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

RICHARD ERWIN WALKER,

Petitioner,

No. CIV S-09-525 WBS CHS P

vs.

J. HAVILAND,

Respondent.

FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner Richard Erwin Walker is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner is currently serving a sentence of 18 years to life following his conviction in Riverside County for second degree murder with use of a firearm. Here, petitioner challenges the execution of his sentence, and specifically, the September 20, 2007 decision of the Board of Parole Hearings that he was not suitable for parole. The petition presents various grounds for relief, each contesting the Board’s denial of parole as a violation of due process. Based on a thorough review of the record and applicable law, it is recommended that the petition be denied. The Board’s 2007 decision to deny parole was supported by some evidence in the record and accordingly did not violate petitioner’s right to due process of law.

1 II. BACKGROUND

2 Although petitioner declined to discuss the circumstances of his commitment  
3 offense at his 2007 parole suitability hearing, the following facts were set forth by the presiding  
4 commissioner and considered by the panel:

5 On November 20, 1988, the inmate [petitioner], along with another  
6 unknown male, contacted the victim, David Ringo, to arrange a  
7 meeting. Inmate suspected the victim of stealing his radio and  
8 wanted to confront the victim about it. When they arrived at the  
9 meeting location, the inmate confronted Ringo about his radio.  
10 The victim told Walker he did not steal the radio and that he would  
11 not do something like that to him. The inmate then pointed a gun  
12 at the victim [and] told him to get down on his knees. The victim  
13 pled for the inmate not to shoot him. The inmate told the other  
14 male who was there to kick him. The victim then stood up and  
15 began running. Inmate fired one shot from the gun, and the victim  
16 fell to his knees -- collapsed and [fell] face first on the ground. It  
17 appear[ed] that the victim was not breathing, and... the inmate then  
18 told the other male to get his pickup truck. They loaded the body  
19 into the truck, and subsequently dumped the body in some orange  
20 groves. The workers of the ranch found the body the following  
21 day.

22 (Pet. Ex. A at 15-16.)

23 Petitioner pleaded guilty to second degree murder with use of a firearm and was  
24 sentenced to a term of 18 years to life in state prison. His minimum eligible parole date passed  
25 on October 12, 2000. On September 20, 2007, a panel of the Board of Prison Terms ("Board")  
26 conducted a hearing to determine petitioner's suitability for parole and concluded that he would  
pose an unreasonable risk of danger to society or a threat to public safety if released and thus that  
he was not suitable for parole.

Petitioner challenged the Board's decision in a petition for writ of habeas corpus  
to the Riverside County Superior Court. The petition was denied without a written opinion on  
June 20, 2008. Subsequent petitions filed to the California Court of Appeal, Fourth District, and  
the California Supreme Court were likewise denied.

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1 III. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

2 An application for writ of habeas corpus by a person in custody under judgment of  
3 a state court can be granted only for violations of the Constitution or laws of the United States.  
4 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*  
5 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (*citing Engle v. Isaac*, 456 U.S. 107, 119 (1982)).

6 This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to,  
7 the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Lindh v. Murphy*, 521  
8 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). Under  
9 AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in  
10 state court proceedings unless the state court’s adjudication of the claim:

11 (1) resulted in a decision that was contrary to, or involved an  
12 unreasonable application of, clearly established Federal law, as  
determined by the Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an unreasonable  
14 determination of the facts in light of the evidence presented in the  
State court proceeding.

15 28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*  
16 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

17 IV. DUE PROCESS

18 The Due Process Clause of the Fourteenth Amendment prohibits state action that  
19 deprives a person of life, liberty, or property without due process of law. A person alleging a due  
20 process violation must first demonstrate that he or she was deprived of a protected liberty or  
21 property interest, and then show that the procedures attendant upon the deprivation were not  
22 constitutionally sufficient. *Kentucky Dep’t. of Corrections v. Thompson*, 490 U.S. 454, 459-60  
23 (1989); *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002).

24 A protected liberty interest may arise from either the Due Process Clause itself or  
25 from state laws. *Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The United States  
26 Constitution does not, in and of itself, create a protected liberty interest in receipt of a parole

1 date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). If a state’s statutory parole scheme uses  
2 mandatory language, however, it “creates a presumption that parole release will be granted”  
3 when or unless certain designated findings are made, thereby giving rise to a constitutional  
4 liberty interest. *McQuillion*, 306 F.3d at 901 (*quoting Greenholtz v. Inmates of Nebraska Penal*,  
5 442 U.S. 1, 12 (1979)).

6 In California, Penal Code section 3041 sets forth the legislative standards for  
7 determining parole for life-sentenced prisoners such as petitioner. Subsection (a) provides that  
8 “[o]ne year prior to the inmate’s minimum eligible parole release date a panel... shall meet with  
9 the inmate and shall normally set a parole release date.” Cal Penal Code §3041(a). Subsection  
10 (b) provides an exception to the regular and early setting of a lifer’s term, if the Board determines  
11 “that the gravity of the current convicted offense or offenses, or the timing and gravity of current  
12 or past convicted offense or offenses, is such that consideration of the public safety requires a  
13 more lengthy period of incarceration...” Cal. Penal Code §3041(b). Due to the mandatory  
14 language in the statute, California state prisoners who have been sentenced to prison with the  
15 possibility of parole have a clearly established, constitutionally protected liberty interest in  
16 receipt of a parole release date. *Irons v. Carey*, 505 F.3d 846, 850-51 (9th Cir. 2007) (*citing Sass*  
17 *v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006)); *Biggs v. Terhune*, 334 F.3d  
18 910, 914 (9th Cir. 2003); *McQuillion*, 306 F.3d at 903; and *Allen*, 482 U.S. at 377-78 (*quoting*  
19 *Greenholtz*, 442 U.S. at 12)).

20 The full panoply of rights afforded a defendant in a criminal proceeding is not  
21 constitutionally mandated in the context of a parole proceeding. *See Pedro v. Or. Parole Bd.*,  
22 825 F.2d 1396, 1398-99 (9th Cir. 1987). The Supreme Court has held that a parole board’s  
23 procedures are constitutionally adequate if the inmate is given an opportunity to be heard and a  
24 decision informing him of the reasons he did not qualify for parole. *Greenholtz*, 442 U.S. at 16.

25 Additionally, as a matter of *state* constitutional law, denial of parole to California  
26 inmates must be supported by “some evidence” demonstrating future dangerousness. *Hayward v.*

1 *Marshall*, No. 06-55392, slip op. at 34-35 (9th Cir. April 22, 2010) (en banc) (citing *In re*  
2 *Rosenkrantz*, 59 P.3d 174, 210 (Cal. 2002), *In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008), and  
3 *In re Shaputis*, 190 P.3d 573, 582 (Cal. 2008)). The federal Due Process Clause requires, in turn,  
4 that California comply with its own quantum of evidence requirement for parole suitability  
5 determinations. *See Pearson v. Muntz*, No. 08-55728, slip op. at 5 (9th Cir. May 24, 2010) (per  
6 curiam). A court reviewing a California inmate’s due process claim in the parole context must  
7 “decide whether the California judicial decision approving the... decision rejecting parole was an  
8 “unreasonable application” of the California ‘some evidence’ requirement, or was “based on an  
9 unreasonable determination of the facts in light of the evidence.” *Hayward v. Marshall*, slip op.  
10 at 37. This analysis is framed by the state’s statutes and regulations governing parole suitability  
11 determinations. *See Irons*, 505 F.3d at 851.

12 Title 15, Section 2402 of the California Code of Regulations sets forth various  
13 factors to be considered by the Board in its parole suitability findings for murderers. The  
14 regulation is designed to guide the Board’s assessment of whether the inmate poses “an  
15 unreasonable risk of danger to society if released from prison,” and thus whether he or she is  
16 suitable for parole. *In re Lawrence*, 44 Cal.4th 1181, 1214, 1202 (2008). The Board is directed  
17 to consider all relevant, reliable information available regarding

18 the circumstances of the prisoner’s social history; past and present  
19 mental state; past criminal history, including involvement in other  
20 criminal misconduct which is reliably documented; the base and  
21 other commitment offenses, including behavior before, during and  
22 after the crime; past and present attitude toward the crime; any  
conditions of treatment or control, including the use of special  
conditions under which the prisoner may safely be released to the  
community; and any other information which bears on the  
prisoner’s suitability for release.

23 15 Cal. Code Regs. §2402(b). The regulation also lists several specific circumstances which tend  
24 to show suitability or unsuitability for parole. 15 Cal. Code Regs. §2402(c)-(d). The overriding  
25 concern is public safety and the focus is on the inmate’s *current* dangerousness. *In re Lawrence*,  
26 44 Cal. 4th at 1205. The relevant question is not whether some evidence supports the reasons

1 cited for denying parole, but whether some evidence indicates that the inmate's release would  
2 unreasonably endanger public safety. *In re Shaputis*, 44 Cal.4th 1241, 1254 (2008). In other  
3 words, there must be a rational nexus between the facts relied upon and the ultimate conclusion  
4 that the prisoner continues to be a threat to public safety. *In re Lawrence*, 44 Cal. 4th at 1227.

5           Here, the panel of the Board presiding over petitioner's 2007 hearing articulated  
6 both positive and negative factors bearing on his suitability for parole. The Board commended  
7 petitioner for his institutional activities and conduct. Petitioner had consistently received above  
8 average work reports for his job assignments. He completed two or three vocational  
9 certifications. He had recently begun community college course work and had completed a  
10 psychology class. His record was free of serious discipline since 1998. He participated regularly  
11 in NA and AA and completed other self-help programs such as anger management, Breaking  
12 Barriers, Pride Project and stress management. The most recent psychological evaluation  
13 available to the Board was supportive of release in that the evaluator indicated petitioner's  
14 "ability to perform in the free society" was good and his "risk of recidivism" was low.

15           Ultimately, however, the Board decided against releasing petitioner. The Board  
16 appeared to rely on the following factors in concluding that petitioner was not suitable to be  
17 released on parole: (1) the circumstances of his commitment offense; (2) his criminal history; (3)  
18 his lack of realistic parole plans; and (4) his past and present attitude toward the crime and lack  
19 of insight into previous criminality.

20           Under the applicable state regulations, the circumstances of a prisoner's  
21 commitment offense tend to show unsuitability for parole for where the offense was committed  
22 "in an especially heinous, atrocious or cruel manner." 15 Cal. Code Regs. §2402(c)(1). Here,  
23 the Board appeared to find that petitioner's offense qualified as especially heinous, atrocious, or  
24 cruel because it was carried out in a dispassionate and calculated manner (§2402(c)(1)(B)), and  
25 because it demonstrated an exceptionally callous disregard for human suffering (§2402(c)(1)(D)).

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1           In order for the facts of petitioner’s commitment offense to constitute a valid  
2 reason to deny parole, there must be some rational nexus between those facts and the ultimate  
3 conclusion that he continues to be a threat to public safety. *In re Lawrence*, 44 Cal.4th at 1214,  
4 1227 (“the aggravated nature of the crime does not in and of itself provide some evidence of  
5 *current* dangerousness to the public unless the record also establishes that something in the  
6 prisoner’s pre- or post-incarceration history, or [ ] current demeanor and mental state, indicates  
7 that the implications regarding the prisoner’s dangerousness that derive from his or her  
8 commission of the commitment offense remain probative to the statutory determination of a  
9 continuing threat to public safety”) (emphasis in original). The relevant inquiry is an  
10 individualized one: “whether the circumstances of the commitment offense, when considered in  
11 light of other facts in the record, are such that they continue to be predictive of current  
12 dangerousness many years after commission of the offense.” *In re Lawrence*, 44 Cal.4th at 1221.  
13 The passage of time and attendant changes in the inmate’s psychological or mental attitude are  
14 relevant considerations. *Id.*

15           In this case, the Board articulated other negative factors bearing on petitioner’s  
16 suitability for parole. These other factors demonstrate a sufficient nexus between petitioner’s  
17 1988 offense and the Board’s ultimate conclusion that he still posed a risk of danger or threat to  
18 the public at the time of his hearing in 2007. These other factors also independently demonstrate  
19 some evidence in the record supporting a conclusion that petitioner was not suitable for parole.

20           The Board considered petitioner’s criminal history and found that his offense was  
21 part of an escalating pattern of criminal conduct. A prisoner’s previous record of violence tends  
22 to show unsuitability for parole where “on previous occasions [the prisoner] inflicted or  
23 attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious  
24 assaultive behavior at an early age.” 15 Cal. Code Regs. §2402(c)(2). A prisoner’s entire  
25 criminal history, including involvement in any reliably documented criminal misconduct, is  
26 additionally relevant under section 2402(b). Here, the Board noted that petitioner had served a

1 prior prison term and that he was on parole at the time of his offense. The Board found that  
2 petitioner had “numerous previous grants of probation and parole” and thus that he had “failed to  
3 profit from society’s previous attempts to correct his criminality.”

4 The Board also considered pursuant to 15 Cal. Code Regs. §2402(b) petitioner’s  
5 past and present attitude toward his commitment offense. Based on the some of petitioner’s  
6 comments at the hearing, the Board questioned whether he had gained sufficient insight into his  
7 commitment offense, previous criminality, and misconduct in prison. Petitioner was questioned  
8 as follows:

9 PRESIDING COMMISSIONER BIGGERS: All right, thank you.  
10 Just a couple of follow-up questions. This ride that took place  
back when you had that 115, you want to tell me about that?

11 INMATE WALKER: What had happened was I came out of work  
12 change, and I seen about 100 inmates -- black inmates coming into  
the white area, and there was about 100 white inmates, and they  
13 were coming, and I just ran up and ran by the whites and right into  
it, and didn’t even know what it was about or anything, and the  
14 yard went down. Nothing actually happened.

15 PRESIDING COMMISSIONER BIGGERS: Uh-huh.

16 INMATE WALKER: And because I ran out there like that, I got it  
for leading a racial riot.

17 PRESIDING COMMISSIONER BIGGERS: Okay, and you were  
18 not involved.

19 INMATE WALKER: Well, I ran out there.

20 PRESIDING COMMISSIONER BIGGERS: Okay, to get  
involved?

21 INMATE WALKER: Well, I ran in that direction, yeah.

22 PRESIDING COMMISSIONER BIGGERS: Okay. There was  
23 also some discussion in your previous hearing with Presiding  
Commissioner Farmer that talks about anger. Can you describe  
24 what took place in that hearing that would have made you -- made  
them get the perception that there was anger, you still had some  
25 anger issues?

26 INMATE WALKER: I don’t know why they came up with that.



1 PRESIDING COMMISSIONER BIGGERS: Well, when I read the  
2 previous transcript, it -- I think the deputy commissioner was  
3 asking you certain questions about different things that were in  
4 your past, and you felt that they were beating up on you a little bit  
5 is what I sort of gathered. Do you recall that?

6 INMATE WALKER: No, it was a pretty rough hearing, but --

7 PRESIDING COMMISSIONER BIGGERS: Well... my point is  
8 that you get out there in society, somebody does something to you  
9 that you don't like, how you going to be able to handle that?

10 INMATE WALKER: Well, I'm going to use my head and I'm  
11 going to think about --

12 PRESIDING COMMISSIONER BIGGERS: Well, you didn't use  
13 your head [at the last parole hearing] according to what I read  
14 there.

15 INMATE WALKER: I don't know what I did there. It was just  
16 body language or something that they said I had anger issues.

17 PRESIDING COMMISSIONER BIGGERS: Well, okay, let's just -  
18 - let me just -- well, they start talking about a bunch of things, and  
19 I'll find that for you, but did you go back -- did you read that -- the  
20 transcript?

21 INMATE WALKER: No.

22 PRESIDING COMMISSIONER BIGGERS: Why didn't you read  
23 the transcript?

24 INMATE WALKER: I read it right after I got it.

25 PRESIDING COMMISSIONER BIGGERS: Okay. You don't  
26 recall what it said about that? When she was talking about -- let's  
see here --

DEPUTY COMMISSIONER ENLOW: I have the CDC 115 in  
front of me, and one thing that jumps out is that it states in here  
that you, Mr. Walker, you were described as turning to a group of  
about 40 white inmates and stating let's go. Those were in quotes,  
"Let's --

INMATE WALKER: Yeah.

DEPUTY COMMISSIONER ENLOE: -- go."

INMATE WALKER: That's what --

DEPUTY COMMISSIONER ENLOE: (inaudible)

1 INMATE WALKER: -- THEY SAY.  
2 DEPUTY COMMISSIONER ENLOE: -- part?  
3 INMATE WALKER: I don't recall. I don't remember saying let's  
4 go, I just ran out there, and I was -- that's what an officer said that I  
5 said, but there was other officers that said that they didn't -- that I  
6 didn't do that, but I was found guilty.  
7 PRESIDING COMMISSIONER BIGGERS: That don't sound like  
8 100, though.  
9 INMATE WALKER: Well, I don't know. You have to -- there's a  
10 report that has everybody's names listed and there's -- it's about  
11 100 black and about 100 white.  
12 PRESIDING COMMISSIONER BIGGERS: Well, that was back  
13 awhile, so I'm not going to really dwell on it, but I just need to  
14 know what that was all about.  
15 INMATE WALKER: I really don't know what it was about. I just  
16 ran out there. When they started coming, I ran to face it.  
17 PRESIDING COMMISSIONER BIGGERS: Ran to face it. Well,  
18 why would you do that if you didn't know what it was about?  
19 INMATE WALKER: Because there was a whole lot of people  
20 coming towards my people, and they're (inaudible)  
21 PRESIDING COMMISSIONER BIGGERS: What do you mean  
22 your people?  
23 INMATE WALKER: White people and --  
24 PRESIDING COMMISSIONER BIGGERS: White --  
25 INMATE WALKER: -- black people.  
26 PRESIDING COMMISSIONER BIGGERS: -- people, black  
people --  
INMATE WALKER: It was black --  
PRESIDING COMMISSIONER BIGGERS: -- were fight --  
INMATE WALKER: -- and white.  
PRESIDING COMMISSIONER BIGGERS: Well, I mean, there's  
a lot of -- you know --  
INMATE WALKER: It's racial in here. You know, I mean, who's

1 going to fool -- I'm not trying to fool anybody. It's (inaudible)

2 PRESIDING COMMISSIONER BIGGERS: No, I know it's racial  
3 in here, but if you were not involved and didn't know what was  
going on, why'd you get involved if they wasn't coming after you.

4 INMATE WALKER: They were coming after me because of my  
5 skin color. The blacks were coming towards the white area. I was  
coming out into the white area.

6 PRESIDING COMMISSIONER BIGGERS: Yeah, but you could  
7 have easily left and departed the area, could you have not?

8 INMATE WALKER: Yes, I could have.

9 PRESIDING COMMISSIONER BIGGERS: But you didn't want  
10 to do that. Okay. And that goes back to -- and again, I'm not  
11 getting into your crime area, but just reading some of your social  
history how you felt that you needed to do certain things and take  
care of certain things. And, again, without getting into your -- the  
crime itself. What happens out there once you're out in society?

12 INMATE WALKER: Well, if I see people, like a gang of people  
13 coming towards you or your family, I'm going to jump in there and  
help you too.

14 PRESIDING COMMISSIONER BIGGERS: Okay. You are?

15 INMATE WALKER: Yeah, but I'm not going to use a weapon or  
16 anything. I'm (inaudible)

17 PRESIDING COMMISSIONER BIGGERS: Well, how are you  
going to get in there and help us? What are you doing to do, jump  
up there and decide you're going to hit them with --

18 INMATE WALKER: Probably get --

19 PRESIDING COMMISSIONER BIGGERS: -- your fist --

20 INMATE WALKER: -- my butt beat, but -- you know -- at least  
21 I'll try.

22 PRESIDING COMMISSIONER BIGGERS: Yeah, but see, have  
23 you ever heard of just getting away from the whole situation?

24 INMATE WALKER: I can't leave people that are in trouble like  
that.

25 PRESIDING COMMISSIONER BIGGERS: Without knowing all  
26 the -- why the person got in trouble?

1 INMATE WALKER: You can -- you could tell when it's a bad  
2 situation.

3 PRESIDING COMMISSIONER BIGGERS: Not necessarily so.  
4 I've gotten myself into some situations that were bad that I didn't  
5 feel that I -- you know -- put myself in that situation and let that  
6 happen, but at the same time, there are ways to get out of it. But  
7 you're telling me that you would just jump in?

8 INMATE WALKER: Well, I would -- I'd run over there and try to  
9 stop it, but if it was happening, it would be happening.

10 PRESIDING COMMISSIONER BIGGERS: All right. Well, see,  
11 that's an issue that concerns me because you haven't learned to  
12 walk away from that type of stuff yet, and -- now, I mean, please  
13 comment on that. I -- you can't continually get yourself involve  
14 din things that necessarily bother -- if it's not your fight, why get in  
15 it?

16 INMATE WALKER: Just can't turn my back on somebody that  
17 needs help.

18 PRESIDING COMMISSIONER BIGGERS: Despite what the help  
19 might be.

20 INMATE WALKER: Well, to a point, you know. I --

21 PRESIDING COMMISSIONER BIGGERS: Well, I'm --

22 INMATE WALKER: -- don't want to hurt anybody. I'm not  
23 looking to -- I don't want to harm anybody, but I --

24 PRESIDING COMMISSIONER BIGGERS: If you go --

25 INMATE WALKER: -- don't want to --

26 PRESIDING COMMISSIONER BIGGERS: -- over there and you  
--

INMATE WALKER: -- watch somebody get harmed either.

PRESIDING COMMISSIONER BIGGERS: Well, why don't you  
just call the police?

INMATE WALKER: Now I guess I would.

PRESIDING COMMISSIONER BIGGERS: Well, that's not what  
you said, though. You said that you would go over there and get  
involved because you don't want to see anybody -- you know --  
anybody take advantage of whatever of somebody -- you know --  
and that's a problem. You should have learned that in your anger

1 management classes. You don't agree?

2 INMATE WALKER: I don't agree.

3 PRESIDING COMMISSIONER BIGGERS: You don't agree.  
4 Okay.

5 (Pet. Ex. A at 47-54.)

6 Based on the above exchange, the Board questioned the low risk assessment score  
7 assigned by the most recent psychological evaluator:

8 [T]he psychological evaluation... dated April the 7th, 2005, by Dr.  
9 Stephanie Wagner... was supportive in that it basically said the  
10 following: That your ability to perform in free society is good and  
11 your risk of recidivism is low. However, you know, from some of  
12 your comment today, we think that may need to be reevaluated, and  
13 I'm going to ask for a new psychological evaluation for you, sir, to  
14 talk about that, primarily because of some of the comments you  
15 made today, and what was surprising was when I asked you, one,  
16 what your triggers were, you were not able to just tell us what they  
17 were. In addition to that, I mentioned to you the fact that what if  
18 you got involved with a situation similar to what you had before,  
19 and your answer was something to the effect that well, I would go  
20 and help them -- I would do this that and the other -- which is an  
21 indication to this Panel that you still have the same mentality that  
22 you had before that you had to take things and do things a certain  
23 way, the way that you know how to do them. That is a concern  
24 because you haven't learned anything. You've been going to all of  
25 these classes on anger management, stress management and the  
26 whole thing, and it could have been so much easier for you to say I  
would go to the authorities, there's no phone there, I'd do this or  
that or the other, but you came right out and basically said I would  
get involved. And I went on even further to suggest to you what  
about if this took place, and you said well we have a difference of  
opinion on that. Which is an indication to this Panel that you still  
have this belief that you have to do things a certain way -- good,  
bad or indifferent -- and that's something I think the (inaudible)  
need to really go in to help you understand that you cannot go  
around doing things like that. You've got to be able to say I just  
walk away. I'm not going to go over there and help anybody,  
regardless of what the situation might be. The doctor also said --  
and I'm quoting again -- that in comparison to other minimum  
security inmates, inside or outside a controlled setting, your  
assessment is also considered to be lower. Your levels of  
dangerousness would increase... if you begin abusing alcohol, and I  
don't think that's going to be the issue at all. I don't think alcohol  
is the issue. I think the issue is your mindset on thinking you have  
to help others if you see a situation arising that you feel that you're

1 going to get involved with.

2 (Pet. Ex. A at 83-85.)

3 A prisoner's remorse or demonstrated understanding of the nature and magnitude  
4 of the commitment offense is factor tending to indicate the prisoner is suitable for release. 15  
5 Cal. Code Regs. §2402(d)(3). The Board is likewise authorized to consider a prisoner's lack of  
6 remorse, understanding or insight under section 2402(b) ("The Board is directed to consider all  
7 relevant, reliable information available regarding... past and present attitude toward the crime...  
8 and any other information which bears on the prisoner's suitability for release.") The Board  
9 properly weighed what it considered to be petitioner's lack of insight into his life crime and  
10 previous criminality.

11 The Board also relied on petitioner's lack of realistic parole plans. A prisoner's  
12 understanding and plans for the future are a parole suitability factor where "[t]he prisoner has  
13 made realistic plans for release or has developed marketable skills that can be put to use upon  
14 release." Here, it is undisputed that petitioner obtained marketable skills while incarcerated  
15 through completion of more than one vocational certificate. On the other hand, he presented no  
16 residential or employment plan in the state of California if paroled. Petitioner wanted to live  
17 with his wife in Oregon, but had not initiated any of the procedures for transferring his parole to  
18 the state of Oregon, an option that could possibly be available, but was not guaranteed. In this  
19 regard, the Board characterized his parole plans as "for all practical purposes... nonexistent."

20 A prisoner's understanding and plans for the future are, notably, a parole  
21 *suitability* factor, as opposed to being an *unsuitability* factor where there are no such plans.  
22 Again, though, the Board is authorized to consider any information which bears on petitioner's  
23 suitability for release. 15 Cal. Code Regs. § 2281(b). A complete lack of evidence that  
24 petitioner has a place to live, employment opportunities, or any support whatsoever, including  
25 emotional support, from friends or family in California bears negatively on a determination of his  
26 suitability. Petitioner's failure to demonstrate realistic plans for parole, or any serious attempts at

1 making such plans, were factors appropriately considered by the Board. A conclusion that  
2 petitioner presents a risk of danger to society if released because he has no demonstrated plans  
3 for the future has support in the record.

4 The Board concluded:

5 The Panel makes the following findings: That first of all, you need  
6 to examine your belief and theory that -- and understand the  
7 causative factors that allow you to get involved in situations that  
8 could produce negative outcomes, that you need to develop and  
9 explore and understand the procedures that will allow you to be  
10 paroled to the state of Oregon so that you can come up and do  
11 viable parole plans, and also you need to be able to recognize those  
12 triggers -- those factors that could trigger your impulses to commit  
13 a crime similar to this based on what you indicated to us today.  
14 Nevertheless, we want to commend you for being a Braille  
15 transcriber, for being a computer technician, getting a completion  
16 of upholstery, being disciplinary-free since '99, your participation  
17 in NA and AA, anger management, Breaking Barriers, and Stress  
18 Pride. However, these positive aspects of your behavior do not  
19 outweigh the fact of unsuitability.

20 (Pet. Ex. A at 87.)

21 There is some evidence to support the Board's conclusion that petitioner was not  
22 suitable for parole at the time of his 2007 suitability hearing. The nature of petitioner's  
23 commitment offense, considered together with his criminal history, lack of insight or  
24 understanding, and failure to demonstrate realistic parole plans provide the required modicum of  
25 evidence to support the Board's 2007 denial of parole. The Board's decision withstands the  
26 minimally stringent "some evidence" test and has not violated petitioner's right to due process of  
law.

## 27 V. CONCLUSION

28 For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's  
29 application for writ of habeas corpus be DENIED.

30 These findings and recommendations are submitted to the United States District  
31 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
32 twenty-one days after being served with these findings and recommendations, any party may file

1 written objections with the court and serve a copy on all parties. Such a document should be  
2 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the  
3 objections shall be served and filed within seven days after service of the objections. Failure to  
4 file objections within the specified time may waive the right to appeal the District Court's order.  
5 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.  
6 1991).

7 DATED: July 9, 2010

  
CHARLENE H. SORRENTINO  
UNITED STATES MAGISTRATE JUDGE

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