in
2 the prisoner's pre- or post-incarceration history, or his or her current demeanor
3 and mental state, indicates that the implications regarding the prisoner's
4 dangerousness that derive from his or her commission of the commitment offense
5 remain probative to the statutory determination of a continuing threat to public
6 safety.

7 Id. at 1214.

8 In addition, "the circumstances of the commitment offense (or any of the other factors
9 related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to
10 the determination that a prison remains a danger to the public. It is not the existence or
11 nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the
12 significant circumstance is how those factors interrelate to support a conclusion of current
13 dangerousness to the public." In re Lawrence, 44 Cal.4th at 1212.

14 "In sum, a reviewing court must consider 'whether the identified facts are *probative* to the
15 central issue of *current* dangerousness when considered in light of the full record before the
16 Board or the Governor.'" Cooke v. Solis, No. 06-15444, 2010 WL 2330283 (9th Cir. June 4,
17 2010) (emphasis in original) (citing Hayward v. Marshall, 603 F.3d at 560).

18 At Petitioner's twenty-third parole consideration hearing in 2006, the parole
19 commissioners split in their decision of whether Petitioner should be found suitable for release.
20 The case was referred to an en banc board, which summarily denied parole. The Sacramento
21 County Superior court construed the en banc denial as dependent on the factors cited by the
22 commissioner who supported the decision to deny parole. This Court will do the same.

23 In the last reasoned decision of the Sacramento County Superior Court, the Court found
24 that some evidence supported the en banc panel's decision to deny parole stating in relevant part:

25 In petitioner's case, the Board relied heavily on his commitment offense,
26 which it is entitled under *Dannenberg* to do, as long as the crime does not
27 represent simply the minimum elements of the offense. Petitioner's crimes were
28 committed on separate occasions against multiple persons singled out only
because of their race. Petitioner was urged to commit such crimes by the Nation
of Islam, but the records failed to show why petitioner would be particularly
drawn to this group or why, after a relatively short association, he would commit
murder for the group. Thus, his motive seems trivial in relationship to the crime.

There are, of course, any number of factors that would weigh in favor of
parole, but the court does not reweigh the evidence. Nor does the court re-assess

1 the Board's reasoning, element by element. The court looks only to see whether
2 some evidence supports the ultimate decision. In this case, some evidence exists
3 to support the denial of parole. That evidence is the commitment offense, which
4 is far more egregious than normal, even for first-degree murder.

5 Petitioner was the triggerman in the assault on the off-duty police officer
6 and in the murder. He is not in the same situation as his co-defendants, even if
7 they were convicted of the same or similar crimes. His parole determination need
8 not be compared with theirs. In any case, the Board is not compelled to conduct
9 comparative analysis.

10 (Exhibit 2, to Answer.)

11 As just stated, the state superior court found the circumstances of the commitment
12 offense, alone, was sufficient to deny parole. However, as previous stated, the California
13 Supreme Court subsequently clarified the standard of review applicable to parole determinations
14 in Lawrence, and contrary to the state superior court's finding, the circumstances of the
15 commitment offense may be relied upon by the Board to deny parole so long as it remains
16 probative of his current dangerousness when viewed in light of the entire record. In re Lawrence,
17 44 Cal.4th at 1221.

18 The state superior court's decision upholding the denial of parole based solely on the
19 circumstances of the commitment offense was an unreasonable application of California's some
20 evidence standard. In finding Petitioner unsuitable for parole, the Board relied on the
21 circumstances of the commitment offense, trivial motive, and escalating pattern of criminal
22 conduct and failure to profit from previous grants of probation.

23 With regard to the commitment offense, the Board found it was carried out in an
24 especially cruel and very callous manner, and multiple victims were attacked, injured, and killed,
25 in three separate unrelated incidents. The Board also found the motive to be trivial as the
26 shootings were motivated by racism as a part of Petitioner's participation in the Islamic faith,
27 which taught that Caucasians were devils and that it was the duty of each Muslim to murder four
28 devils.

