

1 determination of the facts in light of the evidence presented in the State court proceeding.” 28
2 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law
3 and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong
4 applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340
5 (2003).

6 A state court decision is “contrary to” Supreme Court authority, that is, falls under the
7 first clause of § 2254(d)(1), only if “the state court arrives at a conclusion opposite to that
8 reached by [the Supreme] Court on a question of law or if the state court decides a case
9 differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams*
10 (*Terry*), 529 U.S. at 412-13. A state court decision is an “unreasonable application of” Supreme
11 Court authority, that is, falls under the second clause of § 2254(d)(1), if it correctly identifies the
12 governing legal principle from the Supreme Court’s decisions but “unreasonably applies that
13 principle to the facts of the prisoner’s case.” *Id.* at 413. The federal court on habeas review may
14 not issue the writ “simply because that court concludes in its independent judgment that the
15 relevant state-court decision applied clearly established federal law erroneously or incorrectly.”
16 *Id.* at 411. Rather, the application must be “objectively unreasonable” to support granting the
17 writ. *See id.* at 409.

18 “Factual determinations by state courts are presumed correct absent clear and convincing
19 evidence to the contrary.” *Miller-El*, 537 U.S. at 340. Under 28 U.S.C. § 2254(d)(2), a state
20 court decision “based on a factual determination will not be overturned on factual grounds unless
21 objectively unreasonable in light of the evidence presented in the state-court proceeding.”
22 *Miller-El*, 537 U.S. at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).
23 When there is no reasoned opinion from the highest state court to consider the petitioner’s
24 claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*, 501 U.S. 797,
25 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n.2 (9th Cir. 2000). In this case,
26 the last reasoned opinion is that of the superior court denying petitioner’s habeas petition. (Resp.
27 Ex. 2.)

1 B. October 4, 2007 Board Hearing

2 Petitioner had been incarcerated for approximately fourteen years at the time of his 2007
3 parole suitability hearing. Petitioner's minimum parole eligibility date was April 23, 2005. (Tr.
4 at 3.)

5 Regarding his criminal history, Petitioner relayed that he never got into trouble with the
6 police in Mexico. (*Id.* at 47.) On November 12, 1990, Petitioner received a ticket for a Vehicle
7 Code violation and pleaded guilty. (*Id.*) Petitioner stated the violation was for driving without a
8 license and without insurance, and he spent three days in jail. (*Id.* at 47-48.) On December 1,
9 1990, Petitioner was caught being an unlicensed driver again, and spent a short time in jail. (*Id.*
10 at 48-50.) Then, in March 1991, Petitioner was arrested for possession of a controlled substance
11 for sale. (*Id.* at 50.) Petitioner explained that he and his friends were walking along and found a
12 bag full of clothes, drugs, three guns, and \$2000 near a telephone booth. (*Id.* at 42.) They
13 explained this to the police, and the police released them. (*Id.*) Next, on March 18, 1992,
14 Petitioner was arrested for grand theft of a motor vehicle. (*Id.* at 50.) Petitioner explained that
15 he and his friend saw a car that looked like it had been stolen. (*Id.* at 51.) Petitioner's friend
16 wanted to steal the tires and persuaded Petitioner to help him. (*Id.*) They brought the tires to his
17 friend's house and then came back to the car and began jumping on top of it. (*Id.*) At that point,
18 the police arrived, and they were arrested. (*Id.*) Petitioner was placed on two years of probation.
19 A few months later, Petitioner committed the life offense. (*Id.* at 55.)

20 Petitioner grew up in Mexico and moved to the United States in 1988 with his father
21 when he was 16 years old. (*Id.* at 46.) Petitioner testified that he is the oldest of five children.
22 (*Id.* at 56.) He also has eight half-siblings. (*Id.*) After his father hit him once, Petitioner moved
23 in with his girlfriend, to whom he planned to marry. (*Id.* at 59.) While he was in Mexico, he
24 went to school until the ninth grade. (*Id.* at 62.) His father died in 2001, and, at the time of the
25 parole hearing, his mother was in the hospital. (*Id.*)

26 Regarding post-conviction factors, Petitioner had only received one minor disciplinary
27 report in 1994 for possession of inmate manufactured alcohol. (*Id.* at 65.) Petitioner had
28 completed two vocations: small engine repairs and computer refurbishing. (*Id.* at 66.) He also

1 had worked as a Unit Porter and computer work programmer. (*Id.*) While incarcerated,
2 Petitioner was involved in Narcotics Anonymous and Alcoholics Anonymous. (*Id.*) Petitioner
3 had also achieved his GED. (*Id.* at 68.) The Board noted that Petitioner had been involved in
4 several volunteer efforts in his computer work field, participated in several programs, and
5 received three laudatory chronos from prison officials. (*Id.* at 68-69.)

