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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSE ISRAEL LAMAS,

1:09-cv-00582 OWW GSA HC

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

KATHLEEN ALLISON, Acting Warden,

Respondent.

_____/

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, Kathleen Allison¹, is represented by David N. Sunada, Esq., of the Office of the Attorney General of the State of California.

RELEVANT HISTORY²

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation (CDCR) following his convictions in Orange County Superior Court in 1993 of second degree murder, attempted second degree murder, and enhancements for use of a firearm and use of a firearm with great bodily injury. He is serving a sentence of twenty-six years to life

¹Ken Clark is no longer the warden at California Substance Abuse Treatment Facility and State Prison, Corcoran, where Petitioner is housed. Kathleen Allison is currently the acting warden. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kathleen Allison is hereby substituted as Respondent in this matter.

² This information is taken from the state court documents attached to Respondent’s answer.

1 with the possibility of parole.

2 Petitioner does not challenge his underlying conviction; rather, he claims the California
3 Board of Parole Hearings (“Board”) violated his due process rights in its May 2, 2007, decision
4 finding Petitioner unsuitable for parole. Petitioner contends he was denied his due process rights
5 when the Board failed to support its finding that Petitioner posed a risk of current dangerousness.

6 Petitioner filed a habeas court petition challenging the Board’s 2007 decision in the
7 Orange County Superior Court. The petition was denied on May 27, 2008, for failure to support
8 claims by supplying an adequate record. Petitioner next filed a habeas petition in the California
9 Court of Appeal on July 18, 2008. The appellate court summarily denied the petition on July 31,
10 2008. On August 25, 2008, Petitioner filed a habeas petition in the California Supreme Court.
11 The petition was summarily denied on February 25, 2009.

12 Petitioner filed the instant federal petition for writ of habeas corpus on March 31, 2009.
13 Respondent filed an answer to the petition on July 22, 2010. Petitioner did not file a traverse.

14 **STATEMENT OF FACTS³**

15 On June 7, 1992, at approximately 4:41 a.m., Orange County Sheriff’s deputies heard
16 gunshots while patrolling in the City of Stanton. They responded to the area of the railroad
17 tracks south of Orangewood and west of Santa Rosalia and found two male subjects, both victims
18 of gunshot wounds. One of the victims was later identified as Jesse Hubnero. He was found
19 dead at the scene with a single gunshot wound to the head. The second victim, later identified as
20 Michael Moses Munoz, had sustained three gunshot wounds and was transported to the UCI
21 Medical Center for emergency treatment. The two male victims were identified as gang
22 members of the Lomos Gang from Rosemead and South Gabriel area. Victim Hubnero had a
23 street moniker of “Tutti.” The second victim, Munoz, had a street moniker of “Sniper.”

24 Two female juveniles who were from the City of Rosemead were contacted at the scene.
25 They were later identified as Delores Villalobos and Rosemary Guiterro. They were both in the
26 company of the victims and were present when the shooting took place. According to Villalobos
27

28 ³ This information is derived from the summary of the crime set forth in the Board’s decision.

1 and Guiterro, on June 6, 1992, they and two additional females had driven to Orange County in
2 Guiterro's vehicle and picked up Robert Anaya. They all drove to a party on Date Street in
3 Stanton where they met Petitioner, also known by the moniker of "Rascal." At approximately
4 1:15 a.m., Villalobos, Guiterro, and Anaya left the party and drove back to Los Angeles where
5 they dropped the other girls off at the residence.

6 They then drove to the residence of a Lomos gangmember with the moniker "Gremlin."
7 They all exited the vehicle. Some of the Lomos gangmembers gave Anaya a hard time and made
8 him cross out some of the gang graffiti that was on the wall in their neighborhood. Reportedly
9 the graffiti was from Anaya's old neighborhood. Villalobos, Guiterro, and Anaya then left
10 Gremlin's house accompanied by the victims Munoz and Hubnero. They returned to the party in
11 Stanton and found out that the party was over. They then met Petitioner who advised them where
12 they could purchase cocaine. After Petitioner got into the vehicle, they drove to an unknown
13 residence and acquired some cocaine.

14 Petitioner then guided them to a dead end of Orangewood by the railroad tracks where
15 they parked. At that time, Munoz began painting graffiti on a wall on the east side of the railroad
16 tracks. Petitioner told Hubnero to tell Munoz to stop. Hubnero told Petitioner that Munoz was
17 his "homeboy" and that he would not tell him to stop. Petitioner then shot Hubnero once in the
18 head and Hubnero fell to the ground. Petitioner then walked rapidly toward victim Munoz. He
19 fired one shot at him. Munoz turned around and started to run. Petitioner fired three more shots
20 at him. Munoz fell to the ground. Petitioner continued to shoot at him from approximately three
21 to four feet. Petitioner and Anaya then fled the area.

