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United States District Court
For the Northern District of California

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

JERRY L SULLIVAN,

 Petitioner,

 v

ROBERT L AYERS, Warden

 Respondent.

No C-07-4963 VRW (PR)

AMENDED
ORDER GRANTING PETITION FOR
WRIT OF HABEAS CORPUS

_____ /

Petitioner Jerry L Sullivan, a state prisoner incarcerated at San Quentin State Prison in San Quentin, California, seeks a writ of habeas corpus under 28 USC § 2254 challenging the California Board of Parole Hearings' ("BPH") July 21, 2006 decision to deny him parole at his eleventh parole suitability hearing.

At the time he was denied parole in 2006, fifty-three-year-old petitioner had served twenty-three years on his seven-to-life sentence - over thirteen years past his minimum eligible parole date - during which he had exhibited, in the words of BPH, "pretty close to * * * exceptional" institutional behavior, Doc #9-2 at 95; Doc #9-3 at 4; see also Doc #9-2 at 100 (petitioner's "institutional

1 adjustment[] [has] been exceptional"; petitioner's disciplinary
2 record has been "outstanding"; id at 56-57 (during the hearing BPH
3 "commend[ed] [petitioner]" for his "remarkable and outstanding
4 record" throughout the duration of his life term). After
5 recognizing petitioner's "unblemished disciplinary profile," his
6 "positive programming" and "excellent rapport with both inmates and
7 staff," the July 2006 "Life Prisoner Evaluation Report" concluded:

8 Based on the absence of a prior criminal history
9 (taking into account his commitment offense),
10 his prison adjustment, the findings in his
11 psychiatric reports, and his family support I
12 believe [petitioner] will re-integrate into
 society without incident. I did not note any
 information that would indicate he would not be
 able to function as a law-abiding citizen should
 he be allowed parole at this time.

13 Doc #9-5 at 49. And, the doctor who prepared the psychological
14 report specifically for petitioner's parole suitability hearing
15 concluded: "[g]iven [petitioner's] history, institutional
16 adjustment, and present clinical presentation there are no
17 psychological factors that would suggest an increased risk for
18 violent behavior, in either the community, or a controlled setting
19 at the present time." Doc #9-3 at 31.

20 Notwithstanding this evidence, BPH concluded petitioner
21 was not yet worthy of parole. For the reasons that follow, the
22 court finds there is no evidence to support BPH's decision that
23 petitioner would pose an unreasonable risk of danger to society or a
24 threat to public safety if released from prison. The petition will
25 be granted.

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2 On April 20, 1983, petitioner was sentenced to an
3 indeterminate term of seven years to life in state prison following
4 his guilty pleas to two counts of kidnap for robbery with the use of
5 a firearm, two counts of robbery, one count of attempted murder and
6 one count of aggravated assault. Doc #9-1 at 2 & 5. His minimum
7 eligible parole date was June 1, 1993. Doc #9-2 at 4.

8 Petitioner had no history, either as a juvenile or an
9 adult, of violent crime. Doc #9-2 at 55-56; Doc #9-3 at 5. Prior
10 to his sentence in 1983, petitioner's only contact with the criminal
11 justice system was when he was arrested in 1981 for driving under
12 the influence, for which he spent a night in jail and paid a fine.
13 Doc #9-2 at 55-56.

14 On July 21, 2006, thirteen years after his minimum
15 eligible parole date, and after he had served twenty-three years for
16 his crimes, petitioner appeared before BPH for his eleventh parole
17 suitability hearing. Doc #9-2 at 16. At that hearing, BPH found
18 petitioner "was not suitable for parole and would pose an
19 unreasonable risk of danger to society or a threat to public safety
20 if released from prison." Id at 93-94. In denying parole, BPH
21 cited the "calculated" and "especially" cruel nature of the crime,
22 which showed a "callous disregard for human suffering" and also
23 expressed "concern" over petitioner's parole plans. Id at 94, 97.
24 Petitioner's parole was deferred for one year.¹ Id at 99.

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26 ¹ On July 30, 2007, petitioner appeared before BPH for his
27 twelfth parole suitability hearing, at which time he again was denied
28 parole. Pending before this court is his petition for writ of habeas

1 Petitioner unsuccessfully challenged BPH's decision in the
2 superior and state appellate courts. Doc #9-8 at 76-85; Doc #9-9 at
3 2. On September 12, 2007, the California Supreme Court summarily
4 denied petitioner's petition for review. Doc #9-9 at 23. This
5 federal petition for a writ of habeas corpus followed. Doc #1.

6 Per order filed on January 17, 2008, the court found
7 petitioner's claim that BPH violated his due process rights, when
8 liberally construed, colorable under § 2254, and ordered respondent
9 to show cause why a writ of habeas corpus should not be granted.
10 Doc #3. Respondent has filed an answer and petitioner has filed a
11 traverse. Doc ## 9 & 10.

12 13 II

14 The Antiterrorism and Effective Death Penalty Act of 1996
15 ("AEDPA"), codified under 28 USC § 2254, provides "the exclusive
16 vehicle for a habeas petition by a state prisoner in custody
17 pursuant to a state court judgment, even when the petitioner is not
18 challenging his underlying state court conviction." White v
19 Lambert, 370 F3d 1002, 1009-10 (9th Cir 2004). Under AEDPA, this
20 court may entertain a petition for habeas relief on behalf of a
21 California state inmate "only on the ground that he is in custody in
22 violation of the Constitution or laws or treaties of the United
23 States." 28 USC § 2254(a).

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27 corpus challenging that denial of parole. See Case No 08-1837-VRW
(PR). Because the court grants the instant petition, the petition in
28 Case No 08-1837-VRW (PR) will be dismissed as moot in a separate
order.

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The writ may not be granted unless the state court's adjudication of any claim on the merits: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 USC § 2254(d). Under this deferential standard, federal habeas relief will not be granted "simply because [this] court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams v Taylor, 529 US 362, 411 (2000).