6 The most recent psychological evaluation for petitioner was completed in 2007. One part
7 of the risk assessment discussion stated that Petitioner scored in the moderate range on historical
8 factors analyzing future violence, but, combined with clinical and risk management factors,
9 Petitioner's total score placed him in the low range for risk of future violence (Resp. Ex. 2, 2007
10 Evaluation at 5.) Regarding Petitioner's risk of recidivism, Petitioner scored in the medium
11 range. (*Id.* at 5-6.) The evaluation also noted that Petitioner appeared "mildly glib and
12 immature while continuing to demonstrate a lack of insight into his part in the commitment
13 offense," and resolved that he presented a "moderately low" risk of future violence. (*Id.* at 7.)
14 The evaluation concluded that Petitioner posed "a low likelihood to be involved in a violent
15 offense if released to the free community." (Tr. at 69.)

16 Petitioner's parole plans included being deported back to Mexico. (*Id.* at 74-75.) The
17 Board recognized many support letters received on behalf of Petitioner, written by his friends
18 and family. (*Id.* at 77-90.) Petitioner also had several job offers and offers of residence
19 available to him when he returns to Mexico. (*Id.* at 84-87.)

20 Ultimately, the Board denied parole. It found that the offense was carried out in a cruel
21 and callous manner, was calculated, and was committed for a very trivial reason -- financial gain
22 -- in relation to the results of the offense. (*Id.* at 132-34.) The Board also noted that Petitioner
23 had been involved in an escalating pattern of criminal conduct. (*Id.* at 135.) It found that
24 Petitioner had performed very well in prison, acknowledging his achievements and successes,
25 and recognizing that Petitioner had solid parole plans and support. (*Id.* at 135-37.) The Board
26 expressed some concern regarding the psychological evaluation, specifically, Petitioner's risk of
27 recidivism and possession of some antisocial personality traits. (*Id.* at 136.) Finally, the Board
28 commented that it was greatly concerned with Petitioner's lack of insight regarding his

1 motivation for the commitment offense as well as his lack of remorse. (*Id.* at 139.) The Board
2 stated:

3 [B]oth of us thought that we saw a total lack of insight on your part regarding
4 what -- what caused you, what brought you to think the way that you did and
5 participate and then end up taking this man's life. And also, remorse. We
6 believe that you have remorse, but you only have -- we felt in what you
7 exhibited to us that your remorse is for this crime as it relates to you. And
8 really we saw no indications that you really had remorse for this victim and
9 this victim's family, but it was, you know, with your own situation. And a
10 give away was earlier in this hearing when you stated yourself that it was --
11 unlucky shot for me as you were relating to yourself. And I responded to you
12 by stating it was an unlucky shot for the victim. But that came through loud
13 and clear that you were thinking in terms of this crime and how it only related
14 to you. And it really didn't -- it didn't show any -- any feelings or thoughts
15 about the victim and -- and the people that were left behind for him.
16 Specifically, the Board recalled that while Petitioner appeared remorseful, it
17 was with regard to how the commitment offense affected him rather than
18 remorse for the victim or the victim's family.

19 (*Id.* at 139-40.)

20 C. State Court Decisions

21 Petitioner filed a state habeas petition in superior court. In denying the petition, the state
22 court concluded that there was some evidence that the crime was committed in a dispassionate
23 and calculated manner. (Resp. Ex. 3 at 2.) Petitioner and his friends planned to trick the victim
24 into giving them money in exchange for "bunk" cocaine and armed themselves for the encounter.

25 (*Id.*) Once the victim tried to escape, Petitioner fired his weapon repeatedly through a car
26 window without looking. The court concluded that those factors demonstrated more than that
27 necessary to sustain a second degree murder conviction and support the Board's denial. (*Id.*) In
28 addition, the court found some evidence supporting the denial of parole in the Board's reliance
on the psychological evaluation which indicated a medium risk of recidivism. (*Id.* at 3.) Both
the California Court of Appeal and California Supreme Court denied Petitioner's subsequent
state habeas petitions.

29 D. Analysis

30 The Due Process Clause does not, by itself, entitle a prisoner to release on parole in the
31 absence of some evidence of his or her "current dangerousness." *Hayward v. Marshall*, 603 F.3d
32 546, 555, 561 (9th Cir. 2010) (en banc). Under California law, however, "some evidence" of

1 current dangerousness is required in order to deny parole. *Id.* at 562 (citing *In re Lawrence*, 44
2 Cal. 4th 1181, 1205-06 (2008) and *In re Shaputis*, 44 Cal. 4th 1241 (2008)). This requirement
3 gives California prisoners a liberty interest, protected by the federal constitutional guarantee of
4 due process, in release on parole in the absence of “some evidence” of current dangerousness.
5 *Cooke v. Solis*, 606 F.3d 1206, 1213-1214 (9th Cir. 2010).