22 DISCUSSION

23 I. Standard of Review

24 Petitioner is in custody of the California Department of Corrections and Rehabilitation
25 pursuant to a state court judgment. Even though Petitioner is not challenging the underlying state
26 court conviction, 28 U.S.C. § 2254 remains the exclusive vehicle for his habeas petition because
27 he meets the threshold requirement of being in custody pursuant to a state court judgment. Sass
28 v. California Board of Prison Terms, 461 F.3d 1123, 1126-1127 (9th Cir.2006), *citing* White v.

1 Lambert, 370 F.3d 1002, 1006 (9th Cir.2004) (“Section 2254 ‘is the exclusive vehicle for a
2 habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the
3 petition is not challenging [her] underlying state court conviction.’”).

4 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
5 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its
6 enactment. Lindh v. Murphy, 521 U.S. 320 (1997), *cert. denied*, 522 U.S. 1008 (1997); Jeffries
7 v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997), *quoting* Drinkard v. Johnson, 97 F.3d 751, 769 (5th
8 Cir.1996), *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by* Lindh v. Murphy,
9 521 U.S. 320 (1997) (holding AEDPA only applicable to cases filed after statute's enactment).
10 The instant petition was filed after the enactment of the AEDPA. In this case, however, the state
11 courts did not reach the merits of Petitioner’s claims. The first habeas petition was denied by the
12 Orange County Superior Court as procedurally defective in that Petitioner had failed to supply an
13 adequate record. The subsequent habeas petitions filed in the California Court of Appeal and
14 California Supreme Court were denied without comment. We presume that those courts denied
15 the petitions for the same reasons expressed by the superior court. Ylst v. Nunnemaker, 501 U.S.
16 797, 803 (1991). Since no state court reached the merits of Petitioner’s claims, we must review
17 legal issues de novo and factual issues for clear error. Pirtle v. Morgan, 313 F.3d 1160, 1167-68
18 (9th Cir. 2002).

19 II. Review of Petition

20 There is no independent right to parole under the United States Constitution; rather, the
21 right exists and is created by the substantive state law which defines the parole scheme. Hayward
22 v. Marshall, 603 F.3d 546, 559, 561 (9th Cir. 2010) (en banc) (citing Bd. of Pardons v. Allen, 482
23 U.S. 369, 371 (1987); Pearson v. Muntz, No. 08-55728, 2010 WL 2108964, * 2 (9th Cir. May
24 24, 2010) (citing Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174
25 (2005)); Cooke v. Solis, No. 06-15444, 2010 WL 2330283, *6 (9th Cir. June 4, 2010).
26 “[D]espite the necessarily subjective and predictive nature of the parole-release decision, state
27 statutes may create liberty interests in parole release that are entitled to protection under the Due
28 Process Clause.” Bd. of Pardons v. Allen, 482 U.S. at 371.

1 In California, the Board of Parole Hearings' determination of whether an inmate is
2 suitable for parole is controlled by the following regulations:

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

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

18 Cal. Code Regs. tit. 15, §§ 2402(a) and (b). Section 2402(c) sets forth circumstances tending to
19 demonstrate unsuitability for release. "Circumstances tending to indicate unsuitability include:

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

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

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

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

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

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

(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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Because California's statutory parole scheme guarantees that prisoners will not be denied
parole absent some evidence of present dangerousness, the Ninth Circuit Court of Appeals
recently held California law creates a liberty interest in parole that may be enforced under the
Due Process Clause. *Hayward v. Marshall*, 602 F.3d at 561-563; *Pearson v. Muntz*, 606 F.3d

1 606, 608-609 (9th Cir. 2010). Therefore, under 28 U.S.C. § 2254, this Court’s ultimate
2 determination is whether the state court’s application of the some evidence rule was unreasonable
3 or was based on an unreasonable determination of the facts in light of the evidence. Hayward v.
4 Marshall, 603 F.3d at 563; Pearson v. Muntz, 606 F.3d at 608.

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

10 although the Board and the Governor may rely upon the aggravated circumstances
11 of the commitment offense as a basis for a decision denying parole, the aggravated
12 nature of the crime does not in and of itself provide some evidence of current
13 dangerousness to the public unless the record also establishes that something in
14 the prisoner’s pre- or post-incarceration history, or his or her current demeanor
and mental state, indicates that the implications regarding the prisoner’s
dangerousness that derive from his or her commission of the commitment offense
remain probative to the statutory determination of a continuing threat to public
safety.

15 Id. at 1214.

16 In addition, “the circumstances of the commitment offense (or any of the other factors
17 related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to
18 the determination that a prison remains a danger to the public. It is not the existence or
19 nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the
20 significant circumstance is how those factors interrelate to support a conclusion of current
21 dangerousness to the public.” In re Lawrence, 44 Cal.4th at 1212.

