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

ISIDRO ROMERO,  
Petitioner,  
v.  
ROBERT K. WONG, Warden  
Respondent.

No. C-09-1636 TEH (PR)

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS; DENYING  
CERTIFICATE OF APPEALABILITY

\_\_\_\_\_ /

Pro se Petitioner Isidro Romero, a state prisoner incarcerated at San Quentin State Prison seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging the California Board of Parole Hearings' ("BPH") March 26, 2008 decision to deny him parole.

On June 10, 2009, the Court issued an Order to Show Cause why the writ should not be granted. Doc. #4. On August 10, 2009, Respondent filed an Answer. Doc. #5. On September 10, 2009, Petitioner filed a Traverse. Doc. #6.

After the matter was submitted, on April 22, 2010, the Ninth Circuit issued its decision in Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc), which addressed important issues

United States District Court  
For the Northern District of California

1 relating to federal habeas review of BPH decisions denying parole to  
2 California state prisoners. On May 3, 2010, the Court ordered the  
3 parties to file supplemental briefing explaining their views of how  
4 the Hayward en banc decision applies to the facts presented in  
5 Petitioner's challenge to BPH's decision denying him parole. Doc.  
6 #7. Respondent filed supplemental briefing on May 28, 2010;  
7 Petitioner filed his on June 25, 2010. Doc. ## 8 & 9.

8           Having considered all of the papers filed by the parties,  
9 the Court DENIES the Petition.

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Below is a brief factual summary, derived from the state appellate court opinion, of Petitioner's commitment offense as set forth by BPH during Petitioner's March 26, 2008 parole suitability hearing.

During a party, Sergio Cruz, a noninvitee, attempted to coax one of the guests, Sophia, outside. Although Cruz and Sophia had previously dated, Sophia refused to leave the house. Cruz returned hours later accompanied by Petitioner and others. When Sophia still refused to leave with Cruz, catcalls were made until a fight erupted between those inside the house and Cruz and his friends. During the brawl, witnesses identified Petitioner as stabbing Jose Gomez, Sophia's cousin. Petitioner, Cruz and the others fled.

Gomez's autopsy revealed he died from eight stab wounds. Petitioner was arrested at a hospital while being treated for cuts

1 and bruises. Blood tests showed Petitioner's blood alcohol level to  
2 be .16 percent.

3 Petitioner admitted at trial he accompanied Cruz to the  
4 party and was involved in a fight, but denied stabbing anyone. In  
5 addition he admitted drinking beer but denied feeling its effect.

6 The evidence at trial showed the victim Gomez was unarmed  
7 and was the subject of an unprovoked beating by Petitioner and his  
8 cohorts and that Petitioner personally stabbed the victim at least  
9 three times, twice in the chest. Petitioner's previous testimony  
10 negated any claim that his ability to reason was impaired by  
11 alcohol. The evidence at trial was more than adequate to support a  
12 murder conviction. Doc. #5-1 at 9-10.

13 In May 1985, Petitioner was sentenced to sixteen years to  
14 life in state prison following his conviction by a jury in Orange  
15 County of second degree murder with an attached deadly weapon  
16 enhancement. Doc. #5-1 at 29. His minimum eligible parole date was  
17 August 25, 1991. Id.

18 On March 26, 2008, Petitioner appeared before BPH for his  
19 eleventh parole suitability hearing. Doc. #5-1 at 29. At the  
20 conclusion of the hearing, BPH found Petitioner was "not suitable  
21 for parole[] and would pose an unreasonable risk of danger to  
22 society or a threat to public safety if released from prison." Doc.  
23 #5-2 at 17.

24 Petitioner unsuccessfully challenged BPH's decision in the  
25 state superior and appellate courts. Doc. #5-3 at 2-5; Doc. #5-7 at  
26 27. On December 10, 2008, the California Supreme Court summarily  
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1 denied Petitioner's Petition for Review. Doc. #5-8 at 2. This  
2 federal Petition for a Writ of Habeas Corpus followed. Doc. #1.

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4 II

5 In Hayward, the Ninth Circuit explained the law in  
6 California as it relates to parole suitability determinations:

7 The California parole statute provides that  
8 the Board of Prison Terms "shall set a release  
9 date unless it determines that the gravity of  
10 the current convicted offense or offenses, or  
11 the timing and gravity of current or past  
12 convicted offense or offenses, is such that  
13 consideration of the public safety requires a  
14 more lengthy period of incarceration for this  
15 individual." The crucial determinant of whether  
16 the prisoner gets parole in California is  
17 "consideration of the public safety."