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

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

19 *Hawyard*, 603 F.3d at 562 (quoting *Lawrence*, 44 Cal. 4th. at 1191, 1210-14); *see Cooke*, 606
20 F.3d at 1213-1214 (describing California’s “some evidence” requirement).

21 Here, a primary, though not exclusive, basis for the Board’s determination of parole
22 unsuitability was the nature of the commitment offense. The life crime fits two of the
23 regulations’ criteria for determining that it was committed in an especially heinous, atrocious or
24 cruel manner. There was evidence that it was “carried out in a dispassionate and calculated
25 manner,” § 2402(c)(1)(B), in that Petitioner and his co-defendants lured the victim into believing
26 he was going to receive drugs in exchange for money, they were armed with firearms, and, as the
27 victim was trying to run away, Petitioner and a co-defendant repeatedly fired their weapons at
28 him. Although Petitioner fired his weapon without aiming or looking, the victim died as a result

1 of shots from Petitioner’s firearm. Additionally, Petitioner’s role in the crimes was for a very
2 “trivial” motive, § 2402(c)(1)(E), i.e., money.

3 Significantly, the murder was not the only reason for the unsuitability finding. Even
4 aside from the fact that the commitment offense was especially cruel, and was committed for a
5 trivial motive, there was other evidence that reasonably demonstrated Petitioner was still a
6 current threat to society if released. As the Board observed, the psychological evaluation was
7 not fully supportive of Petitioner’s release. The report stated that one assessment rated Petitioner
8 within the medium range for risk of recidivism, though such recidivism does not necessarily
9 include violence. (2007 Evaluation at 5-6.) In addition, the report concluded that, as to a
10 clinical risk assessment, Petitioner presented a “moderately low” risk of future violence.

11 Moreover, the Board’s reliance on Petitioner’s lack of insight and remorse is also
12 supported by some evidence. “An inmate’s lack of remorse or insight into the nature and
13 magnitude of the offense may be some evidence that he currently poses an unreasonable risk of
14 danger to society. Cal. Code Regs., tit. 15, § 2402(d)(3); *In re Shaputis*, 44 Cal. 4th at 1260.
15 Here, the Board observed that during the hearing, Petitioner mainly spoke about the commitment
16 offense in terms of how it affected him, rather than the victim or the victim’s family. During the
17 hearing, Petitioner told the Board that he believed the drug deal would be an easy trick and they
18 would get away with it. (Tr. at 25.) When the Board asked how Petitioner’s life ended up where
19 it is, Petitioner merely responded that he was a “stupid kid” and he did not have anyone to teach
20 him right from wrong. (*Id.* at 97-98.) Petitioner said that he committed the commitment offense
21 because he needed the money. (*Id.* at 100.) Further, the psychological report indicated that
22 Petitioner “presented as mildly glib and immature while continuing to demonstrate a lack of
23 insight into his part in the commitment offense.” (2007 Evaluation at 7.)

24 Based on these circumstances, it was not unreasonable for the Board to interpret
25 Petitioner’s statements as some evidence of current danger to the community. *See Hayward*, 603
26 F.3d at 562-63 (concluding that there was “some evidence” of future dangerousness based on the
27 nature of the commitment offense and “the somewhat unfavorable psychological and counselor
28 reports.”) Notably, Petitioner has not yet served his sentence. Moreover, while self-help and

1 therapy programming count in his favor, it cannot be said that at this point they compel a finding
2 of suitability. There was some evidence to support the Board's denial based on the commitment
3 offense, psychological evaluation, and lack of insight and remorse, and those circumstances were
4 probative of and provided reliable evidence of Petitioner's current dangerousness. These factors
5 indicated "that the implications regarding the prisoner's dangerousness that derive from his []
6 commission of the commitment offense remain probative of the statutory determination of a
7 continuing threat to public safety." See *Lawrence*, 44 Cal.4th at 1214. The state court's
8 rejection of petitioner's petition was not an unreasonable application of California's "some
9 evidence" requirement and was not based on an unreasonable determination of the facts in light
10 of the evidence. Petitioner therefore is not entitled to federal habeas relief.

11 **CONCLUSION**

12 The petition for a writ of habeas corpus is DENIED. Rule 11(a) of the Rules Governing
13 Section 2254 Cases now requires a district court to rule on whether a petitioner is entitled to a
14 certificate of appealability in the same order in which the petition is denied. Petitioner has failed
15 to make a substantial showing that his claims amounted to a denial of his constitutional rights or
16 demonstrate that a reasonable jurist would find the denial of his claim debatable or wrong. *Slack*
17 *v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no certificate of appealability is
18 warranted in this case.

19 The Clerk shall enter judgment and close the file.

20 IT IS SO ORDERED.

21 DATED: __12/21/2010_____



22 LUCY H. KOH
23 United States District Judge
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