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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VICTOR SOLORIO CASTELAN,

Petitioner,

No. CIV S-09-0530-FCD-TJB

vs.

BOARD OF PAROLE HEARINGS,

Respondent.

ORDER, FINDINGS AND RECOMMENDATIONS

_____ /

I. INTRODUCTION

Petitioner Victor Solorio Castelan is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, (1) Petitioner’s requests are denied; and (2) it is recommended that habeas relief be denied.

II. PROCEDURAL HISTORY

On February 3, 1994, Petitioner pleaded nolo contendere to second degree murder, with a firearm use enhancement, assault with a firearm, and discharging a firearm in the San Joaquin County Superior Court. Resp’t’s Answer Ex. 1, at 174, ECF No. 11 (citing CAL. PENAL CODE §§ 187, 245(a)(2), 246, 12022.5(a)). Petitioner is currently serving a sentence of twenty years to life in prison. Pet’r’s Pet. 1, ECF No. 1. In the instant action, Petitioner challenges the decision by the California Board of Parole Hearings (the “Board”) denying Petitioner parole. Petitioner

1 appeared before the Board on November 28, 2007.

2 On March 7, 2008, Petitioner filed a petition for writ of habeas corpus with the San
3 Joaquin County Superior Court challenging the Board's decision. *See* Resp't's Answer Ex. 1.
4 On May 15, 2008, the Superior Court issued a reasoned opinion denying the petition. *See*
5 Resp't's Answer Ex. 2. Petitioner sought relief in the California Court of Appeal, Third
6 Appellate District, and the California Supreme Court; those petitions were likewise denied, but
7 without written opinions. *See* Resp't's Answer Exs. 3-8.

8 On February 24, 2009, Petitioner filed a federal petition for writ of habeas corpus.
9 Respondent filed an answer to the petition on June 19, 2009, to which Petitioner filed a traverse
10 on July 20, 2009.

11 III. FACTUAL BACKGROUND

12 On . . . Sunday, June 28th, 1992 at 1:43 a.m., Antonio Mendez
13 Rocha, . . . age 21, sustained multiple gunshot wounds to the head
14 and face. He was pronounced dead on arrival at San Joaquin
15 General Hospital.

16 Jose Luis Rocha Gomez, age 20, and an uncle to the victim, told
17 the circumstances of Antonio's death to investigating officers of
18 the Stockton Police Department. Antonio was driving a gray four-
19 door 1978 Chrysler Cordoba northbound on El Dorado Street in the
20 middle lane. Jose was his passenger.

21 Another vehicle pulled alongside and someone began firing shots.
22 Jose bent over, Antonio applied the brakes, then collapsed. They
23 hit a curb and stopped. When Jose looked outside the car, the
24 assailants had fled. Despite the broken windows and flat left rear
25 tire, Jose brought the victim to the hospital.

26 The investigating officers were assisted by an anonymous phone
call from an eye witness who stated that the shooting involved a
red Chevrolet Impala, that was occupied by two subjects.

On June 28th, 1992 at 8:30 p.m., an officer of the Stockton Police
Department observed a red two-door Chevrolet Impala roll through
an intersection without completing a stop. The vehicle stopped at
B and 11th Streets, but it did not have a brake light. Knowing this
to be a suspect vehicle, the officer summoned back-up units.

Rudy, initial T, age 15, was driving the vehicle without a driver's
license. His front seat passenger was Angel Borg, . . . age 17. The

1 officer noted that both were actively supervised by the Gang Unit
2 of the Probation Department. The rear passenger, Raymond
Galindo, age 18, was questioned and released.

3 Rudy T. gave the officer permission to search the car. The right
4 armrest of the rear seat was slightly pulled up. Concealed in this
area was a clear plastic box of .22 caliber bullets. The left armrest
5 was slightly pulled away from the panel. In this area w[as] a
revolver wrapped in a white T-shirt and several red shotgun shells.
6 The vehicle that lacked brakes was towed and impounded.

7 Rudy T., Galindo, and Borg were transferred to the Stockton Police
Department for further investigation. After being advised of their
8 rights per Miranda, Torres and Borg advised officers that Victor
Castelan was also in the vehicle at the time of the shooting. Borg
9 also claimed that Castelan fired the weapon that killed the victim.

10 Officers of the Stockton Police Department met with the
supervising probation officer at the Gang Unit, and with the
11 assistance of the Gang Unit went to 2922 Malvern Court, . . .
where Castelan lived. He voluntarily accompanied the officer to
12 the police facility where he provided information regarding the
weapon in question.

13 The officers then proceeded to 1731 South Sutter Street. At this
location, they recovered the shotgun and found two subjects with
14 warrants outstanding for their arrest. During questioning, Borg
told the investigating officer that he was the driver of the suspect
15 vehicle at the time of the shooting. He added that he helped hide
the shotgun.

16 Rudy T. changed his story three times during testimony and finally
17 identified Castelan as the person who fired the shotgun and killed
the victim.

18
19 Pet'r's Pet. Ex. A, at 51-54; Parole Hr'g Tr. 18-21, Nov. 28, 2007 (deriving facts from
20 "Probation Department's report").

