IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ASHFORD,

Petitioner, No. CIV S-09-2703-FCD-TJB

vs.

STEVE MOORE,

Respondent. ORDER, FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner William Ashford 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) it is recommended that habeas relief be denied; and (2) Petitioner's requests are denied.

II. PROCEDURAL HISTORY

On February 19, 1987, a jury convicted Petitioner of second degree murder and robbery in the Alameda County Superior Court. Resp't's Answer Ex. 1, pt. 1, at 2, ECF No. 13. For second degree murder, Petitioner was sentenced to fifteen years to life, with an additional two years for personal use of a firearm. *Id.* For robbery, Petitioner was sentenced, consecutively, to three years. *Id.* at 4. In the instant action, Petitioner challenges the decision by the California Board of Parole Hearings (the "Board") denying Petitioner parole. Petitioner appeared before the Board

on June 20, 2008.

Petitioner filed a petition for writ of habeas corpus, dated November 22, 2008, with the Alameda County Superior Court challenging the Board's decision. *See* Resp't's Answer Ex. 2. On May 26, 2009, the Superior Court issued a reasoned opinion denying the petition. *See* Resp't's Answer Ex. 3. Petitioner sought relief in the California Court of Appeal, First Appellate District, and the California Supreme Court; those petitions were likewise denied, but without written opinions. *See* Resp't's Answer Exs. 4-7.

On September 29, 2009, Petitioner filed a federal petition for writ of habeas corpus. Petitioner amended the petition on October 20, 2009. Respondent filed an answer to the petition on December 8, 2009, to which Petitioner filed a traverse on December 17, 2009.

III. FACTUAL BACKGROUND

> On August 31st, 1985, [Petitioner] and his friend, Debbie Therman, . . . and her young daughter went to the Parkway Theater to see a movie. During the movie [Petitioner] was approached by ushers regarding his use of alcohol in the theater. Each time [Petitioner] gave an angry response. After the movie [Petitioner] saw Leslie Martin[] . . . in front of the theater and mistakenly thought Martin was one of the ushers who had approached him. [Petitioner] put his finger in Martin's face and angrily accused him of taking his drink. Martin moved [Petitioner's] finger out of his face. [Petitioner] said, "I've got something for you." [Petitioner] pulled out a 25-caliber hand gun and shot Martin one time in the heart. Martin died almost instantly. [Petitioner] was asked about the shooting later that night. He responded by saying matter-of-factly, "It was his time to go." [Petitioner] subsequently cut his hair, changed his hair style and changed his residence.
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> . . . .
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> After [Petitioner] shot Leslie Martin, he immediately ran up East 19th Street where he saw David Thomas holding a 10-speed bicycle. [Petitioner] approached Thomas and angrily said, "Give me the mother fucking bike." Thomas refused, at which time [Petitioner] displayed his gun, demanding the bike. Thomas gave the bike to [Petitioner], who then rode away. [Petitioner] later bragged about taking a guy's bicycle to make his getaway.

Resp't's Answer Ex. 1, pt. 2, at 3-6; Parole Hr'g Tr. 13-16, June 20, 2008.

Prior to incarceration, Petitioner completed up to the eleventh grade, when he was

expelled. Resp't's Answer Ex. 1, pt. 2, at 13; Parole Hr'g Tr. 23. Petitioner explained his expulsion was for not attending class. Resp't's Answer Ex. 1, pt. 2, at 13; Parole Hr'g Tr. 23. At age sixteen or seventeen, Petitioner "started using drugs," including "crack cocaine," and "drinking alcoholic beverages." Resp't's Answer Ex. 1, pt. 2, at 14; Parole Hr'g Tr. 24. When Petitioner committed the commitment offense, Petitioner was "twenty-four, 23," unemployed, and "living with [his] brother." Resp't's Answer Ex. 1, pt. 2, at 14, 40; Parole Hr'g Tr. 24, 50.

IV. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

An application for writ of habeas corpus by a person in custody under judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)). This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359, 362 (9th Cir. 1999). Under AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

In applying AEDPA's standards, the federal court must "identify the state court decision that is appropriate for our review." *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005). Where more than one state court has adjudicated a petitioner's claims, a federal habeas court analyzes the last reasoned decision. *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)

(finding presumption that later unexplained orders, upholding judgment or rejecting same claim, rests upon same ground as prior order)). Thus, a federal habeas court looks through ambiguous or unexplained state court decisions to the last reasoned decision to determine whether that decision was contrary to, or an unreasonable application of, clearly established federal law. *Bailey v. Rae,* 339 F.3d 1107, 1112-13 (9th Cir. 2003). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable--a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410).

