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**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

STEVEN ROBERT NARY,

Petitioner,

v.

JAMES D. HARTLEY, Warden of the
Avenal California State Prison,

Respondent.

Case No.

(Original San Francisco County
Superior Court No. 165558)

(Court of Appeal, First Appellate
District No. A129062)

**PETITION FOR WRIT OF
HABEAS CORPUS**

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I. INTRODUCTION

1. Petitioner Steven Robert Nary ("Mr. Nary") has served more than 14 years in custody for a second-degree felony murder conviction resulting from a tragic altercation with the victim, Juan Pifarre ("Mr. Pifarre"). The events culminating in this isolated tragedy include an intoxicated 18 year old sailor's evening of shore leave in San Francisco who, because public transportation was no longer possible, needed to find transportation back to his ship the *USS Carl Vinson* harbored in Alameda.

2. On the evening of March 24, 1996, after excessive consumption of alcohol, Steven Nary was approached by Mr. Pifarre (53 years old at the time) at the Palladium Bar in San Francisco. Mr. Pifarre sat at Mr. Nary's table and learned through conversation that Mr. Nary had no way back to his ship. While at the Palladium, Mr. Pifarre, who lived in San Francisco, offered to assist by taking the young intoxicated sailor in his car back to his ship in Alameda.

3. Once they were in his car, Mr. Pifarre then claimed that he too was so intoxicated and had earlier used cocaine so that he was unable to drive to Alameda. Consequently, instead of traveling back to the ship, Mr. Pifarre volunteered to take Mr. Nary to his San Francisco apartment because the former's wife was not home. Mr. Nary accepted the invitation to stay overnight.

Mr. Pifarre's true intentions surfaced during the drive to his apartment. Several times during the drive, Mr. Pifarre began to touch Mr. Nary and offered to perform oral sex on him. Mr. Nary rejected these uninvited advances which continued once they arrived at Mr. Pifarre's apartment. Although he only wanted to sleep and be left alone, Mr. Nary ultimately found himself submitting to Mr. Pifarre's relentless demands to perform oral copulation.

Mr. Pifarre next attempted to conduct anal sex on Mr. Nary, who again repeatedly resisted these unwanted and persistent advances and made it abundantly

1 clear to Mr. Pifarre that he would not consent to anal sex. Consequently, in
2 response to the undeterred advances by Mr. Pifarre, a violent physical altercation
3 between the two broke out which rapidly escalated to the point where Mr. Nary
4 strangled Mr. Pifarre. Mr. Nary left the apartment with Mr. Pifarre on the floor.

5 4. A few days later, Mr. Nary contacted law enforcement and admitted his
6 violent altercation with Mr. Pifarre. It was at a subsequent meeting with law
7 enforcement that he first learned Mr. Pifarre died. This initial March 1996
8 confession began Mr. Nary's long and continued admission for the crime and his
9 genuine remorse for Mr. Pifarre's unfortunate death. Mr. Nary continues to accept
10 full responsibility for his actions and provides considerable insight into the reasons
11 for his crime.

12 5. Since his 1996 incarceration, Mr. Nary began and continues to
13 participate in numerous self-help groups and forms of higher education. He has
14 participated in an extraordinary number of programs to improve himself, including
15 earning college credits for an associates' degree. Also, since incarceration, Mr.
16 Nary has and is successfully taking the steps to address his alcohol abuse.

17 6. On June 24, 2009, the California Board of Parole Hearings ("the
18 Board") conducted Mr. Nary's initial parole hearing. (See Declaration of Steven
19 F. Gruel Transcript of Hearing filed herewith, Exhibit C). The Board correctly
20 reasoned that on that night he was approached by Mr. Pifarre, Mr. Nary was prone
21 to serious "elements of vulnerability" in that Steven was "young," "intoxicated,"
22 and needed to "get back to base in Alameda." (Gruel Declaration; Exhibit C at
23 p.105).

24 7. While the confluence of the exhibits and testimony showed Mr. Nary's
25 crime to be an isolated event and that he no longer posed a threat of danger to the
26 community, the Board inappropriately found Mr. Nary unsuitable for parole.
27 Without any factual basis and without meeting the required standard of "some
28 evidence," it incorrectly concluded that Mr. Nary remained a present and

1 unreasonable risk of danger if released to the community. (Gruel Declaration;
2 Exhibit C at p.104 -113). Instead, the Board rewarded Mr. Nary's
3 accomplishments by setting his next parole hearing in 5 years. (Gruel Declaration;
4 Exhibit C at p.113-114).

5 8. There is no evidence in the record to support the Board's June 24, 2009
6 conclusion that Mr. Nary would pose a current danger to society if released on
7 parole. To the contrary, as outlined below and as presented to the Board, Mr. Nary
8 has no significant criminal history with no prior acts of violence whatsoever.
9 Additionally, during his 14 years of incarceration, Mr. Nary has remained sober,
10 and successfully demonstrated exemplary programming and self-help.
11 Furthermore, numerous letters of support from family, friends and the general
12 community were presented to the Board offering Mr. Nary housing, employment
13 opportunities, as well as emotional and spiritual support.

14 Finally, Mr. Nary's repeated longtime admissions and sincere expressions of
15 remorse for his crime *coupled* with the expressed April 2, 2009 opinion from two
16 psychologists that Mr. Nary presented a "relatively low risk for violence in the free
17 community" all serve to completely belie the Board's finding that Mr. Nary
18 remains a present danger to the community. (Gruel Declaration; Exhibit E, at 10).

19 9. The Board's denial of parole should be reversed as arbitrary and capricious,
20 and in violation of Mr. Nary's rights under both the California and United States
21 Constitutions. Specifically, other than a mere recitation of alleged "factors," the
22 Board's denial of parole fails to specify, articulate or is supported by anything in
23 the record which supports its conclusion that Steven Nary is unsuitable for parole.

24 **II. PARTIES**

25 10. Petitioner Steven Robert Nary is a prisoner of the State of California,
26 unlawfully confined at the Avenal California State Prison ("ASP") in Avenal,
27 California. Mr. Nary is completely indigent and has had no legal counsel since the
28

1 June 24, 2009 denial of his parole. Undersigned counsel for Mr. Nary is a sole
2 practitioner who is representing Mr. Nary *pro bono* in this Petition.

3 11. Respondent James D. Hartley is the Warden of ASP. Warden Hartley
4 is the legal custodian of Mr. Nary.

5 III. STATEMENT OF THE CASE

6 12. Petitioner, Steven Nary, is unlawfully incarcerated by his custodian,
7 Warden Hartley pursuant to a judgment of conviction in *People v. Steven Nary*,
8 San Francisco County Superior Court Case No. 165558. On November 30, 1999,
9 Mr. Nary was sentenced to 16 years-to-life in prison. (Gruel Declaration; Exhibit A
10 at p.1).

11 13. Mr. Nary began serving his term in the California Department of
12 Corrections on December 2, 1999. (Gruel Declaration; Exhibit A at p.6).

13 14. On June 24, 2009, the Board conducted its initial parole hearing for
14 Mr. Nary. (Gruel Declaration; Transcript of Hearing filed as Exhibit C). Mr.
15 Nary presented exhibits and offered testimony at the hearing in support of parole.
16 His uncontroverted presentation established his: (1) complete remorse for and
17 insight into his crime; (2) remarkable accomplishments with respect to
18 programming, higher education and sobriety; (3) low risk of future violence as
19 independently concluded by two psychologists; (4) wide family and community
20 support; and (5) parole plans which offered employment and housing. *Id.*

21 The San Francisco District Attorney ("DA"), opposed parole. Yet, the
22 DA offered nothing of substance to refute Mr. Nary's clear rehabilitation or which
23 ran contrary to a clear determination that he ***was not a current danger*** to the
24 public. Rather, clearly to inflame the Board, the DA improperly and contrary to
25 proper procedure (circumvention of the 10 day notice rule) sought to introduce
26 graphic crime scene photographs. (*Id.*, at 6-7). Although the Board precluded the
27 DA's last minute effort to waive the inflammatory photographs before the Board
28 members, the DA nevertheless compensated with an improper cross-examination

1 of Mr. Nary which merely "retried the case" and rehashed the crime scene.
2 Moreover, the Board violated its own rules when, in lieu of following its explicit
3 procedure of having the DA question Mr. Nary through the Board, it improperly
4 acquiesced to the DA's attack on Mr. Nary in a one-on-one cross examination (*Id.*
5 at 79-94). [See Footnote 1]

6 Again, notwithstanding this blatant procedural violation, the DA merely
7 rehashed the 14 year old crime and did nothing, much less ask a single question,
8 which directly contested, refuted or undermined the overwhelming evidence which
9 established that Mr. Nary was no longer a current danger to the community. *Id.*

10 15. Without a factual basis and contrary to law, the Board deemed Mr.
11 Nary unsuitable for parole. (Gruel Declaration; Exhibit C at pp.104-113).
12 Specifically, the Board improperly denied parole in that it incorrectly relied upon
13 the commitment offense along with a belief, unsubstantiated by any factual
14 evidence, that that Mr. Nary lacked remorse or had any parole plans. The Board
15 disregarded the undisputed evidence which established Mr. Nary's suitability for
16 parole and that he was not a current danger to society.

17 16. No administrative remedies are available to challenge the Board's
18 denial of parole. This Petition for A Writ of Habeas Corpus is timely and filed
19 without substantial delay in that (1) it is timely filed after the Board's decision
20 became final; (2) Mr. Nary is completely indigent and without funds to hire
21 counsel to assist him in this Petition; (3) current counsel is new to this case and
22 was not counsel at the parole hearing; (4) current counsel's communication with
23

24 1 - This procedural error was far from harmless. In fact, as seen in the record, in finding Mr. Nary unsuitable for
25 parole, one Board member specifically commented on Mr. Nary's body language and "softer voice" during this
26 improper cross-examination as somehow indicative of his lack of remorse and insight into the offense. (Gruel
27 Declaration, Exhibit C; p.112). Not only are we left to guess exactly how a lowered head and softer voice during
28 unexpected cross-examination by an experienced trial lawyer serves as proper guideposts into one's remorse and
insight, we would expect the opposite to ring true. In other words, if one wades into the speculative mud of
"reading" body language, a lowered voice and bowed head frankly reveals someone who *IS* remorseful and has
COMPLETE insight (shame) into his crime. Given the facts and record in this matter, one could easily have
"interpreted" quick snappy answers with unflinching eye contact with the examining DA to be nothing less than
someone with an attitude and "chip on his shoulder."

1 Mr. Nary has been difficult in that counsel's office is in San Francisco and Mr.
2 Nary is incarcerated at Avenal State Prison which is over 200 miles away; (5) it
3 has taken considerable time to accumulate all of the facts, including the hearing
4 exhibits, relied upon at the parole hearing; and (6) this Petition is filed within 10
5 days of the California Appellate Court, First Appellate District's denial of Mr.
6 Nary's Writ of Habeas Corpus.

7 17. On April 28, 2010, Mr. Nary filed his Petition For Writ of Habeas Corpus
8 in the Superior Court for the City and County of San Francisco. On June 18, 2010
9 the Superior Court denied Mr. Nary's Petition For Writ of Habeas Corpus.

10 18. On July 16, 2010, Mr. Nary filed his Petition For Writ of Habeas Corpus in
11 the California Court of Appeal, First Appellate District, Case Number A129062.
12 On July 21, 2010, the Appellate Court denied Mr. Nary's Petition For Writ of
13 Habeas Corpus.

14 IV. STATEMENT OF FACTS

15 A. Personal Background

16 19. Mr. Nary was born on June 8, 1977 in Biloxi, Mississippi and is the
17 oldest of two children. (Gruel Declaration; Exhibit A, at 5). He has a younger
18 sister. *Id.* Mr. Nary was raised within an intact family and he maintains contact
19 with his parents. He has a loving and caring relationship with his family. Mr.
20 Nary's family also consists of several relatives who continue to offer their support
21 for him. (Gruel Declaration; Exhibit G).

22 20. At the time of his incarceration, his formal education consisted of
23 graduating from High School at Cathedral City High in Palm Springs, California.
24 During High School, Mr. Nary developed into a talented basketball player.. (Gruel
25 Declaration; Exhibit A, at 5).

26 21. Mr. Nary has no history of prior adult convictions or arrests. *Id.* As a
27 juvenile, he had two instances involving retail theft and burglary. *Id.* Neither
28 incident involved violence and on both occasions he was released to his parents. *Id.*

1 22. Mr. Nary joined the United States Navy in June 1995 one week after
2 graduating from High School. As a crew member on board the aircraft carrier, the
3 *U.S.S. Carl Vinson*, Mr. Nary assisted in the launching of aircraft. *Id.*

4 23. Mr. Nary experimented with marijuana and stopped because he did not
5 like the drug. *Id.* After joining the Navy, he began to drink beer and malt liquor on
6 weekends until the time of his arrest. *Id.*

7 **B. Commitment Offense**

8 24. As summarized above, while extremely intoxicated and openly
9 vulnerable (a salient and uncontested fact noted by the Board), Mr. Nary while on
10 shore leave had a chance meeting with Mr. Pifarre when the latter approached him
11 at the Palladium Bar in San Francisco. (Gruel Declaration; Exhibit A, at 1- 5). An
12 offer of a ride back to Alameda was the only reason Mr. Nary agreed to
13 accompany Mr. Pifarre in his car. *Id.*

14 25. Once in his car, Mr. Pifarre elected not to travel to Alameda claiming
15 that he was too intoxicated from alcohol and cocaine to drive across the Bay
16 Bridge. *Id.* at 3. While in the car, Mr. Pifarre began to touch Mr. Nary's legs and
17 wanted to engage in oral sex. *Id.*

18 26. Mr. Nary repeatedly denied the sexual advances by Mr. Pifarre.
19 Instead, he agreed to Mr. Pifarre's suggestion that he spend the night at his
20 apartment because his wife was out of town. Once at his apartment, Mr. Pifarre
21 continued with his sexual overtures and oral sex on Mr. Nary occurred. Later,
22 however, Mr. Pifarre then began an undeterred demand and actions to engage in
23 anal sex with Mr. Nary. *Id.* at 1. Mr. Nary did not want to engage in this sexual
24 activity and, consequently, the two men fought resulting with Mr. Pifarre on the
25 floor as Mr. Nary left the apartment. *Id.* at 1-5. Mr. Pifarre's neighbors confirmed
26 that a fight occurred when they told police that they heard strange noises, yelling
27 and the sounds of a "scuffle" coming from that apartment that night. *Id.* at 1. In
28

1 the melee, a towel rod broke from the wall and was used by both combatants
2 against the other in the clash.

3 27. On March 28, 1996, Mr. Nary telephoned the police and admitted his
4 actions. *Id.* He told the police that "he didn't know the victim had deceased and
5 that he was sorry that the victim died and was sorry for the victim's family." *Id.* at
6 1.

7 **C. Trial and Sentencing**

8 28. On or about October 28, 1999, Mr. Nary was convicted after a jury
9 trial of a violation of California Penal Code Section 187(a) – 2nd Degree Murder.
10 An enhancement for the use of a deadly weapon was found also to apply in
11 violation of California Penal Code Section 12022(b). In this case, the towel bar
12 used by both on the other was deemed to be the deadly weapon. (Gruel
13 Declaration; Exhibit A, at 1; Exhibit D, at 1).

14 29. Significantly for purposes of the parole hearing, in the November 30,
15 1999 Probation Report, the District Attorney offered no statements or arguments
16 claiming any aggravating circumstances in this case. (Gruel Declaration; Exhibit
17 D, at 4).

18 30. On November 30, 1999, Mr. Nary was sentenced to 16 years to Life
19 with a MEPD date of August 8, 2010. (Gruel Declaration; Exhibit A, at 1).

20 **D. Post-Commitment Rehabilitation and Programming**

21 31. A most succinct way to characterize Mr. Nary's noteworthy post-
22 commitment accomplishments at rehabilitation and program is simply to quote the
23 Board which reviewed the impressive list of personal achievements: "I don't know
24 when you had time to sleep. You've done an awful lot. I want to just acknowledge
25 that. I don't often see this much programming." (Gruel Declaration; Exhibit C,
26 at p. 69).

27 32. The record in this matter reveals 14 years of rehabilitation and
28 programming all toward the successful emergence of Mr. Nary back into the

1 community. Instead of wasting time in prison, Mr. Nary has put this time to good
2 use by reflecting upon his crime against Mr. Piraffe and how it damaged those who
3 were close to the victim, understanding the events which erupted into violence that
4 single night, realizing the destructive effects of alcohol abuse and seeking
5 forgiveness from God, through his Religion and his Church.

6 33. Mr. Nary has also used this post-commitment time to rehabilitate in other
7 ways by earning college credits, participating in numerous self-help courses and
8 programs and by working several jobs while incarcerated. His only prison
9 disciplinary violation occurred 10 years ago and involved a fist fight started by
10 another inmate because Mr. Nary had earlier violated an unspoken "prison rule"
11 when he played basketball on the yard with members of another Race.

12 **E. The June 24, 2009 Board Appearance**

13 34. Mr. Nary appeared with counsel for his initial parole consideration
14 hearing on June 24, 2009. (Gruel Declaration; Exhibit C). The San Francisco
15 District Attorney's Office was represented by Deputy District Attorney Nancy
16 Tung. Along with the testimony of Mr. Nary, the following exhibits were offered
17 and received at the hearing:

18 *The Exhibits*

19 i) Mr. Nary's Life Prisoner Evaluation Report (Gruel Dec; Ex. A)

20 35. A Life Prisoner Evaluation Report was prepared and submitted to the
21 Board. Notably the detailed report specifically mentioned 3 mitigating factors
22 supporting parole: (1) Mr. Nary has a minimal criminal history; (2) the crime was
23 an unusual situation *unlikely to reoccur*; and (3) Mr. Nary voluntarily
24 acknowledged wrongdoing prior to his arrest and early in the criminal process.
25 (Gruel Declaration; Exhibit A, at 4-5) (emphasis added).

26 36. The Life Prisoner Evaluation Report listed the pages of remarkable
27 therapy and self-help activities Mr. Nary successfully participated in. *Id.* at 7-15.

1 37. The Life Prisoner Evaluation Report listed Mr. Nary's Baptism into the
2 church of St. Paul the Apostle (page 16) and his future plans of residence and
3 employment (page 16). His plans were not fanciful in that they included the names
4 and contact information of the people in the community who knew Mr. Nary and
5 stood ready to assist his assimilation back into society. *Id.* While in custody, Mr.
6 Nary earned his Associates Degree as a Paralegal and earned several certificates as
7 a Microsoft Office Specialist. *Id.*

8 38. In its assessment section, the Report concluded that Mr. Nary was
9 preparing for his future release with college degrees and specialty courses.
10 Moreover, Mr. Nary presented "solid" parole plans for living arrangements and
11 employment opportunities and, if released on parole, "*he certainly will have a*
12 *network of support to guide his entry back into society.*" (Gruel Declaration;
13 Exhibit A, at 17) (emphasis added).

14 39. The District Attorney offered nothing to contest this overwhelming
15 evidence which was presented in support of granting Mr. Nary parole.

16 ii) Mr. Nary's Post Conviction Progress Reports (Gruel Dec; Ex. B)

17 40. The Life Prisoner: Post Conviction Progress Reports (14 pages) were
18 presented. (Gruel Declaration; Exhibit B). These documents painstakingly detail
19 Mr. Nary's relentless thirst to self-improve. In his chronology of vocational
20 training, academics, work and group activities, Mr. Nary has spent his entire
21 incarceration improving himself. Significantly, the records memorialize Mr.
22 Nary's longtime good standing and voluntary participation in AA. The details of
23 his positive approach to his self-help classes are, quite frankly, too voluminous to
24 mention and the Exhibit speaks for itself.

25 41. The District Attorney offered nothing to contest this evidence which was
26 presented in support of granting Mr. Nary parole.

27 iii) Mr. Nary's November 30, 1999 Probation Report (Gruel Dec; Ex. D)

28 42. The November 30, 1999, Probation Report was submitted to the Board.

1 Notably, the offense is described just as Mr. Nary has always told law enforcement
2 and once again memorializes that early in the process Mr. Nary expressed remorse
3 for his actions. (Gruel Declaration; Exhibit D, at 4).

4 43. Significantly, at this critical stage of sentencing, the Probation Report
5 noted that the District Attorney had no statements regarding any circumstances in
6 aggravation regarding this crime. *Id.*, at 4.

7 44. Yet, years later at the June 24, 2009 parole hearing, the DA so as to
8 obviously conjure up *something* to support its reflexive opposition to Mr. Nary's
9 parole, in a glaring contradiction, now argued that that crime involved aggravating
10 circumstances warranting an unsuitability determination.

11 iv) Mr. Nary's April 2, 2009 Risk Assessment Report (Gruel Dec; Ex. E)

12 45. Mr. Nary's 11 page Risk Assessment Report was submitted to the Board.
13 (Gruel Declaration, Exhibit E). After assessing all of the relevant information in
14 Mr. Nary's life, the 2 psychologists opined that " . . . Mr. Nary presents a relatively
15 **LOW RISK** for violence in the community. (emphasis not added). *Id.*, at 10.
16 Indeed, without qualification, the Report mentioned that the HCR-20 (the
17 historical, clinical, risk management scale) for future violence by Mr. Nary was
18 **LOW**. *Id.* at 10. (emphasis not added).

19 46. The District Attorney offered nothing to contest this overwhelming
20 evidence which was presented in support of granting Mr. Nary parole.

21 v) Mr. Nary's Parole Plans, Resume and Letter (Gruel Dec; Ex. F)

22 47. Mr. Nary provided the Board with his written parole plans which included
23 his resume and employment letter. His plans reveal a thoughtful, realistic
24 approach to his life on parole. Indeed, Mr. Nary addressed all aspects of any
25 concern in planning for life on parole. He outlined his parole plans in securing a
26 residence, obtaining employment, continuing his education, maintaining his
27 sobriety, participating in his religious worship and working as a successful member
28 in the community.

1 48. The District Attorney offered nothing to contest this overwhelming evidence
2 which was presented in support of granting Mr. Nary parole.

3
4 vi) Community Letters Offering Housing & Jobs (Gruel Dec; Ex. G)

5 49. Nothing less than a stack of letters of support for Mr. Nary were submitted
6 from friends, family and the general community. (Gruel Declaration, Exhibit G).
7 These letters do much more than offer support and prayers for mercy. Instead, they
8 provide concrete assurances that Mr. Nary has a wide base of support of people
9 who will work with Mr. Nary as he enters back into society. These respectable
10 members of the community stand committed in assisting with jobs, homes, money
11 and emotional support as Mr. Nary enters society.

12 Simply put, Mr. Nary was suitable for parole in that he was surrounded with
13 a strong loving base of friends and family who stood , and remain, ready to provide
14 the necessary structure which will support Mr. Nary's transition from prisoner to
15 successful community member.

16 50. The District Attorney offered nothing to contest this overwhelming
17 evidence which was presented in support of granting Mr. Nary parole.

18 vii) The July 10, 2000 CDC 115 For Mutual Combat (Gruel Dec; Ex. H)

19 51. Mr. Nary has been discipline free for nearly 10 years. His only rule
20 violation ("CDC 115") was in 2000 for a fist fight with another inmate named
21 Nolin. (Gruel Declaration; Exhibit H). Mr. Nary readily admitted his guilt for this
22 violation at the prison disciplinary hearing. *Id.* At the June 24, 2009 parole
23 hearing, Mr. Nary explained that this isolated event was provoked by the other
24 inmate because Mr. Nary acted contrary to "prison practice" by being the only
25 Caucasian to play basketball with African Americans inmates. (Gruel Declaration;
26 Exhibit C, at p. 59).

27 52. The District Attorney offered nothing to contest that this isolated
28 incident, which occurred nearly 10 years earlier, was not provoked by Mr. Nary

1 and occurred only because another inmate thought that mixed Races shouldn't play
2 basketball together.

3 4 *The Testimony*

5 **E. Steven Nary's Testimony Supported Parole**

6 53. Mr. Nary testified at his parole hearing and favorably addressed all the
7 relevant points supporting his parole. His candid testimony included:

8 i) That he was too drunk to dance at the Palladium and sat at his table when
9 Mr. Pifarre approached and sat down [See Footnote 2];

10 ii) That once Mr. Pifarre got Mr. Nary in his car, the former claimed to be
11 incapable of driving back to Alameda. It was in the car when Mr. Pifarre began to
12 touch Mr. Nary's leg and suggest oral sex. Exhibit C, at 20-25;

13 iii) After repeatedly refusing Mr. Pifarre's advances for oral sex in his car
14 and at his apartment, Mr. Nary, who didn't want it to occur, admitted that "it did
15 happen." Exhibit C, at p. 26;

16 iv) Although Mr. Nary wanted to sleep, Mr. Pifarre wanted to engage in anal
17 sex. Although he kept saying "no," Mr. Pifarre continued to grope Mr. Nary [See
18 Footnote 3];

19 v) Mr. Nary described his fight with Mr. Pifarree. He recalled that when he
20 left the apartment, Mr. Piffare was still alive. Exhibit C, at pp. 30-34;

21 vi) Mr. Nary provided insight into his crime when he explained that he was
22 living "recklessly," abusing alcohol and living from "one experience to another."
23 Exhibit C, at pp. 76-77. Mr. Nary realized that his murder of Mr. Pifarre was

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25 2 - The Board correctly reasoned that Mr. Nary was vulnerable that night noting his intoxication, young age and
26 need to get back to his ship. Exhibit C, at p. 105. This vulnerability was likely also noticed by Mr. Pifarre that night
27 in 1996. The Palladium nightclub caters to young men and women with loud techno disco style music. Exhibit C, at
pp. 16-17. Pifarree was 53 years old that night in North Beach when he approached Mr. Nary's table.

28 3 - Adding to Mr. Nary's vulnerability and intoxication was the obvious confusion engulfing this situation. Mr. Nary
testified that he had never been confronted with this type of predicament and had never engaged in homosexual
activity. Exhibit C, at p. 34.

1 caused by his "shame" in engaging in oral sex, "anger" for what Mr. Pifarre was
2 doing to him and "fear" in not knowing when "... it was going to stop." *Id.*

3 vii) Mr. Nary acknowledged that no matter how much he wanted, he
4 couldn't change the events of that March 24, 1996 night. He was sorry for the
5 murder of Mr. Piaffare: "I am sorry from the depths of my soul for the killing of
6 Mr. Juan Piafarre. These are not just words. Every day I am reminded of what I
7 have done and every day I act with purpose to make sure nothing even close to it
8 ever happens again." Exhibit C, at 103.

9 (viii) In light of his post-commitment achievements and remorse for his
10 crime, Mr. Nary assured the Board that "... I know I transformed my life ..." and
11 that he would "... never hurt another person and I'll never commit another
12 crime." "Relapse is not an option." Exhibit C, at p. 102.

13 **G. The San Francisco DA Merely Repeated the Events of the Crime**

14 54. Apart from a standard argument about the offense (which, of course, is
15 not evidence of anything) the DA offered nothing in contrast to the evidence
16 clearly establishing that Mr. Nary was not a current danger to the community and
17 suitable for parole.

18 55. Instead, the DA, contrary to the Board's explicit rules, launched into an
19 improper and aggressive cross-examination of Mr. Nary which only addressed the
20 1996 crime. [See Footnote 4]. (Gruel Declaration; Exhibit C, pp. 79-94). No
21 questions by the DA and nothing offered by her remotely touched upon the only
22 issue pending at the parole hearing: Mr. Nary's *current suitability for parole back*
23 *into the community*. The DA never contested, much less addressed, Mr. Nary's

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25
26
27 4 - Presiding Commissioner Garner specifically instructed ADA Tung that if she had any questions that "... we
28 ask the questions through the Chair and the inmate will respond back to the Chair." Exhibit C, at 79. The ADA
followed this explicit procedure for a mere two (2) questions before disregarding the rules and attacking Mr. Nary in
a direct cross-examination, producing the body language and lowered voice, which in the Board's view were highly
relevant factors indicative of unsuitability for parole. Exhibit C, at 112.

1 genuine remorse, insight into his actions, parole plans, education, community
2 support, rehabilitation or sobriety. *Id.*

3 56. Ignoring the uncontested avalanche of evidence proving Mr. Nary's
4 suitability for parole, the DA's single "*argument*" against granting parole was the
5 "nature of the commitment offense." Exhibit C, at 96. In her argument, the DA
6 again violated the Board's rules of procedure, when she slipped in that "I know
7 the Board is not entertaining evidence of the crime scene photos" but they and the
8 "autopsy photos" are "grisly." Exhibit C, at p. 96. This "backdoor" maneuver
9 was completely improper and, frankly, further confirmed that the DA really lacked
10 any substantive basis to oppose a determination that Mr. Nary is suitable for
11 parole.

12 **F. The Board's Unsuitability Finding and Faulty Reasoning**

13 57. Notwithstanding the evidence supporting parole, the Board found Mr.
14 Nary unsuitable for parole because he posed a present unreasonable risk of danger
15 to society. The Board recommended that his next parole hearing take place in five
16 (5) years. (Gruel Declaration; Exhibit C, p.104-113; Exhibit H).

17 58. The Board relied heavily upon its unsupported statement that there was a
18 particular heinous nature to the commitment offense which supported denying
19 parole and found the "motive for the crime as trivial." [See Footnote 5]. Exhibit C,
20 at 104-105;

21 59. The Board agreed that Mr. Nary was vulnerable on the night that Mr.
22 Pifarre "was in a position to find you [Nary] at a bar in the North Beach area."
23 Exhibit C, at 105;

24
25
26 5 This "motive" was never clarified or defined by the Board. It is particularly disturbing if the Board intended
27 "motive" to mean Mr. Nary's response to Mr. Pifarre's undeterred demand for anal sex. If true, then the Board
28 missed the mark and engaged in improper speculative inquires as to "why Mr. Nary simply didn't leave the
situation?," or "how could this 18 year old young man not easily overpower the older, shorter Mr. Pifarre and walk
away?" Such questions reliving the offense have no place at a parole hearing which under the law is to focus on a
single question: Is Mr. Nary suitable for parole?

60. The Board found that the rapid escalation of violence resulting in Mr. Pifarre's death was due to Mr. Nary's opposition to engaging in anal sex. Exhibit C, at 106;

61. As a factor supporting a belief that the “heinous nature of the commitment offense supported denying parole, the Board stated that Mr. Nary did not provide medical intervention for Mr. Pifarre. Exhibit C, at 106;

62. Without any reasoning or evidence, the Board stated that Mr. Nary minimized his conduct in the crime. Exhibit C, at 107;

63. Without any reasoning or evidence, the Board stated that Mr. Nary lacked insight into the causative factors for his conduct in the crime. Exhibit C, at 107-108;

64. Without any reasoning or evidence, the Board stated that Mr. Nary lacked remorse for his conduct in the crime. Exhibit C, at 109;

65. Ignoring the evidence, the Board claimed that Mr. Nary's parole plans "need some further development." Exhibit C, at 109-110.

CONTENTIONS

I. The Board's denial of Mr. Nary's parole is arbitrary and capricious in violation of his right to due process under the California Constitution.

II. The Board's denial of Mr. Nary's parole is arbitrary and capricious in violation of his right to due process under the United States Constitution.

REQUEST FOR RELIEF

Mr. Nary is without a remedy save by Writ of Habeas Corpus.

WHEREFORE, Mr. Nary prays that this Court:

1. Issue a Writ of Habeas Corpus directing that Petitioner Steven Robert Nary be released;
2. Issue an Order to Show Cause directing Respondent Warden James D. Hartley file a Return within 30 days;
3. Order Respondent to provide Mr. Nary with reasonable discovery;

4. Conduct an evidentiary hearing, including an order directing the Department of Corrections and Rehabilitation to arrange for the presence of Petitioner at the hearing on this matter;
5. Remand these parole proceedings back to the Board for further parole hearing proceedings in accordance with due process of law; and/or
6. Grant all other relief necessary to promote the ends of justice.

DATED: July 30, 2010

Respectfully submitted,

By:


Steven F. Gruel

Attorney for Petitioner Steven Robert Nary

VERIFICATION

I, Steven F. Gruel, declare as follows:

I am an attorney admitted to practice law in the State of California. I represent Steven Nary, who is confined at the Avenal California State Prison in Avenal, California.

I am authorized to file this Petition for Writ of Habeas Corpus on Mr. Nary's behalf. I make this verification because Mr. Nary is incarcerated in a county that is different from that of my law office. I have read the petition and reviewed the exhibits filed with my declaration and know the contents to be true.

I certify under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on July 30, 2010.


STEVEN F. GRUEL

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THE PETITION

I. INTRODUCTION

Recent case law supports granting Mr. Nary's Petition For a Writ of Habeas Corpus. Specifically, the Ninth Circuit in *Cooke v. Solis*, 603 F.3d 561 (9th Cir. 2010), *Pearson v. Muntz*, 606 F.3d 606 (9th Cir. 2010) and *Pirtle v. California Board of Prison Terms*, 2010 WL 2732888 repeatedly underscored that under California law, "the paramount consideration for both the Board and the Governor" must be "whether the inmate currently poses a threat to public safety and thus may not be released on parole." Likewise, there must be "some evidence" which has a rational relationship to a finding of current dangerousness to public safety.

Likewise, this Court, as seen *In re Lawrence*, (2008) 44 Cal.4th 1181, which provided the framework in the determination of an inmate's suitability for parole. Since this Court's decision in *Lawrence*, California Appellate Courts have granted petitions for writs of habeas corpus when the facts failed to support "some evidence" of current dangerousness. For Instance, on May 12, 2010, in First District granted an inmate's petition for writ of habeas corpus when, once again, the record did not support the Governor's reversal of the Board's decision permitting parole. *In Re Calderon*, 184 Cal.App.4th 670 (commitment offense alone cannot serve to deny parole as well as the assertion of "lack of insight" fails to preclude granting parole because it is not a factor in determining suitability). Additional recent case law supports granting the writ for habeas corpus when the record fails to support further incarceration.

On March 16, 2010, in two (2) separate decisions, the First Appellate District of the Court of Appeal of California explicitly adhered to and continued the. *See In Re Moses* (2010) 182 Cal.App. 4th 1279 and *In Re Juarez* (2010) 182 Cal. App. 4th 1316. In the determination of an inmate's suitability for parole, the correct

1 analysis outlined in *Lawrence* and followed in *Moses* and *Juarez* was not followed
2 here.

3 In the instant matter, the record is replete with evidence to support a finding
4 that Steven Nary is not a current danger to the community. Instead, on this record,
5 it is clear that the Board's decision finding Mr. Nary unsuitable for parole was an
6 arbitrary and capricious application of the law in violation of the Due Process
7 Clauses of the California Constitution and the United States Constitution. The
8 Board failed to provide or point to any relevant evidence, much less "some
9 evidence," that Mr. Nary poses a current risk of danger to society.

10 The Board's decision fails to give adequate consideration to Mr. Nary's
11 post-commitment rehabilitation, his solid parole plans, and misconstrues his
12 testimony to conclude that he lacks insight and remorse for his crime. The Board's
13 conclusions are not supported by any evidence and directly contradicts the entire
14 uncontested record, including the opinions of two psychologists who believe that
15 Mr. Nary is a low risk for violence.

16 Mr. Nary respectfully requests that the Court grant his Petition for a Writ of
17 Habeas Corpus and order his immediate release from custody.

18 II. THE LAW

19 A. The Purpose of Parole

20
21 The purpose of parole is to help prisoners "reintegrate into society as
22 constructive individuals as soon as they are able," without being confined for the
23 full term of their sentence. *Morrissey v. Brewer* (1972) 408 U.S. 471, 477.

24
25 Although a prisoner has no constitutional or inherent right to be conditionally
26 released before the expiration of his sentence, in California, Penal Code section
27 3041 creates in every inmate a cognizable liberty interest in parole, and that
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1 interest is protected by the procedural safeguards of the due process clause. *In re*
2 *Lawrence, supra*, 44 Cal.4th at p. 1205 [“petitioner is entitled to a constitutionally
3 adequate and meaningful review of a parole decision, because an inmate's due
4 process right ‘cannot exist in any practical sense without a remedy against its
5 abrogation,’ “ quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664; *Biggs v.*
6 *Terhune* (9th Cir.2003) 334 F.3d 910, 914-915.

9 The law establishes a presumption that parole will be the rule, rather than
10 the exception, providing that the Board “shall set a release date unless it
11 determines that the gravity of the current convicted offense ... is such that
12 consideration of the public safety requires a more lengthy period of incarceration
13 for this individual, and that a parole date, therefore, cannot be fixed.” (See *Board*
14 *of Pardons v. Allen* (1987) 482 U.S. 369, 377-378 [unless designated findings
15 made, parole generally presumed to be available].) “[I]n light of the constitutional
16 liberty interest at stake, judicial review must be sufficiently robust to reveal and
17 remedy any evident deprivation of constitutional rights.” *In re Lawrence, supra*,
18 44 Cal.4th at p. 1211; *Irons v. Carey* (9th Cir.2007) 479 F.3d 658, 662 [section
19 3041 vests “California prisoners whose sentences provide for the possibility of
20 parole with a constitutionally protected liberty interest in the receipt of a parole
21 release date, a liberty interest that is protected by the procedural safeguards of the
22 Due Process Clause”].)

1 In short, the granting of parole is an essential part of our criminal justice
2 system and is intended to assist those convicted of crime to integrate into society as
3 constructive individuals *as soon as possible* and alleviate the cost of maintaining
4 them in custodial facilities. *In Re Vasquea* (2009) 170 Cal. App. 4th 370, citing
5 *Morrissey v. Brewer, supra*, 408 U.S. at p. 477; *People v. Vickers* (1972) 8 Cal.3d
6 451, 455, 458. Release on parole is said to be the rule, rather than the exception
7 (*In re Smith* (2003) 114 Cal.App.4th 343, 351 [7 Cal. Rptr. 3d 655], citing *Pen.*
8 *Code*, § 3041, *subd. (a)*) and the Board is required to set a release date unless it
9 determines that "the gravity of the current convicted offense ... is such that
10 consideration of the public safety requires a more lengthy period of incarceration ...
11 ."*(Pen. Code, § 3041, subd. (b).)*

16 **B. The Purpose Of The Parole Hearing**

17 When assessing whether a life prisoner will pose an unreasonable risk of
18 danger to society if released from prison, the Parole Board considers all relevant,
19 reliable information available on a case-by-case basis. The regulations provide a
20 nonexclusive list of circumstances tending to show suitability or unsuitability for
21 release. (Cal.Code Regs. Title 15 § 2402, subds. (c), (d).) Factors tending to
22 indicate suitability include (1) the absence of a juvenile record, (2) a stable social
23 history, (3) signs of remorse, (4) the motivation for the crime was significant life
24 stress, (5) battered woman syndrome, (6) no significant history of violent crime,
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1 (7) the inmate's age, (8) realistic plans for the future, and (9) institutional behavior.

2 (*Ibid.*) Circumstances tending to show unsuitability include (1) the commitment

3 offense was committed "in an especially heinous, atrocious or cruel manner," (2) a

4 previous record of violence, (3) an unstable social history, (4) sadistic sexual

5 offenses, (5) psychological factors, and (6) serious misconduct while incarcerated.

6 (*Ibid.*) "In sum, the Penal Code and corresponding regulations establish that the

7 fundamental consideration in parole decisions is public safety...."[See Footnote 6]

8 (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.)

9 The "core determination" thus "involves an assessment of an inmate's *current*

10 dangerousness." *In re Lawrence, supra*, 44 Cal.4th at p. 1205. The Board is

11 authorized "to identify and weigh only the factors relevant to predicting 'whether

12 the inmate will be able to live in society without committing additional antisocial

13 acts.'" *In re Lawrence, supra*, 44 Cal.4th at pp. 1205-1206 [quoting *In re*

14 *Rosenkrantz, supra*, 29 Cal.4th at p. 655].) "[I]n directing the Board to consider the

15 statutory factors relevant to suitability, many of which relate to postconviction

16 conduct and rehabilitation, the Legislature explicitly recognized that the inmate's

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24 6 The regulation specifies the factors to be considered in determining whether the offense was committed

25 in an especially heinous, atrocious or cruel manner as: "(A) Multiple victims were attacked, injured or killed in the

26 same or separate incidents. (B) The offense was carried out in a dispassionate and calculated manner, such as an

27 execution-style murder. (C) The victim was abused, defiled or mutilated during or after the offense. (D) The offense

28 was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. (E) The

motive for the crime is inexplicable or very trivial in relation to the offense." (Cal.Code Regs., tit. 15, § 2402, subd.

(c)(1).)

1 threat to public safety could be minimized over time by changes in attitude,
2 acceptance of responsibility, and a commitment to living within the strictures of
3 the law." *In re Lawrence, supra*, 44 Cal.4th at p. 1219.) As a result, the "statutory
4 and regulatory mandate to normally grant parole to life prisoners who have
5 committed murder means that, particularly after these prisoners have served their
6 suggested base terms, the underlying circumstances of the commitment offense
7 alone rarely will provide a valid basis for denying parole when there is strong
8 evidence of rehabilitation and no other evidence of current dangerousness." *In re*
9 *Lawrence, supra*, 44 Cal.4th at p. 1211.

13 The Board can, of course, rely on the aggravated circumstances of the
14 commitment offense as a reason for finding an inmate unsuitable for parole,
15 however, "the aggravated nature of the crime does not in and of itself provide some
16 evidence of *current* dangerousness to the public unless the record also establishes
17 that something in the prisoner's pre- or post-incarceration history, or his ... current
18 demeanor and mental state, indicates that the implications regarding the prisoner's
19 dangerousness that derive from his ... commission of the commitment offense
20 remain probative to the statutory determination of a continuing threat to public
21 safety." *In re Lawrence, supra*, 44 Cal.4th at p. 1214.

26 C. The Purpose of Judicial Review

27 California's courts are empowered to review the factual basis of the
28 Board's decision to deny parole so as to determine whether it is supported by some

1 evidence of the factors specified by statute and regulation. *In re Rosenkrantz*,
2 *supra*, 29 Cal.4th at p. 667; *In re Dannenberg* (2005) 34 Cal.4th 1061. In *In re*
3 *Lawrence, supra*, 44 Cal.4th at page 1212, the California Supreme Court clarified
4 the applicable standard of review: “[W]hen a court reviews a decision of the Board
5 or the Governor, the relevant inquiry is whether some evidence supports the
6 *decision* of the Board or the Governor that the inmate constitutes a current threat to
7 public safety, and not merely whether some evidence confirms the existence of
8 certain factual findings.” The standard is “unquestionably deferential,” and
9 “‘limited to ascertaining whether there is some evidence in the record that supports
10 the [Board’s] decision.’” *In re Lawrence, supra*, 44 Cal.4th at p. 1210. The
11 standard “certainly is not toothless, and ‘due consideration’ of the specified factors
12 requires more than rote recitation of the relevant factors with no reasoning
13 establishing a rational nexus between those factors and the necessary basis for the
14 ultimate decision-the determination of current dangerousness.” *In re Lawrence,*
15 *supra*, 44 Cal.4th at p. 1210. The Court’s inquiry thus is “not merely whether an
16 inmate’s crime was especially callous, or shockingly vicious or lethal, but whether
17 the identified facts are *probative* to the central issue of *current* dangerousness
18 when considered in light of the full record before the Board.” *In re Lawrence,*
19 *supra*, 44 Cal.4th at p. 1221. The Board must articulate a “rational nexus” between
20 the facts of the commitment offense and the inmate’s current threat to public safety.
21 *In re Lawrence, supra*, 44 Cal.4th at p. 1227.

