

1 On September 10, 2009, Petitioner filed the instant federal petition for writ of habeas corpus.
2 Respondent filed a response to the petition on December 20, 2009, to which Petitioner filed a
3 traverse on January 21, 2010.

4 **FACTUAL BACKGROUND**

5 California regulations mandate that the Board consider the circumstances of the commitment
6 offense in determining parole suitability. See Cal. Code Regs. tit. 15, § 2402(c)(1). As the facts of
7 the commitment offense were considered by both the Board and the State court, they are relevant to
8 the Court's inquiry into whether the State court's decision upholding the Board's denial of parole was
9 objectively unreasonable. The Board incorporated into the record a summary of the offense taken
10 from the California Court of Appeal's decision affirming Petitioner's conviction. As read into the
11 record, the portion of the decision stated:

12 Richard Jones lived on Button Willow, near Adams Avenue in Reedley. On
13 August 4, 1992, between 10:15 and 10:20 p.m. he heard between eight to ten gunshots
14 in rapid succession. He looked out his window and saw two stationary vehicles, one
15 facing north and the other facing south. The southbound vehicle, which he could not
16 identify, left 30 seconds after the shots were fired. Helen Boos was driving on Button
Willow near Adams about 10:15 that night. She saw a person lying in the road beside
a truck. She called 911. Sherriff's [sic] Deputy Bayer[] was dispatched to investigate
at 10:22 p.m. When he arrived at 10:36 p.m. paramedics on the scene informed him
that the victim was dead. [¶]

17 Daniel Lozano, [] the victim, died of a gunshot wound to his head. In
18 addition, he had wounds in his left shoulder, left wrist, and right thigh. He also had
19 two gunshot wounds to his head, one adjacent to his left eye and the other behind his
20 left ear. The head wounds were inflicted from a distance of one inch. He had been
21 shot with a .25 caliber weapon. [¶]

22 Miriam Cuevas, [] Lozano's girlfriend, testified Lozano left her house in
23 Reedley about 9:55 p.m. He planned to stop at an automated teller machine for
24 money and then get gas for his truck at the Mart and Deli before he drove to his home
25 in Visalia. Bank records showed Lozano withdrew \$20 from the Wells Fargo ATM at
26 11th and F Streets in Reedley at 10:03 p.m. [¶]

27 About 9:00 or 9:30 p.m., the 18-year-old [Petitioner] drove himself and 19-
28 year-old Ereberto "Eddie" Cintora[] to the Mart and Deli in Reedley. Eddie used a
payphone outside the store to call Patty Cuevas. Patty was [Petitioner]'s former
girlfriend and Eddie was trying to get the two back together. [Petitioner] stayed
nearby. On the drive over, Eddie ascertained that his .25 caliber semiautomatic
handgun was in [Petitioner]'s car. He had left it there a few days earlier, as was his
custom. [Petitioner] was aware it was there. [¶]

When Eddie and Patty had been talking for a while, Daniel Lozano drove into
the Mart and Deli parking lot about 10:10 p.m. Lozano and [Petitioner] had argued
the month before. Lozano asked [Petitioner] if the invitation was still on. [Petitioner]
replied "forget it." Lozano said he did not forget things. [Petitioner] then drove
away, west on Manning toward Columbia. Lozano followed in his pick-up truck.
According to Eddie, [Petitioner] returned to the Mart and Deli about three minutes
later from the direction of Fisher Avenue, which is in the direction of Burton Willow

1 and Adams Avenue. Eddie continued to talk with Patty about three more minutes
2 until 10:20 or 10:30. [Petitioner] said, "It happened." Eddie told him to shut up.
3 [Petitioner] did not say he was going to meet Lozano at Reedley to fight and Lozano
4 never showed up. [¶]

5 Eddie and [Petitioner] left the Mart and Deli, met some friends and went to
6 Blackstone Bowl in Fresno in two cars. Eddie took the gun from [Petitioner]'s car,
7 put it in the trunk of the other car. He noticed that quite a few bullets were missing.
8 He has not seen the gun since then. Several hours later, about 3 a.m., on August 5th,
9 the group returned to Reedley. While taking some of the bowlers home, [Petitioner]
10 drove down Button Willow near Adams. He and Eddie saw flare residue.
11 [Petitioner] pointed to an area and told Eddie, Lozano had stopped there and turned
12 on his hazard lights. [Petitioner] said he went straight, then made a U-turn on Burton
13 Willow and returned to the Mart and Deli to get [] Eddie []. [Petitioner] was quiet for
14 a short while then said, "Fuck." [¶]

15 Patty Cuevas, Mariam's [sic] 16-year-old sister, testified Eddie telephoned her
16 about 9:40 or 9:45 p.m. At one point Eddie said, "I'll call you back. Lozano's here.
17 He's telling [Petitioner] shit." Eddie then told her [Petitioner] left after arguing with
18 Lozano. Patty feared they were going to fight. Eddie told her don't worry,
19 [Petitioner] has my gun. A while later, Patty heard [Petitioner]'s voice over the phone
20 and asked Eddie if he had returned. She estimated [Petitioner] was gone no more than
21 15 minutes. She and Eddie spoke for another minute or two and then hung up at
22 10:10 p.m. The police came to Patty's house about 4 a.m. on August 5th and
23 questioned her. Later that morning she went to [Petitioner]'s house and asked him if
24 he knew Lozano was dead. [Petitioner] did not reply. When she asked him what had
25 happened the previous night, [Petitioner] said he and Lozano planned to fight at the
26 river. [Petitioner] drove to the river but Lozano did not show.

27 (Tr. Parole Hearing at 10-13.¹)

28 DISCUSSION

I. Jurisdiction

A person in custody pursuant to the judgment of a State court may petition a district court for relief by way of a writ of habeas corpus if the custody is in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); *Williams v. Taylor*, 529 U.S. 362, 375 n.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution. Petitioner is currently incarcerated at Avenal State Prison, which is located in Kings County. As Kings County falls within this judicial district, 28 U.S.C. § 84(b), 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

¹The transcript of the parole hearing is contained in the petition for writ of habeas corpus submitted by Petitioner to the Fresno County Superior court. It is listed as Exhibit A of the petition. This petition is Exhibit A of Respondent's Answer.

1 and sentenced Petitioner if the State “contains two or more Federal judicial districts”).

2 **II. AEDPA Standard of Review**

3 On April 24, 1996, Congress enacted the Anti-terrorism and Effective Death Penalty Act of
4 1996 (“AEDPA”), which applies to all petitions for a writ of habeas corpus filed after the statute’s
5 enactment. *Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499
6 (9th Cir. 1997). The instant petition was filed after the enactment of AEDPA and is consequently
7 governed by its provisions. *See Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). Thus, the petition
8 “may be granted only if [Petitioner] demonstrates that the state court decision denying relief was
9 ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as
10 determined by the Supreme Court of the United States.’” *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir.
11 2007) (quoting 28 U.S.C. § 2254(d)(1)), *overruled in part on other grounds, Hayward v. Marshall*,
12 603 F.3d 546, 555 (9th Cir. 2010) (en banc); *see Lockyer*, 538 U.S. at 70-71.

13 Title 28 of the United States Code, section 2254 remains the exclusive vehicle for
14 Petitioner’s habeas petition as Petitioner is in the custody of the California Department of
15 Corrections and Rehabilitation pursuant to a state court judgment. *See Sass v. California Board of*
16 *Prison Terms*, 461 F.3d 1123, 1126-1127 (9th Cir. 2006) *overruled in part on other grounds,*
17 *Hayward*, 603 F.3d at 555. As a threshold matter, this Court must “first decide what constitutes
18 ‘clearly established Federal law, as determined by the Supreme Court of the United States.’”
19 *Lockyer*, 538 U.S. at 71 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is “clearly
20 established Federal law,” this Court must look to the “holdings, as opposed to the dicta, of [the
21 Supreme Court’s] decisions as of the time of the relevant state-court decision.” *Id.* (quoting
22 *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). “In other words, ‘clearly established Federal law’
23 under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at
24 the time the state court renders its decision.” *Id.* Finally, this Court must consider whether the state
25 court’s decision was “contrary to, or involved an unreasonable application of, clearly established
26 Federal law.” *Id.* at 72 (quoting 28 U.S.C. § 2254(d)(1)). “Under the ‘contrary to’ clause, a federal
27 habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by
28 [the Supreme] Court on a question of law or if the state court decides a case differently than [the]

1 Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at 413; *see also*
2 *Lockyer*, 538 U.S. at 72. “Under the ‘unreasonable application clause,’ a federal habeas court may
3 grant the writ if the state court identifies the correct governing legal principle from [the] Court’s
4 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Williams*, 529
5 U.S. at 413. “[A] federal court may not issue the writ simply because the court concludes in its
6 independent judgment that the relevant state court decision applied clearly established federal law
7 erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. A federal
8 habeas court making the “unreasonable application” inquiry should ask whether the State court’s
9 application of clearly established federal law was “objectively unreasonable.” *Id.* at 409.

10 Petitioner bears the burden of establishing that the state court’s decision is contrary to or
11 involved an unreasonable application of United States Supreme Court precedent. *Baylor v. Estelle*,
12 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the states, Ninth
13 Circuit precedent remains relevant persuasive authority in determining whether a state court decision
14 is objectively unreasonable. *Clark v. Murphy*, 331 F.3d 1062, 1072 (9th Cir. 2003) (“While *only* the
15 Supreme Court’s precedents are binding on the Arizona court, and only those precedents need be
16 reasonably applied, we may look for guidance to circuit precedents”); *Duhaime v. Ducharme*, 200
17 F.3d 597, 600-01 (9th Cir. 1999) (“because of the 1996 AEDPA amendments, it can no longer
18 reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on
19 a federal Constitutional issue....This does not mean that Ninth Circuit caselaw is never relevant to a
20 habeas case after AEDPA. Our cases may be persuasive authority for purposes of determining
21 whether a particular state court decision is an ‘unreasonable application’ of Supreme Court law, and
22 also may help us determine what law is ‘clearly established’”). Furthermore, the AEDPA requires
23 that the Court give considerable deference to state court decisions. The state court’s factual findings
24 are presumed correct. 28 U.S.C. § 2254(e)(1). A federal habeas court is bound by a state’s
25 interpretation of its own laws. *Souch v. Schaivo*, 289 F.3d 616, 621 (9th Cir. 2002).

26 The initial step in applying AEDPA’s standards is to “identify the state court decision that is
27 appropriate for our review.” *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005). Where more
28 than one State court has adjudicated Petitioner’s claims, a federal habeas court analyzes the last

1 reasoned decision. *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) for the presumption that
2 later unexplained orders, upholding a judgment or rejecting the same claim, rests upon the same
3 ground as the prior order). Thus, a federal habeas court looks through ambiguous or unexplained
4 state court decisions to the last reasoned decision to determine whether that decision was contrary to
5 or an unreasonable application of clearly established federal law. *Bailey v. Rae*, 339 F.3d 1107,
6 1112-1113 (9th Cir. 2003). Here, the Fresno County Superior Court, the California Court of Appeal,
7 and the California Supreme Court reached the merits of Petitioner’s claims. The California Supreme
8 Court and the California Court of Appeal’s decisions were summary denials; thus, the Court looks
9 through those decisions to the last reasoned decision, namely, the decision by the Fresno County
10 Superior Court. *See Nunnemaker*, 501 U.S. at 804.

11 **III. Review of Petitioner’s Claims**

12 The petition for writ of habeas corpus sets forth four grounds for relief, which all contend that
13 Petitioner’s due process rights were violated by the Board’s denial of parole. In his first ground for
14 relief, Petitioner contends that a denial based on unchanging factors violates his due process rights.
15 Petitioner additionally alleges that the Board’s finding that he required additional insight into the
16 crime was not supported by the psychological report. In his third ground for relief, Petitioner argues
17 that California precedents, namely *In re Shaputis* and *In re Lawrence*, entitles him to relief. Lastly,
18 Petitioner contends that he was denied a neutral and unbiased decision.

19 The Court analyzes Petitioner’s due process claims in two steps: “the first asks whether there
20 exist[s] a liberty or property interest which has been interfered with by the State; the second
21 examines whether the procedures attendant upon that deprivation were constitutionally sufficient.”
22 *Sass*, 461 F.3d at 1127. The United States Constitution does not, by itself, create a protected liberty
23 interest in a parole date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). Respondent argues that
24 Petitioner does not have a federally protected liberty interest in parole. (Resp’t Answer at 2:7.) The
25 Ninth Circuit Court of Appeals has recognized that “[i]f there is any right to release on parole, or to
26 release in the absence of some evidence of future dangerousness, it has to arise from substantive state
27 law creating a right to release.” *Hayward*, 603 F.3d at 555. The Ninth Circuit further recognized
28 that “[t]here is no general federal constitutional ‘some evidence’ requirement for denial of parole, in

1 the absence of state law creating an enforceable right to parole.” *Id.* at 559. The *Hayward* court’s
2 finding, that there exists no free standing federal due process right to parole or the federal right to
3 some evidence of current dangerousness, contained the consistent and continual caveat that state law
4 may in fact give rise to federal protection for those rights. As the Ninth Circuit later reiterated, “state
5 created rights may give rise to liberty interests that may be enforced as a matter of federal law.”
6 *Pearson v. Muntz*, 606 F.3d 606, 609 (9th Cir. 2010) (per curiam) (citing *Wilkinson v. Austin*, 545
7 U.S. 209, 221 (2005)). The *Pearson* court found that, “*Hayward* necessarily held that compliance
8 with state requirement is mandated by federal law, specifically the Due Process Clause” as “[t]he
9 principle that state law gives rise to liberty interests that may be enforced as a matter of federal law is
10 long-established.” *Id.*

11 The next question is whether California’s parole scheme gives rise to a liberty interest
12 enforced as a matter of federal law. The Ninth Circuit has definitively concluded that “California
13 has created a parole system that independently requires the enforcement of certain procedural and
14 substantive rights, including the right to parole absent ‘some evidence’ of current dangerousness.”
15 *Id.* at 611 (citing *Hayward*, 603 F.3d at 562); *see also Cooke v. Solis*, 606 F.3d 1206, 1213 (9th Cir.
16 2010) (noting that “California’s ‘some evidence’ requirement is a component of the liberty interest
17 created by the parole system of that state”). Consequently, the inquiry that a federal habeas court
18 must undertake in determining whether the denial of parole comports with the requirement of federal
19 due process is “whether the California judicial decision approving the governor’s [or parole board’s]
20 decision rejecting parole was an ‘unreasonable application’ of the California ‘some evidence’
21 requirement, or was ‘based on an unreasonable determination of the facts in light of the evidence.’”
22 *Hayward*, 603 F.3d at 563 (quoting 28 U.S.C. § 2254(d)(1)-(2)) (footnotes omitted). Thus, the
23 inquiry the Court must now undertake is whether the Fresno County Superior Court’s decision was
24 an unreasonable application of the California some evidence standard.

25 The Superior Court initially observed that the Board “relied largely on the seriousness of the
26 underlying offense to deny petitioner’s parole.” (Resp’t Answer Ex. B at 1.) The Superior Court
27 found however that reliance on the commitment offense was proper when combined with lack of
28 insight and remorse as that combination evidenced current dangerousness. (*Id.* at 2.) The Superior

1 Court specifically cited to *In re Shaputis*, the companion case to *In re Lawrence*, in which the
2 California Supreme Court found that lack of insight and failure to accept responsibility was
3 sufficient to meet the some evidence standard. *In re Shaputis*, 44 Cal. 4th 1241, 1261 (2008). The
4 Superior Court’s finding that Petitioner lacked insight and remorse was based on Petitioner’s failure
5 to articulate any lessons he had learned from the self-help programming he had participated in and
6 the psychological evaluation. As the Superior Court noted in its decision

7 [T]he Board was concerned that the petitioner’s most recent psychological evaluation
8 was not favorable, and assessed petitioner as being a low to moderate risk of violence
9 if released. ([Tr. Parole Hearing] at p. 98:14-100:3.) In particular, the Board noted
10 that the psychologist found that petitioner lacked empathy and remorse about his
11 crime. (Id. at p. 99:6-8.) The psychologist also found that petitioner lacked remorse
or guilt, failed to accept responsibility for his actions, had a tendency toward glibness,
superficial charm, grandiose sense of self-worth, pathological lying, shallow affect,
callousness, lacked empathy, had poor behavioral controls, and was irresponsible.
(Id. at 99:14-22.)