22 “In sum, a reviewing court must consider ‘whether the identified facts are *probative* to the
23 central issue of *current* dangerousness when considered in light of the full record before the
24 Board or the Governor.’” Cooke v. Solis, 606 F.3d 1206, 1214 (9th Cir. 2010) (emphasis in
25 original) (citing Hayward v. Marshall, 603 F.3d at 560).

26 A. 2007 Board Decision

27 The Board found Petitioner unsuitable for parole based on the circumstances of the
28 commitment offense, prior record of violence, and institutional behavior.

1 As previously set forth, the commitment offense involved Petitioner shooting and killing
2 one individual and shooting and seriously injuring another individual over graffiti. The
3 Board noted that multiple victims were attacked and injured pursuant to Cal. Code Regs., tit. 15,
4 § 2402(c)(1)(A). The evidence supports this finding. Petitioner also committed the offense in a
5 dispassionate and calculated manner. Cal. Code Regs., tit. 15, § 2402(c)(1)(B). The Board noted
6 that Petitioner shot the first individual, who was unarmed, point blank to the head. He then fired
7 at the second individual. When that individual turned and fled, Petitioner shot him down from
8 behind and then shot him again from a distance of 3 to 4 feet. Given these facts, there is some
9 evidence that the offense was dispassionate and calculated as that of an execution-style murder.
10 The Board also found that Petitioner committed the offense in a manner which demonstrates an
11 exceptionally callous disregard for human suffering. Cal. Code Regs., tit. 15, § 2402(c)(1)(D).
12 There is no evidence to support this finding. There is nothing in the record that shows Petitioner
13 tortured or prolonged the victim's suffering. Finally, the Board determined that the motive for
14 the crime was trivial. Cal. Code Regs., tit. 15, § 2402(c)(1)(E). In support, the Board stated that
15 the motive was gang-related and involved Petitioner murdering one and attempting to murder
16 another because of graffiti they had painted. The evidence supports this finding. Therefore,
17 there was some evidence to support the Board's determination that the offense was especially
18 heinous, atrocious or cruel.

19 The Board also noted Petitioner's prior violent criminal history as an indicator of
20 unsuitability. Cal. Code Regs., tit. 15, § 2402(c)(2). He had been arrested as a juvenile for
21 possessing a stolen bike. Petitioner had been involved in several fights in school as a juvenile.
22 He had been arrested for assault and battery. Later, he was arrested for vehicle theft. In light of
23 these offenses, there was some evidence to support the Board's finding that Petitioner had a prior
24 record of violence.

25 The California Supreme Court has held that "[t]he nature of the prisoner's offense, alone,
26 can constitute a sufficient basis for denying parole." In re Rosenkrantz, 29 Cal.4th 616, 682
27 (2002). However, in cases where prisoners have served their suggested base terms and have
28 demonstrated strong evidence of rehabilitation and no other evidence of current dangerousness,

1 the underlying circumstances of the commitment offense alone rarely will provide a valid basis
2 for denying parole. In re Lawrence, 44 Cal.4th 1191, 1211 (2008). In this case, Petitioner has
3 not yet served his base term of twenty-six years, he has not demonstrated strong evidence of
4 rehabilitation, and the Board did not rely only on the commitment offense and prior criminal
5 history.

6 The Board found that Petitioner had continued his violent and assaultive behavior in
7 prison. Cal. Code Regs., tit. 15, § 2402(c)(6). In 2000, Petitioner sustained a serious rules
8 violation for combat. In 2007, he sustained a second serious rules violation for participating in a
9 riot. These violent incidents certainly are probative of a current risk of danger.

10 The Board also considered Petitioner's positive factors. Although Petitioner's self-help
11 programming was limited, he was currently involved. It was recommended that he continue his
12 involvement since drugs and alcohol had played a significant role in his life. He had viable
13 employment plans, although his residence plans were deemed lacking. He was commended for a
14 good work record. Nevertheless, the Board concluded that the positive aspects of Petitioner's
15 behavior did not outweigh the factors of unsuitability. The Board determined that the
16 circumstances of Petitioner's commitment offense and prior criminal history, along with his
17 violent institutional behavior, were more probative of a danger to the public should Petitioner be
18 released. The Board's determination was supported by at least some evidence. Accordingly,
19 federal habeas corpus relief is unavailable.

20 **RECOMMENDATION**

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

- 22 1. The instant petition for writ of habeas corpus be DENIED; and
- 23 2. The Clerk of Court be directed to enter judgment in favor of Respondent.

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

27 Within thirty (30) days after being served with a copy, any party may file written objections with
28 the court and serve a copy on all parties. Such a document should be captioned "Objections to

1 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served
2 and filed within fourteen (14) days after service of the objections. The Court will then review the
3 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
4 failure to file objections within the specified time may waive the right to appeal the District
5 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6
7 IT IS SO ORDERED.

8 **Dated: September 16, 2010**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE