

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

LEROY PAUL LUJAN,
Petitioner,
v.
BEN CURRY, Warden,
Respondent.

No. C 08-0474 CW (PR)
C 09-0462 CW (PR)
ORDER GRANTING
PETITIONS FOR WRIT OF
HABEAS CORPUS

_____ /

These habeas corpus petitions were filed by a state prisoner pursuant to 28 U.S.C. § 2254 challenging decisions in 2006 and 2007 by the California Board of Parole Hearings finding Petitioner unsuitable for parole. Petitioner argues that the Board's denials of parole in 2006 and 2007 deprived him of his right to due process because they were not supported by at least some evidence that he would be a danger to the community if released. In each case, Respondent was ordered to show cause why the petition should not be granted. Respondent filed answers denying the claims in the petitions, along with supporting memoranda and exhibits, and Petitioner filed traverses in response.

Having considered all of the papers filed by the parties, the Court GRANTS the petitions in case numbers C 09-0462 CW and C 08-

1 0474 CW.

2 BACKGROUND

3 The following summary of the facts of Petitioner's commitment
4 offense is derived from the probation report, which was read into
5 the record at both the January 25, 2006 and February 15, 2007
6 parole consideration hearings. (Petitions, Exs. C Probation
7 Report.)

8 Records of the Newport Beach Police Department reveal
9 that on September 30th, 1989, at approximately 10:15
10 p.m., police responded to a West Balboa Boulevard
11 address to investigate a report that gunshots had been
12 fired. Their subsequent investigation revealed that
13 the [Petitioner] was one of several young men involved
14 in a shooting death of 21-year-old John David Fahey.

15 After talking with various witnesses and the suspects,
16 police determined that earlier in the day on September
17 30, 1989, 21-year-old Heather Rose, a resident at 1324
18 West Balboa, Apartment A, became involved in a physical
19 altercation with 19-year-old Jennifer McMartin, who was
20 one of several roommates of Mr. Fahey residing at 1324
21 West Balboa, Apartment C. The physical altercation
22 occurred because Ms. Rose was jealous of another young
23 woman she felt was becoming involved with 20-year-old
24 Brent Claxton, a young man she had been dating. Ms.
25 Rose reportedly received injuries which necessitated
26 medical treatment. Later in the day, Ms. Rose told her
27 roommate, 21-year-old Leslie Peng, that "some guys are
28 coming over to protect them." In the early evening,
approximately 20 persons arrived, mainly male Hispanic
"gang types." One man had a handgun, and other items
that could be used as weapons.

When the occupants of Heather Rose's apartment heard
someone coming down the stairs, the men grabbed for
various weapons and Mr. Fahey was confronted by several
of the suspects, after he came down the stairs. A
physical altercation ensued, involving the victim and
several suspects. Subsequently, Mr. Fahey attempted to
flee, however, he was pursued by approximately five
suspects, including the [Petitioner.] [Petitioner] was
observed to strike Mr. Fahey with a baseball bat,
causing the victim to fall to the ground. The physical
assault continued, until Stanley Anaya allegedly
approached and shot the victim in the chest with a .25
caliber handgun.

The victim was transported to a nearby hospital where

1 he was pronounced dead at 10:45 p.m. as a result of a
2 gunshot wound.

3 (Petitions, Exs. C at 3-4.)

4 In 1990, Petitioner plead guilty to second degree murder.
5 (C 09-0462 CW Petition at 2.) Thereafter, the court sentenced him
6 to a total of fifteen years to life. (Transcript of 2006 Hearing
7 (2006 Tr.) at 1.) His minimum eligible parole date was October 23,
8 1999. (Id.)

9 The Board found Petitioner unsuitable for parole for a third
10 time at his parole hearing in 2006, and Petitioner filed
11 unsuccessful habeas petitions in the California courts challenging
12 the Board's decision. In 2007, the Board held Petitioner's fourth
13 parole hearing and, again, found him unsuitable for parole.
14 Petitioner challenged this decision in the California courts, but
15 these petitions also failed. Thereafter, Petitioner filed a
16 federal petition for writ of habeas corpus in case number C 08-0474
17 CW (PR), in which he challenges the Board's denial of parole in
18 2007. Subsequently, Petitioner filed a federal petition for writ
19 of habeas corpus in case number C 09-0462 CW (PR), in which he
20 challenges the Board's denial of parole in 2006.¹ Both petitions
21 will be addressed below.

22 DISCUSSION

23 I. Standard of Review

24 A district court may not grant a petition challenging a state
25 conviction or sentence on the basis of a claim that was reviewed on

26
27 ¹ Petitioner initially filed a federal habeas petition
28 challenging his 2006 parole hearing on January 19, 2007 in C 07-
0387 CW (PR). On March 25, 2008, the Court dismissed the petition
without prejudice as unexhausted.

1 the merits in state court unless the state court's adjudication of
2 the claim: "(1) resulted in a decision that was contrary to, or
3 involved an unreasonable application of, clearly established
4 Federal law, as determined by the Supreme Court of the United
5 States; or (2) resulted in a decision that was based on an
6 unreasonable determination of the facts in light of the evidence
7 presented in the State court proceeding." 28 U.S.C. § 2254(d).
8 The first prong applies both to questions of law and to mixed
9 questions of law and fact, Williams (Terry) v. Taylor, 529 U.S.
10 362, 407-09 (2000), while the second prong applies to decisions
11 based on factual determinations, Miller-El v. Cockrell, 537 U.S.
12 322, 340 (2003).