12 (Resp’t Answer Ex. B at 3.)

13 The Court initially notes that the Superior Court applied the correct standard of review as the
14 California Supreme Court held in *Lawrence* that, “[t]he relevant determination for the Board and the
15 Governor is, and always has been, an individualized assessment of the continuing danger and risk to
16 public safety posed by the inmate.” *In re Lawrence*, 44 Cal. 4th. at 1227 (noting that “mere
17 recitation of the circumstances of the commitment offense, absent articulation of a rational nexus
18 between those facts and current dangerousness, fails to provide the required “modicum of evidence”
19 of unsuitability”). The Ninth Circuit reiterated this principle, stating that “a reviewing court must
20 consider ‘whether the identified facts are *probative* to the central issue of *current* dangerousness
21 when considered in light of the full record before the Board or the Governor.’” *Cooke*, 606 F.3d at
22 1214 (emphasis in original) (quoting *In re Lawrence*, 44 Cal. 4th at 1221). As the Ninth Circuit
23 observed in *Cooke*:

24 Under California law, “the paramount consideration for both the Board and the
25 Governor” must be “whether the inmate currently poses a threat to public safety and
26 thus may not be released on parole,”[citation], and “the facts relied upon by the Board
or the Governor [must] support the ultimate decision that the inmate remains a threat
to public safety.

27 *Id.* (quoting *In re Lawrence*, 44 Cal. 4th at 1210, 1213); *see also* Cal. Code Regs. tit. 15, § 2402(a)
28 (“[I]f in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if

1 released from prison,” the prisoner must be found unsuitable and denied parole).

2 Here, the Superior Court articulated a rational nexus between the heinous nature of the
3 commitment offense and Petitioner’s lack of insight and remorse. As the California Supreme Court
4 noted:

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

13 *In re Lawrence*, 44 Cal. 4th at 1211.

14 The Superior Court found that Petitioner’s current demeanor and mental state indicated that the
15 implications of dangerousness that could be derived from the commitment offense remained
16 probative. The Superior Court’s finding is support by the record, in which the Board found
17 Petitioner’s demeanor at the hearing very troubling as Petitioner displayed a lack of remorse and
18 insight. The Board stated that Petitioner “probably take[s] the cake for being extraordinarily
19 nonchalant, arrogant, and doing as little as you possibly can and still hoping that you’re going to earn
20 parole.” (Tr. Parole Hearing at 93.) In its decision, the Board also noted that Petitioner displayed a
21 lack of insight and remorse, stating that Petitioner unable “to share with us [the Board] about insight
22 and remorse. You have no compassion for the [victim’s] brother and sister that are sitting here. The
23 only person you feel sorry for is you.” (Tr. Parole Hearing at 95.)

24 Petitioner’s lack of insight and remorse is also evidenced by the psychological evaluation.
25 The psychological evaluation noted that Petitioner’s “insight appeared moderate with an intellectual
26 rather than affective understanding of empathy and remorse.” (Psych. Eval., December 2007, at 4).²
27 The psychologist, Dr. Atwood, found that the interview suggested that Petitioner lacked of remorse
28 or guilt and failure to accept responsibility for one’s own actions. (Psych. Eval. at 7.) Dr. Atwood
noted that to a lesser degree, Petitioner had a tendency towards the following character traits:

²The psychological evaluation is included as Exhibit D in the petition for writ of habeas corpus submitted by
Petitioner to the Fresno County Superior court. This petition is Exhibit A of Respondent’s Answer.

1 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served and
2 filed within ten (10) *court* days (plus three days if served by mail) after service of the objections.
3 The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The
4 parties are advised that failure to file objections within the specified time may waive the right to
5 appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

6 IT IS SO ORDERED.

7 **Dated:** August 2, 2010

/s/ John M. Dixon
UNITED STATES MAGISTRATE JUDGE

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