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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

12 WILLIAM LLOYD VITON,) 1:08-CV-01666 OWW JMD HC
13)
14) Petitioner,) FINDING AND RECOMMENDATION
15) v.) REGARDING PETITION FOR WRIT OF
16) JAMES D. HARTLEY,) HABEAS CORPUS
17) Respondent.)
18)
19)
20)

21 William Lloyd Viton ("Petitioner") is a state prisoner proceeding *pro se* with a petition for
22 writ of habeas corpus pursuant to 28 U.S.C. § 2254.

23 **PROCEDURAL HISTORY**

24 Petitioner is currently in the custody of the California Department of Corrections and
25 Rehabilitation pursuant to a judgement of the Los Angeles County Superior Court. Petitioner was
26 convicted in 1993 of second degree murder with a firearm sentence enhancement, resulting in a
27 sentence of eighteen years to life. (Pet. at 2; Answer at 1).

28 Petitioner is not challenging his conviction in this instant action; rather, Petitioner challenges
the denial of his parole by the California Board of Parole Hearings (the "Board"), whom he appeared
before in October 2006. (Answer at 1). Petitioner contends that the Board violated his constitutional
rights when they denied him parole. (Pet. at 5).

1 Petitioner subsequently filed a petition for writ of habeas corpus with the Los Angeles
2 County Superior Court challenging the Board's denial of parole. (See Answer Ex. 1). The Los
3 Angeles County Superior Court issued a reasoned opinion denying the petition. (See Answer Ex. 2).

4 Petitioner also filed petitions for writ of habeas corpus with the California Court of Appeal
5 and the California Supreme Court. (Answer Exs. 3, 5). The California Court of Appeal and
6 Supreme Court issued summary denials of the petitions. (See Answer Exs. 4, 6).

7 On October 3, 2008, Petitioner filed the instant federal petition for writ of habeas corpus in
8 the Central District of California. (Court Doc. 1). The petition was transferred to this Court on
9 October 31, 2008. (Court. Docs. 3, 4).

10 Respondent filed a response to the petition on May 26, 2009. Respondent admits that
11 Petitioner has exhausted his state remedies and that the instant petition is timely. (Answer at 2).
12 Petitioner filed a traverse to the reply on June 15, 2009 and a supplement to that traverse on July 24,
13 2009. (Court Docs. 19, 20).

14 **FACTUAL BACKGROUND**

15 The facts of the commitment offense were considered by the Board in determining whether
16 Petitioner was suitable for parol and are thus relevant to the Court's inquiry into whether the State
17 court's decision upholding the Board's denial of parole was objectively unreasonable. See Cal. Code
18 Regs., tit. 15, § 2402(c)(1). The Board incorporated into the record a summary of the offense which
19 had been taken from the probation officer's report, stating:

20 Investigation review that the decedent and several friends and family members were
21 at the park when the inmate and person living next door—next to the park objected to
22 the loud radio playing. An altercation between the decedent's group and the inmate
23 accelerated and the inmate left and returned with a twenty gauge shotgun, he pointed
24 at the decedent after firing one round in the air. The second shot hit the decedent in
25 the chest, knocking him to the ground. Paramedics transported [the decedent] to the
26 hospital where he expired. Examination revealed multiple apparent shotgun pellet
27 wounds on the right chest, side, shoulder and upper arm. Multiple pellet wounds
28 were also found on the back of the left hand. The inmate was arrested, transported to
and booked at Norwalk Sheriff's station.

(Transcript of Parole Hearing, at 8-9).