While circuit law may provide persuasive authority in determining whether the state court made an unreasonable application of Supreme Court precedent, the only definitive source of clearly established federal law under 28 USC § 2254(d) rests in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Williams, 529 US at 412; Clark v Murphy, 331 F3d 1062, 1069 (9th Cir 2003).

III

A

The Fifth and Fourteenth Amendments prohibit the government from depriving an inmate of life, liberty or property without due process of law. US Const Amends V & XIV. It is now

1 settled that California's parole scheme, codified in California
2 Penal Code section 3041, vests all "prisoners whose sentences
3 provide for the possibility of parole with a constitutionally
4 protected liberty interest in the receipt of a parole release date,
5 a liberty interest that is protected by the procedural safeguards of
6 the Due Process Clause." Irons v Carey, 505 F3d 846, 850 (9th Cir
7 2007) (citing Sass v Calif Bd of Prison Terms, 461 F3d 1123, 1128
8 (9th Cir 2006); Biggs v Terhune, 334 F3d 910, 914 (9th Cir 2003);
9 McQuillon v Duncan, 306 F3d 895, 903 (9th Cir 2002)). It matters
10 not that a parole release date has not been set for the inmate
11 because "[t]he liberty interest is created, not upon the grant of a
12 parole date, but upon the incarceration of the inmate." Biggs, 334
13 F3d at 915. Due process accordingly requires that a parole board
14 premise its decision regarding a petitioner's parole suitability on
15 "some evidence in the record" such that the decision is not
16 arbitrary. Sass, 461 F3d at 1128-29 (quoting Superintendent v Hill,
17 472 US 445, 457 (1985)). The "some evidence" standard is clearly
18 established federal law in the parole context for purposes of
19 § 2254(d). Id at 1129.

20 The Supreme Court set forth the "some evidence" standard
21 in Hill, which concerned the revocation of "good time" credits
22 towards parole resulting from inmate misconduct. Hill, 472 US at
23 455. The Court rested its holding upon the procedural due process
24 foundation it laid in Wolff v McDonnell, 418 US 539, 563-67 (1974).
25 As the Court noted, Wolff required, among other things, that an
26 inmate receive "a written statement by the fact finder of the
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1 evidence relied on and the reasons" for the deprivation of his good
2 time credits. Hill, 472 US at 454 (citing Wolff, 418 US at 565).
3 The Court then added to the foundation laid in Wolff: "[R]evocation
4 of good time does not comport with 'the minimum requirements of
5 procedural due process,' unless the findings of the prison
6 disciplinary board are supported by some evidence in the record."
7 Hill, 472 US at 455 (quoting Wolff, 418 US at 558).

8 The "some evidence" standard does not permit the court to
9 "reweigh the evidence." Powell v Gomez, 33 F3d 39, 42 (9th Cir
10 1994). Instead, the inquiry is "whether there is any evidence in
11 the record that could support the conclusion reached by the
12 disciplinary board." Hill, 472 US at 455-56. While this test is
13 stringent, it must at minimum protect an inmate's "strong interest
14 in assuring that the loss of [parole] is not imposed arbitrarily."
15 Id at 454.

16 Due process also requires that the evidence underlying the
17 parole board's decision have some indicium of reliability. Biggs,
18 334 F3d at 915; McQuillion, 306 F3d at 904. Relevant to this
19 inquiry is whether the prisoner was afforded an opportunity to
20 appear before, and present evidence to, the board. See Pedro v
21 Oregon Parole Bd, 825 F2d 1396, 1399 (9th Cir 1987). If BPH's
22 determination of parole unsuitability is to satisfy due process,
23 there must be some reliable evidence to support the decision. Rosas
24 v Nielsen, 428 F3d 1229, 1232 (9th Cir 2005).

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2 When assessing whether a state parole board's suitability
3 determination was supported by "some evidence" the court's analysis
4 is framed by the statutes and regulations governing parole
5 suitability determinations in the relevant state. Irons, 505 F3d at
6 850. Under California law, prisoners serving indeterminate life
7 sentences, like petitioner, become eligible for parole after serving
8 minimum terms of confinement required by statute. In re Dannenberg,
9 34 Cal 4th 1061, 1069-70 (2005). At that point, California's parole
10 scheme provides that BPH "shall set a release date unless it
11 determines that the gravity of the current convicted offense or
12 offenses, or the timing and gravity of current or past convicted
13 offense or offenses, is such that consideration of the public safety
14 requires a more lengthy period of incarceration." Cal Penal Code
15 § 3041(b). Regardless of the length of the time served, "a life
16 prisoner shall be found unsuitable for and denied parole if in the
17 judgment of the panel the prisoner will pose an unreasonable risk of
18 danger to society if released from prison." Cal Code Regs tit 15,
19 § 2402(a). In making this determination, BPH must consider various
20 factors, including the prisoner's social history, past and present
21 mental state, past criminal history, the base and other commitment
22 offenses, including behavior before, during and after the crime,
23 past and present attitude toward the crime and any other information
24 that bears on the prisoner's suitability for release. See Cal Code
25 Regs tit 15, § 2402(b)-(d).

26 In considering the commitment offense, BPH must determine
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1 whether "the prisoner committed the offense in an especially
2 heinous, atrocious or cruel manner." Cal Code Regs tit 15, §
3 2402(c)(1). The factors to be considered in making that
4 determination include: "(A) Multiple victims were attacked, injured
5 or killed in the same or separate incidents; (B) The offense was
6 carried out in a dispassionate and calculated manner, such as an
7 execution-style murder; (C) The victim was abused, defiled or
8 mutilated during or after the offense; (D) The offense was carried
9 out in a manner which demonstrates an exceptionally callous
10 disregard for human suffering; (E) The motive for the crime is
11 inexplicable or very trivial in relation to the offense." Id.

12 Under California law, the "core determination" regarding a
13 prisoner's threat to public safety "involves an assessment of an
14 inmate's current dangerousness." See In re Lawrence, 44 Cal 4th
15 1181, 1205 (2008) (emphasis in original) (citing In re Rosenkrantz,
16 29 Cal 4th 616 (2002) and In re Dannenberg, 34 Cal 4th 1061 (2005)).

17 According to the court:

18 to the extent our decisions in Rosenkrantz and
19 Dannenberg have been read to imply that a
20 particularly egregious commitment offense *always*
21 will provide the requisite modicum of evidence
22 supporting the Board's or the Governor's
23 decision, this assumption is inconsistent with
24 the statutory mandate that the Board and the
25 Governor consider all relevant statutory factors
26 when evaluating an inmate's suitability for
27 parole, and inconsistent with the inmate's due
28 process liberty interest in parole that we
recognized in Rosenkrantz.

25 Lawrence, 44 Cal 4th at 1191 (emphasis in original). The court
26 continued:

1 In some cases, such as this one, in which
2 evidence of the inmate's rehabilitation and
3 suitability for parole under the governing
4 statutes and regulations is overwhelming, the
5 only evidence related to unsuitability is the
6 gravity of the commitment offense, and that
7 offense is both temporally remote and mitigated
8 by circumstances indicating the conduct is
9 unlikely to recur, the immutable circumstance
10 that the commitment offense involved aggravated
11 conduct does not provide "some evidence"
12 inevitably supporting the ultimate decision that
13 the inmate remains a threat to public safety.

8 Id.

10 C

11 A critical issue in parole denial cases concerns BPH's use
12 of evidence about the crime that led to the conviction. A trio of
13 Ninth Circuit cases guide the application of the Superintendent v
14 Hill "some evidence" standard in determining whether or not a
15 particular prisoner would pose an unreasonable risk of danger to
16 society or a threat to public safety if released from prison, taking
17 into account the circumstances of the commitment offense: Biggs,
18 334 F3d 910, Sass, 461 F3d 1123 and Irons, 505 F3d 846. The first
19 case, Biggs, explained that the value of the criminal offense fades
20 over time as a predictor of parole suitability:

21 The Parole Board's decision is one of 'equity'
22 and requires a careful balancing and assessment
23 of the factors considered. * * * A continued
24 reliance in the future on an unchanging factor,
25 the circumstance of the offense and conduct
26 prior to imprisonment, runs contrary to the
27 rehabilitative goals espoused by the prison
28 system and could result in a due process
violation.

26 Biggs, 334 F3d at 916-17. Although the court in Biggs upheld the

1 initial denial of a parole date based solely on the nature of the
2 crime and the prisoner's conduct before incarceration, it cautioned
3 that "[o]ver time * * *, should Biggs continue to demonstrate
4 exemplary behavior and evidence of rehabilitation, denying him a
5 parole date simply because of the nature of Biggs' offense and prior
6 conduct would raise serious questions involving his liberty interest
7 in parole." Id at 916.

8 Next came Sass, which criticized the court's statements in
9 Biggs as improper and beyond the scope of the dispute before the
10 court. Sass determined that the parole board is not precluded from
11 relying on unchanging factors such as the circumstances of the
12 commitment offense or the parole applicant's pre-offense behavior in
13 determining parole suitability. See Sass, 461 F3d at 1129
14 (commitment offenses in combination with prior offenses provided
15 some evidence to support denial of parole at subsequent parole
16 consideration hearing).

17 The last of the three cases, Irons, determined that due
18 process was not violated by the use of the commitment offense and
19 pre-offense criminality to deny parole for a prisoner sixteen years
20 into his seventeen-to-life sentence. Irons emphasized, however,
21 that in all three cases (Irons, Sass and Biggs) in which the court
22 had "held that a parole board's decision to deem a prisoner
23 unsuitable for parole solely on the basis of his commitment offense
24 comports with due process, the decision was made before the inmate
25 had served the minimum number of years required by his sentence."
26 Irons, 505 F3d at 853. The court, citing Biggs, then expressed

1 "hope that the Board will come to recognize that in some cases,
2 indefinite detention based solely on an inmate's commitment offense,
3 regardless of the extent of his rehabilitation, will at some point
4 violate due process, given the liberty interest in parole that flows
5 from the relevant California statutes." Id at 854.

6
7 IV

8 Petitioner seeks federal habeas corpus relief from BPH's
9 July 21, 2006 decision finding him unsuitable for parole and denying
10 him a subsequent hearing for one year on the ground that the
11 decision does not comport with due process. Specifically,
12 petitioner argues that BPH "made an arbitrary and capricious
13 decision" in denying parole "because the record did not contain any
14 evidence that * * * [p]etitioner presently poses a danger to
15 society." Doc #1, Memorandum at 1.

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17 A

18 In rendering its decision to deny petitioner parole, BPH
19 "looked at the offense." Doc #9-2 at 94. Below is a summary of the
20 circumstances of the crime, as described during petitioner's parole
21 suitability hearing.

22 On July 2, 1982, pursuant to a prearranged plan,
23 petitioner met Mr and Mrs Reily, a couple selling real estate, who
24 showed petitioner and two other men a house that was for sale in
25 Tracy, California. After about twenty minutes, when the Reilys were
26 securing the house, petitioner showed the Reilys a gun he pulled

1 from his pants and directed them to drive to their home in Walnut
2 Creek. When petitioner pulled the gun from his pants, the pin
3 holding the gun's cylinder dislodged from the gun and remained stuck
4 in his pants, rendering the gun inoperative. Petitioner directed
5 one of his two companions to leave, and the other man joined
6 petitioner in the drive to Walnut Creek. Upon their arrival at the
7 Reilys' home, petitioner played on a tape player the men brought
8 into the home with them a pre-recorded message made by one of
9 petitioner's companions, which demanded \$150,000 and threatened the
10 rape and murder of Mrs Reily and the subsequent murder of Mr Reily.
11 The Reilys stated they did not have \$150,000, so eventually
12 petitioner and the other man drove the Reilys to their bank so they
13 could withdraw money. Doc #9-2 at 16-18, 31-32, 35-36 & 42-43; Doc
14 #9-3 at 8.