18 In California, when a prisoner receives an  
19 indeterminate sentence of fifteen years to life,  
20 the "indeterminate sentence is in legal effect a  
21 sentence for the maximum term, subject only to  
22 the ameliorative power of the [parole authority]  
23 to set a lesser term." Under the California  
24 parole scheme, the prisoner has a right to a  
25 parole hearing and various procedural guarantees  
26 and rights before, at, and after the hearing; a  
27 right to subsequent hearings at set intervals if  
28 the Board of Prison Terms turns him down for  
parole; and a right to a written explanation if  
the Governor exercises his authority to overturn  
the Board of Prison Terms' recommendation for  
parole. Under California law, denial of parole  
must be supported by "some evidence," but review  
of the [decision to deny parole] is "extremely  
deferential."

23 Hayward, 603 F.3d at 561-62 (footnotes and citations omitted).

24 The court further explained that:

25 [s]ubsequent to Hayward's denial of parole, and  
26 subsequent to our oral argument in this case,  
27 the California Supreme Court established in two  
28 decisions, In re Lawrence . . . and In re

1            Shaputis, . . . that as a matter of state law,  
2            "some evidence" of future dangerousness is  
3            indeed a state sine qua non for denial of parole  
4            in California. We delayed our decision in this  
5            case so that we could study those decisions and  
6            the supplemental briefs by counsel addressing  
7            them. As a matter of California law, "the  
8            paramount consideration for both the Board [of  
9            Prison Terms] and the Governor under the  
10            governing statutes is whether the inmate  
11            currently poses a threat to public safety."  
12            . . . There must be "some evidence" of such a  
13            threat, and an aggravated offense "does not, in  
14            every case, provide evidence that the inmate is  
15            a current threat to public safety." . . . The  
16            prisoner's aggravated offense does not establish  
17            current dangerousness "unless the record also  
18            establishes that something in the prisoner's  
19            pre- or post-incarceration history, or his or  
20            her current demeanor and mental state" supports  
21            the inference of dangerousness. . . . Thus, in  
22            California, the offense of conviction may be  
23            considered, but the consideration must address  
24            the determining factor, "a current threat to  
25            public safety."

26            Hayward, 603 F.3d at 562 (footnotes and citations omitted).

27            After providing this background on California law as it  
28            applies to parole suitability determinations, the court then  
29            explained the role of a federal district court charged with  
30            reviewing the decision of either the BPH or the governor in denying  
31            a prisoner parole. According to the Ninth Circuit, this Court must  
32            decide whether a decision "rejecting parole was an 'unreasonable  
33            application' of the California 'some evidence' requirement, or was  
34            'based on an unreasonable determination of the facts in light of the  
35            evidence.'" Hayward, 603 F.3d at 562-63 (citations omitted); see  
36            also Cooke v. Solis, 606 F.3d 1206, 1208, n. 2 & 1213 (9th Cir.  
37            2010) (applying Hayward and explicitly rejecting the state's  
38            argument that "the constraints imposed by AEDPA preclude federal

1 habeas relief" on petitioner's claim; noting that in Hayward, the  
2 court "held that due process challenges to California courts'  
3 application of the 'some evidence' requirement are cognizable on  
4 federal habeas review under AEDPA").

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6 III

7 When assessing whether California's parole board's  
8 suitability determination was supported by "some evidence," this  
9 Court's analysis is framed by the state's "regulatory, statutory and  
10 constitutional provisions that govern parole decisions in  
11 California." Cooke, 606 F.3d at 1213 (citing In re Rosenkrantz, 29  
12 Cal. 4th 616 (2002)); see Hayward, 603 F.3d at 561-62. Under  
13 California law, prisoners serving indeterminate life sentences, like  
14 Petitioner, become eligible for parole after serving minimum terms  
15 of confinement required by statute. In re Dannenberg, 34 Cal. 4th  
16 1061, 1069-70 (2005). Regardless of the length of the time served,  
17 "a life prisoner shall be found unsuitable for and denied parole if  
18 in the judgment of the panel the prisoner will pose an unreasonable  
19 risk of danger to society if released from prison." Cal. Code Regs.  
20 tit. 15, § 2402(a). In making this determination, BPH must consider  
21 various factors, including the prisoner's social history, past and  
22 present mental state, past criminal history, the base and other  
23 commitment offenses, including behavior before, during and after the  
24 crime, past and present attitude toward the crime and any other  
25 information that bears on the prisoner's suitability for release.  
26 See Cal. Code Regs. tit. 15, § 2402(b)-(d).

