

United States District Court  
For the Northern District of California

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

PAUL ALBERT GUARDADO,  
Petitioner,  
v.  
MARGARITA PEREZ et al.,  
Respondents.

No. C 05-00194 CW  
ORDER GRANTING  
PETITIONER'S  
APPLICATION FOR  
ORDER ENFORCING WRIT  
OF HABEAS CORPUS

Petitioner Paul Albert Guardado applies for an order enforcing the Court's April 9, 2008 Order granting his petition for a writ of habeas corpus. Respondents have opposed the application. The Court took the matter under submission. Having considered all of the papers filed by the parties, the Court grants the application and remands to the Board to submit its decision, along with this Court's opinions, for review by the Governor.

BACKGROUND

I. April 9, 2008 Order

Petitioner filed three separate federal habeas corpus petitions challenging the 2002, 2003, 2004 denials of parole by the

1 Board of Prison Terms<sup>1</sup> (Board). On March 8, 2006, the three  
2 petitions were consolidated into this case. On May 15, 2007, the  
3 Court consolidated into this case Petitioner's fourth habeas corpus  
4 petition challenging the Board's 2006 decision. On April 9, 2008,  
5 this Court issued an Order Granting Petition for Writ of Habeas  
6 Corpus. In the April 9 Order, the Court stated the following.

7 The Board explained that it based its denial primarily on  
8 the commitment offense. It is undeniable that the  
9 offense was heinous, atrocious and cruel, demonstrating a  
10 callous disregard for human suffering. These facts will  
11 never change. However, the Ninth Circuit has held that  
12 continuous reliance over time on static factors such as  
13 the commitment offense could violate due process.  
(Citations omitted). . . Petitioner has served more than  
his minimum sentence and has been denied parole by the  
Board five times. The question is whether it is  
reasonable to find after almost thirty years that the  
facts of the offense constitute some evidence that  
Petitioner would be a danger to society if released.

14 April 9, 2008 Order at 12.

15 The Court addressed the evidence that weighed against a  
16 finding that Petitioner was currently dangerous and noted that his  
17 1999 and 2004 psychological reports concluded that his violence  
18 potential if released in the community was not more than the  
19 average citizen and that his prognosis for successful community  
20 living was good. Id. at 13. One of the most compelling factors  
21 supporting a finding that Petitioner is not a danger to public  
22 safety is the fact that he had lived in the community for ten years  
23 before being charged with the commitment offense and during that  
24 time was not convicted of any violent crime. Id. at 18. Also,  
25 Petitioner has no juvenile record, a relatively minor record of  
26 convictions, and a stable social history. He has expressed sincere

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27  
28 <sup>1</sup>The Board of Prison Terms is now the Board of Parole  
Hearings. Cal. Penal Code § 5075(a).

1 remorse. During his incarceration he has made educational  
2 achievements that have given him marketable skills and has been  
3 involved in rehabilitation programs and charitable work which  
4 indicate he has an enhanced ability to function within the law upon  
5 release. Id. at 16. Furthermore, he has made realistic plans for  
6 release. Id. The Court also noted that none of the factors  
7 tending to indicate a prisoner's unsuitability for parole were  
8 present in Petitioner's case. Id. at 17 (listing unsuitability  
9 factors).

10 In the Order, the Court noted that the only factor other than  
11 the commitment offense relied on by the Board was what it called  
12 his "lack of insight" and "lack of remorse." Id. at 13. The Court  
13 pointed out that under California Penal Code § 5011(b), the Board  
14 may not require an inmate to admit guilt to any crime for which the  
15 inmate was committed, and that the Board had improperly equated  
16 Petitioner's denial that he was the shooter with a lack of insight.  
17 Id. at 13-14. The Court concluded that the Board was incorrect in  
18 its statement that Petitioner did not demonstrate any remorse  
19 whatsoever, noting that the record showed that Petitioner had  
20 expressed remorse for the crime and sorrow for the victim and his  
21 family. Id. at 15.