While the factual circumstances underlying Petitioner's convictions were undoubtedly
atrocious, the question remains whether 32 years later, it remains indicative of his present
dangerousness to the public. Petitioner was 19 years old at the time of the commitment, and 51

1 years old at the time of the 2006 hearing. The commitment offenses were committed 32 years
2 prior to the parole hearing, and Petitioner had been incarcerated for that period of time. At the
3 2006 hearing, Petitioner repeatedly accepted full responsibility for the offenses and explained the
4 remorse he felt for his actions. In the most recent psychological report, by Dr. Schroeder, dated
5 May 5, 2006, it was opined that:

6 [Petitioner] understands that he was not independent thinking person while under
7 the influence of Black Muslims who were violating the tenets of their religion. In
8 hindsight, he sees himself as a follower who did not think through his attitudes
9 and beliefs and allowed himself to be swept up in a belief system that supported
10 violence, in contrast to the Muslim faith. He has accepted full responsibility for
11 his crimes. Dr. Schroeder concluded that Petitioner “can be counted to be a
12 productive, self sufficient, contributing member of society.

13 Dr. Schroeder’s assessment is consistent with the 2004 opinion of the prior
14 Psychological, Dr. Wagner, who found that Petitioner “expressed considerable remorse and
15 empathy for his victim and stated that he was involved in a victim restitution program and wrote
16 a letter to the District Attorney to give to the victim’s family. He said he feels ashamed of what
17 he did and of becoming brainwashed into the Nation of Islam mindset.” Dr. Wagner concluded
18 that Petitioner’s potential for violence was reduced by his “age and maturity, taking full
19 responsibility for his criminal acts, expressing significant remorse for his victims, gaining insight
20 into the causative factors leading to his Committing Offense, having a minimal criminal history
21 prior to his Commit[ment] Offense, having a minimal criminal history prior to his Commit[ment]
22 Offense, and having good vocational skills and a viable parole plan.” In comparison to other
23 minimum security inmates, [Petitioner’s] potential for violence is considered to be lower.”
24 Based on Petitioner’s overwhelming insight into the commitment offense, there must be some
25 other evidence to demonstrate that he remains an unreasonable risk to public safety is released.
26 Lawrence, 44 Cal.4th at 1214.

27 The Board found that Petitioner has an escalating pattern of criminal conduct and failed
28 previous grants of probation. Yet, the Board later recognized that Petitioner had a minimal
criminal history consisting of one juvenile conviction for petty theft and no prior adult
convictions. It is clear Petitioner had not committed any prior violent offenses and there is not
some evidence that this factor remains predicative of Petitioner’s current dangerousness. See

1 Cal. Code Regs. tit. 15, § 2402(c)(2) (a factor demonstrating unsuitability is previous record of
2 violence when “[t]he prisoner on previous occasions inflicted or attempted to inflict serious
3 injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an
4 early age.”). This finding is also supported by the psychological report which stated that
5 Petitioner did not have a history of violence other than the commitment offense. The
6 psychologist concluded that Petitioner possessed a below average risk of harm to others when
7 compared to the parolee population and equal risk of harm compared to the average citizen.

8 In addition, the record before the Board at the 2006 hearing is replete with evidence of
9 Petitioner’s extensive rehabilitation, including exemplary institutional behavior, completion of
10 several vocational training courses, employment within the prison, self-help programming, strong
11 family ties, marketable employment skills, solid parole plans, and support by correctional
12 officials. With regard to Petitioner’s institutional behavior, he had suffered eight serious rules
13 violation, however, the last occurred in 1984 for failure to report to class, and four counseling
14 chronos, the last in 2004 for out of bounds. Petitioner has remained free of any serious rules
15 violations for the last 26 years of incarceration and none of the prior violations involved
16 violence. See Cal. Code Regs. tit. 15, § 2402 (c)(6) (“Institutional Behavior. The prisoner has
17 engaged in serious misconduct in prison or jail.”). Therefore, Petitioner’s institutional behavior
18 for the past two and a half decades has been exemplary, and supports the finding that he is
19 suitable for release on parole.