21 Petitioner was sixteen years old and on probation when he committed the commitment
22 offenses. Pet'r's Pet. Ex. A, at 54-57, 96; Parole Hr'g Tr. 21-24, 63. Petitioner's "first contact
23 with the juvenile justice system occurred when [he] w[as] 12 years old, and [he] had 27 contacts
24 with the juvenile justice system." Pet'r's Pet. Ex. A, at 59; Parole Hr'g Tr. 26. Petitioner stated
25 "he began using marijuana at the age or 12 off and on," and "he drank alcohol on occasion."
26 Pet'r's Pet. Ex. A, at 83; Parole Hr'g Tr. 50. Petitioner's psychological evaluation revealed that

1 Petitioner “was in the Sixth Street Gang prior to coming into prison.” Resp’t’s Answer Ex. 1, at
2 174.

3 Petitioner’s father was a truck driver, and his mother was a baker. Pet’r’s Pet. Ex. A, at
4 57; Parole Hr’g Tr. 24. At the hearing, Petitioner was not married, and had one child who was
5 fifteen years old. Pet’r’s Pet. Ex. A, at 58; Parole Hr’g Tr. 25. Petitioner’s family and friends
6 wrote letters in support of his release, including offers of residence and jobs. Pet’r’s Pet. Ex. A,
7 at 95-96; Parole Hr’g Tr. 62-63.

8 Petitioner performed well in prison. *See, e.g.*, Pet’r’s Pet. Ex. A, at 60-67, 129-30, 141;
9 Parole Hr’g Tr. 27-34, 97-98, 109. Petitioner completed numerous self-help programs. Pet’r’s
10 Pet. Ex. A, at 60-64; Parole Hr’g Tr. 27-31; *see also* Resp’t’s Answer Ex. 1, at 173-74.
11 Petitioner’s psychological evaluation stated Petitioner “dropped out of school in the 7th grade
12 because he was in and out of Juvenile Hall,” but he “received a GED while in prison in 1995.”¹
13 Resp’t’s Answer Ex. 1, at 173. Petitioner “completed the vocational welding program in ‘05;”
14 experienced some training in refrigeration, air conditioning, computers, small engines, and office
15 services; and “completed a program through the Blackstone Career Institute” for a “degree [as a]
16 legal assistant[] [or] paralegal” in October 2005. Pet’r’s Pet. Ex. A, at 62, 69-70, 111; Parole
17 Hr’g Tr. 29, 36-37, 79. Petitioner’s most recent psychological evaluation, dated November 14,
18 2007, concluded that Petitioner “poses a very low risk of violence in the community.” Pet’r’s
19 Pet. Ex. A, at 88; Parole Hr’g Tr. 55; *see* Resp’t’s Answer Ex. 1, at 171-80.

20 IV. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

21 An application for writ of habeas corpus by a person in custody under judgment of a state
22 court can be granted only for violations of the Constitution or laws of the United States. 28

23
24 ¹ At the time of the hearing, Petitioner was two classes short of achieving a high school
25 diploma. Pet’r’s Pet. Ex. A, at 141-42; Parole Hr’g Tr. 109-10. Petitioner explained he “was
26 planning on completing [his] high school diploma . . . in [his] extra time,” until “somebody made
a decision” to “recall all the books” for “guys [who] have GEDs” already, because they “[we]re
taking valuable tools” Pet’r’s Pet. Ex. A, at 112; Parole Hr’g Tr. 80. Petitioner was “cut
short” and “didn’t get to finish that.” Pet’r’s Pet. Ex. A, at 112; Parole Hr’g Tr. 80.

1 U.S.C. § 2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
2 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)).

3 This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to,
4 the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Lindh v. Murphy*, 521
5 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359, 362 (9th Cir. 1999). Under
6 AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in
7 state court proceedings unless the state court’s adjudication of the claim:

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

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

12 28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*
13 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

14 In applying AEDPA’s standards, the federal court must “identify the state court decision
15 that is appropriate for our review.” *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005).

16 Where more than one state court has adjudicated a petitioner’s claims, a federal habeas court
17 analyzes the last reasoned decision. *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)
18 (“Where there has been one reasoned state judgment rejecting a federal claim, later unexplained
19 orders upholding that judgment or rejecting the same claim rest upon the same ground.”)). A
20 federal habeas court looks through ambiguous or unexplained state court decisions to the last
21 reasoned decision to determine whether that decision was contrary to, or an unreasonable
22 application of, clearly established federal law. *Bailey v. Rae*, 339 F.3d 1107, 1112-13 (9th Cir.
23 2003). “The question under AEDPA is not whether a federal court believes the state court’s
24 determination was incorrect but whether that determination was unreasonable--a substantially
25 higher threshold.” *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at
26 410).

1 V. REQUESTS FOR REVIEW

2 The petition for writ of habeas corpus sets forth two requests. Specifically, Petitioner
3 requests: (1) an order to show cause; and (2) appointment of counsel. Pet'r's Pet. 19.

4 A. First Request: Order To Show Cause

5 First, Petitioner requests “an[] Order to Show Cause . . . directing respondents to Show
6 Cause, if any, why the relief sought should not be granted[.]” *Id.* As stated earlier, Respondent
7 filed an answer to the petition on June 19, 2009, to which Petitioner filed a traverse on July 20,
8 2009. Petitioner’s request for an order to show cause is denied as moot.

9 B. Second Request: Appoint Counsel

10 Second, Petitioner requests appointment of counsel in further litigation of this action. *Id.*
11 The Sixth Amendment right to counsel does not apply in habeas corpus actions. *See Knaubert v.*
12 *Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). A district court, however, may appoint counsel to
13 represent a habeas petitioner whenever “the court determines that the interests of justice so
14 require,” and such person is financially unable to obtain representation. 18 U.S.C. §
15 3006A(a)(2)(B). The decision to appoint counsel is within the district court’s discretion. *See*
16 *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986). Courts have made appointment of
17 counsel the exception rather than the rule by limiting it to: (1) capital cases; (2) cases that turn
18 on substantial and complex procedural, legal, or mixed legal and factual questions; (3) cases
19 involving uneducated or mentally or physically impaired petitioners; (4) cases likely to require
20 the assistance of experts either in framing or in trying the claims; (5) cases in which the petitioner
21 is in no position to investigate crucial facts; and (6) factually complex cases. *See generally* 1 J.
22 LIEBMAN & R. HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 12.3b, at 383-86
23 (2d ed. 1994). Appointment is mandatory only when the circumstances of a particular case
24 indicate that appointed counsel is necessary to prevent due process violations. *See Chaney*, 801
25 F.2d at 1196; *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir. 1965).

26 Appointment of counsel is not warranted in this case. Petitioner’s claim is a typical claim

1 arising in a habeas petition and is not especially complex. This is not an exceptional case
2 warranting representation on federal habeas review. Petitioner’s request for appointment of
3 counsel is denied.

4 This matter is now ready for decision. For the following reasons, it is recommended that
5 habeas relief be denied.

6 VI. CLAIM FOR REVIEW

7 The petition for writ of habeas corpus sets forth one ground for relief. Specifically,
8 Petitioner argues his due process rights were violated by the “Board decision denying parole”
9 because it “is not supported by some evidence that petitioner remains current[ly] danger[ous] to
10 public safety.” Pet’r’s Pet. 4, 24.

11 A. Legal Standard for Parole Denial

12 The Due Process Clause of the Fourteenth Amendment prohibits state action that deprives
13 a person of life, liberty, or property without due process of law. A person alleging a due process
14 violation must first demonstrate that he or she was deprived of a protected liberty or property
15 interest, and then show that the procedures attendant upon the deprivation were not
16 constitutionally sufficient. *Ky. Dep’t. of Corr. v. Thompson*, 490 U.S. 454, 459-60 (1989);
17 *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002).

18 1. Liberty Interest in Parole

19 A protected liberty interest may arise from either the Due Process Clause itself or from
20 state laws. *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The United States Constitution
21 does not, in and of itself, create for prisoners a protected liberty interest in the receipt of a parole
22 date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). The full panoply of rights afforded a
23 defendant in a criminal proceeding is not constitutionally mandated in the context of a parole
24 proceeding. *See Pedro v. Or. Parole Bd.*, 825 F.2d 1396, 1398-99 (9th Cir. 1987). The Supreme
25 Court has held that a parole board’s procedures are constitutionally adequate if the inmate is
26 given an opportunity to be heard and a decision informing him of the reasons he did not qualify

1 for parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979). If a
2 state’s statutory parole scheme uses mandatory language, however, it “‘creates a presumption that
3 parole release will be granted’ when or unless certain designated findings are made,” thereby
4 giving rise to a constitutional liberty interest. *McQuillion*, 306 F.3d at 901 (quoting *Greenholtz*,
5 442 U.S. at 12).

6 Section 3041 of the California Penal Code sets forth the state’s legislative standards for
7 determining parole for life-sentenced prisoners. Subsection (a) provides that “[o]ne year prior to
8 the inmate’s minimum eligible parole release date a panel . . . shall again meet with the inmate
9 and shall normally set a parole release date” Subsection (b) provides an exception to the
10 regular and early setting of a life-sentenced individual’s term, if the Board determines “‘that the
11 gravity of the current convicted offense or offenses, or the timing and gravity of current or past
12 convicted offense or offenses, is such that consideration of the public safety requires a more
13 lengthy period of incarceration” Based on this statute, California state prisoners who have
14 been sentenced to prison with the possibility of parole have a clearly established, constitutionally
15 protected liberty interest in receipt of a parole release date. *Allen*, 482 U.S. at 377-78 (quoting
16 *Greenholtz*, 442 U.S. at 12); *Irons v. Carey*, 505 F.3d 846, 850-51 (9th Cir. 2007) (citing *Sass v.*
17 *Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006)); *Biggs v. Terhune*, 334 F.3d 910,
18 914 (9th Cir. 2003); *McQuillion*, 306 F.3d at 903.