1           In considering the commitment offense, BPH must determine  
2 whether "the prisoner committed the offense in an especially  
3 heinous, atrocious or cruel manner." Cal. Code Regs. tit. 15, §  
4 2402(c)(1). The factors to be considered in making that  
5 determination include: "(A) Multiple victims were attacked, injured  
6 or killed in the same or separate incidents; (B) The offense was  
7 carried out in a dispassionate and calculated manner, such as an  
8 execution-style murder; (C) The victim was abused, defiled or  
9 mutilated during or after the offense; (D) The offense was carried  
10 out in a manner which demonstrates an exceptionally callous  
11 disregard for human suffering; (E) The motive for the crime is  
12 inexplicable or very trivial in relation to the offense." Id.

13           According to the California Supreme Court, "the core  
14 statutory determination entrusted to the Board and the Governor [in  
15 determining a prisoner's parole suitability] is whether the inmate  
16 poses a current threat to public safety . . . ." In re Lawrence, 44  
17 Cal. 4th 1181, 1191 (2008). And, "the core determination of 'public  
18 safety' under the statute and corresponding regulations involves an  
19 assessment of an inmate's current dangerousness." Id. at 1205  
20 (emphasis in original) (citing Rosenkrantz, 29 Cal. 4th 616 &  
21 Dannenberg, 34 Cal. 4th 1061). The court further explained that:

22           a parole release decision authorizes the Board  
23 (and the Governor) to identify and weigh only  
24 the factors relevant to predicting "whether the  
25 inmate will be able to live in society without  
26 committing additional antisocial acts." . . .  
27 These factors are designed to guide an  
28 assessment of the inmate's threat to society, if  
released, and hence could not logically relate  
to anything but the threat currently posed by  
the inmate.

1 Lawrence, 44 Cal. 4th at 1205-06 (citations omitted). The relevant  
2 inquiry, therefore, is:

3 whether the circumstances of the commitment  
4 offense, when considered in light of other facts  
5 in the record, are such that they continue to be  
6 predictive of current dangerousness many years  
7 after commission of the offense. This inquiry  
8 is, by necessity and by statutory mandate, an  
9 individualized one, and cannot be undertaken  
10 simply by examining the circumstances of the  
11 crime in isolation, without consideration of the  
12 passage of time or the attendant changes in the  
13 inmate's psychological or mental attitude.

9 In re Shaputis, 44 Cal. 4th 1241, 1254-55 (2008).

10 The evidence of current dangerousness "must have some  
11 indicia of reliability." In re Scott, 119 Cal. App. 4th 871, 899  
12 (2004) (Scott I). Indeed, "the 'some evidence' test may be  
13 understood as meaning that suitability determinations must have some  
14 rational basis in fact." In re Scott, 133 Cal. App. 4th 573, 590,  
15 n. 6 (2005) (Scott II); see also Cooke, 606 F.3d at 1216 (holding  
16 that the state court decision upholding the denial of parole was  
17 "'based on an unreasonable determination of the facts in light of  
18 the evidence[],'" Hayward, 603 F.3d at 563 (quoting 28 U.S.C. §  
19 2254(d)(2)), and therefore finding petitioner entitled to habeas  
20 relief because "[n]othing in the record supports the state court's  
21 finding that there was 'some evidence' in addition to the  
22 circumstances of the commitment offense to support the Board's  
23 denial of petitioner's parole").

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1 IV

2 After reviewing the petition filed in superior court  
3 challenging Petitioner's March 26, 2008 parole denial, the court  
4 affirmed BPH's decision to deny Petitioner parole, finding it was  
5 supported by "some evidence."<sup>1</sup> See Doc. #5-3 at 5. The court  
6 concluded Petitioner was not entitled to relief, noting that in  
7 addition to relying on the circumstances of the commitment offense,  
8 BPH "recount[ed] Petitioner's previous criminal history, which  
9 included substance abuse, the psychologist's evaluation which noted  
10 the risk factor of substance abuse, and Petitioner's parole plans  
11 which needed more complete documentation." Id. After careful  
12 review of the law and the evidence, and as set forth below, this  
13 Court cannot say that the state court's approval of BPH's decision  
14 to deny Petitioner parole was an unreasonable application of the  
15 California "some evidence" standard, nor that it was based on an  
16 unreasonable determination of the facts in light of the evidence.  
17 See Hayward, 603 F.3d at 563.

18 As an initial matter, the record shows that BPH afforded  
19 Petitioner and his counsel an opportunity to speak and present  
20 Petitioner's case at the hearing, gave them time to review documents  
21 relevant to Petitioner's case and provided them with a reasoned  
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23 <sup>1</sup> Here, the state appellate courts summarily denied Petitioner  
24 relief; the state superior court was the highest state court to  
25 address the merits of Petitioner's claim in a reasoned decision. It  
26 is that decision, therefore, that the Court analyzes. See LaJoie v.  
27 Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000); Williams v. Rhoades,  
354 F.3d 1101, 1106 (9th Cir. 2004) (federal court may look to any  
lower state court decision that was examined, and whose reasoning was  
adopted, by the highest state court to address the merits of a  
petitioner's claim).

1 decision in denying parole. Doc. #5-1 at 33-37; Doc. #5-2 at 17-23.  
2 The record also shows that BPH relied on several circumstances  
3 tending to show unsuitability for parole and that these  
4 circumstances formed the basis for its conclusion that Petitioner  
5 was not yet suitable for parole and would pose a current  
6 unreasonable risk of danger to society or threat to public safety if  
7 released from prison. Doc. #5-2 at 17-23; see Lawrence, 44 Cal. 4th  
8 at 1191, 1205; Cal. Code Regs. tit. 15, § 2402(a) (stating that a  
9 prisoner determined to be an unreasonable risk to society shall be  
10 denied parole).

11 In its decision denying Petitioner parole, BPH  
12 acknowledged Petitioner's lack of serious disciplinary history while  
13 in prison, his receipt of several laudatory chronos, and the  
14 positive steps he had taken with respect to furthering his education  
15 and developing a vocation. Doc. #5-2 at 18-19. But BPH also noted  
16 Petitioner's "history of violence and assaults and prior criminality  
17 that shows an escalating pattern of criminal conduct." Doc. #5-2 at  
18 18-19. Specifically, BPH observed that Petitioner "ha[d] failed  
19 society's previous attempts to correct [his] criminality including  
20 time in County Jail as well as adult probation," citing Petitioner's  
21 prior criminal convictions for driving under the influence, failure  
22 to appear and assault.<sup>2</sup> Id.

23 BPH also noted that Petitioner had "lied many times"  
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25 <sup>2</sup> The assault involved an act of domestic violence where  
26 Petitioner threatened his girlfriend with a knife. Id. at 22; see  
27 Doc. #5-1 at 44-45. Petitioner's commitment offense was for  
repeatedly stabbing someone to death with a knife. Doc. #5-1 at 9-10.

1 regarding the circumstances surrounding the commitment offense,  
2 which indicated to BPH that Petitioner failed to understand the  
3 nature and magnitude of his crime. Doc. #5-2 at 21-22; see Doc. #5-  
4 1 at 38, 40-41. BPH noted Petitioner's failure to enroll in any  
5 victim impact classes despite recommendations from prior panels that  
6 he do so. Doc. #5-1 at 51. BPH again recommended that Petitioner  
7 do some soul-searching to help him understand the gravity of his  
8 actions and be prepared to discuss what he has learned at his next  
9 parole suitability hearing. See Doc. #5-2 at 22-23.

10           Finally, BPH stated "there are no documented parole plans  
11 that are current to this Panel today" including "no concrete  
12 employment plans." Doc. #5-2 at 20. BPH also noted that Petitioner  
13 did "not have any type of substance abuse prevention plan in place."  
14 *Id.* This was of particular interest to BPH given Petitioner's  
15 substance abuse history, his "periodic" participation in Alcoholics  
16 Anonymous while in prison, and the psychologist's observation that  
17 Petitioner's "foremost risk factor if released into the community is  
18 the potential for alcohol relapse" given the "clearly established  
19 link between [Petitioner's] class consumption of alcohol and the  
20 commission of violence." *Id.* at 19-20. BPH recommended that  
21 Petitioner improve on his sporadic participation in Alcoholics  
22 Anonymous and suggested he attend "very conscientiously" and  
23 "consistent[ly]." Doc. #5-1 at 47 & 49.

24           Based on the entire body of evidence presented at  
25 Petitioner's March 26, 2008 parole suitability hearing, the Court  
26 cannot say that the state court's approval of BPH's decision to deny  
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1 Petitioner parole was an unreasonable application of the California  
2 "some evidence" standard, nor that it was based on an unreasonable  
3 determination of the facts in light of the evidence. See Hayward,  
4 603 F.3d at 563. Petitioner therefore is not entitled to federal  
5 habeas relief.

6  
7 V

8 For the foregoing reasons, the Petition for a Writ of  
9 Habeas Corpus is DENIED. Further, a certificate of appealability is  
10 DENIED. See Hayward, 603 F.3d at 554-55. Petitioner has failed to  
11 make "a substantial showing of the denial of a constitutional  
12 right." Id. (citing 28 U.S.C. § 2253(c)(2)). Nor has Petitioner  
13 demonstrated that his claim is "debatable among reasonable jurists."  
14 See Hayward, 603 F.3d at 555.

15 The Clerk of Court shall terminate all pending motions as  
16 moot, enter judgment in accordance with this Order and close the  
17 file.

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19 IT IS SO ORDERED.

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21 DATED 08/19/10



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THELTON E. HENDERSON  
United States District Judge

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