15 While petitioner and the other man remained in the car
16 with Mr Reily, Mrs Reily entered the bank to withdraw money. Mrs
17 Reily alerted the bank teller as to what was happening, and the
18 police were summoned. Petitioner and the other man fled in the car
19 with Mr Reily, with police giving chase. Petitioner, who was
20 driving, lost control of the car and crashed into a fence. Mr Reily
21 told police that after the crash, petitioner stuck a gun he had been
22 carrying in his pants into Mr Reily's ribs and pulled the trigger,
23 but the gun did not fire. Petitioner then dragged Mr Reily out of
24 the car at gunpoint and attempted to escape but eventually was
25 apprehended and arrested. After his arrest, petitioner told police
26 he knew the gun would not fire because the pin holding the gun's
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1 cylinder had fallen out and remained in his pants. He also told
2 police that while he and Mr Reily struggled over the gun, petitioner
3 placed his hand over the gun's hammer so that it would not fire
4 accidentally. Doc #9-2 at 18-19, 33-34, 35-36 & 42-43.

5 At the police station, petitioner was strip-searched.
6 During the search, "a small piece of metal, resembling a bent piece
7 of coat hanger, fell from" petitioner's underwear. Doc #9-3 at 13.
8 The piece of metal later was determined to be the cylinder pin of
9 the gun. Id. According to the probation report prepared in
10 connection with the offense:

11 Laboratory work was done on the gun. It was
12 found that the cylinder pin was missing, the
13 side plate screw was missing, the cylinder
14 advance hand spring was not in the gun and the
stud that the hammer pivots on was broken off
but still in its location. The gun was found to
be inoperable.

15 Id.

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17 B

18 In explaining its reasons for finding petitioner not
19 suitable for parole, BPH relied on the circumstances of the
20 commitment offense, and expressed "concern" regarding petitioner's
21 parole plans, noting that petitioner: (1) failed to identify any
22 substance abuse treatment options, including a sponsor, that would
23 be available to him upon his release; (2) failed to provide BPH with
24 a dated letter demonstrating he had secured employment; and (3) had
25 insufficient letters of support. Doc #9-2 at 97, 98, 99 & 100.

26 Regarding the offense, BPH noted:
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1 It was calculated. It was especially cruel and
2 it did create human suffering * * * And a gun
3 was used which created an especially [sic]
4 disregard for human suffering. The gun was, in
5 fact, pointed at [the victim's] head which * * *
6 would make [sic] an especially callous disregard
7 for human suffering. Can you imagine the * * *
8 trauma that you put these people through the
9 fact that you put a gun to their head. The
10 motive for this crime was very trivial in
11 relation to the offense in that those people are
12 traumatized now because you needed money,
13 because you were living beyond your means.

14 Doc #9-2 at 94. BPH later emphasized its concern over the use of
15 the gun, stating:

16 you know, you got [sic] to look at it that it's
17 hard to believe that you would even try to use a
18 gun like that that has lost a pin, because, I
19 mean, I'm no gun expert, but I know that when
20 you lose the pin that cylinder turns just a
21 little bit and if the firing pin don't [sic] hit
22 directly on that bullet and it hits on the side
23 that gun can explode.

24 * * * *

25 Which would create some problem not only for
26 you, but problems for everybody else because
27 that cylinder just don't [sic] stay there.
28 That's what hold[s] it into place for the firing
pin to go straight.

Doc #9-2 at 99.

BPH also "had some concern" about petitioner's parole
plans. Doc #9-2 at 97. Although acknowledging that petitioner had
a place to live (with his mother, a long time resident of Oakland),
a niece who had offered to help him upon his release, several
diverse, marketable job skills and a guaranteed, written (though
undated) job offer, BPH concluded the hearing by advising petitioner
as follows:

1 and becoming a forklift operator, presently as the "lead man." Doc
2 #9-2 at 57-58; see also id at 59-60 (petitioner had been working for
3 Prison Industry Authority for four years, and had been a "lead man"
4 in both sewing and sanding). BPH read from a March 8, 2006 letter
5 of recommendation from I T Jenkins, the lock-stitch sewing machine
6 superintendent at San Quentin who noted petitioner

7 is the current lead man in the pillow factory
8 and has filled the position admirably for the
9 past year. [Petitioner was] involved in the
10 conception of a new department in [Prison
11 Industry Authority] complex. And * * * before
12 [petitioner was] transferred to the pillow
13 factory [he] was employed as a lead man in the
14 finishing department for a year. And * * *
15 [petitioner] continually prove[s] [himself] to
16 be a reliable, conscientious and hard-working
17 individual. Definitely an asset to this
18 department. Upon his release would prove * * *
19 equity value to any company or business venture
20 he might become associated with.

21 Doc #9-2 at 72-73.

22 BPH further recognized that since petitioner's last parole
23 suitability hearing, he had "completed three different Impact
24 courses. One in Successful Relationships, one on Specific
25 Relationships, and * * * another one called Module IV." Doc #9-2 at
26 58. BPH observed that petitioner had a "regular pattern since 1992
27 of self-help group participation," which included thirty-two hours
28 of Nonviolent Communication self-help group participation, the
Hooked on Phonics program, a series of Alternatives to Violence
workshops, Self-Esteem Group workshops, Chiros [sic] [prison

1 ministry] participation, "Toastmasters,"² Gavel Club³ participation,
2 and "numerous other * * * violence prevention workshops." Id at 58-
3 59. BPH then "commend[ed]" petitioner for his "full and ongoing
4 participation in [his] self-help groups, which included weekly
5 participation in Alcoholics Anonymous ("AA") from 1992 to the
6 present. Id.

7 The following is a more comprehensive overview detailing
8 petitioner's "Therapy & Self Help Activities" as set forth in his
9 July 2006 "Life Prisoner Evaluation Report," to which BPH referred
10 during the hearing and in rendering its decision:

11		
12	03/22/92 to present	Alcoholics Anonymous
13	12/31/92	Completion of Vocational Upholstery Program
14		
15	01/11/93	Completion of Upholstery class, Deuel Vocational Institute
16	09/16/93	Completion of sixteen-week Stage I Manalive class
17		
18	12/31/93	Participation in three-day Alternatives to Violence Project workshop
19		
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21 ² According to its website, Toastmasters International, a non-
22 profit organization, began in 1924 at the YMCA in Santa Ana, and "has
23 grown to become a world leader in helping people become more competent
24 and comfortable in front of an audience" * * * "offering a proven -
25 and enjoyable! - way to practice and hone communication and leadership
26 skills." See Toastmasters, Inc online at
27 <http://www.toastmasters.org/MainMenuCategories/WhatIsToastmasters.aspx>
(visited Sept 28, 2009).

28 ³ "Gavel Clubs are affiliates of Toastmasters International, the
leading movement devoted to making effective oral communication a
world-wide reality." See Gavel Club, online at
<http://www.gavelclub.org/> (visited Sept 28, 2009).

1	02/24/94	Participation in three-day Advanced Alternatives to Violence Project workshop
2		
3	04/21/94-10/31/00	Participation in the Hooked on Phonics program
4		
5	06/15/95	Completion of Lifeskills program
6	05/01/96	Participation in the annual Walk- A-Thon '96 for the prevention of child abuse
7		
8	05/26/95-07/16/96	Narcotics Anonymous
9	08/08/96	Certificate of Completion, Toastmasters International, Competent Toastmaster Certificate
10		
11	03/25/98	Donated sixteen magazines to the CTF-North Library
12	09/15/94-06/30/99	Member of the San Quentin Speak Easy Gavel Club
13		
14	10/06/99	Self Esteem Enhancement Certificate
15	12/13/99	Completion of class [on] the cause, prevention, treatment, and management of Sexually Transmitted Diseases
16		
17		
18	10/09/00	Participated in the three-day Kairos Men's Retreat
19	02/17/01	Participated in the three-day Kairos Men's Retreat
20		
21	05/20/02	Certificate of Achievement, Forklift Operator
22	03/04/03	Completion of fifteen-week Parenting course
23		
24	10/09/03	Participation in Free to Succeed Literacy class
25	12/08/03	Participated in the Insight Meditation class
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03/01/04 Completed Session One (sixteen-week) Violence Prevention workshop

03/29/04 Completed Session Two (sixteen-week) Violence Prevention workshop - "Time Outs"

05/10/04 Completed Session Three (sixteen-week) Violence Prevention workshop - "Body Signals"

06/21/04 Completed Session Four (sixteen-week) Violence Prevention workshop - "Self Talk"

07/26/04 Completed Session Five (sixteen-week) Violence Prevention workshop - "Conflict Resolution"

01/30/05 Participated in the "A Life for Peace, Action, and Service to Others" workshop

03/08/05 Completed a sixteen-week Non-Violent Communication class

03/21/05 Certificate of Completion - Module III, Addictions

04/17/05 Certificate for participating in a workshop/seminar on Working with Anger

05/23/05 Participated in Session One of Project IMPACT'S sixteen-week workshop on Relationships

06/07/05 Certificate of Proficiency, Roll-or-Tape-Edge-Machine Operator

06/27/05 Participated in Session Two of Project IMPACT'S sixteen-week workshop, Relationship Dynamics

08/01/05 Participated in Session Three of Project IMPACT'S sixteen-week workshop, Cultivating Successful Relationships

1	09/26/05	Participated in Session Four of Project IMPACT'S sixteen-week workshop, Specific Relationships
2		
3	10/03/05	Certificate of Completion, Project IMPACT, Module IV - Relationships
4		
5	02/28/06	Certificate of Completion, Nonviolent Communication self-help group - thirty-two hours of instruction
6		
7		

8 Doc #9-5 at 42 & 46-47. The same report noted, in its "Summary"
9 section:

10 [Petitioner] has continued his unblemished
11 disciplinary profile since his last [] hearing.
12 He has received numerous commendations for his
13 positive programming and has maintained an
14 excellent rapport with both inmates and staff.
15 Based on the absence of a prior criminal history
16 (taking into account his commitment offense),
17 his prison adjustment, the findings in his
18 psychiatric reports, and his family support I
19 believe [petitioner] will re-integrate into
20 society without incident. I did not note any
21 information that would indicate he would not be
22 able to function as a law-abiding citizen should
23 he be allowed parole at this time.

18 Doc #9-5 at 49.

19 Equally as positive was the information contained in the
20 psychological evaluation conducted at BPH's request in preparation
21 for his 2006 parole suitability hearing:

22 When asked what his plans for parole were,
23 [petitioner] stated that he planned to "stay out
24 of trouble and help people." When asked for
25 specific details, [petitioner] stated that he
26 plans to stay with his mother at her home. She
27 has made it clear that he is welcome to stay
28 with her for as long as he needs to.
[Petitioner] believes that his mother is 70 or
71 years old. He describes his relationship
with her as being very close. She visits him

1 every other weekend and has done so throughout
2 his incarceration. He has tried to encourage
3 her to stay at home and take care of herself,
4 but has not been able to deter her from
5 traveling around the state to visit him. He
6 feels a deep sense of gratitude toward her for
7 her unwavering support. Being able to help his
8 mother is a primary factor in [petitioner's]
9 desire to be released to the community.

10 [Petitioner] has extended family in many
11 communities in the Bay Area. He has a 26-year-
12 old daughter with whom he is contact. She
13 visited him about a month ago.