20 Petitioner has participated in numerous self-help programs, including Alcoholics
21 Anonymous and Narcotics Anonymous, Basic Alternatives to Violence, faith-based pre-release
22 program, creative options, parenting program, success from inside out, victim awareness
23 program, Ways to Happiness, and individual and group therapy. Petitioner has also completed
24 several vocational training programs, including automotive mechanics, welding, and electrical
25 technician.

26 Petitioner received several laudatory chronos from correctional staff. The oldest dated
27 August 31, 2006, by his vocational instructor, Mr. Medeiros, indicated that Petitioner was
28 assigned to the vocational automotive mechanics class as a teacher’s aide and clerk. Medeiros

1 praised Petitioner stating the following:

2 [H]is experience - - extensive knowledge and expertise in the field of auto motive
3 repair and his clerical skills have been valuable in a number of areas, and helping
4 this instructor set up and reopen the facility two auto mechanics shop, [Petitioner]
5 was very instrumental in helping me put together the class curriculum. He's also
6 been and continues to be a very helpful in working with other inmates and
7 working on learning activity and on practical projects. You're accountable,
8 dependable, and willing to work hard.

6 (Transcript, at 30.)

7 The next chrono is dated September 1, 2006, acknowledged Petitioner's participation in several
8 self-help programs. There was also a chrono dated April 15, 2004, in which Petitioner received
9 above grades in his work assignment. Petitioner also received two Associate of Science degrees
10 in computer science and electronics.

11 Petitioner has a stable social history and has maintained strong connections with his
12 family members through letters and visitations. In regard to Petitioner's parole plans, the Board
13 found that he had viable residential plans and marketable skills upon release. See Cal. Code
14 Regs. tit. 15, §2281(d)(8) (a factor in support of suitability is whether "[t]he prisoner has made
15 realistic plans for release or has developed marketable skills that can be put to use upon
16 release.").³ Petitioner planned to reside with his brother or uncle in Sacramento. Petitioner had
17 numerous letters of support from family members. Petitioner has completed four different skill
18 levels to assist him in obtaining a job. He also performed above satisfactory in his prison
19 employment, which is supported by the numerous laudatory chronos. Therefore, this factor is
20 also in favor of Petitioner's suitability for release.

21 In light of the evidence before the Board at the 2006 hearing, there is no basis to conclude
22 that the circumstances of the commitment offense provide some evidence to support the finding
23 that Petitioner currently posed an unreasonable risk to public safety. In sum, the Board's ultimate
24 conclusion that Petitioner "needs therapy in order to face, discuss, understand and cope with
25 stress in a nondestructive manner until progress is made, [he] continues to be unpredictable and a
26 threat to others" is completely unsupported by the record, and the state courts' determination that
27

28 ³ The statute does not require an actual job offer.

1 the circumstances of the commitment offense constitute some evidence of Petitioner's current
2 dangerousness is an unreasonable application of the facts in light of the evidence. 28 U.S.C. §
3 2254(d)(2).

4 RECOMMENDATION

5 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 6 1. The instant petition for writ of habeas corpus be GRANTED;
- 7 2. The Board of Parole Hearings be DIRECTED to reverse its October 11, 2006,
8 decision, thereby providing Petitioner with any parole credit for time since the
9 October 11, 2006 decision as if release had been granted and any other term credit
10 which he is entitled to by law.⁴

11 This Findings and Recommendation is submitted to the assigned United States District
12 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
13 Local Rules of Practice for the United States District Court, Eastern District of California.

14 Within thirty (30) days after being served with a copy, any party may file written objections with
15 the court and serve a copy on all parties. Such a document should be captioned "Objections to
16 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served
17 and filed within fourteen (14) days after service of the objections. The Court will then review the
18 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
19 failure to file objections within the specified time may waive the right to appeal the District
20 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21
22 IT IS SO ORDERED.

23 **Dated: June 25, 2010**

/s/ Dennis L. Beck
24 UNITED STATES MAGISTRATE JUDGE

25
26
27
28 _____
⁴ The Court notes that on April 26, 2010, Petitioner was released on parole for a determinate term of 5 years. (Notice of Release, Exhibit 1.)