22 The Court also concluded that the state court opinion  
23 affirming the Board's decision had misstated the "some evidence"  
24 test and, thus, its finding that Petitioner's due process rights  
25 had not been violated was contrary to and involved an unreasonable  
26 application of Supreme Court authority. Id. at 18-19. The Court  
27 remanded to the Board to hold a new hearing and to re-evaluate  
28 Petitioner's suitability for parole in accordance with the Court's

1 order. Id. at 19.

2 II. The Board's August 12, 2008 Decision

3 On June 4, 2008, the Board began a hearing on Petitioner's  
4 suitability for parole and continued it to August 12, 2008, when it  
5 issued its decision. The Board again found Petitioner "not yet  
6 suitable for parole" and that Petitioner "would pose an  
7 unreasonable risk or danger to society or a threat to public safety  
8 if released from prison." August 12, 2008 Decision at 60.

9 The Board gave the following reasons for its decision: "the  
10 commitment offense was carried out in an especially cruel and  
11 callous manner," id. at 60, the motive for the offense was trivial,  
12 id. at 62, and an April 29, 2008 psychological report by Dr.  
13 Richard Starrett was not totally supportive of release, id. at 64.  
14 However, the Board gave the greatest weight to its finding that  
15 Petitioner had only recently gained insight into his responsibility  
16 for the commitment offense. Id. at 60:19-20, 62:5-63-7, 65:8-24.

17 DISCUSSION

18 Respondents oppose Petitioner's motion on several grounds:  
19 (1) the Board complied with the Court's April 9, 2008 Order by  
20 holding a parole suitability hearing for Petitioner within sixty  
21 days from the date of the Order; (2) before this Court may review  
22 the Board's August 12, 2008 decision, Petitioner's claims must be  
23 presented to the state's highest court to exhaust his state  
24 remedies; and (3) the Board's decision was substantively in  
25 compliance with the April 9, 2008 Order.

26 I. Holding a Hearing

27 The Court did not merely instruct the Board to hold a hearing  
28 within sixty days; it instructed the Board to hold a hearing in

1 accordance with the Court's order. The fact that the Board held a  
2 hearing within sixty days of the Order is insufficient, by itself,  
3 to demonstrate that it complied with the findings in the Order.  
4 Therefore, this ground for denying Petitioner's motion is rejected.

5 II. Exhaustion

6 Respondents cite federal authority requiring that state  
7 prisoners seeking habeas relief in federal court must first exhaust  
8 their remedies in state court by presenting the highest state court  
9 a fair opportunity to rule on the merits of each issue they seek to  
10 raise in federal court. Respondents argue that Petitioner's  
11 application must be denied because he is attempting to circumvent  
12 the state courts in bringing this motion directly to this Court.

13 Respondents incorrectly characterize Petitioner's application.  
14 Ordinarily, a federal habeas petition requires a federal court to  
15 examine a state court opinion to determine if it was contrary to,  
16 or involved an unreasonable application of, clearly established  
17 federal law or resulted in a decision that was based on an  
18 unreasonable determination of the facts in light of the evidence  
19 presented in the state court proceeding. See April 9, 2008 Order  
20 at 8 (citing Williams v. Taylor, 529 U.S. 362, 412 (2000)). A  
21 federal habeas petition directed at the Board's finding of  
22 unsuitability for parole is the last step in the habeas procedure  
23 after the highest state court has examined the constitutionality of  
24 the Board's proceedings. However, Petitioner's application is not  
25 a new habeas petition, but is directed at the Board's compliance  
26 with this Court's order. Therefore, this ground for denying  
27 Petitioner's motion is rejected.

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1 III. Substantive Compliance with Court Order

2 Respondents argue that even if this Court reviews the  
3 substance of the Board's decision for compliance with the April 9,  
4 2008 Order, it must find that the Board complied. The Court finds  
5 that the Board failed to re-evaluate Petitioner's suitability for  
6 parole in accordance with its order.

7 The recitation by the Board of factors present before or at  
8 the time of the commitment offense are repetitive of the reasons  
9 the Board gave at the 2006 hearing, which the Court found were  
10 improper grounds for finding parole unsuitability because, under  
11 the circumstances here, the Board's continued reliance over time on  
12 static factors such as the commitment offense violated Petitioner's  
13 due process rights. April 9, 2008 Order at 12 (citing Irons v.  
14 Carey, 505 F.3d 846, 851 (9th Cir. 2007); Sass v. California Bd. of  
15 Prison Terms, 461 F.3d 1123, 1129 (9th Cir. 2006); and Biggs v.  
16 Terhune, 334 F.3d 910, 916-17 (9th Cir. 2003)). The Court stated,  
17 "In light of Petitioner's entire record . . . his commitment  
18 offense, which occurred twenty-nine years ago, no longer  
19 constitutes 'some evidence' that his release will pose an imminent  
20 danger to public safety." Id. at 18. Thus, the Board may no  
21 longer rely on static factors such as the commitment offense, the  
22 trivial motivation for the offense, or Petitioner's participation  
23 in street gangs when he was a teenager. See Transcript of August  
24 12, 2008 Hearing at 61, 63. These factors do not constitute some  
25 evidence of Petitioner's danger to public safety.<sup>2</sup>

26 \_\_\_\_\_  
27 <sup>2</sup>The Board also listed the fact that Petitioner had an  
28 unstable social history. See Transcript of August 12, 2008 Hearing  
(continued...)

1 The new finding that the Board relied on in its August 12,  
2 2008 decision was that Petitioner had, only for the first time at  
3 the August 12, 2008 hearing, "accepted the responsibility . . . for  
4 your participation in chasing the victim, for your participation in  
5 surrounding the victim, for your participation in preventing the  
6 victim's escape and for your participation and lack of assistance  
7 in helping the victim or the fact that you chose not to alert the  
8 police and also for the fact that you chose to remain a fugitive  
9 from justice for a substantial period of time." August 12, 2008  
10 Decision at 62.

11 However, Petitioner had accepted responsibility for the  
12 commitment offense at least as early as 2004, as evidenced by his  
13 December 15, 2004 letter to the Board, in which he stated, "I was a  
14 culpable part of a gathering that spawned deadly violence and I am  
15 therefore guilty of his death . . . I chose to remain part of a  
16 group of law breakers . . . My failure to act was part of a chain  
17 of causation that ended in Steven's tragic, senseless death . . .  
18 If I had left and called the police the group would have disbanded  
19 and Mr. Buus would be alive today. I am responsible . . ." 2004  
20 Letter at 1-2.

21 In the 2004 letter, Petitioner also provided an insightful  
22 explanation as why he had been previously reluctant to take  
23 responsibility for the crime:

24 In order to deal with the guilt I allowed myself for a  
25 very long time, even up to these last months in prison,  
to take false comfort in the fact that I was not one of

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26 <sup>2</sup>(...continued)

27 at 63. However, in the April 9, 2008 Order at 16, the Court noted  
28 that the Board's past findings in this regard had been inconsistent  
and found that Petitioner had a stable social history.

1 the triggermen . . . [but] the fact that I was not an  
2 active participant or encourager does not really make the  
3 difference that I tried to tell myself that it did. . . .  
I am therefore guilty of his death and remorseful for  
contributing my presence.

4 2004 Letter at 1.

5 Further, at the May 25, 2006 hearing, two years prior to the  
6 August 12, 2008 hearing, Petitioner had testified that he joined in  
7 the chase of the victim and admitted that chasing the victim was  
8 wrong. Transcript of May 25, 2006 Hearing at 60. He had also  
9 testified that he was standing in the ring of people that prevented  
10 the victim from escaping and admitted that doing so was wrong. Id.  
11 at 63. At the August 12, 2008 hearing at issue here, Petitioner  
12 similarly stated that he chased after the victim, that he was in a  
13 group of people that surrounded him, that he was part of the circle  
14 of people that prevented him from escaping, that he did nothing to  
15 stop the killing and that he was morally and legally responsible  
16 for the victim's death. Transcript of August 12, 2008 Hearing at  
17 30-31. Any differences between Petitioner's statements at the  
18 August 12, 2008 hearing and his earlier statements at the May 25,  
19 2006 hearing are insignificant and the result of semantic parsing  
20 of words.

21 At the August 12, 2008 hearing, the Board cited May 10, 1999  
22 and November 22, 2004 psychological reports for the finding that  
23 Petitioner had "denied participation either in the beating or the  
24 death of the victim." Id. at 62-63. However, these evaluations  
25 also concluded that Petitioner's then-current level of insight and  
26 judgment regarding the commitment offense were good and supported a  
27 positive prediction of successful adaptation to community living  
28 with a violence potential of no more than the average citizen. See

1 Washburn Dec. (Docket # 36), Ex. B-1, 1999 Psychological Evaluation  
2 at 4-5; Ex. D-1, 2004 Psychological Evaluation at 2-3. Both  
3 evaluations indicated that Petitioner felt sincere remorse for his  
4 participation in the offense, the death of the victim, and the  
5 suffering of the victim's family.<sup>3</sup>

6 The Board's continued focus on Petitioner's past denial of  
7 participating in the beating and death of the victim fails to  
8 demonstrate some evidence that Petitioner is presently a danger to  
9 the public safety if released, in light of Petitioner's long-felt  
10 remorse and his 2004 and 2006 acceptance of responsibility for  
11 causing the victim's death by chasing him, preventing him from  
12 escaping and failing to leave and summon help.

13 The Board also cited Dr. Starrett's 2008 opinion that  
14 Petitioner's propensity for violence is in the low to moderate  
15 range when compared to similar inmates. However, this finding  
16 contradicts the findings in the 1999 and 2004 psychological  
17 evaluations which indicate Petitioner has a low propensity for  
18 violence. That Petitioner was continuously involved in positive  
19 programming and education from 2004 to 2008 without any incidents  
20 that would indicate a propensity for violence makes it unreasonable  
21 to conclude that, during this time, Petitioner's propensity for  
22 violence changed for the worse. This conclusion is supported by  
23 the July 18, 2008 psychological evaluation by Dr. Melvin Macomber  
24 who opined that Dr. Starrett had used inappropriate measures for

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26 <sup>3</sup>The Board also relied on Dr. Starrett's April 29, 2008  
27 psychological report which indicated that Petitioner's version of  
28 the crime was that he "followed as opposed to chased the victim in  
the park." However, the Court previously concluded that following  
the victim and chasing the victim were not necessarily  
inconsistent. See April 9, 2008 Order at 15.

1 his risk assessment of Petitioner and thus his conclusion was  
2 invalid. Washburn Dec. (Docket # 77), Ex. C at 6. Dr. Macomber  
3 concluded that Petitioner "does not pose any more risk to society  
4 than the average citizen," and that "the results of psychological  
5 testing and interviewing indicate that Mr. Guardado is probably one  
6 of the least dangerous people the State has." Id. at 12-13.

7 Therefore, the Court concludes that the Board's August 12,  
8 2008 decision again failed to cite some evidence that Petitioner  
9 would be a danger to the public safety if released and thus failed  
10 to evaluate Petitioner's suitability for parole in accordance with  
11 the Court's April 9, 2008 Order.

12 IV. Appropriate Relief

13 Respondents argue that, should the Court determine that  
14 Petitioner is entitled to relief, the proper procedure would be to  
15 return the case to the executive branch for the Governor to review  
16 the Board's decision rather than ordering the Board to set a  
17 release date. Respondents argue that to do otherwise would  
18 deprive the Governor of his power to review the Board's decision.  
19 Petitioner responds that the Governor's review is not necessary  
20 because he would be reviewing the same evidence reviewed by this  
21 Court.

22 The Governor has the authority to review the Board's grant,  
23 denial, revocation, or suspension of the parole of an inmate  
24 sentenced to an indeterminate prison term based upon a conviction  
25 of murder. Cal. Penal Code § 3041.2; Cal. Const. art. V. § 8(b).  
26 When reviewing the Board's decision, the Governor shall review  
27 materials provided by the Board. Cal. Penal Code § 3041.2; Cal.  
28 Const. art. V. § 8(b). The Governor has 150 days to review the



1 jurisdiction over this petition until the Governor completes his  
2 review.

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4 IT IS SO ORDERED.

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6 Dated: 1/22/09

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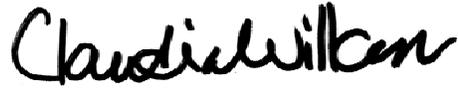
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CLAUDIA WILKEN  
United States District Judge