19 2. Scope of Due Process Protection

20 Additionally, as a matter of California state law, denial of parole to state inmates must be
21 supported by at least “‘some evidence” demonstrating future dangerousness. *Hayward v.*
22 *Marshall*, 603 F.3d 546, 562-63 (9th Cir. 2010) (en banc) (citing *In re Lawrence*, 44 Cal. 4th
23 1181, 82 Cal. Rptr. 3d 169, 190 P.3d 535 (2008); *In re Shaputis*, 44 Cal. 4th 1241, 82 Cal. Rptr.
24 3d 213, 190 P.3d 573 (2008); *In re Rosenkrantz*, 29 Cal. 4th 616, 128 Cal. Rptr. 2d 104, 59 P.3d
25 174 (2002)). California’s “‘some evidence” requirement is a component of the liberty interest
26 created by the state’s parole system. *Cooke v. Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010). The

1 federal Due Process Clause requires, in turn, that California comply with its own “some
2 evidence” requirement. *Pearson v. Muntz*, 606 F.3d 606, 609 (9th Cir. 2010) (per curiam). A
3 reviewing court must “decide whether the California judicial decision approving the . . . decision
4 rejecting parole was an ‘unreasonable application’ of the California ‘some evidence’
5 requirement, or was ‘based on an unreasonable determination of the facts in light of the
6 evidence.’” *Hayward*, 603 F.3d at 562-63 (quoting 28 U.S.C. § 2254(d)(2)).

7 The analysis of whether some evidence supports the denial of parole to a California state
8 inmate is framed by the state’s statutes and regulations governing parole suitability
9 determinations. *See Irons*, 505 F.3d at 851. A reviewing court “must look to California law to
10 determine the findings that are necessary to deem [a petitioner] unsuitable for parole, and then
11 must review the record to determine whether the state court decision holding that these findings
12 were supported by ‘some evidence’ [] constituted an unreasonable application of the ‘some
13 evidence’ principle.” *Id.*

14 3. California’s Parole Scheme

15 Title 15, section 2402 of the California Code of Regulations sets forth various factors to
16 be considered by the Board in its parole suitability findings for murderers. “All relevant, reliable
17 information available to the [Board] shall be considered in determining suitability for parole.”
18 CAL. CODE REGS. tit. 15, § 2402(b). This includes:

19 [T]he circumstances of the prisoner’s social history; past and
20 present mental state; past criminal history, including involvement
21 in other criminal misconduct which is reliably documented; the
22 base and other commitment offenses, including behavior before,
23 during and after the crime; past and present attitude toward the
24 crime; any conditions of treatment or control, including the use of
25 special conditions under which the prisoner may safely be released
26 to the community; and any other information which bears on the
prisoner’s suitability for release.

24 *Id.* The regulation also lists specific circumstances which tend to show suitability or unsuitability
25 for parole. *Id.* § 2402(c)-(d).

26 Under section 2402(c)(1), factors relating to a commitment offense tend to show

1 unsuitability for parole where (A) multiple victims were attacked, injured or killed; (B) the
2 offense was carried out in a dispassionate and calculated manner, such as an execution-style
3 murder; (C) the victim was abused, defiled or mutilated; (D) the offense was carried out in a
4 manner which demonstrates an exceptionally callous disregard for human suffering; or (E) the
5 motive for the crime is inexplicable or very trivial in relation to the offense. *Id.* § 2402(c)(1)(A)-
6 (E).

7 Other circumstances tending to indicate unsuitability include:

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

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

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

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

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

21 *Id.* § 2402(c)(2)-(6).

22 Section 2402(d) sets forth circumstances tending to show suitability, which include:

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

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

(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 the
prisoner has given indications that he understands the nature and
magnitude of the offense.

(4) Motivation for Crime. The prisoner committed his crime as the
result of significant stress in his life, especially if the stress had

1 built over a long period of time.

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

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

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

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

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

15 *Id.* § 2402(d)(1)-(9).

16 The overriding concern is public safety and the focus is on the inmate's *current*
17 dangerousness. *In re Lawrence*, 44 Cal. 4th at 1205, 82 Cal. Rptr. 3d 169, 190 P.3d 535. The
18 proper articulation of the standard of review is not whether some evidence supports the stated
19 reasons for denying parole, but whether some evidence indicates that the inmate's release would
20 unreasonably endanger public safety. *In re Shaputis*, 44 Cal. 4th at 1254, 82 Cal. Rptr. 3d 213,
21 190 P.3d 573. There must be a rational nexus between the facts relied upon and the ultimate
22 conclusion that the prisoner continues to be a threat to public safety. *In re Lawrence*, 44 Cal. 4th
23 at 1227, 82 Cal. Rptr. 3d 169, 190 P.3d 535.

24 B. State Court Decision

25 Here, because the California Supreme Court and California Court of Appeal summarily
26 denied the petition, the state court decision appropriate for review is the Superior Court's
27 decision. Under AEDPA's standards, the Superior Court reasonably held that "the Board's
28 conclusion is supported by some evidence" showing Petitioner was currently dangerous.
29 Resp't's Answer Ex. 2, at 183. The Superior Court explained that this included "the fact that
30 there were multiple victims and petitioner fled the scene." *Id.* The Superior Court then cited

1 “hearing transcript pages 99 through 104,” which included other reasons the Board denied parole.
2 *Id.* This citation shows the Superior Court considered Petitioner’s (1) commitment offenses
3 involving multiple victims; (2) juvenile record and unstable social history; (3) institutional
4 disciplinary record; (4) need for additional insight; and (5) lack of adequate alcohol and gang
5 affiliation relapse prevention plans. *See id.* (citing Pet’r’s Pet. Ex. A, at 131-36; Parole Hr’g Tr.
6 99-104).

7 1. Commitment Offenses

8 First, the Superior Court properly noted that the Board considered Petitioner’s
9 commitment offenses, among other factors, when denying parole. *See id.* The Board read into
10 the record the summary of Petitioner’s commitment offenses, taken from the “Probation
11 Department’s report.” Pet’r’s Pet. Ex. A, at 51-54; Parole Hr’g Tr. 18-21; *see supra* Part III. The
12 Board explained its reliance, in part, on Petitioner’s commitment offense as follows:

13 We’ve looked at this crime and there were multiple victims. The
14 offense was carried out in a dispassionate manner, as the
15 motivation appears to be gang-related and the victims were
16 members of a rival gang. And the manner in which these four
17 shotgun blasts were carried out short-range, without legal
18 justification, and the use of deadly force[,] demonstrated a callous
19 disregard for human suffering, as you just continued on and
20 basically escaped from detection at the time.

21 Pet’r’s Pet. Ex. A, at 135; Parole Hr’g Tr. 103.

22 Here, the Superior Court reasonably affirmed the Board’s finding that Petitioner’s
23 commitment offenses involved multiple victims, were carried out in a dispassionate manner, and
24 showed a callous disregard for human suffering. Without question, Antonio, the 21-year-old
25 who died from Petitioner’s gunshots, was a victim. Additionally, Petitioner’s plea of *nolo*
26 *contendere* to assault with a firearm is sufficient to identify Jose as a victim, since Jose was also
attacked when Petitioner fired shots at the vehicle in which Jose was a passenger. CAL. CODE
REGS. tit. 15, § 2402(c)(1)(A) (“Multiple victims” include those who “were attacked . . . in the
same . . . incident[.]”); *see* Pet’r’s Pet. Ex. A, at 42; Parole Hr’g Tr. 9 (“[T]here are two separate

1 victims, the second victim is Jose [Luis] Rocha Gomez. . . . [T]herefore, it is appropriate to list a
2 separate conviction under [Section 245(a)(2) of the California Penal Code].”); *see also* Pet’r’s
3 Pet. Ex. A, at 52; Parole Hr’g Tr. 19 (“Jose was [Antonio’s] passenger” when “[a]nother vehicle
4 pulled alongside and someone began firing shots. Jose bent over, Antonio applied the brakes,
5 then collapsed.”). The Superior Court reasonably found that the Board weighed the nature and
6 gravity of Petitioner’s commitment offenses when denying Petitioner parole. *See* CAL. CODE
7 REGS. tit. 15, § 2402(c)(1).

8 2. Juvenile Record and Unstable Social History

9 Second, the Board appropriately considered Petitioner’s extensive juvenile record and
10 unstable social history when denying parole. The Board noted Petitioner’s “first contact with the
11 juvenile justice system occurred when [he] w[as] 12 years old, and [he] had 27 contacts with the
12 juvenile justice system.” Pet’r’s Pet. Ex. A, at 59; Parole Hr’g Tr. 26. The Board listed some of
13 Petitioner’s arrests as follows:

14 You were arrested on December 14th, 1989 for petty theft. The
15 petition was adjudicated on that offense. There was an arrest for
violation of probation January 13th, 1989.

16 There was an attempted burglary and you admitted trespassing on
17 railroad property in regard to that petition. An arrest on . . . March
31st, 1989, auto burglary, 459 of the Penal Code. You admitted
18 that petition.

19 May 1st, 1989, violation of probation under the Welfare and
Institutions Code, and you were -- A petition was filed and you
20 were continued a ward of the Court on that petition. That was
sustained. It appears that you were put into placement, under the
21 discretion of the Probation Department at that time, based on that
violation of probation. You had a subsequent petition [as a] minor
22 in possession of a firearm for the arrest on June 1st, 1989.² You
were placed in a residential group home as a result of that petition.

23
24 ² Petitioner clarified, “In that incident, there was like six of us, gang members walking
down the street. One of them threw the gun. When we got arrested, they charged all of us . . . for
25 having the weapon, but [another person] admitted to it,” so Petitioner “never went to Court.”
Pet’r’s Pet. Ex. A, at 102; Parole Hr’g Tr. 70. The Board commented, “But that’s still young to
26 be hanging around people packing firearms.” Pet’r’s Pet. Ex. A, at 102-03; Parole Hr’g Tr. 70-
71.

1 A bench warrant was issued for runaway from the group home . . .
2 on or about July 19th, a petition having been filed on July 18th,
3 1989. And that matter resulted in a booking and replacement into
4 the group home, and that occurred on or about August 17th, 1989.
5 A subsequent bench warrant was issued for runaway. That petition
6 was filed on . . . September 11th, 1989.

7
8 September 20th, there was a vandalism petition filed, and . . . the
9 vandalism was dismissed as there were subsequent petitions, one
10 of which was a possession of stolen property in which there was an
11 admission. And you were committed to an entity called Rite of
12 Passage, R-I-T-E.

13
14 There w[ere] . . . two petitions in October for violations of
15 probation, a third petition in October of 1990 for violation of
16 probation. It resulted in a booking in which Probation filed a
17 supplemental W and I petition, resulting in placement in March of
18 1991 into Aaron's Boys' Home.

19
20 It appears that after the placement at Aaron's Boys' Home, there
21 was a petition filed with the Court in April of 1991 for runaway
22 from placement, and that bench warrant remained outstanding until
23 your arrest in November of 1991. And that refers to additional
24 matters ultimately resulting in a placement in 1992 at Natividad
25 Group Home.

26
27 There was a subsequent bench warrant and a petition for runaway
28 from placement subsequent to the placement in Natividad Group
29 Home. Ultimately, in May of 1992, you were returned to your
30 mother's home and supervised by the Probation Gang Unit.

31 Pet'r's Pet. Ex. A, at 55-57; Parole Hr'g Tr. 22-24.

32 The Board also recounted that Petitioner "received a number of infractions while
33 incarcerated at the Juvenile Justice Center." Pet'r's Pet. Ex. A, at 58; Parole Hr'g Tr. 25. These
34 included: (1) belligerence and hostility toward staff; (2) gang behavior, including a fight, on
35 December 22, 1992; (3) possession of contraband; (4) tampering with Petitioner's handcuffs; and
36 (5) an escape attempt on January 3, 1993. Pet'r's Pet. Ex. A, at 59; Parole Hr'g Tr. 26.

37 When rendering its decision, the Board recognized "that at the age of [Petitioner's] first
38 contact," Petitioner was not "fully developed" nor "fully mature by any means." Pet'r's Pet. Ex.
39 A, at 136; Parole Hr'g Tr. 104. But, the Board noted "the conduct does involve . . . serious
40 threats such as breaking in[to] cars for auto burglary at the age of 13, which is not normal," and

1 “[b]eing associated with handguns” Pet’r’s Pet. Ex. A, at 136; Parole Hr’g Tr. 104. The
2 Board was concerned over the “failed efforts by people to correct [Petitioner’s] criminality,” as
3 Petitioner had “numerous attempts” for rehabilitation through “group home” and “boys’ camp”
4 placements. Pet’r’s Pet. Ex. A, at 136; Parole Hr’g Tr. 104.

5 At the hearing, the Board also examined Petitioner’s unstable social history. When
6 inquiring about how Petitioner planned to reside with his mother if paroled, the Board asked if
7 this was “a good place for [Petitioner] to be in [his] parole plans.” Pet’r’s Pet. Ex. A, at 103;
8 Parole Hr’g Tr. 71. The Board explained, “This is a household that you rejected by all of these
9 runaways, all this out of control. . . . [H]ow many times did you get placed back in there and it
10 didn’t work out?” Pet’r’s Pet. Ex. A, at 103; Parole Hr’g Tr. 71. Petitioner admitted that at the
11 time, he “resented” his mother, and he “called her names behind her back[.]” Pet’r’s Pet. Ex. A,
12 at 103-04; Parole Hr’g Tr. 71-72. Petitioner also conceded that “when [he] was young, [he] dealt
13 with feelings of rejection and insecurity by turning to gangs. Gangs became [his] family and [he]
14 was willing to do anything to please them.” Pet’r’s Pet. Ex. A, at 125; Parole Hr’g Tr. 93. When
15 denying parole, the Board also pointed out Petitioner started “early [with] alcohol.” Pet’r’s Pet.
16 Ex. A, at 131; Parole Hr’g Tr. 99. The Board appropriately reviewed Petitioner’s juvenile record
17 and unstable social history when denying parole. *See* CAL. CODE REGS. tit. 15, § 2402(b), (c)(2)-
18 (3); *cf. id.* § 2402(d)(1)-(2), (6).

19 3. Institutional Disciplinary Record

20 Third, the Board properly considered Petitioner’s institutional disciplinary record when
21 denying parole. The Board observed that Petitioner had two 115 violations: (1) “February 27th
22 of ‘02 for possession of inmate alcohol;” and (2) “February 18th of 2000 for failure to report to
23 an assignment.” Pet’r’s Pet. Ex. A, at 77; Parole Hr’g Tr. 44. At the hearing, Petitioner
24 acknowledged that his decision to manufacture alcohol in prison, which he knew was a felony,
25 “was just driven by stupidity.” Pet’r’s Pet. Ex. A, at 78; Parole Hr’g Tr. 45. Petitioner stated that
26 he “didn’t accept responsibility” for the offense at the time, but at the hearing, he did. Pet’r’s

1 Pet. Ex. A, at 78; Parole Hr'g Tr. 45.

2 The Board also remarked that Petitioner's most recent 128 violation was on September 6,
3 2005, for a "procedural violation on mail." Pet'r's Pet. Ex. A, at 79; Parole Hr'g Tr. 46.
4 Petitioner sought to explain this violation, but the Board replied, "You don't need to. This Panel,
5 I don't consider 128s." Pet'r's Pet. Ex. A, at 125; Parole Hr'g Tr. 93.

6 When denying parole, the Board based its decision, in part, on the most recent 115
7 violation, reasoning:

8 The 115 that involves alcohol, which was a contributing factor to
9 the pattern of juvenile misconduct shortly before the homicide, that
10 115 was 2002, and that was not in the distant past. It seems to
11 have really triggered a wake-up call in you that resulted in a lot of
12 progress in a short time. We'd like to see the gains that you've
13 maintained over, established over a longer period of time.

14 Pet'r's Pet. Ex. A, at 136; Parole Hr'g Tr. 104. The Board properly weighed Petitioner's
15 institutional disciplinary record against Petitioner when denying parole. *See* CAL. CODE REGS.
16 tit. 15, § 2402(b), (c)(6).

17 4. Need for Additional Insight

18 Fourth, the Board appropriately found Petitioner needed additional insight into the
19 commitment offenses. At the hearing, the Board asked Petitioner whether he "believe[d] that
20 [he] still pose[d] a risk to the safety of people outside of the prison walls." Pet'r's Pet. Ex. A, at
21 79; Parole Hr'g Tr. 46. Petitioner responded, "No." Pet'r's Pet. Ex. A, at 80; Parole Hr'g Tr. 47.
22 The Board then inquired what made Petitioner believe he was a different man at the hearing than
23 when he came into prison for the commitment offenses. Petitioner answered, in part:

24 Well first, I grew up. You know when this happened, I was
25 young[.] . . . What other people thought about me was more
26 important than what I thought about myself. So I needed you to
like me for me to like me. That's what I thought at the time, so I
was willing to do whatever[.] . . . I look back and I get embarrassed
because of a lot of things that I thought . . . are different.

At that time, I thought I knew a lot. I thought I knew everything.
And when I look back, I realize there's a lot I didn't know. But at

1 that time, you couldn't convince me and you couldn't tell me that
2 look, I've experienced life more than you. . . . I was like[,] you just
3 don't understand me I know what I'm doing, I feel what I'm
4 doing is right.

5 . . . I felt like I really had a family in gangs. That's what I honestly
6 felt. I was willing to die.

7 Pet'r's Pet. Ex. A, at 80-81; Parole Hr'g Tr. 47-48.

8 When denying parole, the Board stated that Petitioner should "eliminate the reference to
9 well, I was just a young guy, and it seemed like the thing to do. Break it down even more."

10 Pet'r's Pet. Ex. A, at 101; Parole Hr'g Tr. 133. The Board reasoned, "[T]here's a lot of people
11 who don't get involved with gangs in tough neighborhoods," and "[t]here's also a lot of people
12 who get involved in gangs that don't end up with homicide." Pet'r's Pet. Ex. A, at 100-01;

13 Parole Hr'g Tr. 132-33. The Board urged Petitioner to develop "more insight[] as to the life
14 crime . . . to give you more confidence in answering those questions." Pet'r's Pet. Ex. A, at 101;
15 Parole Hr'g Tr. 133. The Board properly determined Petitioner needed additional insight into the
16 commitment offenses when denying parole. *See* CAL. CODE REGS. tit. 15, § 2402(b); *In re*
17 *Shaputis*, 44 Cal. 4th at 1261, 82 Cal. Rptr. 3d 213, 190 P.3d 573 (holding "gravity of the offense
18 and petitioner's lack of insight and failure to accept responsibility" constituted some evidence
19 "suggest[ing] petitioner remains a current danger to the public"); *cf.* CAL. CODE REGS. tit. 15, §
20 2402(d)(3).

21 5. Lack of Adequate Alcohol and Gang Affiliation Relapse Prevention Plans

22 Fifth, the Board properly factored in Petitioner's lack of relapse prevention plans for
23 alcohol and gang affiliation. The Board observed that Petitioner "began drinking alcohol at a
24 very early age and . . . smoking marijuana." Pet'r's Pet. Ex. A, at 77; Parole Hr'g Tr. 44.

25 Petitioner's latest 115 violation in 2002 was for possession of inmate alcohol. Pet'r's Pet. Ex. A,
26 at 77; Parole Hr'g Tr. 44. In prison, Petitioner stated he "went on and off" to Alcoholics
Anonymous (AA), but "started consistently in 2003 . . . because [his] brother died in an alcohol-
related accident. And then [Petitioner went] and attempt[ed] to make prison alcohol." Pet'r's

1 Pet. Ex. A, at 110-11; Parole Hr'g Tr. 78-79. Petitioner decided, "I need to go check this
2 program out I did it on my own I felt it was worth a shot at least." Pet'r's Pet. Ex. A, at
3 111; Parole Hr'g Tr. 79.

4 At the hearing, Petitioner admitted he did not know all the twelve steps. Pet'r's Pet. Ex.
5 A, at 73; Parole Hr'g Tr. 40. Petitioner stated he was "struggling" with step three. Pet'r's Pet.
6 Ex. A, at 68, 73, Parole Hr'g Tr. 35, 40. Petitioner explained:

7 Step Three requires that you . . . come to the God of your
8 understanding, and my problem is that, I believe in God . . . but
9 what I've been taught growing up is that there's only one God, . . .
10 and that's Christ. So I'm feeling that . . . I'm being forced to
11 convert to a religion because of this. Because you can't have any
12 other God."

13 Pet'r's Pet. Ex. A, at 68, Parole Hr'g Tr. 35.

14 Later, the Board asked Petitioner whether he was "able to work through the eighth and
15 ninth steps." Pet'r's Pet. Ex. A, at 41, Parole Hr'g Tr. 74. At first, Petitioner responded that he
16 did not know what the steps were, but then he remembered that step eight was to "recognize the
17 harm you'd done and make amends, write a letter" Pet'r's Pet. Ex. A, at 41, Parole Hr'g Tr.
18 74. Petitioner stated he wrote a letter, but he did not "have it anymore." Pet'r's Pet. Ex. A, at 41,
19 Parole Hr'g Tr. 74.

20 When denying Petitioner parole, the Board mentioned that "the religious aspects and
21 [Petitioner's] struggle with that are not of a concern to the Board . . . , because we do not hold
22 against you your personal religious beliefs nor the fact that you're struggling to adopt religions
23 beliefs in whatever therapy program." Pet'r's Pet. Ex. A, at 106, Parole Hr'g Tr. 138. The Board
24 elaborated, though, that "we'd like to see you be able to go through all 12 Steps, be able to
25 verbalize that, [and] the values that you've learned from that." Pet'r's Pet. Ex. A, at 106-07,
26 Parole Hr'g Tr. 138-39. The Board stated, "Alcohol was a significant factor in [Petitioner's] life
as [he] had . . . 27 contacts with the juvenile authorities." Pet'r's Pet. Ex. A, at 99, Parole Hr'g
Tr. 131. The Board "want[ed] Petitioner to sit down with [his] sponsor and just say, the Board . .

1 . ha[s] talked to me about what is a substance relapse prevention plan,” and “can you tell me
2 more about this and what’s involved.” Pet’r’s Pet. Ex. A, at 99, Parole Hr’g Tr. 131. That way,
3 Petitioner could “recogniz[e] the triggers of stress in [himself] both then and now, [and] the
4 coping mechanisms [he has] developed.” Pet’r’s Pet. Ex. A, at 99, Parole Hr’g Tr. 131.

5 Additionally, the Board expressed concern over “retaliation issues” if Petitioner were
6 paroled, Pet’r’s Pet. Ex. A, at 75, Parole Hr’g Tr. 107, referencing the “NFL player [who] died as
7 a result of being shot.” Pet’r’s Pet. Ex. A, at 76, Parole Hr’g Tr. 108. Although the NFL player
8 “changed and got out of that gang[,] . . . the guys he used to hang with didn’t change.” Pet’r’s
9 Pet. Ex. A, at 76, Parole Hr’g Tr. 108. Petitioner did not know if his “old gang” still existed, and
10 did not know if the victim’s gang still existed. Pet’r’s Pet. Ex. A, at 77-78, Parole Hr’g Tr. 109-
11 10.

12 Likewise, the Board wanted Petitioner to “prepare a violence gang relapse prevention
13 plan for the [next] Board” hearing. Pet’r’s Pet. Ex. A, at 100, Parole Hr’g Tr. 132. The Board
14 reasoned, Petitioner was a “young guy,” he “will be on the streets as a young man,” and “it’s
15 important that you use the same strategy for substance relapse and incorporate that into gangs.”
16 Pet’r’s Pet. Ex. A, at 100, Parole Hr’g Tr. 132. The Board asked Petitioner to delve into the
17 “psychological mechanisms . . . as to why” Petitioner joined a gang, “because there’s a lot of
18 people who don’t get involved with gangs in tough neighborhoods.” Pet’r’s Pet. Ex. A, at 100,
19 Parole Hr’g Tr. 132. The Board specified the relapse plan should involve “the identification of
20 the stressors, why it appealed to you, and then . . . why was it related to homicide, and why it
21 won’t happen again.” Pet’r’s Pet. Ex. A, at 101, Parole Hr’g Tr. 133. The Board found
22 Petitioner lacked adequate alcohol and gang affiliation relapse prevention plans when denying
23 parole. *See* CAL. CODE REGS. tit. 15, § 2402(b); *cf. id.* § 2402(d)(8).

24 In sum, the Superior Court reasonably concluded that “[t]he Board’s conclusion is
25 supported by some evidence” indicating Petitioner’s current dangerousness. *See* Resp’t’s
26 Answer Ex. 2, at 183. The Superior Court’s citation to the hearing transcript shows it considered

1 Petitioner’s (1) commitment offenses involving multiple victims; (2) juvenile record and unstable
2 social history; (3) institutional disciplinary record; (4) need for additional insight; and (5) lack of
3 adequate alcohol and gang affiliation relapse prevention plans. *See id.* (citing Pet’r’s Pet. Ex. A,
4 at 131-36; Parole Hr’g Tr. 99-104). These factors demonstrate a nexus between the facts in the
5 record regarding Petitioner’s commitment offenses and the ultimate conclusion that Petitioner
6 still posed a risk of danger or threat to the public. These factors also independently demonstrate
7 some evidence in the record that Petitioner was not suitable for parole. The Superior Court
8 reasonably concluded that the Board’s decision withstands the minimally stringent “some
9 evidence” test and has not violated Petitioner’s right to due process of law.

10 VII. CONCLUSION

11 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 12 1. Petitioner’s request for an order to show cause is DENIED as moot; and
- 13 2. Petitioner’s request for appointment of counsel is DENIED.

14 IT IS HEREBY RECOMMENDED that Petitioner’s application for writ of habeas corpus
15 be DENIED.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one
18 days after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
21 shall be served and filed within seven days after service of the objections. Failure to file
22 objections within the specified time may waive the right to appeal the District Court’s order.
23 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156-57
24 (9th Cir. 1991). In any objections he elects to file, Petitioner may address whether a certificate of
25 appealability should be issued in the event he elects to file an appeal from the judgment in this

26 ///

1 case. *See* Rule 11(a), Federal Rules Governing Section 2254 Cases (district court must issue or
2 deny certificate of appealability when it enters final order adverse to applicant).

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DATED: November 12, 2010.



TIMOTHY J BOMMER
UNITED STATES MAGISTRATE JUDGE