14 [Petitioner] describes himself as a good
15 worker, who would be willing to take any job in
16 the community. He would be most likely to
17 return to his previous employment as a roofer.
18 [Petitioner] has done this type of work
19 successfully in the past and believes that he
20 would be hired again. He has also worked as a
21 tree trimmer and parking lot attendant with
22 positive evaluations from his previous
23 employers. While incarcerated, he has gained
24 additional skills and experience as an
25 upholsterer, truck driver, and forklift
26 operator.

27 [Petitioner] would continue his
28 participation in [Alcoholics Anonymous ("AA")]
as he states that "AA is a part of my life
everyday." He would plan to attend meetings as
soon as he leaves prison, and has gotten a list
of AA meeting locations near his mother's home.
[Petitioner's] mother is also active in her
church and [petitioner] has promised her that he
would regularly attend services with her.

[Petitioner] has been married once and is
divorced. He is not presently engaged in a
relationship. He looks forward to develop[ing]
a positive circle of friends, in the future, as
he states "there are a lot of people out there
who are doing good things. I know I made a bad
decision and I see my life getting better. I
know I got life left in me. I still enjoy
working."

* * * *

[Petitioner] has no current symptoms of a

1 recognized mental disorder. He is functioning
2 well in most areas of his life in that he is
3 programming well, has supportive family
4 relationships, is positive about his life and
5 his ability to make a contribution to society.
6 He is aware of the needs of others and actively
7 looks for ways to solve problems by constructive
8 means. He is not receiving any mental health
9 services at this time and does not have a need
10 for therapeutic intervention.

11 * * * *

12 [Petitioner] has a good understanding of
13 the factors that led to his commitment offense.
14 He stated that he was raised with good values
15 and did not get into trouble as an adolescent.
16 He was employed at the time of the crime and
17 living independently in the community. * * *
18 [Petitioner] acknowledges the harm he did to the
19 victims as individuals who did not deserve to be
20 victimized by criminal actions. [Petitioner]
21 takes direct responsibility for his actions in
22 regard to the crime.

23 While [petitioner's] crime was one that
24 placed his victims at direct risk of harm,
25 everyone was fortunate in that there was no loss
26 of life. [Petitioner] has received a very long
27 sentence for his crimes and acknowledges that he
28 did wrong and deserves punishment by the court.
His criminal actions did not seem to be the
result of an antisocial personality or criminal
lifestyle. He also does not have a criminal
record from a young age. These factors would
suggest that [petitioner] would be an inmate who
could benefit greatly from rehabilitation, in
that he has a foundation of socially conforming
behavior prior to incarceration.

There is the question of the contribution
of alcohol to [petitioner's] crime.
[Petitioner] admits to inappropriate use of
alcohol around the time of his offense. He
denies that he was intoxicated at the time of
the offense and it would appear that alcohol did
not play a direct role in the commission of the
crime. It is more likely that [petitioner's]
abuse of alcohol contributed to an overall lack
of judgement [sic] and an erosion of the values
with which he was raised. He has clearly stated
a commitment to lifelong participation in AA.

1 Given [petitioner's] lack of an early or
2 extensive history of criminal behavior, and
3 active recovery from alcohol abuse, the greatest
4 risk would be likely to come from any clinical
5 factors associated with violent behavior. Any
6 recognized factors such as lack of insight,
7 negative attitudes, lack of empathy,
8 impulsivity, symptoms of major mental illness,
9 or failure at treatment would be considered as
10 possible sources of increased risk. Based on
11 review of [petitioner's] present institutional
12 record and the clinical interview conducted for
13 this report, it would appear that none of these
14 risk factors is currently present.

15 [Petitioner] also has a number of
16 protective factors such as a feasible plan for
17 parole and substantial social support. He also
18 is clear about his remorse for his actions and
19 his willingness to continue his participation in
20 self-help and rehabilitation activities. He has
21 reflected on his crime and is willing to do
22 whatever would be appropriate to make amends to
23 those who have been harmed by his actions.

24 Doc #9-3 at 28-31. The psychologist's conclusions and
25 recommendations were are follows:

26 Other than continuing in AA, there would be
27 no recommendation for necessary therapeutic
28 interventions prior to parole. [Petitioner] is
an individual whose crime was extreme in its
complexity and recklessness. [Petitioner's]
sentence reflects this. There is not, in my
opinion, a direct relationship between the
extreme actions of the crime and [petitioner's]
criminality. He was not known to be a violent
person before the crime, and has not engaged in
violence subsequent to the crime. His criminal
action seemed to reflect a dramatic, but failed
attempt to solve his financial problems by
criminal means.

 Given [petitioner's] history, institutional
adjustment, and present clinical presentation
there are no psychological factors that would
suggest an increased risk for violent behavior,
in either the community, or a controlled setting
at the present time. While it is not possible
to accurately predict future violent behavior,

1 given [petitioner's] age, commitment to ongoing
2 substance abuse treatment, and limited criminal
3 history, he would be expected to be able to
continue to live a positive, non-violent life
when released to the community.

4 Doc #9-3 at 31.

5 During the hearing, BPH often referred to the
6 psychological evaluation, initially stating, "[BPH], at the last
7 hearing, specifically requested a [] new psych report and asked []
8 that the report address the prisoner's violence potential in the
9 free community, the significance of alcohol or drugs relative to the
10 commitment offense, and any need for any further therapy." Doc #9-2
11 at 61-62. BPH then quoted from the part of the report that
12 addressed petitioner's remorse for his involvement in the crime, and
13 asked petitioner regarding "making amends," which petitioner
14 identified as the ninth step of AA's "Twelve Steps." Id at 62-63.
15 Petitioner explained "the best amends I can make to [the victims] is
16 to continue to participate in AA, because what I did I - I can't
17 take it back and I'm truly sorry for it." Id at 63; see also id at
18 90-92 (in petitioner's concluding statement to BPH, he states he
19 accepts responsibility for his role in the crimes and reiterates his
20 deep feelings of remorse). Petitioner then confirmed that he had
21 told the doctor conducting his psychological evaluation that he
22 would work for the victim for a year without pay to make amends and
23 to show his true remorse for what petitioner had done to the
24 victims. Id at 63. Petitioner explained he did not know how else
25 he could demonstrate how sorry he was for what he had done. Id.

26 Earlier in the hearing, petitioner confirmed his feelings
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1 of remorse for his participation in the crimes as he expressed to
2 the psychologist, telling BPH:

3 I feel really sick about it. * * * I take full
4 responsibility for the part I played in this,
5 because it was like a decision that I made - it
6 was a bad one 'cause I never made - I never did
7 anything like this in my life and it was a bad
8 decision I made that day. And I take full
9 responsibility in the part I played 'cause if it
10 weren't for me it wouldn't never [sic] [have]
11 happened. That's - that's the way I look at it.
12 If it wasn't for me it would've never happened
13 'cause I wouldn't have been there and it
14 would've never happened to these people.

15 Doc #9-2 at 30-31.

16 Petitioner also reiterated his close family ties, noting
17 that his twenty-six year old daughter came to visit him "quite
18 often." Doc #9-2 at 51. Regarding his parole plans, petitioner
19 stated that he planned to live with his mother, who by letter of
20 support "reaffirm[ed] [her] commitment to provide [petitioner] with
21 whatever [he] need[s] in the way of shelter, clothes,
22 transportation, and money." Doc #9-2 at 67; see id at 69.

23 Regarding his prospects for employment, petitioner had an
24 undated letter from a Mr Mike Farrell who "will guarantee a job for
25 [petitioner]" in Sausalito in industrial roofing at \$14 an hour with
26 a possible raise after three months. Doc #9-2 at 67-68. Petitioner
27 also reaffirmed his commitment to continue his participation in AA
28 and stated that if he were given a parole date he would acquire an
AA sponsor. Id at 74.

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2 Notwithstanding this substantial body of favorable
3 evidence, BPH decided to deny petitioner parole. In rendering its
4 decision, BPH first told petitioner:

5 This was a truly difficult situation for us.
6 And - but there are some things that we do have
7 some concerns about. And once [we] go through
8 the entire process, you'll understand why I have
9 some concerns about this. But I want to make
10 sure that you understand * * * and don't get
11 discouraged because you are extremely close to
12 being let go out of here.

13 Doc #9-2 at 93; see also id at 101 (BPH told petitioner he was
14 "very, very close" to being paroled). BPH then told petitioner he
15 was "not suitable for parole" and that he "would pose an
16 unreasonable risk of danger to society or a threat to public safety
17 if released from prison." Id at 92-93.

18 The state superior court affirmed the decision of BPH to
19 deny petitioner parole, stating "[b]ecause [p]etitioner's commitment
20 offense was for financial gain, premeditated, and not committed as
21 the result of significant stress in [his] life, the commitment
22 offense does provide some evidence that the [p]etitioner would
23 present an unreasonable risk to public safety if released from
24 prison." Doc #9-8 at 84. The court added that BPH "could properly
25 assess that [p]etitioner's uncertain parole plans, with their
26 attendant financial uncertainty, exacerbated the risk to public
27 safety." Id. The state appellate court summarily denied
28 petitioner's request for habeas corpus relief, Doc #9-9 at 2, and
the state supreme court summarily denied his petition for review.

1 Doc #9-9 at 23.

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4 In light of the entire record now before the court, it is
5 difficult, if not impossible, to reconcile BPH's decision to deny
6 petitioner parole with the evidence upon which it relied to make
7 that decision. Indeed, even BPH, in denying petitioner parole,
8 acknowledged how "difficult" the decision was, implying how
9 seemingly easy it would have been to reach the opposite conclusion,
10 ie, that petitioner was suitable for parole. Doc #9-2 at 93 & 101.
11 The court finds the record was "so devoid of evidence that the
12 findings of [BPH] were without support or otherwise arbitrary."
13 Hill, 472 US at 457, such that the state court's determination that
14 there was "some evidence" in the record to support BPH's decision to
15 deny petitioner parole was an objectively unreasonable application
16 of Hill. See 28 USC § 2254(d). There simply was no reliable
17 evidence to suggest that if released on parole, petitioner would
18 pose an unreasonable risk of danger to society or a threat to public
19 safety if released from prison. Cal Code Regs tit 15, § 2402(a).

20 Rather than accept the solid body of evidence
21 demonstrating petitioner's uncontroverted efforts at rehabilitation
22 and his firmly established commitment to bettering himself, BPH's
23 comments prove that its decision to deny petitioner parole stemmed
24 primarily from speculative fear. For instance, BPH engaged in sheer
25 conjecture in discussing the circumstances of the crime, with the
26 presiding commissioner claiming that he "kn[ew]" that the gun could
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1 have "explode[d]," implying that as a result of his actions,
2 petitioner could have been responsible for maiming or even killing
3 someone. Doc #9-2 at 99. But according to petitioner's statement
4 to police when he was arrested, which was confirmed by lab work
5 performed on the gun following petitioner's arrest, the gun was
6 "inoperable," missing at least three pieces. Doc #9-2 at 33-34, 35-
7 36 & 42-43; Doc #9-3 at 13.

8 Regarding his parole plans, BPH conjured up a scenario -
9 made out of whole cloth - wherein a recently-paroled petitioner
10 found himself craving a doughnut but without money to buy one,
11 necessarily implying that he would resort to committing a crime to
12 satisfy an impulse. See Doc #9-2 at 97-98; see also Doc #9-3 at 30-
13 31 (according to petitioner's psychological evaluation, he does not
14 exhibit evidence of "impulsivity").

15 But the evidence regarding petitioner's parole plans shows
16 that if he were granted parole, petitioner planned on living with
17 and caring for his elderly mother, to whom he expressed his
18 gratitude and indebtedness for not abandoning him during his lengthy
19 incarceration. See Doc #9-3 at 28-29. The evidence shows that upon
20 his release petitioner's mother "reaffirm[ed] [her] commitment to
21 provide [petitioner] with whatever [he] need[s] in the way of
22 shelter, clothes, transportation, and money," Doc #9-2 at 67; see id
23 at 69, a commitment which the presiding commissioner summarily
24 dismissed. See Doc #9-2 at 97 (emphasis added) ("your mother * * *
25 would not be able to help you as much").

26 The evidence shows that some of petitioner's free time
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1 would be spent regularly attending religious services with his
2 mother, who was active in her church. Doc #9-3 at 29. Petitioner
3 also planned to spend some of his time continuing his regular
4 participation in AA meetings, which he began in 1992. Doc #9-2 at
5 62-63. Although, as BPH noted, petitioner had not yet secured an AA
6 sponsor outside of prison, petitioner did demonstrate his continuing
7 commitment to participating in AA even if he were paroled by
8 obtaining a list of meeting locations close to his mother's home,
9 Doc #9-3 at 29, something that BPH failed to recognize. See Doc #9-
10 2 at 97 (in expressing "concern" regarding petitioner's parole
11 plans, BPH advised him "to identify what NA/AA programs are
12 available in the area" he planned on attending if paroled). There
13 is no evidence in the record to suggest that petitioner would fail
14 to obtain an AA sponsor or otherwise lapse in his commitment to his
15 recovery if he were released on parole.

16 In addition to having the support of the church and AA,
17 the evidence shows petitioner had "extended family in many
18 communities in the Bay Area," which included a "26-year-old daughter
19 with whom he is in contact" and with whom he recently had visited,
20 and a "niece who had offered to help him upon his release." Doc #9-
21 2 at 97; Doc #9-3 at 28.

22 The evidence also shows that petitioner had deep remorse
23 for his actions, and an even deeper motivation to make the most of
24 the remainder of his life if released from prison. See Doc #9-3 at
25 29 (petitioner "looks forward to develop[ing] a positive circle of
26 friends, in the future, [and] states 'there are a lot of people out
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1 there who are doing good things. I know I made a bad decision and I
2 see my life getting better. I know I got life left in me. I still
3 enjoy working.'"); id at 28-31; Doc #9-2 at 63 & 90-92.

4 Petitioner's record of developing various vocational
5 skills while incarcerated, which included woodworking, sewing,
6 upholstering and operating a forklift, and establishing himself as a
7 "lead man" and overall model employee support his self-stated desire
8 to find gainful employment upon his release from prison. Doc #9-2
9 at 57-60 & 72-73. Petitioner even provided BPH with a guaranteed
10 offer of employment in roofing, a profession in which he was engaged
11 prior to his incarceration. Id at 67-68 (undated letter from Mr
12 Mike Farrell who "will guarantee a job for [petitioner]" in
13 Sausalito in industrial roofing at \$14 an hour with a possible raise
14 after three months).

15 BPH's decision regarding petitioner's parole suitability
16 lies in stark contrast to that of the psychologist, who concluded
17 that in light of petitioner's "history, institutional adjustment,
18 and present clinical presentation there are no psychological factors
19 that would suggest an increased risk for violent behavior, in either
20 the community, or a controlled setting at the present time." Doc
21 #9-3 at 31. The July 2006 "Life Prisoner Evaluation Report"
22 similarly concluded:

23 Based on the absence of a prior criminal history
24 (taking into account his commitment offense),
25 his prison adjustment, the findings in his
26 psychiatric reports, and his family support I
27 believe [petitioner] will re-integrate into
28 society without incident. I did not note any
information that would indicate he would not be
able to function as a law-abiding citizen should

1 he be allowed parole at this time.

2 Doc #9-5 at 49.

3 Petitioner's criminal offense was an isolated aberration
4 in his past, "temporally remote" - committed some twenty-three years
5 earlier - and certainly mitigated by various circumstances
6 indicating the conduct is unlikely to recur. See Lawrence, 44 Cal
7 4th at 1191. At the time BPH denied petitioner a parole date for
8 the eleventh time in 2006, he had served twenty-three years on his
9 seven-to-life sentence, over thirteen years past his minimum
10 eligible parole date. Perhaps in some cases the circumstances of a
11 prisoner's commitment offense reasonably may continue to predict his
12 future, even in spite of a prisoner's dramatic behavioral
13 improvement while in prison. But, where, as here, petitioner's
14 complete lack of a violent history, his extensive and successful
15 programming in prison, strong family support, realistic parole
16 plans, highly favorable psychological evaluations and model behavior
17 that has been maintained for his entire time spent behind bars, his
18 continued incarceration based on the circumstances of his 1982
19 commitment offense rises to the level of a due process violation the
20 Ninth Circuit envisioned. See Irons, 505 F3d at 854 ("in some
21 cases, indefinite detention based solely on an inmate's commitment
22 offense, regardless of the extent of his rehabilitation, will at
23 some point violate due process, given the liberty interest in parole
24 that flows from the relevant California statutes").

25 After careful review of the record and pertinent law, the
26 court finds there simply is no evidence that petitioner was not

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1 suitable for parole and would pose an unreasonable risk of danger to
2 society or a threat to public safety if released from prison. The
3 state court's determination that BPH's reliance on the commitment
4 offense as well as what it termed petitioner's "uncertain parole
5 plans" satisfied the "some evidence" standard was an objectively
6 unreasonable application of Hill. See 28 USC § 2254(d). As a
7 result, petitioner is entitled to federal habeas relief on his due
8 process claim.

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11 For the reasons stated above, the petition for writ of
12 habeas corpus is GRANTED. Within twenty days of the date of this
13 order, BPH must calculate a term for petitioner and set an imminent
14 date for his release in accordance with California Penal Code
15 § 3041(a). Within ten days of petitioner's release, respondent must
16 file a notice with the court confirming the date on which petitioner
17 was released.

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19 IT IS SO ORDERED.

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22 VAUGHN R WALKER
23 United States District Chief Judge