22 23 **D. The Application of The Facts Of This Case To The Law**

24 In the instant case, it is clear that Mr. Nary’s state and federal constitutional
25 rights were violated because the Board denied his parole notwithstanding the
26 overwhelming facts showing his suitability for parole release. In other words, the
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1 uncontested evidence as established in the record show that the homicide was an
2 isolated act of violence flowing from a chance encounter wherein Mr. Pifarre
3 approached Mr. Nary, and as the Board itself noted, with a likely intent to explore
4 possible sexual activity, not the promised ride from the Palladium back to
5 Alameda.
6

7
8 Indeed, in assessing Mr. Nary's current dangerousness, it is noteworthy what
9 this case *did not involve*. Mr. Nary did not initiate the contact with Mr. Pifarre that
10 tragic night. Mr. Nary was not on the prowl to commit a hate crime against a gay
11 man. He was, as the Board noted but then ignored, a vulnerable individual.
12

13 All of this is not meant to suggest that Mr. Nary is not responsible for the
14 crime. To the contrary, since 1996 he has repeatedly admitted to the crime.
15 Rather, these observations are offered to further show that the Board's denial of
16 parole was arbitrary and capricious because, against the uncontested record
17 showing rehabilitation at the parole hearing, the unique events of that March 1996
18 evening which downwardly spiraled into Mr. Nary's isolated act of violence will
19 never be repeated. Simply put, there is no "rational nexus" between the facts of
20 Mr. Nary's commitment offense and the Board's decision that he is a current threat
21 to public safety. As such, the Board's parole denial is unconstitutional.
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26 **III. THE BOARD'S DECISION FINDING UNSUITABILITY FOR**
27 **PAROLE IS ARBITRARY AND CAPRICIOUS, IN VIOLATION**
28 **OF MR. NARY'S DUE PROCESS RIGHTS UNDER THE**
CALIFORNIA CONSTITUTION.

1 The Board violated Mr. Nary's due process rights under the California
2 Constitution when it denied a finding of parole suitability at the June 24, 2009
3 hearing. Article I § 7(a) of the California Constitution guarantees that every
4 person shall be afforded due process of law. The California Penal Code and
5 corresponding regulations that govern the Governor's decision to reverse a grant of
6 parole creates a liberty interest that is protected by due process. (*In re Powell*,
7 (1988) 45 Cal. 3d 894; *In re Rosenkrantz*, (2002) 29 Cal. 4th 616.) The California
8 Supreme Court has recognized that this liberty interest "cannot exist in any
9 practical sense without a remedy against its abrogation." (*In re Lawrence*, (2008)
10 44 Cal.4th 1181 at p. 1205 [quoting *Rosenkrantz*, *supra*, at p. 677].) Parole
11 applicants are entitled to "constitutionally adequate and meaningful review" of
12 parole decisions for "some evidence" to support the conclusion that the inmate is
13 unsuitable for parole because he or she is currently dangerous. (*Id.*)

14
15 In this case, there is a complete lack of "some evidence" or any rational
16 nexus from the evidence to support the conclusion that Mr. Nary is unsuitable for
17 parole because he is a currently dangerous. To the contrary, the only evidence
18 presented at the parole hearing establishes that Mr. Nary is not a danger to the
19 public.

20 1. Nature of the Commitment Offense

21 a. The Facts Do Not Support the Board's Finding

22 The Board stated that the "heinous, atrocious and cruel manner" of the
23 commitment offense weighed heavily against parole. (Gruel Declaration, Exhibit
24 C, at p. 104). Yet, the Board never provided any nexus, rational or otherwise, how
25 this observation, 14 years after the crime, served to support a conclusion that Mr.
26 Nary was a current danger to society. In fact, the Board contradicted its own
27 "analysis" by acknowledging that Mr. Nary was vulnerable that night which
28 erupted into violence. There was no evidence that Mr. Nary "mutilated" Mr.

1 Pifarre whatsoever as fabricated by the Board. *Id.* at 104. There is no Board
2 explanation how, in the whirlwind of the fight in the apartment, Mr. Nary's failure
3 to check on Mr. Pifarre's condition or call an ambulance is now a true predictor of
4 a current tendency to violence.

5 Finally, the Board bizarrely labeled the "motive for the crime" as "trivial."
6 Exhibit C, at 105. Apart from being a completely puzzling statement, it provides
7 clear insight into the Board's arbitrary and capricious application of the law to Mr.
8 Nary. Would the Board make such a cavalier statement if Mr. Nary had been an
9 intoxicated, 18 year old female who was led back to a man's apartment on the
10 "promise" of ride home as the target of a 53 year old man's sexual desire?

11 In short, a denial based on the nature of the crime must also be supported by
12 evidence in the record of "the prisoner's pre- or post-incarceration history, or his or
13 her current demeanor and mental state," that indicates that the implications
14 regarding dangerousness that derive from the commission of the commitment
15 offense "remain probative to the statutory determination of a continuing threat to
16 public safety." *In Re Lawrence*, at p. 1214. Absent such evidence, a denial based
17 on the nature of the commitment offense violates due process. (*Id.* at pp. 1213-14.)

18 b. The Passage of Time Dilutes The Nexus to Current Danger

19 As the California Supreme Court recognized in *Lawrence*, the aggravated
20 nature of the commitment offense loses its predictive value over time. (*Id.* at p.
21 1219.) "[T]he Legislature explicitly recognized that an inmate's threat to public
22 safety could be minimized over time by changes in attitude, acceptance of
23 responsibility, and a commitment to living within the strictures of the law," and the
24 Board and the Governor are required to consider those rehabilitative factors in
25 determining parole suitability. (*Id.*) Thus, a temporally remote and unchanging
26 commitment offense will gradually lose all predictive value given intervening
27 years of an inmate's demonstrated good conduct and rehabilitation "specifically
28 tailored" to address the causative factors of the crime. (*Id.* at pp. 1219, 1226.) A

1 crime which indicated current dangerousness only a few years after its commission
2 cannot continue to indicate current dangerousness many years later in the face of
3 legitimate rehabilitation. To find otherwise would not only run afoul of the statute,
4 but also would contravene the rehabilitative purpose of the parole system. (*Id.* at p.
5 1220, n.19.)

6 There is no evidence in the record to support the Board's conclusion that Mr.
7 Nary poses a current risk of danger to the public. The Board's failure to identify
8 any evidence that Steven Nary is currently dangerous renders its decision arbitrary
9 and capricious in violation of due process.

10 c. Other Crimes Found Not To Be "Heinous" For Parole Purposes

11 One needs only to read the recent case law concerning parole matters to realize
12 that Mr. Nary's crime was not "heinous" for suitability for parole purposes. First,
13 second degree murder is defined as the unlawful killing of a human being with
14 malice aforethought, but without the additional elements--i.e., willfulness,
15 premeditation, and deliberation--that would support a conviction of first degree
16 murder. *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102. All second degree
17 murders, by definition, involve callousness or an indifference to the feelings and
18 suffering of others. *In re Smith, supra*, 114 Cal.App.4th at p. 366.) Because parole
19 is the rule, rather than the exception (*id.* at p. 351), the inquiry must be whether the
20 particular crime was "exceptionally callous," so as to be described as "especially
21 heinous, atrocious or cruel." (*Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).*) [*384]

22 *In Re Vasquez*, the Appellate Court reversed the Governor's denial of parole
23 because he found that Vasquez demonstrated an exceptionally callous disregard for
24 human suffering when he continued to hit and kick the victim after he had stopped
25 fighting. (*Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(D).*) The *Vasquez* Court
26 noted that "any murder is atrocious and hitting and kicking an unconscious
27 opponent shows a callous disregard for human suffering, *but the regulation*
28 *requires some evidence of exceptional callousness.* Here, there was no evidence

1 showing how long or vigorously Vasquez beat the victim after they stopped
2 fighting. Standing alone, the evidence cited by the Governor did not show
3 *exceptional* callousness and was insufficient to show that this particular crime was
4 *especially* heinous, atrocious or cruel. (*Cal. Code Regs., tit. 15, § 2402, subd.*
5 *(c)(1).*) The Court found that viewing the overall nature of this second degree
6 murder, it did not appear to be particularly egregious and it appears to be *less*
7 egregious than most. (Cf. *Rosenkrantz, supra, 29 Cal.4th at p. 678* [after a week of
8 planning and rehearsal, defendant killed the victim by firing 10 shots at close range
9 and at least three or four shots into the victim's head as he lay on the pavement].)

10 Moreover, in *In Re Dannenberg* (2009) 173 Cal. App. 4th 237, the Court
11 found that striking one's wife several times with a pipe wrench during a domestic
12 fight and, after she collapsed and passed out, placing her head in a bathtub so as to
13 drown was not, standing alone, an indicator of current dangerousness. Dannenberg
14 had engaged in extensive rehabilitation, gained insight into his offense, expressed
15 remorse and made realistic parole plans. The Court reversed the Governor's denial
16 of parole, finding that: "[T]he underlying circumstances of the commitment offense
17 alone rarely will provide a valid basis for denying parole when there is strong
18 evidence of rehabilitation and no other evidence of current dangerousness."
19 (*Lawrence, supra, 44 Cal.4th at p. 1211.*) Here, as in *Lawrence*, there is
20 uncontradicted evidence of Dannenberg's rehabilitation and no other evidence that
21 he currently poses a danger to society.

22 The nature of the commitment offense "does not in and of itself provide some
23 evidence of *current* dangerousness to the public unless the record also establishes
24 that something in the prisoner's pre- or post-incarceration history, or his or her
25 current demeanor and mental state, indicates that the implications regarding the
26 prisoner's dangerousness that derive from his or her commission of the
27 commitment offense remain probative to the statutory determination of a
28 continuing threat to public safety." (*Lawrence, supra, 44 Cal.4th at p. 1214.*)

1 In this case, there is simply nothing in Mr. Nary's record to suggest that the
2 underlying unique circumstances of the 1996 homicide still renders him a current
3 danger to the community.

4 2. Claims That Mr. Nary Minimizes His Conduct

5 The Board stated that Mr. Nary continues to minimize his conduct by "failing to
6 come to terms with the issue as why this crime occurred. Exhibit C, at 107. A
7 review of the transcript and exhibits show this to be utterly false.

8 Mr. Nary has repeatedly acknowledged his guilt in this crime and has taken full
9 responsibility for his offense. [See Footnote 7]. He did not, contrary to the
10 Board's comment, put "blame on the victim." *Id.* The record is completely devoid
11 of the Board's "finding" that Mr. Nary blamed Mr. Pifarre or that his remorse was
12 any less than heartfelt and genuine.

13 3. Remorse and Insight

14 In fact, against the backdrop of relevant case law, to deny Mr. Nary
15 parole on a claim that he lacks remorse or insight into his crime is nothing less than
16 arbitrary and capricious. In *Shaputis*, supra, the inability of the inmate "to gain
17 insight into his antisocial behavior despite years of therapy and rehabilitative
18 'programming,'" was some evidence of his dangerousness and unsuitability for
19 parole (*Shaputis*, supra, 44 Cal.4th at p. 1260) because (1) his killing his wife "was
20 the culmination of many years of [his] violent and brutalizing behavior toward the
21 victim, his children, and his previous wife" (*id.* at p. 1259), (2) his continuing
22 claim that the killing was unintentional was contrary to undisputed evidence that
23 the gun he used "could not have been fired accidentally, because the hammer was
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25
26 7 -- In an apparent effort to conjure up an effort to minimize conduct, the Board stated to Mr. Nary: You continue
27 to maintain that you got separated from a buddy, actually knowing this person had been arrested. You had this
28 knowledge when you were initially questioned, but you didn't reveal it until the Deputy Commissioner found it in
the file." Exhibit C, at 107. The problem with this comment (aside that its totally not relevant to anything at the
Board hearing) is that Mr. Nary was never asked to explain exactly how or why he get separated from his friend.
Mr. Nary certainly never lied to the Board about his friend's whereabouts that night or deny that his buddy had been
arrested.

1 required to be pulled back into a cocked position to enable the trigger to function,
2 and the gun had a 'transfer bar' preventing accidental discharge" (*id. at pp. 1248,*
3 *1260*), and (3) his recent psychological reports reflected that his character, as
4 shown by the killing and his "history of domestic abuse," "remain[ed] unchanged"
5 at the time of the parole hearing (*id. at p. 1260*).

6 Likewise, in *In Re McClendon*, (2003) 113 Cal.App. 4th 315, the inmate arrived
7 around midnight at the home of his estranged wife; was wearing rubber gloves and
8 carrying a loaded handgun, a wrench, and a bottle of industrial acid; "barged ...
9 into" the residence; aimed the gun at his wife and the man with whom she was
10 sitting on the couch and talking; shot his wife in the head; and, when the gun
11 jammed, struck the man two or three times in the head with the wrench.
12 (*McClendon, supra*, 113 Cal.App.4th at pp. 319-320, 322.) The inmate claimed the
13 shooting was unintended, and he showed no remorse for the killing and attack on
14 the male victim. (*Id. at p. 322.*) Accordingly, his failure to accept complete
15 responsibility for killing his estranged wife--instead claiming it was unplanned,
16 despite overwhelming evidence that it was a calculated attack--was some evidence
17 of his continuing dangerousness at the time of the parole hearing. (*Ibid.*)

18 In *Re Van Houten*, (2004) 116 Cal.App. 4th 339, the inmate, a disciple of
19 Charles Manson, "felt 'left out' [because she was not asked to take part in the brutal
20 murders of Sharon Tate, Voiccek Frykowski, Abigail Folger, Jay Sebring, and
21 Steven Parent] and wanted to be included next time." (*Van Houten, supra*, 116
22 Cal.App.4th at pp. 344-345.) Getting her wish, she participated in the fatal
23 stabbings and "gratuitous mutilation" of two victims, and said that "she had
24 stabbed a woman who was already dead, and that the more she did it the more fun
25 it was." (*Id. at pp. 346, 350-351.*) Although she "did not contest the Board's
26 version of events" (*id. at p. 355, fn. 9*), she minimized her culpability and
27 "deflect[ed] responsibility for her actions on Manson." (*Id. at p. 355.*) In light of
28

1 the "egregious character of the offenses" and her "unstable social history," the
2 inmate's "attitude" about the murders was some evidence she remained "an
3 unstable person" in need of "continued therapy and programming" to obtain
4 "further insight" concerning her "vicious and evilly motivated" actions before it
5 could be said that she no longer posed a risk to public safety. (*Id. at pp. 353, 355-*
6 *356.*)

7 Here, in contrast to the situations above, Mr. Nary accepted "full responsibility"
8 for his crime and expressed complete remorse; he participated effectively in
9 rehabilitative programs while in prison; and the psychologists who evaluated him
10 opined that he was a low risk of danger to the public if released on parole.

11 4. Dr. Roske's March 19, 2009 Evaluation Report

12 The favorable evaluation report finding a "relatively low risk of violence in a
13 free community" was disregarded by the Board as incomplete. Exhibit C, at 108.
14 Instead of fleshing out alleged concerns about why the Roske report did not
15 mention the CDC 115 in 2000, Mr. Nary's two juvenile offenses or the use of a
16 qualifying language that Mr. Nary was a "relatively low risk," the Board
17 speculated that the report was unreliable. The Board's reliance on guesswork,
18 along with violations of its own procedural rules as seen with the ADA's improper
19 cross-examination of Mr. Nary render the entire process in violation of due
20 process. At a minimum, the Court should remand this matter back to the Board
21 for further hearings with respect to these matters.

22 5. Parole Plans

23 Although acknowledging the stack of letters presented in support of Mr. Nary's
24 parole plans, the Board gave simply elected not to give these letters any merit. The
25 numerous letters, coupled with Mr. Nary's post-commitment educational and
26 employment achievements, belie the Board's conclusion that the parole plans were
27 without substance. In fact, three correctional councilors viewed Mr. Nary's parole
28

1 plans as “solid” in such areas of housing and employment. (Gruel Declaration,
2 Exhibit A, pages 17-18).

3 **IV. THE BOARD’S PAROLE DENIAL LIKEWISE FAILS TO**
4 **SATISFY FEDERAL DUE PROCESS BECAUSE THERE IS NO**
5 **EVIDENCE THAT MR. NARY POSES A CURRENT DANGER TO**
6 **SOCIETY.**

7 **1. Like California Due Process, Federal Due Process Requires Some**
8 **Evidence of Current Dangerousness in Order to Support a Parole**
9 **Denial.**

10 The Due Process Clause of the United States Constitution states that no state
11 shall “deprive any person of life, liberty, or property without due process of law.”
12 (U.S. Const. amend. XIV.) To establish a due process violation, a petitioner must
13 show that the state interfered with a federally protected liberty interest. (*Kentucky*
14 *Dep’t of Corrections v. Thompson*, (1989) 490 U.S. 454, 460.)

15 States create federally protected liberty interests in parole by using
16 “mandatory language” in statutes or regulations – language that requires a
17 decisionmaker to reach a certain outcome if “specified substantive predicates” are
18 met. (*Greenholtz v. Inmates of the Nebraska Penal and Correction Complex*,
19 (1979) 422 U.S. 1, 12; *Bd. of Pardons v. Allen*, (1987) 482 U.S. 369, 376.) Two
20 U.S. Supreme Court decisions provide examples of such mandatory language.
21 (*Greenholtz*, at p. 11; *Allen*, at p. 376). In both *Greenholtz* and *Allen*, state parole
22 statutes provided that the parole authority “shall” order release *unless* certain risks
23 were present; this mandatory language was sufficient to create a federally protected
24 liberty interest. (*Greenholtz*, at p. 11; *Allen*, at p. 376). Because the statutory
25 language governing parole in California is virtually identical to the language in
26 *Greenholtz* and *Allen*, the Ninth Circuit confirmed that California parole applicants
27
28

1 have a federally protected liberty interest, created by the statute's mandatory
2 language. (*McQuillion v. Duncan*, (9th Cir. 2002) 306 F.3d 895, 898.)⁸

3 Federal due process, like California due process, requires that a parole denial
4 be supported by "some evidence." (*Jancsek v. Oregon Bd. of Parole*, (9th Cir.
5 1987) 833 F.2d 1389.) The Ninth Circuit adopted this "some evidence" standard
6 from *Superintendent v. Hill*, (1985) 472 U.S. 445, 456, the same case relied upon
7 by the *Rosenkrantz* court. (*Rosenkrantz*, 29 Cal. 4th 616 at p. 656.) Rather than
8 mere procedural safeguards, the standard requires substantive evidence that has
9 "real probative value" and "indicia of reliability." (*Rosenkrantz v. Marshall*, (C.D.
10 Cal. 2006) 444 F. Supp. 2d 1063, 1084; *Jancsek*, at p. 1389.)

11 In laying out the "some evidence" standard, the *Lawrence* court quoted with
12 approval an extensive passage from a Ninth Circuit case, *Biggs v. Terhune*, (9th
13 Cir. 2003) 334 F.3d 910, further indicating that the state "some evidence" standard
14 is meant to be identical to the federal "some evidence" standard. Emphasizing the
15 importance of looking beyond the factors of the commitment offense, the Court
16 quoted *Biggs*: "To insure that a state-created parole scheme serves the public
17 interest purposes of rehabilitation and deterrence, the Parole Board must be
18 cognizant not only of the factors required by state statute to be considered, but also
19 the concepts embodied in the Constitution requiring due process of law. . . . We
20 must be ever cognizant that '[d]ue [p]rocess is not a mechanical instrument. It is
21 not a yardstick. It is a process. It is a delicate process of adjustment inescapably
22 involving the exercise of judgment by those whom the Constitution entrusted with
23 the unfolding of the process.' A continued reliance in the future upon an
24 unchanging factor, the circumstance of the commitment offense and conduct prior
25

26 8 The language in the California Penal Code is practically identical to the statutory language in *Greenholtz*
27 and *Allen*. (Compare Cal. Pen. Code §3041(b) (2008) ["The panel or the board, sitting en banc, *shall* set a release
28 date *unless* it determines that . . . consideration of the public safety requires a more lengthy incarceration."] and
Greenholtz, at 11 ["[T]he Board of Parole . . . *shall* order [the inmate's] release *unless*" certain risks are present.];
Allen, at 376 ["[T]he board *shall* release on parole . . . *when* in its opinion there is reasonable probability that the
prisoner can be released without detriment to the prisoner or to the community."].)

1 to imprisonment, runs contrary to the rehabilitative goals espoused by the prison
2 system and could result in a due process violation.” (*Lawrence*, 44 Cal. 4th at n.20
3 [quoting *Biggs*, 334 F.3d at 916-17].) Thus, in endorsing the current
4 dangerousness approach and emphasizing that the Board and the Governor must
5 take rehabilitation into account, the California Supreme Court clearly believed that
6 it was mirroring the federal standard.

7 Thus, for all of the above reasons and given the record in this case, Mr. Nary’s
8 federal constitutional rights were also violated.

9
10 **V. RECENT STATE CASE LAW SUPPORTS A**
11 **SUITABILITY FOR PAROLE FINDING**

12 It is instructive that on March 16, 2010, California’s Court of Appeal for the
13 First Appellate District granted parole in two (2) cases in accordance with the state
14 Supreme Court’s analysis in *In Re Lawrence* (2008) 44 Cal.4th 1181. The two (2)
15 cases, *In Re Moses* (2010) 182 Cal.App. 4th 1279 and *In Re Juarez* (2010) 182 Cal.
16 App. 4th 1316 continued the proper analysis for parole suitability which was not
17 followed in Steven Nary’s hearing.

18 *Moses* involved his close range shooting of another man resulting in a jury
19 finding of second degree murder. In reversing the Governor’s denial of parole
20 based on his claim that the murder was accomplished in a “calculated and
21 dispassionate manner,” the Court found no evidence to support such a contention
22 given that on that day Moses had “copious consumption of alcohol” that day and
23 that if anything, the shooting was a “crime of passion.” Although deplorable, the
24 Court concluded that there was nothing uncommon in the murder which made it
25 exceptionally callous. The paramount consideration, said the Court, is whether the
26 inmate currently poses a threat to public safety. Indeed, the Court reinforced that
27 “a policy of rejecting parole solely upon the basis of the type of offense, without
28 individualized treatment and due consideration, deprives an inmate of due process

1 of law. In granting parole, the Court stated that the Governor cannot simply ignore
2 the undisputed evidence of Moses's taking responsibility and repeated expressions
3 of remorse.

4 That same day, the Court in *Juarez*, reversed a Board's denying parole because
5 there was no evidence to support its finding that the inmate poses a danger to
6 public safety if released on parole. High on PCP, Juarez drove a car which killed
7 someone. Although he had eight disciplinary actions while incarcerated, Juarez
8 nonetheless completed numerous self-help courses and had significant work
9 achievements. As with Steven Nary, the psychological evaluations concluded that
10 he was a low risk for violence if released on parole. The Court concluded that there
11 was no evidence in the record to support denying parole. Juarez's actions, while
12 criminal and reckless, were not committed in an especially heinous, cruel or
13 callous manner that is probative of his current dangerousness.

14 Likewise, applying the recent case law, and as supported by the record in this
15 case, nothing in Steven Nary's commitment offense is probative of current
16 dangerousness. Moreover, the Board failed to articulate any evidence or provide
17 any rational nexus supporting an unsuitability finding.

18 Rather, since his 14 years of incarceration, Mr. Nary has expressed remorse,
19 gained insight into the offense, improved himself and thereby worked to earn
20 society's trust.

21 VI. REMAND FOR FURTHER BOARD HEARINGS

22 It is clear that the Board conducted Mr. Nary's hearing contrary to the
23 constitutional guarantees of due process. Aspects of the paroles proceedings were
24 in violation of the Board's own rules. Certain "findings," such as what did Dr.
25 Roske mean or know were left to guesswork. Finally, the Board's decision itself if
26 devoid of proper analysis as required under the case law. As a consequence, one
27 remedy in this matter is to remand the case back to Avenal State Prison for further
28 parole proceedings. See *In Re Vasquez* (2009) 172 Cal.App.4th 1185.

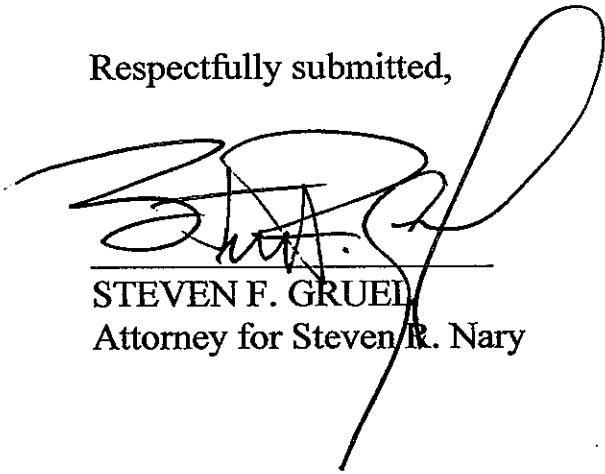
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2 **VII. CONCLUSION**

3 For the reasons discussed above, the factors cited by the Board in its parole
4 denial fail to provide any evidence, much less "some evidence," that Mr. Nary
5 presents a current risk of danger. There is no causal nexus between the nature of
6 Mr. Nary's commitment offense and his current dangerousness. Mr. Nary's
7 statements before the Board, the Board's own findings, and two psychologists all
8 acknowledge that Mr. Nary has accepted responsibility for his crime and shown
9 genuine remorse.

10 Mr. Nary respectfully asks this Court to reverse the Board's denial of parole
11 and issue a Writ of Habeas Corpus directing that he be released.

12
13 Dated: July 30, 2010

Respectfully submitted,

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17 STEVEN F. GRUEL
18 Attorney for Steven R. Nary
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PROOF OF SERVICE

**IN THE SUPREME COURT
FOR THE STATE OF CALIFORNIA**

**STEVEN ROBERT NARY, Petitioner v. JAMES D. HARTLEY, Warden of the
Avenal California State Prison, Respondent**

I, Steven F. Gruel, hereby declare that I am a citizen of the United States, over the age of eighteen (18) and my work address is 315 Montgomery Street, 9th Floor, San Francisco, California 94104; that I am not a party to the within action; and that on July 30, 2010, I caused to be served a copy of:

PETITION FOR WRIT OF HABEAS CORPUS; and

**DECLARATION OF STEVEN F. GRUEL AND EXHIBITS IN
SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

on all interested parties in said cause addressed as follows:

By Hand-Delivery

Nancy Tung
Assistant District Attorney
850 Bryant Street, Room 322
San Francisco, California 94103

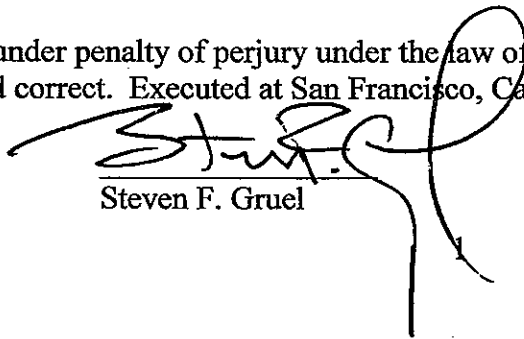
Superior Court
City and County of San Francisco
850 Bryant Street
San Francisco, California 94103

California Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, California 94102

By U.S Mail

Jerry Brown, Attorney General, State of California
California Department of Justice
P.O. Box 944255
Sacramento, California 94244-2550

I declare under penalty of perjury under the law of the State of California that the above is true and correct. Executed at San Francisco, California this 30th day of July 2010.


Steven F. Gruel