13 A state court decision is "contrary to" Supreme Court
14 authority, that is, falls under the first clause of § 2254(d)(1),
15 only if "the state court arrives at a conclusion opposite to that
16 reached by [the Supreme] Court on a question of law or if the state
17 court decides a case differently than [the Supreme] Court has on a
18 set of materially indistinguishable facts." Williams (Terry), 529
19 U.S. at 412-13. A state court decision is an "unreasonable
20 application of" Supreme Court authority, that is, falls under the
21 second clause of § 2254(d)(1), if it correctly identifies the
22 governing legal principle from the Supreme Court's decisions but
23 "unreasonably applies that principle to the facts of the prisoner's
24 case." Id. at 413. The federal court on habeas review may not
25 issue the writ "simply because that court concludes in its
26 independent judgment that the relevant state-court decision applied
27 clearly established federal law erroneously or incorrectly." Id.
28 at 411. Rather, the application must be "objectively unreasonable"

1 to support granting the writ. See id. at 409.

2 "Factual determinations by state courts are presumed correct
3 absent clear and convincing evidence to the contrary." Miller-El,
4 537 U.S. at 340. Under 28 U.S.C. § 2254(d)(2), a state court
5 decision "based on a factual determination will not be overturned
6 on factual grounds unless objectively unreasonable in light of the
7 evidence presented in the state-court proceeding." Miller-El, 537
8 U.S. at 340; see also Torres v. Prunty, 223 F.3d 1103, 1107 (9th
9 Cir. 2000).

10 When there is no reasoned opinion from the highest state court
11 to consider the petitioner's claims, the court looks to the last
12 reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 801-06
13 (1991); Shackleford v. Hubbard, 234 F.3d 1072, 1079, n.2 (9th Cir.
14 2000). However, the standard of review under AEDPA is somewhat
15 different where the state court gives no reasoned explanation of
16 its decision on a petitioner's federal claim and there is no
17 reasoned lower court decision on the claim. In such a case, a
18 review of the record is the only means of deciding whether the
19 state court's decision was objectively reasonable. See Plascencia
20 v. Alameida, 467 F.3d 1190, 1197-98 (9th Cir. 2006); Himes v.
21 Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Greene v. Lambert, 288
22 F.3d 1081, 1088 (9th Cir. 2002). When confronted with such a
23 decision, a federal court should conduct "an independent review of
24 the record" to determine whether the state court's decision was an
25 objectively unreasonable application of clearly established federal
26 law. Plascencia, 467 F.3d at 1198; accord Lambert v. Blodgett, 393
27 F.3d 943, 970 n.16 (9th Cir. 2004). The federal court need not
28 otherwise defer to the state court decision under AEDPA: "A state

1 court's decision on the merits concerning a question of law is, and
2 should be, afforded respect. If there is no such decision on the
3 merits, however, there is nothing to which to defer." Greene, 288
4 F.3d at 1089.

5 II. Case number C 09-0462 CW

6 A. January 25, 2006 Board Hearing

7 Petitioner had been incarcerated for approximately sixteen
8 years at the time of his 2006 parole suitability hearing.
9 Petitioner elected to discuss the commitment offense. (2006 Tr. at
10 7.) Petitioner stated that he arrived at the party even though he
11 did not really know anyone there because a friend told him that
12 there was going to be a party and Petitioner thought he could sell
13 drugs to some people. (Id. at 13.) When Petitioner heard an
14 altercation starting, he tried to get away by going out the back
15 door because he didn't know what was happening and wanted to get
16 back to his truck. (Id. at 11-12, 14.) On his way out, he saw a
17 baseball bat and decided to grab it because he did not know what
18 was happening inside. (Id. at 12, 54.) He was not otherwise
19 armed. (Id. at 52.) Petitioner denies that he ran out with four
20 other people, insisting that he fled out the back door by himself.
21 (Id. at 53.) When he got around to the side of the house,
22 Petitioner encountered the victim but did not know who the victim
23 was or if he had been at the party. (Id. at 15-16.) Petitioner
24 states that he was still alone at this time. (Id. at 54.) The
25 victim swung at Petitioner and then ran. (Id. at 16.) Petitioner
26 believed that the victim was holding a knife or something in his
27 hand. (Id. at 10-11.) Even though the victim was running away,
28 Petitioner ran after him and hit him with the baseball bat. (Id.

1 at 16.) The victim fell and took a swing at Petitioner's leg, so
2 Petitioner hit him again with the bat. (Id. at 17.) At that
3 point, Stanley Anaya ran up and shot and killed the victim. (Id.
4 at 17, 55.)

5 Petitioner said that he was responsible for the victim's
6 death, and explained that "it happened so fast, it was like [a]
7 reaction." (Id. at 17.) Petitioner went on to say that when he
8 was a child, his father always taught him that, "if anybody tries
9 to hurt you, you get them before they get you, and it was kind of
10 the way I grew up. It was like if you are angry, try to hit him it
11 was instilled to me that I got back. And not that I'm making that
12 as an excuse, it's just the way I grew up, was that you don't get
13 [sic] unless someone hits or beats you up in other words. And
14 that's just the way as a kid I was brought up to think that way."
15 (Id. at 20.) Petitioner denied being in any gang, but admitted
16 that he hung around a lot of gang members because he often sold
17 crack cocaine to them. (Id. at 19.)