Petitioner was provided with an opportunity to provide his version of events:

The situation started with one event and then it progressed from there to that point. It
started with when [sic] they first pulled the vehicle behind my fence and they

1 started—the whole group ended up around this particular vehicle. I guess that he'd
2 gotten in a car accident or something, later I found out. Then my dog went out to the
3 fence and started barking at 'em and they started kicking him and pushing at my fence
4 and yelling at my dog. And I was in the garage working and went out to see what was
5 going on. When I proceeded to go out there, they got belligerent and started wanting
6 to go climb over the fence and get to me, per se. And I defended myself through what
7 I thought was the best of my ability at that particular time. And they did not seem to
8 want to back off at all. You know, I told them, why don't you take your car down to a
9 parking lot where it belongs, because this whole areas where it was at was a no
10 parking zone. And it continued to escalate from that point to the point where I had
11 talked to my wife, I told her—I yelled at my wife and told her to call the police, and I
12 didn't know if she did. And I turned around to go into the house and as I was
13 returning to the house, I was hit in the back with a beer bottle. I proceeded to go into
14 the house and at that point in time I found out she was already on the phone with the
15 police. And I went and got my shotgun from out of the bed—out from underneath the
16 bed and proceeded back out into the yard. I thought that if I fired a shot in the air, that
17 they would leave the area. Obviously they didn't. It just continued to escalate to the
18 point they were down at my neighbor's fence ripping off boards for weapons. And I
19 proceeded to move towards the fence, and then I was struck in the head with a beer
20 bottle in the head by one of them as they kicked my gate open. And I dropped the gun
21 down and shot.

22 (Transcript of Parole Hearing, at 9-10).

23 DISCUSSION

24 I. Jurisdiction

25 A person in custody pursuant to the judgment of a State court may petition a district court for
26 relief by way of a writ of habeas corpus if the custody is in violation of the Constitution, laws, or
27 treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); *Williams v. Taylor*, 529
28 U.S. 362, 375 n.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by
the United States Constitution stemming from the Board's denial of parole, which occurred when
Petitioner was incarcerated at Avenal State Prison, which is located in Kings County.¹ (Pet. at 2).
As Petitioner is still incarcerated at Avenal State Prison, the Court has jurisdiction over Petitioner's
application for writ of habeas corpus. *See* 28 U.S.C. § 2241(d) (vesting concurrent jurisdiction over
application for writ of habeas corpus to the district court where the petitioner is currently in custody
or the district court in which a State court convicted and sentenced Petitioner if the State "contains
two or more Federal judicial districts").

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¹Kings County falls within this judicial district. 28 U.S.C. § 84(b).

1 **II. ADEPA Standard of Review**

2 All petitions for writ of habeas corpus filed after 1996 are governed by the Antiterrorism and
3 Effective Death Penalty Act of 1996 (“AEDPA”), enacted by Congress on April 24, 1996. *Lindh v.*
4 *Murphy*, 521 U.S. 320, 326-327 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997), *cert.*
5 *denied*, 522 U.S. 1008, 118 S.Ct. 586 (1997) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th
6 Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by Lindh*, 521 U.S. 320
7 (holding AEDPA only applicable to cases filed after statute’s enactment)). The instant petition was
8 filed in 2008 and is consequently governed by AEDPA’s provisions. *Lockyer v. Andrade*, 538 U.S.
9 63, 70 (2003). While Petitioner does not challenge his underlying conviction, the fact that
10 Petitioner’s custody arises from a State court judgment renders Title 28 U.S.C. section 2254 the
11 exclusive vehicle for Petitioner’s habeas petition. *Sass v. California Board of Prison Terms*, 461
12 F.3d 1123, 1126-1127 (9th Cir. 2006) (quoting *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir.
13 2004) in holding that § 2254 is the exclusive vehicle for a habeas petitioner in custody pursuant to a
14 State court judgment even though he is challenging the denial of his parole).

15 Under AEDPA, a petition for habeas corpus “may be granted only if [Petitioner]
16 demonstrates that the State court decision denying relief was ‘contrary to, or involved an
17 unreasonable application of, clearly established federal law, as determined by the Supreme Court of
18 the United States.’” *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007) (quoting 28 U.S.C. §
19 2254(d)(1)); *see also Lockyer*, 538 U.S. at 70-71. As a threshold matter, this Court must “first
20 decide what constitutes ‘clearly established federal law, as determined by the Supreme Court of the
21 United States.’” *Lockyer*, 538 U.S. at 71 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is
22 “clearly established federal law,” this Court must look to the “holdings, as opposed to the dicta, of
23 [the Supreme Court's] decisions as of the time of the relevant state-court decision.” *Id.* (quoting
24 *Williams*, 592 U.S. at 412). “In other words, ‘clearly established federal law’ under § 2254(d)(1) is
25 the governing legal principle or principles set forth by the Supreme Court at the time the State court
26 renders its decision.” *Id.*

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1 Finally, this Court must consider whether the State court's decision was "contrary to, or
2 involved an unreasonable application of, clearly established federal law." *Lockyer*, 538 U.S. at 72,
3 (quoting 28 U.S.C. § 2254(d)(1)). "Under the 'contrary to' clause, a federal habeas court may grant
4 the writ if the State court arrives at a conclusion opposite to that reached by [the Supreme] Court on
5 a question of law or if the State court decides a case differently than [the] Court has on a set of
6 materially indistinguishable facts." *Williams*, 529 U.S. at 413; *see also Lockyer*, 538 U.S. at 72.
7 "Under the 'unreasonable application clause,' a federal habeas court may grant the writ if the State
8 court identifies the correct governing legal principle from [the] Court's decisions but unreasonably
9 applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "[A] federal
10 court may not issue the writ simply because the court concludes in its independent judgment that the
11 relevant State court decision applied clearly established federal law erroneously or incorrectly.
12 Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the
13 "unreasonable application" inquiry should ask whether the State court's application of clearly
14 established law was "objectively unreasonable." *Id.* at 409. Although only Supreme Court law is
15 binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining
16 whether a State court decision is objectively unreasonable. *See Clark v. Murphy*, 331 F.3d 1062,
17 1069 (9th Cir. 2003); *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999).

18 Petitioner bears the burden of establishing that the State court's decision is contrary to or
19 involved an unreasonable application of United States Supreme Court precedent. *Baylor v. Estelle*,
20 94 F.3d 1321, 1325 (9th Cir. 1996). AEDPA requires that a federal habeas court give considerable
21 deference to State court's decisions. The State court's factual findings are presumed correct. 28
22 U.S.C. § 2254(e)(1). Furthermore, a federal habeas court is bound by a State's interpretation of its
23 own laws. *Souch v. Schaivo*, 289 F.3d 616, 621 (9th Cir. 2002), *cert. denied*, 537 U.S. 859 (2002),
24 *rehearing denied*, 537 U.S. 1149 (2003).

25 Thus, the initial step in applying AEDPA's standards is to "identify the state court decision
26 that is appropriate for our review." *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005). Where
27 more than one State court has adjudicated Petitioner's claims, a federal habeas court analyzes the last
28 reasoned decision. *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) for the presumption that

1 later unexplained orders, upholding a judgment or rejecting the same claim, rests upon the same
2 ground as the prior order). The Ninth Circuit has further stated that where it is undisputed that
3 federal review is not barred by a State procedural ruling, “the question of which state court decision
4 last ‘explained’ the reasons for judgement is therefore relevant only for purposes of determining
5 whether the state court decision was ‘contrary to’ or an ‘unreasonable application of’ clearly
6 established federal law.” *Bailey v. Rae*, 339 F.3d 1107, 1112-1113 (9th Cir. 2003). Thus, a federal
7 habeas court looks through ambiguous or unexplained State court decisions to the last reasoned
8 decision in order to determine whether that decision was contrary to or an unreasonable application
9 of clearly established federal law. *Id.*

10 Here, the Los Angeles County Superior Court, the California Court of Appeal, and the
11 California Supreme Court all adjudicated Petitioner’s claims. (See Answer Exs. 2, 4, 6). As the
12 California Court of Appeal and California Supreme Court issued summary denials of Petitioner’s
13 claims, the Court “look[s] through” those courts’ decisions to the last reasoned decision; namely, that
14 of the Los Angeles County Superior Court. See *Ylst v. Nunnemaker*, 501 U.S. at 804.

15 **III. Review of Petitioner’s Claim**

16 The claims for relief set forth in the petition for writ of habeas corpus all allege that the
17 Board’s denial of parole was a violation of his right to due process of the law as there was not “some
18 evidence” to support the Board’s decision.

19 ***A. Legal Standard for Denial of Parole***

20 “We analyze a due process claim in two steps. ‘[T]he first asks whether there exist a liberty
21 or property interest which has been interfered with by the State; the second examines whether the
22 procedures attendant upon that deprivation were constitutionally sufficient.’” *Sass*, 461 F.3d at 1127.
23 The United States Constitution does not, by itself, create a protected liberty interest in a parole date.
24 *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). Respondent argues that Petitioner does not have a
25 liberty interest in parole despite recognizing the existence of Ninth Circuit authority to the contrary.
26 (Answer at 2). The Ninth Circuit has consistently held that California prisoners whose sentence
27 provide for the possibility of parole possess a liberty interest in receiving a parole release date, “a
28 liberty interest that is protected by the procedural safeguards of the Due Process Clause.” *Irons*, 505

1 F.3d at 850; *see also* *McQuillion v. Duncan*, 306 F.3d 895, 901 (9th Cir. 2002) (quoting *Greenholtz*
2 *v. Inmates of Nebraska Penal*, 442 U.S. 1, 12 (1979) in holding that California’s parole scheme gives
3 rise to a cognizable liberty interest in release on parole); *Biggs v. Terhune*, 334 F.3d 910, 914 (9th
4 Cir. 2003). The Ninth Circuit’s reasoning is compelling; thus, the Court finds that Petitioner has a
5 protected liberty interest in a parole date.

6 A finding that a liberty interest exists does not end the Court’s inquiry as the Due Process
7 Clause is not violated where the denial of a petitioner’s liberty interests follows the State’s
8 observance of certain procedural safeguards. *See Greenholtz*, 442 U.S. at 12. Respondent contends
9 that due process merely entitles Petitioner the right to be heard, advance notice of the hearing, and
10 for the Board to state their reasons for denial. (Answer at 4-5). This contention is based on the
11 argument that the “some evidence” standard does not constitute clearly established federal law and is
12 not applicable to parole denials. (*Id.* at 5).² However, Respondent admits that a line of Ninth Circuit
13 cases has found otherwise. (*Id.*) The Ninth Circuit has held that a prisoner’s due process rights are
14 implicated where there is no evidence to support the denial of parole and that the some evidence
15 standard is applicable under AEDPA. *Irons*, 505 F.3d at 851; *see also* *Sass*, 461 F.3d at 1128-1129.
16 “In *Superintendent, Mass. Correc. Inst. v. Hill* [472 U.S. 445 (1985)] the Supreme Court held that
17 ‘revocation of good time does not comport with ‘the minimum requirements of procedural due
18 process’ unless the findings of the prison disciplinary board are supported by some evidence in the
19 record.’” *Sass*, 461 F.3d at 1128 (citations omitted). This evidentiary standard prevents arbitrary
20 deprivations of the prisoner’s liberty interest without imposing undue administrative burdens or
21 threatening institutional interests. *Hill*, 472 U.S. at 455. The rationale espoused by the Ninth Circuit
22 in *Irons*, *Sass*, and *Biggs* is compelling and the Court rejects Respondent’s argument that the
23 application of the “some evidence” standard to the parole context is improper under AEDPA.

24
25 ²Respondent is correct that a parole release determination is not subject to all of the due process protections of an
26 adversarial proceeding. *See Pedro v. Oregon Parole Board*, 825 F.2d 1396, 1398-99 (9th Cir. 1987). “[S]ince the setting
27 of a minimum term is not part of a criminal prosecution, the full panoply of rights due a Petitioner in such a proceeding is
28 not constitutionally mandated, even when a protected liberty interest exists.” *Id.* at 1399; *Jancsek v. Oregon Bd. of Parole*,
833 F.2d 1389, 1390 (9th Cir. 1987). Thus, an inmate is at least entitled to receive advance written notice of a hearing, be
afforded an “opportunity to be heard” and told why “he[/she] falls short of qualifying for parole.” *Greenholtz*, 442 U.S. at
16; *see also* *Pedro*, 825 F.2d at 1399. Here, the Court notes that Petitioner does not allege that he was deprived of any of
these procedural safeguards.

1 Errors of state law generally do not give rise to habeas corpus relief as “it is not the province
2 of a federal habeas court to reexamine state-court determinations on state-law questions.” *Estelle v.*
3 *McGuire*, 502 U.S. at 67-68. However, the inquiry of “whether a state parole board’s suitability
4 determination was supported by ‘some evidence’” is framed by the state statutes and regulations
5 governing parole suitability. *Irons*, 505 F.3d at 851; *see Briggs*, 334 F.3d at 915. California law
6 provides that after an eligible life prisoner has served the minimum term of confinement required by
7 statute, the Board “shall set a release date unless it determines that the gravity of the current
8 convicted offense or offenses, or the timing and gravity of current or past convicted offense or
9 offenses, is such that consideration of the public safety requires a more lengthy period of
10 incarceration for” the prisoner. Cal. Penal Code § 3041(b). “[I]f in the judgment of the panel the
11 prisoner will pose an unreasonable risk of danger to society if released from prison,” the prisoner
12 must be found unsuitable and denied parole. Cal. Code Regs., tit. 15, § 2402(a); *see In re*
13 *Dannenberg*, 34 Cal.4th at 1078, 1080. The Board decides whether a prisoner is too dangerous to be
14 suitable for parole by applying factors set forth in the California Code of Regulations. *See* Cal. Code
15 Regs., tit. 15, § 2402; *Irons*, 505 F.3d at 851-852; *Biggs*, 334 F.3d at 915-916. The regulations
16 permit consideration of “all relevant, reliable information available to the panel,” and explicitly calls
17 for consideration of “the base and other commitment offenses, including behavior before, during and
18 after the crime.” Cal. Code Regs., tit. 15, § 2402(b). Factors supporting a finding of unsuitability for
19 parole include: the underlying offense was carried out in an “especially heinous, atrocious or cruel
20 manner”; a record, prior to incarceration for the underlying offense, of violence; a history of unstable
21 relationships with others; and serious misconduct while incarcerated. Cal. Code Regs., tit. 15, §
22 2402 (c); *see also In re Shaputis*, 44 Cal.4th 1241, 1257 n. 14 (Cal. 2008).

23 The Court’s review of Los Angeles County Superior Court’s decision reveals that the State
24 court did not unreasonably apply the “some evidence” standard. *See* 28 U.S.C. § 2254(d)(1). The
25 Superior Court concluded that there was some evidence to support the Board’s finding that Petitioner
26 “presents an unreasonable risk of danger to society and is unsuitable for parole.” (Pet. Ex. G at 1).
27 The Superior Court noted that the Board had relied not only on the commitment offense but also on
28 Petitioner’s failure to “fully acknowledge[] the scope of his actions, as he maintained that he was not

1 sure the victim had died, and also that he thought he had a right to defense himself and his family.”
2 (Id. at 2).

3 Thus, it is not the case that Petitioner’s due process rights were violated by continued reliance
4 on the commitment offense. Both the Ninth Circuit and the California courts have noted that sole
5 reliance on the commitment offense may violate an inmate’s due process rights. The Ninth Circuit
6 noted in *Biggs* that, “continued reliance in the future on an unchanging factor, the circumstance of
7 the offense and conduct prior to imprisonment...*could* result in a due process violation.” *Id.* at 917
8 (emphasis added). The California Supreme Court has held that even where the commitment offense
9 was particularly egregious, reliance on this immutable factor *may* violate a petitioner’s due process
10 rights. *In re Lawrence*, 44 Cal.4th 1181, 1191 (Cal. 2008).³ However, prior to *Lawrence*, the Ninth
11 Circuit had found that a parole board’s sole reliance on a commitment offense comports with the
12 requirements of due process where the board’s determination of unsuitability came prior to the
13 prisoner serving the minimum number of years required by his sentence. *Irons*, 505 F.3d at 853.
14 The *Irons* court specifically stated that:

15 We note that in all the cases in which we have held that a parole board’s decision to
16 deem a prisoner unsuitable for parole solely on the basis of his commitment offense
17 comports with due process, *the decision was made before the inmate had served the*
18 *minimum number of years required by his sentence...*All we held in those cases and
19 all we hold today, therefore, is that, given the particular circumstances of the offenses
20 in these cases, *due process was not violated when these prisoners were deemed*
21 *unsuitable for parole prior to the expiration of their minimum terms.*

22 *Id.* (emphasis added). *Irons* suggests that the Board’s reliance on immutable factors, including the
23 commitment offense, would not violate Petitioner’s due process rights. *See id.* at 853-854; *Sass*, 469
24

25 ³In *Lawrence*, the California Supreme Court found that the intervening twenty-four years in which petitioner, now
26 age sixty-one, had demonstrated, “extraordinary rehabilitative efforts specifically tailored to address the circumstances that
27 led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the
28 support of her family, and numerous institutional reports justifying parole” rendered “the unchanging factor of the gravity
of petitioner’s commitment offense” no longer probative of “her current threat to public safety, and thus provides no support
for the Governor’s conclusion that petitioner is unsuitable for parole at the present time.” *Id.* at 1226.

1 F.3d at 1129.⁴ Thus, even if the Board has solely relied on the commitment offense, Petitioner's case
2 is significantly distinct from *Lawrence* as the *Lawrence* court had been confronted with a denial of
3 parole stemming from a thirty-six year old commitment offense. Here, Petitioner began serving his
4 indeterminate life sentence on January 25, 1995.⁵ Contrary to Petitioner's assertion otherwise,
5 Petitioner will have served his minimum sentence of fifteen years to life on January 25, 2010, after
6 the October 2006 hearing at which time he had only served approximately eleven years and nine
7 months. Consequently, the Board's reliance on Petitioner's commitment offense comports with the
8 requirements of due process as the Board's determination of unsuitability came prior to when
9 Petitioner served the minimum number of years required by his sentence. *See Irons*, 505 F.3d at 853;
10 *Paddock v. Mendoza-Powers*, 674 F.Supp.2d 1123,*6 (C.D. Cal. 2009) (citing *Irons* and *Sass* for the
11 proposition even if evidence of the commitment offense "were the only evidence the Board had
12 supporting its determination to deny petitioner parole, petitioner would not have been deprived of
13 due process of the law by the Board because petitioner 'had not served the minimum number of years
14 to which [he] had been sentenced at the time of the challenged parole denial by the Board'").

15 Furthermore, Petitioner's due process rights were not violated even if Petitioner had served
16 his minimum sentence by the time the Board denied him parole. As noted by the *Lawrence* court, a
17 discipline-free record while incarcerated does not automatically render the commitment offense
18 unpredictable of current dangerousness. *Id.* (citing *Lawrence's* companion case, *In re Shaputis*, 44
19 Cal.4th 1241, 1259-1260 (Cal. 2008), in concluding that lack of insight into the commitment offense
20 rendered aggravating factor of the crime probative of petitioner's current dangerousness such that
21 Governor's reversal of parole was neither arbitrary or capricious despite an inmate's discipline-free
22 record during incarceration). The denial of parole in Petitioner's case, akin to *Shaputis*, is based
23

24 ⁴The rationale for permitting reliance on the commitment offense prior to the inmate having served his/her minimum
25 sentence may lie in the fact that the "rational nexus" between the commitment offense relied upon by the Board and an
26 inmate's current dangerousness is not as attenuated where the inmate has yet to serve his full sentence.

27 ⁵As Petitioner's sentence consisted of a three years term in addition to his life sentence, Petitioner did not start
28 serving his fifteen years to life sentence until January 1995 despite having been received into the custody of the California
Department of Corrections in July 1993. (Transcript of Parole Hearing at 1).

1 primarily on Petitioner’s lack of insight combined with the nature of the commitment offense. In its
2 decision, the Board explicitly relied on Petitioner’s lack of insight into a causative factor of the
3 crime, namely anger issues, in finding that Petitioner “continues to be unpredictable and a threat to
4 others.” (Transcript of Parole Hearing at 56). The Board noted that “[i]n view of the lack of
5 accountability and acknowledgment of his role and the ultimate consequence of his actions, the Panel
6 believes there is no indication that the prisoner would behave differently if parole.” (Id). The
7 Board’s finding is supported by the record as the psychological evaluation noted:

8 The inmate questions the veracity of several of the events and facts in the case, not the
9 least of which is whether or not the victim actually died. However, given his
10 conviction by a jury, *the inmate must be viewed as not taking full responsibility for*
11 *his behaviors, as focusing blame onto others, and thus not being able to present some*
12 *semblance of emotional remorse.*

13 (Pet. Ex. F at 9) (emphasis added).

14 The Board also cited to Petitioner’s responses during the hearings as evidence that he had yet
15 to grasp the causative factors of his crime.⁶ (Transcript of Parole Hearing at 55). During the hearing,
16 Petitioner continued to deny that he had anger issues and that his anger issues has played a role in his
17 commission of the crime. (Id. at 25). Additionally, Petitioner attributed blame for the commission
18 of the crime to victim, stating, “[y]ou know, if the situation hadn’t been what they brought to start
19 with I think it would have never came about.” (Id. at 12). The Board noted that in shifting blame to
20 others and in not believing that the victim had died, Petitioner has failed to take responsibility for the
21 crime. (Id. at 55). Failure to take responsibility for the crime bears a rational nexus to current
22 dangerousness as it suggests that Petitioner has not dealt with the factors that caused his actions, thus
23 making it more likely that Petitioner would react similarly when confronted with a similar situation.
24 As the “some evidence standard is minimal, and assures that ‘the record is not so devoid of evidence
25 that the findings of the disciplinary board were without support or otherwise arbitrary,’” the Court

26 ⁶Petitioner contends that the Board’s finding that he lacked remorse was erroneous given his closing remarks. Here,
27 the Board gave more credence to his remarks throughout the hearing and the psychological evaluation than Petitioner’s
28 closing remarks. It is not the function of this court to re-weigh the evidence that was before the Board. *Superintendent v.*
Hill, 472 U.S. at 454 (noting that in conducting the “some evidence” inquiry, a court need not examine the entire record,
independently assess the credibility of witnesses, or re-weigh the evidence).

1 finds that the State court did not unreasonably apply this standard as the Petitioner's lack of insight
2 into the crime meet that minimal standard. *See Sass*, 461 F.3d at 1129 (quoting *Hill*, 472 U.S. at
3 457). Thus, Petitioner is not entitled to habeas corpus relief.

4 **RECOMMENDATION**

5 Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be
6 DENIED WITH PREJUDICE and the Clerk of Court be DIRECTED to enter judgment for
7 Respondent.

8 This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United
9 States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of
10 the Local Rules of Practice for the United States District Court, Eastern District of California.
11 Within thirty (30) days after being served with a copy, any party may file written objections with the
12 court and serve a copy on all parties. Such a document should be captioned "Objections to
13 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and
14 filed within ten (10) *court* days (plus three days if served by mail) after service of the objections.
15 The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The
16 parties are advised that failure to file objections within the specified time may waive the right to
17 appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18
19 IT IS SO ORDERED.

20 **Dated:** April 16, 2010

/s/ John M. Dixon
UNITED STATES MAGISTRATE JUDGE