V. REQUESTS FOR REVIEW

The petition for writ of habeas corpus sets forth three requests. Specifically, Petitioner requests: (1) an order to show cause; (2) appointment of counsel; and (3) an evidentiary hearing. Pet'r's Am. Pet. 14, ECF. No. 9.

A. First Request: Order To Show Cause

First, Petitioner requests that "this Court Order a Formal Show Cause [sic]." *Id.* As stated earlier, Respondent filed an answer to the petition on December 8, 2009, to which Petitioner filed a traverse on December 17, 2009. Petitioner's request for an order to show cause is denied as moot.

B. Second Request: Appoint Counsel

Second, Petitioner requests appointment of counsel in further litigation of this action. *Id.* The Sixth Amendment right to counsel does not apply in habeas corpus actions. *See Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). A district court, however, may appoint counsel to represent a habeas petitioner whenever "the court determines that the interests of justice so require," and such person is financially unable to obtain representation. 18 U.S.C. § 3006A(a)(2)(B). The decision to appoint counsel is within the district court's discretion. *See Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986). Courts have made appointment of counsel the exception rather than the rule by limiting it to: (1) capital cases; (2) cases that turn

on substantial and complex procedural, legal, or mixed legal and factual questions; (3) cases involving uneducated or mentally or physically impaired petitioners; (4) cases likely to require the assistance of experts either in framing or in trying the claims; (5) cases in which the petitioner is in no position to investigate crucial facts; and (6) factually complex cases. *See generally* 1 J. LIEBMAN & R. HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 12.3b, at 383-86 (2d ed. 1994). Appointment is mandatory only when the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations. *See Chaney*, 801 F.2d at 1196; *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir. 1965).

Appointment of counsel is not warranted in this case. Petitioner's claims are typical claims arising in habeas petitions and are not especially complex. This is not an exceptional case warranting representation on federal habeas review. Petitioner's request for appointment of counsel is denied.

C. Third Request: Evidentiary Hearing

Third, Petitioner requests an evidentiary hearing. Pet'r's Am. Pet. 14. Under 28 U.S.C. § 2254(e)(2), a district court presented with a request for an evidentiary hearing must first determine whether a factual basis exists in the record to support a petitioner's claims and, if not, whether an evidentiary hearing "might be appropriate." *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999); *see also Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005); *Insyxiengmay v. Morgan*, 403 F.3d 657, 669-70 (9th Cir. 2005). "[W]here the petitioner establishes a colorable claim for relief and has never been afforded a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing." *Earp*, 431 F.3d at 1167 (citing *Insyxiengmay*, 403 F.3d at 670; *Stankewitz v. Woodford*, 365 F.3d 706, 708 (9th Cir. 2004); *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001)). In other words, a hearing is required if: "(1) [the petitioner] has alleged facts that, if proven, would entitle him to habeas relief, and (2) he did not receive a full and fair opportunity to develop those facts[.]" *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

Here, Petitioner's request does not establish that these requirements are satisfied such that an evidentiary hearing would be appropriate. Petitioner does not allege facts that establish a colorable claim for relief because the Board's parole denial is supported by "some evidence" demonstrating future dangerousness, and the Superior Court's decision is reasonable. *See infra* Part VI. Petitioner's request for an evidentiary hearing is denied.

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

VI. CLAIMS FOR REVIEW

The petition for writ of habeas corpus sets forth two grounds for relief, both of which are due process claims. First, Petitioner argues that "the Board . . . [f]ailed to follow [] the laws" because "the Board failed to present any evidence that supports a denial of parole." Pet'r's Am. Pet. 5. Second, Petitioner contends "[t]he [s]tate [c]ourt [d]ecision (last reasoned) was unreasonable in light of the facts . . . ." *Id.* at 4.

A. Legal Standard for Parole Denial

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

1. Liberty Interest in Parole

A protected liberty interest may arise from either the Due Process Clause itself or from state laws. *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The United States Constitution does not, in and of itself, create for prisoners a protected liberty interest in the receipt of a parole date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). The full panoply of rights afforded a defendant in a criminal proceeding is not constitutionally mandated in the context of a parole

proceeding. *See Pedro v. Or. Parole Bd.*, 825 F.2d 1396, 1398-99 (9th Cir. 1987). The Supreme Court has held that a parole board's procedures are constitutionally adequate if the inmate is given an opportunity to be heard and a decision informing him of the reasons he did not qualify for parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979). If a state's statutory parole scheme uses mandatory language, however, it "'creates a presumption that parole release will be granted' when or unless certain designated findings are made," thereby giving rise to a constitutional liberty interest. *McQuillion*, 306 F.3d at 901 (quoting *Greenholtz*, 442 U.S. at 12).

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

2. Scope of Due Process Protection

Additionally, as a matter of California state law, denial of parole to state inmates must be supported by at least "some evidence" demonstrating future dangerousness. *Hayward v. Marshall*, 603 F.3d 546, 562-63 (9th Cir. 2010) (en banc) (citing *In re Lawrence*, 44 Cal. 4th 1181, 82 Cal. Rptr. 3d 169, 190 P.3d 535 (2008); *In re Shaputis*, 44 Cal. 4th 1241, 82 Cal. Rptr.

3d 213, 190 P.3d 573 (2008); *In re Rosenkrantz*, 29 Cal. 4th 616, 128 Cal. Rptr. 2d 104, 59 P.3d 174 (2002)). California's "some evidence" requirement is a component of the liberty interest created by the state's parole system. *Cooke v. Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010). The federal Due Process Clause requires, in turn, that California comply with its own "some evidence" requirement. *Pearson v. Muntz*, 606 F.3d 606, 609 (9th Cir. 2010) (per curiam). Thus, a reviewing court such as this one must "decide whether the California judicial decision approving the . . . decision rejecting parole was an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence.'" *Hayward*, 603 F.3d at 562-63 (quoting 28 U.S.C. § 2254(d)(2)).

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

3. California's Parole Scheme

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

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

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

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

Other circumstances tending to indicate unsuitability include:

> (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.

Id. § 2402(c)(2)-(6).

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

> (1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.
>
> (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 built over a long period of time.
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> (5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.
>
> (6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.
>
> (7) Age. The prisoner's present age reduces the probability of recidivism.
>
> (8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.
>
> (9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.

Id. § 2402(d)(1)-(9).

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

B. State Court Decision

Here, because the California Supreme Court and California Court of Appeal summarily denied the petition, the state court decision appropriate for review is the Superior Court's decision. Under AEDPA's standards, the Superior Court reasonably held that "some evidence"

showed Petitioner "currently poses an unreasonable risk of danger to society if released . . . ." *See* Resp't's Answer Ex. 3, at 5. The Superior Court considered Petitioner's (1) commitment offense; (2) prior criminal and social history; (3) institutional disciplinary record; (4) psychological assessment; and (5) lack of parole plans. *Id.*

1. Commitment Offense

First, the Superior Court properly noted that the Board considered Petitioner's commitment offense, among other factors, when denying parole. *Id.* The Board read into the record the summary of Petitioner's commitment offense, taken from the June 2008 Board Report, "which refers back to the June 2006 Board Report for the summary." Resp't's Answer Ex. 1, pt. 2, at 3; Parole Hr'g Tr. 13; *see supra* Part III. At the hearing and in summary, the Board explained its reliance, in part, on Petitioner's offense as follows:

> The first consideration that gives great weight in this case towards unsuitability is the commitment offense. . . . [Petitioner] did commit this offense in a cruel manner . . . which demonstrates an exceptionally callous disregard for human life and suffering. . . . Mr. Martin . . . was shot to death by [Petitioner] outside of a movie theater and . . . this particular victim was mistaken for another individual who had evidently taken [Petitioner's] alcohol or [his] drink at this particular movie theater. [Petitioner was] under the influence at the time and reacted in a very angry manner and, again, confronted Mr. Martin, pulling out a weapon and shooting him in the heart and killing him instantly. We note . . . that this was a public area, as well, and there were other people . . . that were obviously present[,] and . . . the potential of others being injured and killed . . . was very high and it's . . . fortunate that that did not occur. We note that the motive obviously is very trivial in relation to this offense and that this particular young man who had his life in front of him, 18 years old, was shot for no reason at all, and that certainly is very callous and essentially a very disregard for this man.
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> . . . .
>
> [Petitioner] did not even bother to stay and render aid or any assistance whatsoever for the victim, but instead fled. On the way, as he fled, he then encountered another victim and proceeded to steal his bicycle, a 10-speed bicycle. This particular victim initially had refused to give the bicycle[.] [W]hen that occurred, [Petitioner] then angrily, . . . pointing the weapon at him, demanded that he give him the bike and then, . . . the victim did hand over the bicycle

> and . . . was not harmed, but . . . there was a potential there for this particular victim . . . [to] be[] injured or killed by [Petitioner]. . . . [W]e note that the murder of this particular victim, Mr. Martin, certainly did not deter [Petitioner] from later committing this additional crime; that of robbery. We also note that [Petitioner], after the commission of this crime, took some measures to change his appearance by cutting his hair and changing his hairstyle and actually changing residence, . . . but . . . to no avail, because he was later apprehended.

Resp't's Answer Ex. 1, pt. 2, at 54-57, 64; Parole Hr'g Tr. 64-67, 74.

At the hearing, Petitioner's counsel asserted that Petitioner would speak about "[e]verything but the commitment offense." Resp't's Answer Ex. 1, pt. 2, at 2; Parole Hr'g Tr. 12. The Board then read Petitioner's version into the record:

> [Petitioner] stated the official version of the life crime is essentially accurate. The incident that led to the shooting was, in essence, a disagreement with the theater staff. When confronted outside the theater by the usher, [Petitioner] felt somewhat threatened by the situation and acted impulsively. He was under the influence of alcohol and cocaine. [Petitioner] explained the reason for being armed was due to [an] ongoing disagreement with a neighbor. He was truly in fear for his and his family's safety during the previous several weeks and expressed a commitment to a drug free and sober lifestyle. [Petitioner] acknowledges the pain and tragedy that the victim's family must have felt. He accepts complete responsibility for his actions and regrets taking the life of Leslie Martin.

Resp't's Answer Ex. 1, pt. 2, at 4-5; Parole Hr'g Tr. 14-15.

When the Board asked Petitioner if he had any comments regarding his version of the statement, Petitioner replied, "No, sir." Resp't's Answer Ex. 1, pt. 2, at 5-6; Parole Hr'g Tr. 15-16. The Board recognized Petitioner was "not speaking of the crime," but also asked, "What's the definition of remorse?" Resp't's Answer Ex. 1, pt. 2, at 45; Parole Hr'g Tr. 55. Petitioner answered, "To feel bad about something. . . . You try to make amends. . . . I don't want to [b]e this individual that committed this crime. I don't, you know, it's a shameful thing, it's a painful thing." Resp't's Answer Ex. 1, pt. 2, at 45; Parole Hr'g Tr. 55.

The Board then questioned Petitioner about step eight in the twelve-step program, i.e., making amends. Resp't's Answer Ex. 1, pt. 2, at 45-46; Parole Hr'g Tr. 55-56. Petitioner

replied, "I made a written list of the people I harmed." Resp't's Answer Ex. 1, pt. 2, at 46; Parole Hr'g Tr. 56. Petitioner elaborated, "I have apologized to people, the ones I've been able to contact, such as my ex-wife or my mother . . . ." Resp't's Answer Ex. 1, pt. 2, at 46; Parole Hr'g Tr. 56. At the top of Petitioner's list, he claimed, was the victim of the commitment offense. Resp't's Answer Ex. 1, pt. 2, at 47; Parole Hr'g Tr. 57.

Petitioner reiterated that he took "full responsibility for the crime." Resp't's Answer Ex. 1, pt. 2, at 47; Parole Hr'g Tr. 57. When the Board asked "[i]n what way," Petitioner replied, "I shot a man, I'm being punished for it. I'm trying to change myself . . . into a better human being." Resp't's Answer Ex. 1, pt. 2, at 47; Parole Hr'g Tr. 57. The Board then questioned whether Petitioner felt he had "done a good job . . . of trying to change [him]self." Resp't's Answer Ex. 1, pt. 2, at 48; Parole Hr'g Tr. 58. Petitioner replied, "I was thinking, . . . [a]m I trying to be perfect? . . . Because I'm going to fail. . . . But, I'm trying to change and I'm trying to do the right thing." Resp't's Answer Ex. 1, pt. 2, at 48; Parole Hr'g Tr. 58.

The psychological report revealed Petitioner "lacks insight into the causes for his life crime . . . ." Resp't's Answer Ex. 1, pt. 2, at 61; Parole Hr'g Tr. 71. The report explained that Petitioner "lacks insight into his personality structure and his vulnerability to aggressive outbursts[,]" and "[i]t is in this area that he lacks insight into the causes of his life crime." Resp't's Answer Ex. 1, pt. 2, at 61; Parole Hr'g Tr. 71; *see infra* Part VI.B.4. Thus, the Superior Court properly found that the Board weighed the nature and gravity of Petitioner's commitment offense, and "noted the nexus between . . . Petitioner's commitment offense and his disciplinary history." Resp't's Answer Ex. 3, at 4; *see infra* Part VI.B.3.

2. Prior Criminal and Social History

Second, the Superior Court appropriately noted that the Board examined Petitioner's "escalating pattern of criminal conduct" and "unstable social history." Resp't's Answer Ex. 1, pt. 2, at 57; Parole Hr'g Tr. 67. The Board stated:

> [W]e move on to your criminal history and . . . we note that you

> have an adult criminal history prior to the commitment offense. We note that you do not have a juvenile record at this time. But, it certainly does weigh heavily against suitability. [T]hat does include assaulting others and . . . there was a conviction of battery. You certainly have an escalating pattern of criminal conduct and of violence that does include possession of controlled substance, the battery, selling and furnishing marijuana and hashish. You also have an unstable social history and . . . a history of unstable and tumultuous relationships with others. . . . [T]here is substance abuse, that you involved yourself of crack cocaine and alcohol. You dropped out of high school. . . . We do note that your social history was so unstable that you did fail to profit from society's attempts to correct your criminality through adult probation and county jail[.] . . . [A]t times[,] . . . you were supporting yourself by selling drugs . . . .

Resp't's Answer Ex. 1, pt. 2, at 57-58; Parole Hr'g Tr. 67-68.

Specifically, Petitioner "grew up at periods with [his] mother and father." Resp't's Answer Ex. 1, pt. 2, at 11; Parole Hr'g Tr. 21. Mostly, he "was raised by [his] grandmother." Resp't's Answer Ex. 1, pt. 2, at 11; Parole Hr'g Tr. 21. Petitioner's grandmother "had like seven or eight kids running around," and "[i]t was too much for her." Resp't's Answer Ex. 1, pt. 2, at 12; Parole Hr'g Tr. 22. Petitioner was "placed at the Hannah Boy's Center for four years." Resp't's Answer Ex. 1, pt. 2, at 12; Parole Hr'g Tr. 22. In total, Petitioner had five brothers and one sister. Resp't's Answer Ex. 1, pt. 2, at 10; Parole Hr'g Tr. 20. Petitioner also had two daughters who were twenty-six and twenty-three years old at the time of hearing. Resp't's Answer Ex. 1, pt. 2, at 16; Parole Hr'g Tr. 26.

At the time of the hearing, both of Petitioner's parents were deceased. Resp't's Answer Ex. 1, pt. 2, at 10; Parole Hr'g Tr. 20. Petitioner stated he corresponded with one of his brothers, and "the rest of them, you know, they [were] in and out of the system . . . ." Resp't's Answer Ex. 1, pt. 2, at 10; Parole Hr'g Tr. 20. Petitioner's sister was "born of another mother," so he "never really . . . knew her." Resp't's Answer Ex. 1, pt. 2, at 11; Parole Hr'g Tr. 21. Petitioner explained his daughters were "pretty much raised away from [him]" once he was incarcerated. Resp't's Answer Ex. 1, pt. 2, at 16; Parole Hr'g Tr. 26. Petitioner was also divorced. Resp't's Answer Ex. 1, pt. 2, at 16; Parole Hr'g Tr. 26.

When rendering its decision, the Board noted Petitioner had "somewhat of a dysfunctional family," and that was "something there that you were not able to control." Resp't's Answer Ex. 1, pt. 2, at 57-58; Parole Hr'g Tr. 67-68. The Board acknowledged "that was just a situation in your childhood." Resp't's Answer Ex. 1, pt. 2, at 58; Parole Hr'g Tr. 68. However, the Board considered Petitioner's social history because it was "so unstable that you did fail to profit from society's attempts to correct your criminality through adult probation and county jail[.] . . . [A]t times[,] . . . you were supporting yourself by selling drugs . . . ." Resp't's Answer Ex. 1, pt. 2, at 58; Parole Hr'g Tr. 68.

The Board also reviewed Petitioner's prior criminal history. In August 1980, Petitioner had "an arrest by Richmond PD for assault with a deadly weapon. That was rejected by the District Attorney's office." Resp't's Answer Ex. 1, pt. 2, at 7; Parole Hr'g Tr. 17. In April 1981, Petitioner was arrested by the "Emeryville PD for disturbing the peace, malicious mischief, [and] vandalism, [which was] rejected by the District Attorney's office." Resp't's Answer Ex. 1, pt. 2, at 7; Parole Hr'g Tr. 17. In August 1981, Petitioner was arrested by the "Oakland PD for possession of narcotic controlled substance for sale, [which was] rejected by the District Attorney's office." Resp't's Answer Ex. 1, pt. 2, at 7; Parole Hr'g Tr. 17. Petitioner was then "arrested for possession of a controlled substance and [he] did receive a conviction and . . . [was] granted 18 months court probation."[1] Resp't's Answer Ex. 1, pt. 2, at 7; Parole Hr'g Tr. 17. In October 1981, Petitioner was arrested by the "Oakland PD for possession of marijuana, hashish for sale and possession of a controlled substance. Once again, there was a reject." Resp't's Answer Ex. 1, pt. 2, at 7; Parole Hr'g Tr. 17.

In January 1985, Petitioner was arrested by the "Oakland PD [for] . . . battery and vandalism." Resp't's Answer Ex. 1, pt. 2, at 7-8; Parole Hr'g Tr. 17-18. Since the "[d]isposition [wa]s unknown," the Board asked Petitioner to explain what happened. Resp't's Answer Ex. 1,

[1] The record does not provide when and where this arrest and conviction occurred.

pt. 2, at 8; Parole Hr'g Tr. 18. To Petitioner's knowledge, "it was dismissed." Resp't's Answer Ex. 1, pt. 2, at 8; Parole Hr'g Tr. 18. Petitioner explained, "[M]e and my cousin had got into a[n] argument, right? And a window got broke." Resp't's Answer Ex. 1, pt. 2, at 9; Parole Hr'g Tr. 19.

In February 1985, Petitioner was arrested and convicted of battery. Resp't's Answer Ex. 1, pt. 2, at 9; Parole Hr'g Tr. 19. In March 1985, Petitioner was arrested for battery again, "and that was rejected." Resp't's Answer Ex. 1, pt. 2, at 9; Parole Hr'g Tr. 19. In August 1985, Petitioner had "another arrest for selling, furnishing marijuana, hashish, possession of marijuana, hashish for sale, and both charges were dismissed due to [a] plea to other unknown charges." Resp't's Answer Ex. 1, pt. 2, at 9; Parole Hr'g Tr. 19. When asked about the plea, Petitioner responded, "I couldn't tell you what that -- that's been a long time." Resp't's Answer Ex. 1, pt. 2, at 9; Parole Hr'g Tr. 19. The Superior Court, therefore, reasonably found that the Board appropriately considered Petitioner's prior criminal and social history.

3. Institutional Disciplinary Record

Third, the Superior Court properly determined that the Board reviewed Petitioner's institutional disciplinary record. *See* Resp't's Answer Ex. 3, at 5. At the time of the hearing, Petitioner had eight 128 violations, the most recent being in March 2002, when Petitioner used "a forklift where supposedly [he] didn't have permission." Resp't's Answer Ex. 1, pt. 2, at 30; Parole Hr'g Tr. 40. Petitioner explained:

> [W]hen I first got in that shop, we all used to just get on the forklift. . . . So I just did what I thought everybody else was doing. . . . What happened was that I got confused on whether the break should be up or down . . . and it just went down into the door. We fixed it within a[n] hour, but they felt like it should go in my file.

Resp't's Answer Ex. 1, pt. 2, at 32; Parole Hr'g Tr. 42. "[A]fter that period[,] [Petitioner] even worked [his] way up to lead man." Resp't's Answer Ex. 1, pt. 2, at 32; Parole Hr'g Tr. 42. The Board asked about this incident because it "wanted to make sure it was clear that it wasn't like using the forklift in a negative way or something." Resp't's Answer Ex. 1, pt. 2, at 31; Parole

Hr'g Tr. 41.

At the time of the hearing, Petitioner also had six 115 violations. Resp't's Answer Ex. 1, pt. 2, at 32; Parole Hr'g Tr. 42. Petitioner had violations for: (1) unlawful influence in 1988; (2) failure to perform as directed in 1989; (3) verbal disrespect in 1989; (4) involvement in a group altercation in 1994; (5) "mutual combat with serious injury" in October 2000; and (6) "behavior which could result in violence" on January 17, 2007. Resp't's Answer Ex. 1, pt. 2, at 32-33; Parole Hr'g Tr. 42-43. For Petitioner's October 2000 violation, Petitioner "pled guilty to that." Resp't's Answer Ex. 1, pt. 2, at 33; Parole Hr'g Tr. 43.

The Board emphasized that Petitioner's "'07 violation is really problematic." Resp't's Answer Ex. 1, pt. 2, at 34; Parole Hr'g Tr. 44. Petitioner "was found guilty of it and it was reduced to an administrative." Resp't's Answer Ex. 1, pt. 2, at 32-33; Parole Hr'g Tr. 42-43. In this incident, Petitioner "[m]ade a comment, left, came back and made another comment to the staff member." Resp't's Answer Ex. 1, pt. 2, at 33; Parole Hr'g Tr. 43.

> The first [comment] was, "You better check your boy," and then [Petitioner] left and came back and said, "I don't know what kind of game you and that bitch ass nigga's playing, but it is going to cause someone to get hurt."

Resp't's Answer Ex. 1, pt. 2, at 33; Parole Hr'g Tr. 43. The Board acknowledged, "It was not violence itself," but "you look back historically and you see altercations and disrespect and you see" the 2007 violation, "which is very recent, . . . just a little over a year ago." Resp't's Answer Ex. 1, pt. 2, at 32, 34; Parole Hr'g Tr. 42, 44. The Superior Court, therefore, properly found that the Board weighed Petitioner's institutional disciplinary record against Petitioner.

4. Psychological Assessment

Fourth, the Superior Court appropriately maintained that the Board factored in Petitioner's psychological report. *See* Resp't's Answer Ex. 3, at 5. The reported assessed Petitioner's "overall risk for re-offense [a]s moderate." Resp't's Answer Ex. 1, pt. 2, at 35; Parole Hr'g Tr. 45. The assessment also noted Petitioner had a "personality disorder with

antisocial and narcissistic traits." Resp't's Answer Ex. 1, pt. 2, at 36; Parole Hr'g Tr. 46. When rending its decision, the Board read an excerpt from the psychological report:

> [Petitioner] displayed some of the predictive factors for recidivism. He lacks insight into his personality structure and his vulnerability to aggressive outbursts when he feels challenged or not recognized as someone of worth. It is in this area that he lacks insight into the causes of his life crime, as well as the more recent 115, although he is generally stable as witnessed by his primarily satisfactory to exceptional ratings at work. He remains vulnerable to impulsivity and certain kinds of situations such as just noted where he feels overwhelmed by negative emotions. This suggests that he still lacks some insight into his problems with emotional control. Although he has some negative attitude toward the parole process he has been very responsive to [Board] recommendations in recent years.

Resp't's Answer Ex. 1, pt. 2, at 36; Parole Hr'g Tr. 46.

The psychological evaluator recognized Petitioner completed anger management,[2] but the Board recounted "there seems to be an issue there in reference to . . . [is Petitioner] internalizing that. [Is Petitioner] getting it? . . . [Is Petitioner] pulling from that and having a good understanding and adapting this to what [his] problems are." Resp't's Answer Ex. 1, pt. 2, at 36; Parole Hr'g Tr. 46. Thus, the Superior Court reasonably held that the Board factored in Petitioner's psychological report when denying parole.

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[2] When rendering its decision, the Board found Petitioner's self-help programming "[wa]s somewhat of a mixed bag." Resp't's Answer Ex. 1, pt. 2, at 58; Parole Hr'g Tr. 68. In 1991, Petitioner started participating in Narcotics Anonymous (NA), and at the hearing, Petitioner continued to participate in it. Resp't's Answer Ex. 1, pt. 2, at 28; Parole Hr'g Tr. 38. Petitioner admitted, however, he stopped attending NA for "a couple months or something," after he received one of his 115 violations, because he "got kind of down." Resp't's Answer Ex. 1, pt. 2, at 28; Parole Hr'g Tr. 38. On May 16, 2006, Petitioner was suspended from the Straight Life Program for passing his correspondence information to a program participant, Resp't's Answer Ex. 1, pt. 2, at 21; Parole Hr'g Tr. 31, but at the time of the hearing "[h]e started that again." Resp't's Answer Ex. 1, pt. 2, at 27; Parole Hr'g Tr. 37. In July 2006, Petitioner received a certificate for completing an anger management course. Resp't's Answer Ex. 1, pt. 2, at 20; Parole Hr'g Tr. 30. In August 2006, Petitioner received a certificate for completing a stress management course. Resp't's Answer Ex. 1, pt. 2, at 20-21; Parole Hr'g Tr. 30-31. The Board concluded, "While you have participated in self-help groups while incarcerated, you have not internalized what you have learned," as Petitioner's most recent 115 violation demonstrated. Resp't's Answer Ex. 1, pt. 2, at 69; Parole Hr'g Tr. 59.

5. Lack of Parole Plans

Fifth, the Superior Court properly affirmed the Board's determination that Petitioner had inadequate parole plans. *See* Resp't's Answer Ex. 3, at 5. Petitioner participated in the Coastline Community College Program. Resp't's Answer Ex. 1, pt. 2, at 22; Parole Hr'g Tr. 32. In total, Petitioner "probably ha[d] about 36 units." Resp't's Answer Ex. 1, pt. 2, at 22; Parole Hr'g Tr. 32.

Petitioner was a "culinary janitor" until April 6, 2007, when "he was assigned to the Plant Operation Engineering Shop." Resp't's Answer Ex. 1, pt. 2, at 24; Parole Hr'g Tr. 34. At the plant, "[h]e earned a combination of satisfactory, below average, and unsatisfactory grades. Resp't's Answer Ex. 1, pt. 2, at 24; Parole Hr'g Tr. 34. In December 2007, Petitioner was "assigned as an [i]nfirmary janitor." Resp't's Answer Ex. 1, pt. 2, at 24; Parole Hr'g Tr. 34. As an infirmary janitor, "[h]e earned exceptional grades." Resp't's Answer Ex. 1, pt. 2, at 24; Parole Hr'g Tr. 34.

At the hearing, Petitioner tried to explain the deviation in work reviews. According to Petitioner, one report was unsatisfactory because he had "a confrontation with an inmate that a supervisor interceded on." Resp't's Answer Ex. 1, pt. 2, at 25; Parole Hr'g Tr. 35. Petitioner said "something to [the supervisor] that she didn't like and then that's when everything just went downhill from there," resulting in the January 2007 115 violation. Resp't's Answer Ex. 1, pt. 2, at 25; Parole Hr'g Tr. 35; *see supra* Part VI.B.3. Next, at Petitioner's culinary job, he "was bored" because "[i]t wasn't much work. . . . You know, it was one of them jobs." Resp't's Answer Ex. 1, pt. 2, at 25-26; Parole Hr'g Tr. 35-36. Then, at the "Plant Ops," Petitioner had "seven or eight supervisors and each one was requesting [him] to do something at different times and sometimes their requests would conflict. So, it was a situation that [Petitioner] didn't like being in." Resp't's Answer Ex. 1, pt. 2, at 26; Parole Hr'g Tr. 36. Petitioner believed "that was reflected in . . . [h]is grades there" because he "made it known that . . . [he] wanted to move on." Resp't's Answer Ex. 1, pt. 2, at 26; Parole Hr'g Tr. 36.

Petitioner also admitted:

> After I got the 115 I kind of like got discouraged from even attempting to put together a parole plan. My previous plan was to try to go to a half-way house or some type of Delancey Street or something like that to slowly enter myself back into the community, work my way back in. And that was basically it. To attend some type of NA program out there . . . . Not long after I came from the Board that 115 . . . happened and it just took a lot out of me. So, I don't have parole plans.

Resp't's Answer Ex. 1, pt. 2, at 38; Parole Hr'g Tr. 48. When the Board asked if Petitioner made any attempts to contact Delancey Street, Petitioner responded, "I didn't even try to fool myself into thinking that that was a possibility." Resp't's Answer Ex. 1, pt. 2, at 38-39; Parole Hr'g Tr. 48-49. Thus, the Board properly determined Petitioner lacked parole plans, and the Superior Court reasonably affirmed this.

In sum, the Superior Court reasonably concluded that "the circumstances of the commitment offense, when considered in light of Petitioner's prior criminal and social history, his institutional disciplinary record, his psychological assessment, which indicates a lack of insight, and lack of parole plans, continue to be predictive of current dangerousness." *See* Resp't's Answer Ex. 3, at 5. These factors demonstrate a nexus between the facts in the record regarding Petitioner's commitment offense and the ultimate conclusion that Petitioner still posed a risk of danger or threat to the public. These factors also independently demonstrate some evidence in the record that Petitioner was not suitable for parole. The Superior Court properly concluded that the Board's decision withstands the minimally stringent "some evidence" test and has not violated Petitioner's right to due process of law.

VII. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Petitioner's request for an order to show cause is DENIED as moot;

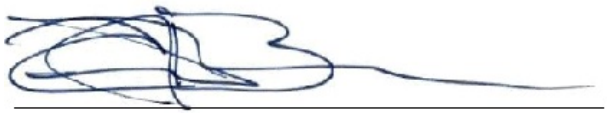
2. Petitioner's request for appointment of counsel is DENIED; and

3. Petitioner's request for an evidentiary hearing is DENIED.

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

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within seven days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991). In any objections he elects to file, Petitioner may address whether a certificate of appealability should be issued in the event he elects to file an appeal from the judgment in this case. *See* Rule 11(a), Federal Rules Governing Section 2254 Cases (district court must issue or deny certificate of appealability when it enters final order adverse to applicant).

DATED: October 28, 2010.



TIMOTHY J BOMMER
UNITED STATES MAGISTRATE JUDGE