18 After Petitioner's prior parole hearing in 2003, he had
19 completed an Impact Program which taught him how to be a better
20 person, not just to react to things but to think before reacting.
21 (Id. at 21.) Petitioner noted the contrast between that way of
22 thinking and how he was taught. (Id. at 21-22.) As a child, "[i]t
23 was always to where I would just did it [sic], and whatever
24 happens, happens. Now that I've been in here all these years, I've
25 taken quite a bit of classes, self-help. I go to AA, NA. It's
26 just made me a total different person, how I perceive life, and how
27 I reacted in this situation." (Id. at 22.) Petitioner has learned
28 how to draw since being incarcerated and he uses that ability to

1 "take [himself] away." (Id. at 25-26.)

2 Petitioner had been arrested as a juvenile in February, 1989,
3 for transporting and selling narcotics and for receiving stolen
4 property. (Id. at 26.) Petitioner was in night school at the time
5 of the commitment offense and was 18 or 19 years old. (Id. at 28.)
6 Petitioner has since received his GED. (Id. at 51.)

7 As a parole plan, Petitioner wanted to live with his sister,
8 Michelle. (Id. at 30.) Petitioner has four siblings, all of whom
9 live in Southern California. (Id. at 30-31.) Petitioner had job
10 offers as well. (Id. at 31.) Petitioner was married to his
11 childhood sweetheart but realized that she had put her life on hold
12 while waiting for him. (Id. at 32, 35.) The Board read several
13 support letters from Petitioner's family. (Id. at 36-42.)

14 While institutionalized, Petitioner had received three 128As
15 since March, 1995 for gambling, and two 115s, the last one in
16 February, 1997, for attempting to smuggle photographs. (Id. at
17 43.) Further, since Petitioner's last parole hearing in 2003, he
18 had received eight laudatory chronos for his continuous
19 participation in AA, and secured a sponsor from AA for when he is
20 released into the community. (Id. at 43.) Petitioner had received
21 four additional laudatory chronos for completion of the inmate
22 employability program and of a three hour anger management course.
23 (Id. at 44.) Petitioner had also taken health courses and was
24 currently a furniture finisher. (Id. at 44-45.) Moreover,
25 Petitioner had consistently received above average work reports and
26 acquired a certificate of proficiency as a sewing machine operator.
27 (Id. at 45.) Finally, Petitioner participated in Buddhist
28 meditation studies which taught him how to relax and control

1 himself. (Id. at 46-47.)

2 Reviewing Petitioner's psychological evaluation from December,
3 2005, the Board noted that Petitioner's diagnosis scores appeared
4 normal. The doctor reported that Petitioner was "still vague about
5 the motive for the crime" and needed some more "soul-searching"
6 before being considered for release. (Id. at 48-49, 50.) The
7 report concluded that Petitioner's violence potential was estimated
8 to be below average compared to the average citizen. (Id. at 49.)

9 The Board denied parole. (Id. at 77.) It concluded that the
10 commitment offense was carried out in a dispassionate manner and
11 the motive was very trivial in relation to the offense. (Id. at
12 77-78.) The Board commented that Petitioner's criminal history
13 involved only one arrest for the sale of drugs, but that selling
14 drugs contributed to his unstable social history. (Id. at 78.)
15 The Board viewed the 2005 psychological report as inconsistent and,
16 therefore, did not rely on it. (Id. at 79.) The Board commended
17 Petitioner on his realistic and strong parole plans and for
18 remaining disciplinary-free since 1997. (Id.) The Board
19 recommended that Petitioner continue to participate in self-help
20 programs in order to "face, discuss, understand, and cope with
21 stress in a nondestructive manner." (Id.)

22 It's the area of the crime that just, you know, we just
23 need to feel completely comfortable that you have
24 confronted all the aspects and all the activities of
25 that night, so that it's completely behind you, and
26 that it is not apt to happen again. So if you can
27 regroup and go back over these transcripts, please pay
28 special attention to particularly what Commissioner
Smith said about the opportunities that night where you
had an opportunity to stop, and even perhaps if you
have a trusted friend here who can read back the
transcript and say, you know, this is where it kind of
falls apart. This is what you need to really think
about, and be able to address. . . . So you've got to

1 be able to come in here so that the Panel feels
2 completely comfortable about your rendition of the
3 commitment crime because, you know, this is only the
4 first step.

5 (Id. at 81-82.)

6 B. State Court Decisions

7 In 2006, Petitioner filed a petition for a writ of habeas
8 corpus in Orange County Superior Court. (Resp. Ex. 1.) That
9 petition was denied because Petitioner failed to provide the court
10 with a complete copy of his 2006 parole hearing transcript. (Resp.
11 Ex. 2.) Petitioner filed the same claim in the California Court of
12 Appeal, which denied the petition. (Resp. Exs. 3, 4.) Petitioner
13 filed a petition for review in the California Supreme Court, which
14 rejected the petition as untimely. (Resp. Ans. at ¶ 4.) Finally,
15 Petitioner filed an original habeas petition in California Supreme
16 Court, which was summarily denied. (Resp. Ex. 6.)

17 C. Analysis

18 This petition can be summarized as a single claim that
19 Petitioner was denied due process because the Board's decision was
20 not supported by some evidence that he is currently dangerous. In
21 conjunction with answering on the merits, Respondent asserts that
22 Petitioner's claims are procedurally defaulted.

23 1. Procedural Default

24 Respondent asserts that because Petitioner failed to attach
25 adequate records to his superior court petition and the superior
26 court denied the petition based on that failure as an independent
27 and adequate state ground, this Court is barred from reviewing
28 Petitioner's claims.

However, a denial based on People v. Duvall, 9 Cal. 4th 464,

1 474 (1995), cited by the superior court in its denial (Resp. Ans.
2 Ex. 2 at 2), is not irremediable and can be cured in a renewed
3 petition. Cf. Gaston v. Palmer, 417 F.3d 1030, 1039 (9th Cir.
4 2005) (analyzing whether a state petition was "properly filed" and
5 concluding that citations to Duvall and In re Swain, 34 Cal. 2d
6 300, 303-304 (1949) are more akin to a demurrer rather than a final
7 ruling on the merits); Kim v. Villalobos, 799 F.2d 1317, 1319-1320
8 (9th Cir. 1986) (discussing "fair presentation" and explaining that
9 a citation to In re Swain is a curable deficiency rather than an
10 automatic preclusion of review).

11 Thus, because California law allowed Petitioner to file a new
12 state petition remedying these deficiencies, by definition,
13 Petitioner's claim is not procedurally barred. Cf. Johnson v.
14 Lewis, 929 F.2d 460, 463 (9th Cir. 1991) ("If a federal
15 constitutional claim can no longer be raised because of a failure
16 to follow the prescribed procedure for presenting such an issue,
17 however, the claim is procedurally barred"); Carey v. Sisto, 2009
18 WL 385777 (E.D. Cal.). Furthermore, Petitioner did file a new and
19 original state petition in the California Supreme Court, which was
20 summarily denied without citation. Thus, contrary to Respondent's
21 assertion, Petitioner gave the state courts an opportunity to
22 dispose of his claims on the merits.

23 Accordingly, Respondent's argument for procedural default is
24 not well-taken and the Court will address Petitioner's claim on the
25 merits.

26 2. Due Process

27 The Due Process Clause does not, by itself, entitle a prisoner
28 to release on parole in the absence of some evidence of his or her

1 "current dangerousness." Hayward v. Marshall, 603 F.3d 546, 555,
2 561 (9th Cir. 2010) (en banc). Under California law, however,
3 "some evidence" of current dangerousness is required in order to
4 deny parole. Id. at 562 (citing In re Lawrence, 44 Cal. 4th 1181,
5 1205-06 (2008) and In re Shaputis, 44 Cal. 4th 1241 (2008)). This
6 requirement gives California prisoners a liberty interest,
7 protected by the federal constitutional guarantee of due process,
8 in release on parole in the absence of "some evidence" of current
9 dangerousness. Cooke v. Solis, 606 F.3d 1206, 1213-1214 (9th Cir.
10 2010).

11 When a federal habeas court in this circuit is faced with a
12 claim by a California prisoner that his right to due process was
13 violated because the denial of parole was not supported by "some
14 evidence," the court analyzes whether the state court decision
15 reflects "an 'unreasonable application'[] of the California 'some
16 evidence' requirement, or was 'based on an unreasonable
17 determination of the facts in light of the evidence.'" Hayward,
18 603 F.3d at 562-63 (quoting 28 U.S.C. § 2254(d)(1)-(2)); see Cooke,
19 606 F.3d at 1213. California's "some evidence" requirement was
20 summarized in Hayward as follows:

21 As a matter of California law, "the paramount
22 consideration for both the Board and the Governor under
23 the governing statutes is whether the inmate currently
24 poses a threat to public safety." There must be "some
25 evidence" of such a threat, and an aggravated offense
26 "does not, in every case, provide evidence that the
27 inmate is a current threat to public safety." The
28 prisoner's aggravated offense does not establish current
dangerousness "unless the record also establishes that
something in the prisoner's pre- or post-incarceration
history, or his or her current demeanor and mental state"
supports the inference of dangerousness. Thus, in
California, the offense of conviction may be considered,
but the consideration must address the determining
factor, "a current threat to public safety."

1 Hawyard, 603 F.3d at 562 (quoting Lawrence, 44 Cal. 4th. at 1191,
2 1210-14); see Cooke, 606 F.3d at 1213-1214 (describing California's
3 "some evidence" requirement).

4 Because there is no reasoned state court opinion, this Court
5 conducts "an independent review of the record" to determine whether
6 the state court's decision was an objectively unreasonable
7 application of clearly established federal law. Plascencia, 467
8 F.3d at 1198.

9 Here, a primary, though not exclusive, basis for the Board's
10 determination of parole unsuitability was the nature of the
11 commitment offense. (2006 Tr. at 78.) In Lawrence, the California
12 Supreme Court held that in cases

13 in which evidence of the inmate's rehabilitation and
14 suitability for parole under the governing statutes and
15 regulations is overwhelming, the only evidence related to
16 unsuitability is the gravity of the commitment offense,
17 and that offense is both temporally remote and mitigated
18 by circumstances indicating the conduct is unlikely to
19 recur, the immutable circumstance that the commitment
20 offense involved aggravated conduct does not provide
21 "some evidence" inevitably supporting the ultimate
22 decision that the inmate remains a threat to public
23 safety.

24 Lawrence, 44 Cal. 4th at 1191 (emphasis in original); see also
25 Cooke, 606 F.3d at 1214 (finding California's "some evidence" rule
26 requires "more than the crime or its circumstances alone to justify
27 the Board's or Governor's finding of current dangerousness"). The
28 question then is whether any other factors for parole unsuitability
indicate that the cruel and callous nature of a petitioner's
commitment offense is still "probative" of the risk he poses to
public safety. Cooke, 606 F.3d at 1214.

One of the bases upon which the Board deemed Petitioner
unsuitable for parole was that he had an unstable social history.

1 (2006 Tr. at 78.) However, the Board failed to identify any
2 evidence supporting this conclusion except that he sold narcotics.
3 (Id.) In fact, while Petitioner has used drugs and alcohol in the
4 past, (2001 Psychological Evaluation at 2), he currently does not
5 use drugs, alcohol, or cigarettes, (2006 Tr. at 74). Moreover, the
6 record demonstrates that Petitioner's post-incarceration record
7 includes continuous involvement in AA and NA. Thus, that
8 Petitioner had engaged in selling drugs prior to being incarcerated
9 does not lead to a finding of current dangerousness.

10 In discussing his social history, Petitioner stated that he
11 has four siblings and a mother still living. (Id. at 30-31, 33.)
12 He also reportedly has a seventeen or eighteen year old son whom he
13 has never met. (Id. at 33-34.) In Petitioner's 2001 psychological
14 report, the evaluator noted that Petitioner's "family relationships
15 were poor in the past, but he says that they are good now. One
16 sister ran away from home because of drugs. His siblings have had
17 a variety of positions as secretaries and in managerial positions."
18 (2001 Psychological Evaluation at 2.) In fact, Petitioner's
19 support letters came from family members.

20 Petitioner dropped out of high school mainly due to conflicts
21 with his peers because he would get into fights. (2006 Tr. at 28-
22 29.) At the hearing, Petitioner suggested that he engaged in
23 fights because he was looking for attention, and he does not look
24 for that kind of attention any longer. (Id. at 29.)

25 Nothing in the record reveals an unstable social history that
26 can be rationally connected to a finding that Petitioner is
27 currently dangerous. As the California Supreme Court explained,
28 "due consideration of the specified factors [for parole

1 suitability] requires more than rote recitation of the relevant
2 factors with no reasoning establishing a rational nexus between
3 those factors and the necessary basis for the ultimate decision --
4 the determination of current dangerousness." Lawrence, 44 Cal. 4th
5 at 1210 (internal quotation marks omitted). Although the Board may
6 base a parole denial on "immutable facts" like an unstable social
7 history, "some evidence will support such reliance only if those
8 facts support the ultimate conclusion that an inmate continues to
9 pose an unreasonable risk to public safety." Id. at 1221 (emphasis
10 in original). No rational nexus links the immutable facts of
11 Petitioner's pre-offense "unstable social history" with his current
12 dangerousness. Given the record as a whole, Petitioner's social
13 history does not provide "some evidence" of danger to others.

14 The second factor the Board appeared to rely upon in denying
15 parole was that Petitioner needed to "cope with stress in a
16 nondestructive manner" and to engage in "self-help." (2006 Tr. at
17 79.) However, again, the Board did not identify any evidence
18 supporting this conclusion. Petitioner excelled in his
19 participation in self-help programs. He received numerous
20 laudatory chronos in AA, anger management, and the inmate
21 employability program; had been disciplinary free for almost ten
22 years; and was vice-chair of AA. (Id. at 79-80.) Accordingly,
23 this factor does not reasonably support a finding of current
24 dangerousness. See Cooke, 606 F.3d at 1215.

25 The last factor the Board relied on, and seemingly the most
26 significant, was Petitioner's lack of insight into the crime.
27 (2006 Tr. at 81-82.) Specifically, the Board indicated that it
28 needed to feel completely comfortable that Petitioner had

1 "confronted all the aspects and all the activities of that night,"
2 and had thought about the opportunities he had to stop or
3 disengage. (Id. at 81.) A prisoner's remorse or demonstrated
4 understanding of the nature and magnitude of the commitment offense
5 is one factor tending to indicate the prisoner is suitable for
6 release. 15 Cal.Code Regs., tit. 15, § 2402(d)(3). "Lack of
7 insight," however, is probative of unsuitability only to the extent
8 that it is both (1) demonstrably shown by the record and
9 (2) rationally indicative of the inmate's current dangerousness.
10 In re Calderon, 184 Cal. App. 4th 670, 690 (2010). Further, the
11 California Penal Code provides that the Board "shall not require,
12 when setting parole dates, an admission of guilt to any crime for
13 which an inmate was committed." Cal. Penal Code § 5011(b).

14 Contrary to the Board's conclusion, the record contains
15 evidence of Petitioner's remorse and insight into the offense.
16 Petitioner acknowledged that he did not feel threatened after the
17 victim started to run from him and that he ran after the victim
18 because he was always taught as a child to "get them before they
19 get you." (2006 Tr. at 20, 55.) Petitioner explained that,
20 through self-help classes and programs, he has learned to think
21 before he reacts and knows how different his perception of life has
22 become. (Id. at 21-22.) Petitioner took responsibility for the
23 victim's death (id. at 75) and understood that he hit the victim
24 and engaged in fights pre-incarceration because he wanted to look
25 "tough." (Id. at 75-76.) Petitioner said, "Before it was just, I
26 was just a kid trying to look tough. I don't want to be tough no
27 more. I don't want to be out in a crowd. I want to be just like
28 the real men and enjoy the rest of my life and my families." (Id.

1 at 76.) Petitioner's psychological evaluation in 2001 reported
2 that he "feels remorse for the family and doesn't know how to repay
3 the family." (Petition, Ex. D 2001 Psychological Evaluation at 4.)
4 Although the Board believed Petitioner must have had more reasons
5 for failing to disengage that he was not disclosing, the Board
6 cannot deny Petitioner parole for disagreeing with its version of
7 events. See Cal. Penal Code § 5011(b).

8 This record contrasts with that in Shaputis, where the
9 California Supreme Court upheld a parole denial based in part on
10 Shaputis' failure to grasp the nature of his commitment offense.
11 Although Shaputis stated that his conduct was "wrong" and that he
12 felt "some remorse" for his crime, he still claimed that his wife's
13 brutal murder was an "accident" and sought to minimize his
14 responsibility. In addition, recent psychological reports
15 indicated that Shaputis' character remained unchanged and that he
16 was "unable to gain insight into his antisocial behavior despite
17 years of therapy and rehabilitative programming." Shaputis, 44
18 Cal. 4th at 1260 (internal quotation marks omitted).

19 Here, there simply was no reliable evidence showing that
20 Petitioner failed to appreciate the significance of his offense or
21 lacked remorse or insight into his role in the offense.

22 The Board mentioned that it was not relying on the 2005
23 psychological evaluation because of its inconsistencies. (2006 Tr.
24 at 78-79.) Because the report was disregarded, it was not found
25 probative of the Board's determination that Petitioner was
26 dangerous. See Cooke, 606 F.3d at 1215.

27 At the time of the parole decision, Petitioner had served
28 approximately sixteen years in state prison, more than six years

1 past his minimum eligible parole date. "[A]fter these prisoners
2 have served their suggested base terms, the underlying
3 circumstances of the commitment offense alone rarely will provide a
4 valid basis for denying parole when there is strong evidence of
5 rehabilitation and no other evidence of current dangerousness."
6 Lawrence, 44 Cal. 4th at 1211. As described above, there is strong
7 evidence of Petitioner's rehabilitation and no other evidence of
8 current dangerousness cited by the Board.

9 Therefore, pursuant to the standard announced in Hayward
10 entitling a petitioner to habeas relief if the state court
11 unreasonably applied California's "some evidence" requirement, the
12 petition for a writ of habeas corpus in this case will be granted.
13 See Hayward, 603 F.3d at 563 (citing 28 U.S.C. § 2254(d)(1)); see
14 also Cooke, 606 F.3d at 1216.

15 III. Case number C 08-0474 CW

16 A. February 15, 2007 Board Hearing

17 Petitioner had been incarcerated for approximately seventeen
18 years at the time of his 2007 parole suitability hearing.

19 Petitioner elected to discuss the commitment offense. The Board
20 again questioned Petitioner about his motivation for running after
21 the victim once the victim began to flee. (Transcript of 2007
22 Hearing (2007 Tr.) at 18.) Petitioner responded that he wasn't
23 thinking, but merely reacting. (Id.) Petitioner acknowledged that
24 he realizes now that the decision to chase after the victim was
25 wrong. (Id. at 19.)

26 With respect to his criminal history, Petitioner elaborated on
27 prior encounters with law enforcement that the Board had not
28 discussed in his 2006 parole hearing. Specifically, when

1 Petitioner was around sixteen or seventeen years old, he was
2 arrested for carrying a gun which belonged to his father, and
3 received counseling as a result. (Id. at 30-31.) Then, as
4 discussed in his 2006 hearing, he was arrested for the sale of a
5 controlled substance and receiving stolen property in February,
6 1989. (Id. at 28.) Ultimately, those charges were dropped when
7 Petitioner plead guilty to the commitment offense. (Id. at 28-29.)
8 Also in 1989, Petitioner had been charged with theft for use of an
9 access card when his brother found a wallet near their house and
10 Petitioner used the card. (Id. at 31-32.) Petitioner was
11 convicted of petty theft and placed on two years informal
12 probation. (Resp. Ex. C, Orange County Probation Department at 14;
13 2007 Tr. at 32-33.)

14 Since Petitioner's 2006 hearing, he had remained disciplinary-
15 free. (Id. at 43.) He had also received at least five laudatory
16 chronos for his participation in an Alternatives to Violence
17 Project (AVP), where he was "an interactive participant radiating
18 positive energy and exuberance," (id. at 47), and in AA, (id. at
19 47-48, 49, 50.) The Board read into the record five separate
20 chronos written by prison staff vouching for Petitioner's good
21 character. (Id. at 52-57.) Petitioner also presented many updated
22 support letters. (Id. at 57, 58-74.) There was no updated
23 psychological report.

24 Again, the Board denied parole. (Id. at 110.) The Board
25 concluded that the commitment offense was "carried out in a very,
26 very cruel and calloused manner in that the victim was clearly
27 outnumbered." (Id.) The Board also concluded that Petitioner had
28 a "history of unstable and tumultuous relationships with others,"

1 referring to Petitioner's admission that he had sold drugs,
2 associated with gang members, and supplied drugs to gang members.
3 (Id. at 112.) The Board mentioned Petitioner's prior arrest for
4 sale of a controlled substance and receiving stolen property and
5 stated that Petitioner had "failed previous grants of probation"
6 and "failed to profit from society's attempts to correct his
7 criminality." (Id. at 113.) The Board again dismissed the 2005
8 psychological report as inconclusive because of its contradictions.
9 (Id. at 113-114.) The Board again stated that Petitioner needed to
10 "continue to participate in documented self-help in order to face,
11 discuss and cope with . . . stress and anger in a nondestructive
12 manner" and that "[u]ntil progress is made, the prisoner continues
13 to be unpredictable and a threat to others." (Id. at 115.)
14 Finally, the Board's main concern was about Petitioner's motivation
15 to chase the victim once the victim started to run. (Id. at 114-
16 115.) In fact, one Board member stated:

17 I really, really needed to know from you why this
18 happened, other than I was macho. I needed to hear
19 from you the truth. And I'm not saying that you didn't
20 give the truth, but I struggled with how you could not
21 be a part of a gang when you agreed to participate in
22 this behavior with these other nine young men -- or
23 other nine people. So, I suggest that you really,
24 really dig deep and think about what you did and your
25 state of mind at that time.

22 (Id. at 118.)

23 B. State Court Decisions

24 In 2007, Petitioner filed a state habeas petition in superior
25 court. In denying the petition, the state court concluded that
26 there was "some evidence" to support the Board's denial. (Resp.
27 Ex. 2.) The court relied on In re Dannenberg, 34 Cal. 4th 1061
28 (2005), and concluded that the Board did not abuse its discretion

1 in denying parole. (Id.) The court determined that, because the
2 Board pointed to other factors beyond the minimum elements of the
3 commitment offense, i.e., that Petitioner could not give a
4 satisfactory explanation for his behavior and that he became
5 involved in an attack on an unknown and unarmed person, the Board
6 "was not required to engage in a further analysis." (Id. at 3.)
7 The court therefore found it unnecessary for the Board, and thus
8 the court, to consider other suitability factors, and denied habeas
9 relief. (Id. at 2-3.)

10 The California Court of Appeal and California Supreme Court
11 both denied Petitioner's subsequent state habeas petitions. (Resp.
12 Exs. 4, 6.)

13 C. Analysis

14 Petitioner's claims, again, can be summarized as a single
15 assertion that the denial of parole for a fourth time, based on
16 immutable factors, did not rest on "some evidence" of current
17 dangerousness and violated his right to due process.

18 The state court found it unnecessary to discuss all the
19 Board's reasons for denying parole, and upheld the denial of parole
20 based solely on the facts and circumstances of the commitment
21 offense. In Lawrence, which was announced after the superior
22 court's decision here, the California Supreme Court addressed
23 whether the "some evidence" requirement can be met solely by the
24 circumstances of the commitment offense, stating that

25 to the extent our decisions in Rosenkrantz and
26 Dannenberq have been read to imply that a particularly
27 egregious commitment offense always will provide the
28 requisite modicum of evidence supporting the Board's or
the Governor's decision, this assumption is
inconsistent with the statutory mandate that the Board
and the Governor consider all relevant statutory

1 factors when evaluating an inmate's suitability for
2 parole, and inconsistent with the inmate's due process
liberty interest in parole that we recognized in
Rosenkrantz.

3 Lawrence, 44 Cal. 4th at 1191 (emphasis in original); see also
4 Cooke, 606 F.3d at 1214 (finding California's "some evidence" rule
5 requires "more than the crime or its circumstances alone to
6 justify the Board's or Governor's finding of current
7 dangerousness"). Thus, the state court's decision approving the
8 Board's denial of parole based solely on the circumstances of the
9 commitment offense was an unreasonable application of California's
10 "some evidence" standard.

11 Here, however, the Board denied parole based on several
12 additional factors. First, the Board relied on Petitioner's
13 unstable social history and, in particular, his history of selling
14 drugs to gang members. The Court finds no evidence that
15 Petitioner's prior sales of drugs to gang members is probative of
16 current dangerousness. See In re Shipman, 185 Cal. App. 4th 446,
17 459 (2010) ("an inmate's unstable social history, like his
18 commitment offense, is an 'immutable' fact, and thus insufficient
19 by itself to prove unsuitability."). Considering the time that
20 has passed since Petitioner's incarceration, his past relationship
21 with gang members is unlikely to motivate his actions upon
22 release.

23 In fact, the evidence indicates that Petitioner does not have
24 "unstable or tumultuous relationships with others." Cal. Code
25 Regs., tit. 15, § 2402(c)(3). Numerous family members and friends
26 sent letters of support and offers of residency and employment,
27 evidencing Petitioner's stable relationships with people outside
28

1 of prison. (2007 Tr. at 58-73.) Thus the Court finds that
2 Petitioner's social history does not provide some evidence that he
3 is currently dangerous.

4 The Board also relied on Petitioner's prior criminal history.
5 While Petitioner's record is not pristine, there is no indication
6 that he committed previous violent crimes. Cf. In re Scott, 133
7 Cal. App. 4th 573, 601-602 (2005) ("the fact that a prisoner has a
8 previous record of violence -- i.e., that '[t]he prisoner on
9 previous occasions inflicted or attempted to inflict serious
10 injury on a victim, particularly if the prisoner demonstrated
11 serious assaultive behavior at an early age' -- tends to show him
12 unsuitable for release; while the fact that he 'lacks any
13 significant history of violent crime' tends to show him suitable
14 for release on parole") (internal citations omitted). Moreover,
15 Petitioner was nineteen years old at the time of the commitment
16 offense and seventeen years had passed from the time of the
17 commitment offense to the hearing. During that time, Petitioner
18 had committed no serious rules violations involving violence and
19 had committed no serious rules violations at all for the previous
20 twelve years.

21 The Board's reliance on the immutable factor of Petitioner's
22 pre-incarceration criminal record is erroneous as the Board failed
23 to articulate a rational explanation as to why this immutable
24 factor continues to be probative of Petitioner's current
25 dangerousness. Just as "mere recitation of the circumstances of
26 the commitment offense, absent articulation of a rational nexus
27 between those facts and current dangerousness, fails to provide
28 the required 'modicum of evidence,' " mere recitation of

1 Petitioner's pre-incarceration record fails to provide the
2 required modicum of evidence here. See Lawrence, 44 Cal. 4th at
3 1227. Accordingly, the Court finds that Petitioner's non-violent
4 youthful criminal history is not probative of current
5 dangerousness.

6 Next, although the Board stated that Petitioner needed to
7 participate in more self-help studies in order to cope "with
8 stress in a nondestructive manner," the record demonstrates that
9 Petitioner had received at least five laudatory chronos for his
10 participation and completion in AA and AVP since his previous
11 parole hearing one year prior. There was no reliable evidence
12 supporting the Board's conclusion. See Cooke, 606 F.3d at 1215.

13 Finally, the record does not support the Board's continued
14 concern about Petitioner's lack of insight into why he committed
15 his offense. As Petitioner stated in his 2006 hearing, he
16 recalled that at the time of the commitment offense, everything
17 happened quickly and he just "reacted" after the victim struck him
18 and ran. (2007 Tr. at 19.) Petitioner explained that he realized
19 he was the cause of the victim's death even though he did not know
20 that someone was going to shoot the victim. (Id. at 22.)
21 Petitioner said he wished he could "correct what went wrong," but
22 understood that the only thing he could do now is recognize that
23 he is no longer that same child and demonstrate that he is a
24 changed person. (Id. at 22-23.)

25 Petitioner went on to talk about what he had learned, in
26 going to classes and counseling, about himself, confrontation, and
27 choices that he would make now. (Id. at 24.) He learned to walk
28 away from confrontation and to think about what he would do if he

1 were forced into such a situation. (Id.) Petitioner explained
2 that he was housed in a dorm with 370 people all with their own
3 ways of doing things and he has learned to deal with disagreements
4 in a non-confrontational way in order to resolve those
5 disagreements. (Id. at 26.)

6 Guys don't want to do things that, you know, the way
7 that it should be done. They want to do it their way.
8 And I try to talk to them. And I've learned after a
9 while, talking to somebody even if they're mad, you
10 have to come down to being a better result of getting
11 things done the right way. And that's what I've been
12 trying to do. Like I said, every day I work, it's just
13 like -- I know out there on the street is stressful,
14 too, I imagine. My brother tells me, my sisters tell
15 me. It's not easy there. And I know that, but being
16 in here isn't easy either dealing with nothing but
17 convicts and people that don't have rational thinking.
18 I try to be as rational in everything. I'm not the
19 smartest person in the world. I'm not even close to
20 being anything like that, but I try to think and take
21 into consideration how this person thinks or how he's
22 going to react. So I know how I should react. And
23 that's what I do every day at work.

24 (Id. at 27.)

25 In light of the record as a whole, the Board's conclusion that
26 Petitioner had poor insight into his crime and needed to tell the
27 "truth" as to his motive does not appear to be based on reliable
28 evidence. See Pirtle v. California Board of Prison Terms, 611 F.3d
1015, 1025 (9th Cir. 2010) ("[t]he record contains no evidence that
contradicts [the] professional assessment [of the psychologist who
concluded the petitioner] was neither unstable [n]or potentially
dangerous"); Cooke, 606 F.3d at 1216 ("[w]hen habeas courts review
the 'some evidence' requirement in California parole cases, both
the subsidiary findings and the ultimate finding of some evidence"
must have reasonable factual support).

The Court therefore concludes that the state courts'

1 determinations that the Board's denial of parole suitability was
2 supported by "some evidence" of current dangerousness was an
3 "'unreasonable application' of the California 'some evidence'
4 requirement, and was 'based on an unreasonable determination of the
5 facts in light of the evidence.'" Hayward, 603 F.3d at 562-63
6 (citations omitted). As a result, Petitioner is entitled to
7 federal habeas relief on his due process claim.

8 CONCLUSION

9 The petitions for a writ of habeas corpus are GRANTED. Within
10 thirty (30) days of the date of this order, the California Board of
11 Parole Hearings must set a parole date for Petitioner in accordance
12 with Section 3041(a) of the California Penal Code. See Pirtle,
13 611 F.3d at 1025. Within ten (10) days thereafter, Respondent must
14 file a notice with the Court indicating whether Petitioner was
15 released on parole. The Court retains jurisdiction to enforce its
16 Order.

17 The Clerk of the Court shall terminate all pending motions,
18 enter judgment and close the file.

19 IT IS SO ORDERED.

20 Dated: 9/17/2010



21 CLAUDIA WILKEN
22 United States District Judge
23
24
25
26
27
28

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 LEROY PAUL LUJAN,

5 Plaintiff,

6 v.

7 BEN CURRY et al,

8 Defendant.

Case Number: CV08-00474 CW
CV09-00462CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
10 Northern District of California.

11 That on September 17, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 Leroy Paul Lujan E-76840
16 Correctional Training Facility
17 P.O. Box 689 / East Dorm 8-Low
18 Soledad, CA 93960-0689

Dated: September 17, 2010

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk