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

STEVEN H. CASWELL,

Petitioner,

No. CIV S-91-1079 FCD EFB P

vs.

ARTHUR CALDERON,

Respondent.

ORDER SETTING STATUS CONFERENCE

Petitioner is a state prisoner proceeding through counsel with this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the 1999 decision by the California Board of Parole Hearings (hereinafter, the “Board”) to rescind his unexecuted 1996 grant of parole. In his traverse filed on December 30, 2004, petitioner requests a status conference in order to address matters concerning supplementation of the record before this court. Good cause appearing, and for the reasons explained below, this request will be granted.

I. Factual and Procedural Background

To provide background and context with respect to petitioner’s request for a status conference, the court will set forth the factual and procedural background to this complicated case.

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1 **A. State Court Proceedings**

2 Caswell is serving an indeterminate life sentence with the
3 possibility of parole, following his 1976 conviction of four counts
4 of kidnapping for the purpose of robbery (Pen. Code, § 209); he
5 was also convicted of four counts each of first degree robbery
6 (Pen. Code, § 211), assault with a deadly weapon (Pen. Code, §
7 245, subd. (a)), and attempted murder (Pen. Code, §§ 664, 187), as
8 to which prison sentences were stayed. The Board is the executive
9 agency authorized to grant parole and set release dates for
10 prisoners serving life sentences, and in certain circumstances it
11 may rescind an unexecuted grant of parole. (Pen. Code, §§ 3040,
12 3041.)

13 **A. Caswell's Offenses**

14 The 1978 appellate decision affirming Caswell's convictions
15 summarizes the offenses as follows: "On the evening of May 20,
16 1976, at approximately 9:00 p.m., [the victims] college students
17 Eanswythe Leicester, Jeremy Grainger, James McCabe and Laura
18 Goldman were in the vicinity of Redding, California, on a camping
19 trip. The [victims] stopped at campsite 14 of the Antlers
20 Campground to eat and go swimming. On their way to the lake the
21 [victims] met [the prisoner] Caswell and spoke with him briefly.
22 After finding that they could not reach the lake from their
23 campsite, the [victims] crossed campsite 16 on their way back to
24 the car, and there talked with both [Caswell and his crime partner,
25 David Englund] who were occupying that campsite. [¶] The
26 [victims] then returned to their car and left the campsite, and as
27 they passed campsite 16 [Caswell and Englund] came out to the
28 road and waved for them to stop. [Caswell and Englund] asked for
29 a ride out of the campground, then . . . Englund pointed a gun at
30 the [victims] and ordered them out of the car. The [victims] were
31 ordered to the campsite 16 picnic benches as Englund pointed the
32 gun at them and Caswell pushed them along, saying that Englund
33 had 'a hole in his leg.' Caswell drove the car into the campsite.
34 [¶] [Caswell and Englund] demanded money from the [victims];
35 Jeremy and Laura gave their money to [Caswell and Englund] and
36 James went to the car with Caswell and gave his money to him.
37 Eanswythe had left her money in her backpack in the car and she
38 told [Caswell and Englund] she did not have money. When
39 [Caswell and Englund] wanted more money[,] Jeremy told them
40 they were students and did not have much. Englund struck him
41 with the gun. [Caswell and Englund] indicated that they were
42 going to take the car, and again stated that Englund was wounded.
43 [¶] [Caswell and Englund] attempted to tie the [victims] at the
44 picnic bench, but then took them through the bushes to a meadow
45 where they were forced to lie on the ground. [Caswell and
46 Englund] decided that the [victims] were too close to the road and
47 might be able to shout for help, so they ordered them to get up and
48 took them farther from the road. [Either Caswell or Englund]

1 stated that Jeremy's political T-shirt would make a good target.
2 The gun was fired, but no one was shot at that time. [¶] The
3 victims were taken to a cliff and ordered to undress. Eanswythe
4 was then tied by the ankles with Jeremy's T-shirt, and Laura and
5 Jeremy were tied together with rope [Caswell and Englund] had
6 brought along. [Caswell and Englund] tied Eanswythe's ankles to
7 Laura and Jeremy using the same rope that Laura and Jeremy were
8 tied with. While tying the victims, Caswell indicated that he
9 wanted to take sexual advantage of one of the girls, but Englund
10 was in a hurry and the matter was dropped. When the victims
11 were tied [Caswell and Englund] debated whether to shoot them,
12 Englund arguing that they should and Caswell saying they should
13 not. [¶] After tying three of the victims [Caswell and Englund]
14 ran out of rope, and so they tied James' [sic] legs with some
15 clothing. Englund struck James with the gun[,] and Caswell
16 pushed him off the cliff. [Caswell and Englund] shot at James and
17 rolled rocks down at him until they believed he was dead. Caswell
18 attempted to push the others off the cliff but failed, due to the
19 manner in which they had been bound. The following discussion
20 then took place: 'Englund: "Okay, let's just gag them." Caswell:
21 "Shoot them." Englund: "Okay."' Englund then shot Laura in the
22 stomach and Jeremy in the chest. Eanswythe realized that it was
23 her turn, and she held her hand in front of her face to prevent her
24 glass lens from shattering into her eyes. She was struck with the
25 gun four or six times, and two shots were fired at her, one passing
26 backwards. [¶] [Caswell and Englund] ran back to the car and
drove off."

B. Board's Grant of Parole in 1986

Caswell became eligible for release on parole in April 1983, but was denied a parole date on four occasions between May 1982 and March 1985, due at least in part to the seriousness of his offenses and, on most of these occasions, unfavorable psychiatric evaluations.

In March 1986, Caswell again appeared before the Board for parole consideration. In addition to the summary of the offenses from the appellate decision, the 1986 panel had before it other material depicting the crimes, including transcripts of the 1982 and 1985 parole hearings. Based on this information, it appeared the appellate court had attributed the statement, "Shoot them," to Caswell due to the testimony of one of the female victims. The two male victims had testified that Caswell repeatedly disagreed with Englund's suggestion to shoot them. According to the attorney who represented both Englund and Caswell at the 1985

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1 hearing, Englund represented that Caswell had never suggested
2 shooting the victims.¹

3 The 1986 panel found Caswell suitable for parole, based on: his
4 minimal criminal record and lack of significant history of violent
5 crimes; his stable social history; his participation in education
6 programs, self-help programs, and vocational programs while in
7 prison; his maturity and age; his parole plans, including job offers
8 and family support; his positive institutional behavior; and
9 favorable psychological evaluations. The panel stated: “Based on
10 the information contained in the record and considered at this
11 hearing, the panel states as required by [Penal Code section] 3043
12 that the prisoner would not pose an unreasonable threat to public
13 safety if released on parole.”

14 The 1986 panel calculated an aggregate term of sentence of 36
15 years, minus 41 months of postconviction credits, and set a parole
16 release date in December 2006. Caswell’s period of confinement
17 was based on the four counts of kidnapping for the purpose of
18 robbery. The panel set an aggravated term on two of these four
19 counts, a middle term on another, and a mitigated term on the
20 count pertaining to victim McCabe. The panel justified the
21 mitigated term by pointing to the fact that, although Caswell
22 pushed McCabe off a cliff and attempted to kill him, McCabe’s
23 injuries were minor. Caswell’s term was later reduced, with a
24 release date in September 2000.

25 The Board, sitting en banc, reviewed the grant of Caswell’s parole
26 release date in August 1998. Although this review was undertaken
without a transcript of the 1986 hearing, the hearing at which a
panel found the prisoner suitable for parole, the Board ordered that
a parole rescission hearing be conducted to determine whether
there was good cause to rescind Caswell’s parole. Three reasons
were identified for ordering the parole rescission hearing: (1) the
extreme seriousness of the crime; (2) Caswell’s minimization of
his involvement in the commitment offenses; and (3) Caswell’s
lack of remorse.

C. The Board’s Rescission of Parole in 1999

At the rescission hearing in March 1999, the panel relied
exclusively on the transcript of the 1986 hearing and did not
receive any new evidence. For example, the 1999 panel was not in
possession of transcripts of the 1982 and 1985 hearings, which

¹ Caswell requested we take judicial notice of the first 11 pages of the transcript of the 1985 parole hearing that he inadvertently omitted from the record before the 1999 panel. We denied the request.

1 would have provided full descriptions of the crimes and Caswell's
2 involvement, as well as Caswell's testimony on those points.

3 Following the hearing, the 1999 panel unanimously found good
4 cause to rescind Caswell's parole, citing the extreme seriousness of
5 the crimes and Caswell's minimization of his involvement. In
6 particular, the 1999 panel concluded that: (1) "[A]n in depth
7 discussion of the life crime was not conducted by the [1986] Panel
8 and the prisoner clearly minimized his role in this horrific crime";
9 (2) "[t]he [1986] Panel never mention[ed]" the stayed convictions;
10 (3) the [1986] Panel's mitigation of the term for McCabe "missed
11 the point in that the prisoner acted alone in attempting to murder
12 the victim by pushing him over a cliff" and then with Englund
13 "pushed boulders down on him to further do harm to the victim";
14 (4) Caswell minimized the "sexual overtures" he made to one of
15 the female victims; and (5) the [1986] Panel should have found
16 aggravation in the fact that Caswell "played an integral part in the
17 facilitation of these crimes which resulted in numerous attempts to
18 murder the victims" rather than finding mitigation in the fact that
19 Caswell "did not shoot the victims." The 1999 panel concluded,
20 however, that Caswell displayed sufficient remorse.

21 The Board's appeals unit denied Caswell relief. He then filed a
22 petition for writ of habeas corpus in Solano County Superior
23 Court.

24 **D. The Trial Court's Grant of Caswell's Habeas Corpus 25 Petition**

26 On December 21, 2000, the trial court granted Caswell's petition
for writ of habeas corpus and ordered the Board to reinstate
Caswell's parole and parole date. The court found: "[A] full and
complete review of the record herein fails to reveal any evidence in
support of the rescinding panel's conclusion that the grant of
parole was improvidently given for failure to consider the
seriousness of the crime or failure to consider the petitioner's
minimization of his involvement in the crime."

The Board appealed, and the superior court granted a stay pending
disposition of the appeal.

In re Caswell, 92 Cal.App.4th 1017, 1022-1026 (2001).

In a published opinion, the California Court of Appeal subsequently reversed the
judgment of the trial court and upheld the Board's 1999 decision rescinding petitioner's parole.

Id. The appellate court explained its reasoning as follows:

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1 **A. BACKGROUND**

2 The Board is vested with exclusive authority to decide whether a
3 life prisoner is suitable for parole. (Pen. Code, § 3040; Cal. Code
4 Regs., tit. 15, §§ 2265-2454; *In re Powell* (1988) 45 Cal.3d 894,
5 901 [248 Cal.Rptr. 431, 755 P.2d 881] (*Powell*.) One year before
6 the prisoner’s minimum eligible release date, a panel of the Board
7 meets with the inmate and normally sets a parole release date.
8 (Pen. Code, § 3041, subd. (a).) Parole must be denied, however, if
9 the panel in its discretion determines that the prisoner would pose
10 an unreasonable risk of danger to society if released, in light of the
11 gravity of his current convicted offenses or the timing and gravity
12 of his current or past convicted offenses. (Pen. Code, § 3041,
13 subd. (b); Cal. Code Regs., tit. 15, §§ 2281, subd. (a), 2402.)

14 Even after parole is granted, the Board is authorized to rescind the
15 grant of parole, if unexecuted, for good cause after a rescission
16 hearing. (*Powell, supra*, 45 Cal.3d at p. 901; Cal. Code Regs., tit.
17 15, § 2450; *see* Pen. Code, §§ 3040, 3063.) “Cause” for rescission
18 includes conduct enumerated in section 2451 of title 15 of the
19 California Code of Regulations, which at the time of Caswell’s
20 rescission hearing included: (1) any disciplinary conduct
21 subsequent to the grant of parole, (2) psychiatric deterioration of
22 the prisoner, and (3) new information indicating parole should not
23 occur, such as an inability to meet a special condition of parole,
24 information significant to the original grant of parole being
25 fraudulently withheld from the Board, or fundamental errors which
26 resulted in the improvident grant of parole. (*Powell, supra*, at p.
 902.)²

 Cause for rescission is not restricted to those matters enumerated
 in California Code of Regulations, title 15, section 2451. (*In re*
 Johnson (1995) 35 Cal.App.4th 160, 168 [41 Cal.Rptr.2d 449]
 (*Johnson*); *In re Fain* (1976) 65 Cal.App.3d 376, 393-394 [135
 Cal.Rptr. 543] (*Fain*.) Because the Board is afforded great
 discretion in parole decisions, “cause” includes a determination by
 the Board that parole was improvidently granted under the
 circumstances appearing at the time of the grant of parole or at a
 later time. (*Powell, supra*, 45 Cal.3d at p. 902; *Johnson, supra*, at
 p. 168; *Fain, supra*, at p. 394.) Thus, it has been held, parole may
 be rescinded if the granting panel failed to adequately consider the

² In 2000, title 15, section 2451 of the California Code of Regulations was amended
 without substantive change, making the occurrence of “[f]undamental errors” a separate ground
 for convening a rescission hearing. Under the current version, therefore, a rescission hearing
 (and rescission itself) may be based on (1) the prisoner’s disciplinary conduct; (2) his psychiatric
 deterioration; (3) “[f]undamental errors” during the hearing at which parole was granted; or (4)
 new information indicating parole should not occur. (Cal. Code Regs., tit. 15, § 2451, subds.
 (a)-(d).)

1 gravity of the prisoner's convictions. (*Johnson, supra*, at pp.
2 168-169.)

3 Of course, a rescission may not be upheld merely because the
4 Board has mouthed words that have been held to constitute
5 "cause" for rescission. There must also be an adequate "*factual*
6 *underpinning* for the Board's determination of cause." (*Johnson,*
7 *supra*, 35 Cal.App.4th at p. 169, italics added.) In light of the
8 Board's broad discretion in these matters, however, we review the
9 sufficiency of this factual underpinning using an extremely
10 deferential standard, requiring merely "some evidence" to justify
11 the rescinding panel's determination. (*Powell, supra*, 45 Cal.3d at
12 pp. 902, 904-906.) As our Supreme Court has explained: "A
13 parole date, like a good time credit, is a prospective benefit that is
14 conditioned on the inmate's continued good performance and
15 subject to review and withdrawal for cause by the [Board]. While
16 the board cannot rescind a parole date arbitrarily or capriciously, it
17 does not abuse its discretion when it has some basis in fact for its
18 decision. . . . [T]he [Board] must strike 'a balance between the
19 interests of the inmate and of the public.' [Citation.] If it is to
20 accomplish this delicate task, it must operate with broad discretion
21 and not be 'subject to second-guessing upon review.' [Citation.]"
22 (*Powell, supra*, at p. 904; *Johnson, supra*, 35 Cal.App.4th at pp.
23 169-170.)

24 An example of the application of the "some evidence" standard
25 was provided by our Supreme Court in *Powell*. There, a life
26 prisoner was granted release dates at parole consideration hearings
held in 1977 and 1979. After a subsequent counselor's report
expressed doubt about the prisoner's suitability for parole, the
board ordered a rescission hearing. At the rescission hearing, the
panel considered three psychological reports, all of which had been
prepared after Powell had been given a release date. Two of the
reports favored the grant of parole, while one report favored the
rescission of parole. (*Powell, supra*, 45 Cal.3d at pp. 898-901.)
The panel decided to rescind the prisoner's parole release date,
because (1) the report favoring rescission raised significant doubts
about the prisoner's potential for violence, convincing the panel
that he would pose a danger to others if released, and (2) the
granting panel had committed fundamental error, by failing to
consider the prisoner's prior escape attempt and gun smuggling
incident and only perfunctorily considering another escape
attempt. (*Id.* at p. 901.)

23 After announcing the applicable standard of review, our Supreme
24 Court ruled that "some evidence" supported the first ground for
25 rescission (pertaining to the new psychological evaluation), since
26 the evaluation on which the Board premised its rescission was
based on the prisoner's complete medical and correctional history.
(*Powell, supra*, 45 Cal.3d at pp. 905-906.) The court concluded:
"In sum, while the evidence was unquestionably in conflict, the

1 resolution of that conflict and the weight to be given the evidence
2 was for the board. [Citation.] Since its determination had a factual
3 basis, the board did not abuse its discretion in rescinding Powell's
4 parole." (*Id.* at p. 906.)

5 However, we point out that Powell did not decide whether there
6 was a sufficient basis in fact for the rescinding panel's second
7 ground for rescission – that the granting panel failed to adequately
8 consider the gravity of the offenses. (*Powell, supra*, 45 Cal.3d at
9 p. 906, fn. 12 ["Accordingly, we need not consider the [Board's]
10 finding that the 1977 and 1979 panels committed fundamental
11 error resulting in the improvident granting of parole dates."].)
12 Powell therefore does not illustrate the application of the "some
13 evidence" standard where, as here, the basis for the rescission was
14 not new evidence, but a purportedly inadequate consideration of
15 evidence by the granting Board.

16 Circumstances more analogous to the matter at hand were
17 addressed by Division Four of this court in *Johnson, supra*, 35
18 Cal.App.4th 160. There, a prisoner convicted of two first degree
19 murders was found suitable for parole in 1981. The Board, sitting
20 en banc, later ordered a rescission hearing, due to (among other
21 things) a clinical evaluation warning that his potential for violence
22 on parole was unpredictable, a prison disciplinary action for
23 possession of contraband, and concerns expressed by the Governor
24 regarding public safety and the gravity of the prisoner's crimes.
25 (*Id.* at pp. 163-164.) After the hearing, the panel decided to
26 rescind the prisoner's parole on two grounds, both of which were
premiered on its disagreement with the granting panel's assessment
of the evidence: (1) failure to give "adequate weight" to the
clinical evaluation report, which indicated that the prisoner's
release would pose a danger to public safety; and (2) inadequate
consideration of the gravity of his crimes. (*Id.* at pp. 167-168.)

18 The appellate court ruled that a granting panel's failure to
19 adequately consider the gravity of the crimes may constitute
20 "cause" for rescission of a prisoner's parole release date. Turning
21 to the sufficiency of the factual underpinning for the two grounds,
22 the court identified "some evidence" to support the Board's
23 decision to rescind parole because, in effect, it was not
24 unreasonable to do so. (*Johnson, supra*, 35 Cal.App.4th at pp.
25 169-170.) The court explained: "Reasonable minds could differ as
26 to whether the granting panel of the Board in 1981 gave adequate
consideration to the gravity of Johnson's offenses. Reasonable
minds could also differ as to whether Johnson's release would pose
a danger to public safety and as to whether in that regard adequate
consideration was given to the clinical evaluation report
Because the Board's discretion in parole matters is 'great,'
'absolute,' and 'almost unlimited'" [citation], it is certainly broad
enough to permit the Board to make the findings herein."
(*Johnson, supra*, at p. 169.)

1 This language in *Johnson* should not be misconstrued. *Johnson*
2 could be read – incorrectly – to uphold the rescission of a parole
3 release date merely because “reasonable minds could differ” as to
4 the panel’s determination of the prisoner’s suitability for parole.
5 That is, as long as there had been “some evidence” before the
6 granting panel that could have reasonably justified a finding of
7 unsuitability, a subsequent panel would have carte blanche to
8 rescind the parole, decades later, for no reason other than its
9 conclusory disagreement with the granting panel’s ultimate
10 decision, or mere political aversion to the concept of parole in
11 general. Notwithstanding the nearly absolute discretion of the
12 Board, we find this interpretation of the standard untenable, and
13 not in line with what our Supreme Court had in mind when it
14 decided *Powell*. Indeed, “some evidence” of unsuitability for
15 parole would exist in virtually every parole hearing, exposing
16 every grant of parole to a Board’s subsequent change of heart or
17 political whim.

18 In reviewing a rescission of parole based on the granting panel’s
19 failure to adequately consider the gravity of the offenses, the
20 proper focus is on the findings and conclusions that were central to
21 the original panel’s ultimate decision to grant parole. When these
22 findings or conclusions cannot be reconciled with the evidence
23 before the granting panel, or when the granting panel misstated
24 facts or explicitly declined to consider information germane to the
25 gravity of the crimes, it can fairly be said that reasonable minds
26 could differ on whether the panel gave adequate consideration to
the severity of the crimes. In those instances, “some evidence” of
the panel’s failure to adequately consider the gravity of the
prisoner’s offense(s) would exist, thereby justifying rescission of
the parole release date. (Cf. Cal. Code Regs., tit. 15, § 2451, subd.
(c) [rescission hearing (and rescission) warranted for
“[f]undamental errors” by granting panel].)

We now proceed to review the 1999 panel’s decision de novo to
determine if it properly applied the *Powell* standard to the findings
and conclusions that underlay the earlier decision to grant parole.
(See *Powell*, *supra*, 45 Cal.3d at p. 905.)

B. Evidence Supporting the 1999 Rescission of Parole

The record of the Board’s actions might suggest to some readers
that the 1999 panel had determined Caswell’s fate before the
hearing commenced. The en banc recommendation that a
rescission hearing be held – purportedly because the 1986 panel
improvidently granted parole – was made without benefit of a
transcript of the 1986 hearing, and the rescinding panel did not
have the 1982 and 1985 hearings’ transcripts, at which the offenses
and Caswell’s participation were extensively discussed. In light of
Caswell’s exemplary conduct throughout the period of his
incarceration, one might question whether the determinations of

1 either panel represented a predetermined conclusion in search of a
2 justification, supported by little more than makeweight
3 rationalizations for the rescission. (*See generally In re*
4 *Rosenkrantz* (2000) 80 Cal.App.4th 409 [95 Cal.Rptr.2d 279].)
5 Indeed, the statutory and administrative framework under which
6 the Board operates invites debate over the role of political
7 influence and public clamor in the parole review scheme. (*See*
8 *Warren, State Slams Door on Hopes for Parole Prisoners, L.A.*
9 *Times* (Oct. 3, 1999) p. 1.)

10 Our task, however, is not to debate the predisposition of the panel
11 or the political influences upon it, but to determine whether there is
12 an appropriate statement of “cause” for the rescission and “some
13 evidence” to support the 1999 panel’s conclusions. The Board’s
14 grounds for rescission, which we have reorganized slightly to
15 clarify our discussion, were the following: (1) the granting panel
16 did not conduct an in-depth discussion of the life crime; (2) the
17 granting panel did not mention the stayed convictions; (3) the
18 granting panel should have found aggravation in the fact that
19 Caswell “played an integral part in the facilitation of these crimes
20 which resulted in numerous attempts to murder the victims” rather
21 than finding mitigation in the fact that Caswell “did not shoot the
22 victims”; (4) Caswell minimized his role in the life crime and the
23 “sexual overtures” he made to one of the female victims; and (5)
24 the granting panel’s mitigation of the term for McCabe “missed the
25 point in that the prisoner acted alone in attempting to murder the
26 victim by pushing him over a cliff” and then with Englund “pushed
boulders down on him to further do harm to the victim.”

We accept the premise, not substantially disputed by the parties,
that these grounds generally fall within the rubric of inadequate
consideration of the gravity of Caswell’s offenses, and thus there
exists a sufficient statement of “cause” for the action taken by the
rescinding panel. (*Johnson, supra*, 35 Cal.App.4th at pp.
168-169.) We next examine the factual underpinning for each of
these grounds. As we shall explain, the first four grounds lack
sufficient factual support in the record and, as such, cannot justify
rescission of the parole release date. The fifth ground, however,
properly addresses a determination by the granting panel, which
was so at odds with the material before the granting panel that
there is a sufficient factual basis to conclude the granting panel
failed to adequately consider the gravity of Caswell’s offenses.

1. 1986 Panel’s Discussion of Caswell’s Life Crime

The 1986 panel’s discussion of Caswell’s life crime was not so
lacking as to constitute evidence of the panel’s failure to consider
the gravity of his offenses. The granting panel appeared familiar
with the facts and began its interrogation of Caswell with questions
concerning his involvement in the crimes. Unlike the 1999 panel,
the 1986 panel also had transcripts of Caswell’s 1982 and 1985

1 parole hearings, which contained thorough descriptions of the
2 offenses. In addition, the 1986 panel was provided a broad array
3 of other material, including the transcript of the sentencing hearing
4 at which the trial court commented on the seriousness of the
5 offenses and a life prisoner evaluation discussing the aggravating
6 circumstances of the commitment offense. We may presume the
7 panel considered the evidence before it. (Evid. Code, § 664.)³

8 In fact, the contention that the granting panel failed to sufficiently
9 discuss Caswell's life crime appears to be derived solely from the
10 rescinding panel's disagreement with the result of the 1986
11 hearing. The rescinding panel did not support its contention with
12 any erroneous specific factual determination by the granting panel
13 that concerned the life crimes. Nor did it cite to any express
14 omission of evidence material to the earlier panel's consideration
15 of those crimes. Because the rescinding panel's subjective
16 characterization of the granting panel's discussion of Caswell's life
17 crimes fails to address any specific finding and lacks evidentiary
18 support, it is an insufficient ground for rescinding Caswell's
19 parole.

2. Failure to Mention Stayed Offenses

20 The 1999 panel also found that rescission was justified because the
21 1986 panel failed to mention Caswell's stayed offenses. When
22 Caswell was sentenced by the trial court, prison terms as to 12 of
23 the 16 counts were stayed pursuant to Penal Code section 654:⁴
24 four counts each of attempted murder, first degree robbery with
25 intent to inflict great bodily injury (including special findings that
26 the victims suffered great bodily injury), and assault with a deadly
27 weapon and/or by means of force likely to produce great bodily
28 injury.

29 The 1986 panel's failure to recite and discuss the stayed offenses is
30 not evidence that parole was improvidently granted. There is no
31 requirement that the stayed offenses be recited or independently
32 discussed. Although the 1986 panel was obligated to consider the
33 facts underlying these stayed offenses, since they were intertwined
34 with the crimes for which Caswell was imprisoned (Cal. Code

35 ³ The rescinding panel's assertion that the 1986 panel failed to adequately consider the
36 1982 and 1985 hearing transcripts is somewhat ironic, since the 1999 panel did not even have
37 transcripts of Caswell's 1982 or 1985 hearings when it passed judgment on the action taken by
38 the earlier panel.

39 ⁴ Section 654, subdivision (a), reads: "An act or omission that is punishable in different
40 ways by different provisions of law shall be punished under the provision that provides for the
41 longest potential term of imprisonment, but in no case shall the act or omission be punished
42 under more than one provision. An acquittal or conviction and sentence under any one bars a
43 prosecution for the same act or omission under any other."

1 Regs., tit. 15, § 2326, subd. (b)), we can find no statement by the
2 1986 panel, or other affirmative evidence, suggesting the panel
3 declined to take into consideration the entirety of Caswell's actions
4 in its discussion of the commitment offenses. To the contrary, the
5 1986 panel discussed with Caswell topics such as the tying up and
6 shooting of the victims, his suggestion of sexual contact with one
7 of the female victims, the pushing of McCabe over a cliff and the
8 rolling of rocks onto him, as well as more general questions
9 concerning the prisoner's participation in "all the acts." We
10 conclude that rescission cannot be justified on this ground.

3. Failure to Find Aggravation

7
8 As a third ground for rescission, the 1999 panel declared that the
9 granting panel should have found aggravation in Caswell's integral
10 role in the facilitation of the crimes, which resulted in numerous
11 attempts to murder the victims, rather than finding mitigation in
12 the fact that Caswell did not shoot the victims. The suggestion that
13 the 1986 panel mitigated Caswell's crimes because he did not
14 shoot anyone is inaccurate. The 1986 panel did not state that it
15 considered Caswell's actions less grave on this basis; and it did not
16 reduce his term of confinement for that reason. Instead, the
17 remarks to which the 1999 panel refers appear in the closing
18 comments of one of the 1986 panel members, as follows: "*This
19 was an exceptionally serious and aggravated commitment offense.
20 In mitigation, you did not shoot the victims, and you have made
21 tremendous progress while in the institution.*" (Italics added.) In
22 context, the 1986 panel member was merely differentiating
23 Caswell's actions from those of Englund, based on the
24 uncontroverted fact that Caswell was not the one pulling the
25 trigger. The lone panel member's gratuitous comment does not
26 provide a factual underpinning for the 1999 panel's determination
that the granting panel failed to adequately consider the gravity of
the commitment offenses.

4. Caswell's Minimization of His Role in the Crimes.

19 The 1999 panel also concluded rescission was appropriate because
20 Caswell minimized his role in the crimes and his "sexual
21 overtures" to one of the female victims. In essence, at the 1986
22 hearing Caswell characterized his continuing participation in the
23 crimes as an "inability" or "omission" in not escaping his crime
24 partner. He also attributed his suggestion of sexual contact with
25 the bound, naked female victim, held at gunpoint, as
26 "awkwardness," because he felt "uncomfortable tying those people
up," he was "trying to impress [Englund]," and he "didn't want
anybody to get shot."

Initially we point out that, contrary to appellant Board's implicit
contention, a prisoner's refusal to admit participation in the crime
on matters of conflicting evidence does not necessarily constitute

1 unsuitability for parole or mandate rescission. Section 2236 of
2 title 15 of the California Code of Regulations reads: “The facts of
3 the crime shall be discussed with the prisoner to assist in
4 determining the extent of personal culpability. *The board shall not*
5 *require an admission of guilt* to any crime for which the prisoner
6 was committed. A prisoner may refuse to discuss the facts of the
7 crime in which instance a decision shall be made based on the
8 other information available and the refusal shall not be held against
9 the prisoner.” (Italics added.)⁵ Nor does appellant provide any
10 legal authority for the proposition that a prisoner’s “minimization”
11 of his involvement in the crimes is sufficient to warrant rescission
12 where, as here, the prisoner has acknowledged responsibility and
13 demonstrated remorse.

14 At any rate, the record does not uphold the panel’s finding that
15 Caswell minimized his involvement in the commission of the
16 offenses. In testifying that the crimes escalated because of his
17 “inability to control” and his “omission to do anything to counter
18 what [Englund] wanted [him] to do,” Caswell took responsibility
19 not only for what he actually did, but also for the escalation of the
20 crime in his failure to act. The transcript of the 1986 proceedings
21 reveals that Caswell repeatedly admitted full responsibility for the
22 entirety of the incident. When asked whether he took “full
23 responsibility for what happened,” he responded: “Yes, sir.” He
24 was then asked, “Everything that you did prior to and after the life
25 crime, you accept full responsibility for?” Caswell responded,
26 “Yes, sir.” Notwithstanding how one may view his excuses for
suggesting sexual contact with one of the female victims, Caswell
prefaced his explanation with an acknowledgement of its
insufficiency, stating: “And in no way, I don’t want this panel to
take this as a justification, because I don’t believe there’s any
justification for my actions” The 1999 panel’s rescission
order is not justified on the ground Caswell minimized his
involvement in the crimes.

5. The McCabe Offense

Last, we turn to the two panels’ views of Caswell’s criminal
conduct relative to victim McCabe. The 1999 panel maintained
that the granting panel misconstrued the gravity of this conduct
and, as a result, improperly arrived at a mitigated term of
imprisonment as to count VI, kidnapping for the purpose of
robbery (Pen. Code, § 209), which identified McCabe as the

⁵ This is particularly relevant to the present case. As Caswell’s attorney pointed out at the 1999 hearing, the 1999 panel was to investigate whether the granting panel duly considered certain points or improvidently granted parole based on the material before it. Further testimony from Caswell is not relevant to whether the granting panel made an appropriate consideration of the record. Caswell himself explained that everything was a matter of record and he had nothing new to add.

1 victim. In particular, the 1999 panel concluded the 1986 panel
2 “missed the point” that Caswell acted alone in pushing McCabe off
3 a cliff and rolling rocks down onto him, and inappropriately
4 focused on the fact that McCabe suffered only minor injuries. For
5 reasons we shall explain, this ground for rescission reflects more
6 than a mere disagreement with the ultimate determination reached
7 by the 1986 panel. Instead, it targets a specific conclusion of the
8 granting panel and establishes the disparity between the conclusion
9 and the evidence.

6 Before proceeding to our analysis, we dispose of a matter which,
7 although not addressed by the parties at any length, warrants
8 clarification. The granting panel’s mention of the minor nature of
9 McCabe’s injuries was not explicitly brought up during the
10 Board’s assessment of Caswell’s suitability for parole. Rather,
11 discussion of McCabe’s injuries, and the assignment of a mitigated
12 term as to count VI, arose in connection with the granting panel’s
13 calculation of Caswell’s release date. The granting panel’s
14 determination of the prisoner’s suitability for parole and the
15 calculation of a release date were made at the same hearing, by the
16 same panel members, and based on the same evidence. The
17 conclusion to be drawn is that the granting panel had the same
18 evaluation of Caswell’s conduct when deciding his suitability for
19 parole as it did when calculating his release date.

14 The granting panel’s assessment of Caswell’s participation in the
15 McCabe offense was a *specific finding*, which, in the context of the
16 record before us, was central to its ultimate determination of the
17 gravity of Caswell’s offenses and his suitability for parole.
18 Furthermore, the 1999 rescinding panel pointed to a factual basis
19 in the record for concluding the granting panel’s finding was
20 inconsistent with the facts before it. The evidence before the
21 granting panel was as follows: after tying McCabe up, Caswell
22 pushed him off a cliff and proceeded to roll rocks onto McCabe
23 until he believed McCabe was dead. The fact that McCabe
24 suffered relatively minor injuries might be attributed to fortuity or
25 an act of God, but it certainly cannot be attributed to Caswell. On
26 this record, reasonable minds could differ on whether the granting
panel gave adequate consideration to the gravity of Caswell’s
crimes. We are therefore constrained to agree there was “some
evidence” this panel failed to adequately consider the gravity of
Caswell’s criminal acts against McCabe.⁶ This ground alone

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24 ⁶ As mentioned, ante, the 1999 panel did not obtain transcripts from the 1982 and 1985
25 parole hearings, which were before the granting panel. The 1999 panel sought to excuse this
26 failure by expressing confidence in Caswell’s attorney to bring to its attention salient
information from these hearings. We reject the notion that a rescinding panel might be relieved,
on that basis, from obtaining readily available information that had been considered by the
granting panel. We point out, however, that nothing in the record suggests that the 1986 panel’s

1 justifies rescission of Caswell's unexecuted grant of parole, and
2 the trial court erred in ruling to the contrary.

3 **III. Disposition**

4 The judgment is reversed.

5 *Id.* at 1026 -1035.⁷ Petitioner subsequently filed a Petition for Review in the California Supreme
6 Court. That petition was summarily denied by order dated January 15, 2002. October 25, 2004
7 Answer, Ex. I.⁸

8 **B. Proceedings in Federal Court**

9 On August 12, 1991, petitioner, proceeding in pro per, filed his petition for a writ of
10 habeas corpus in this court, in which he raised two claims. First, he claimed that the trial court
11 violated his right to due process by failing to give a proper jury instruction on aiding and
12 abetting. Second, he claimed that the Board violated the Ex Post Facto clause when it deferred
13 his parole release date until 2000. By order dated April 8, 1993, petitioner's jury instruction
14 claim was dismissed. This disposition was affirmed by the U.S. Court of Appeals for the Ninth
15 Circuit in an order dated July 16, 1997. On October 20, 1997, following the ruling by the Ninth
16 Circuit, petitioner informed this court that he intended to proceed with his claim for relief based

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18 finding concerning Caswell's criminal acts against McCabe turned on anything contained within
19 the 1982 or 1985 transcripts. For this reason, the rescinding panel's failure to obtain transcripts
20 of the two earlier hearings poses no impediment to upholding the rescission based upon the
21 granting panel's view of Caswell's participation in the McCabe offense.

22 ⁷ In a subsequent order entitled "Order Modifying Opinion and Denying Rehearing;
23 Supplemental Opinion upon Denial of Rehearing," Justice Stevens issued the following
24 supplemental opinion:

25 I would grant the petition for rehearing to consider further whether
26 or not the granting panel's assessment of Caswell's participation in
the McCabe offense was a specific finding as to Caswell's
suitability for parole.

October 25, 2004 Answer, Ex. I.

⁸ Justices Baxter and Brown were of the opinion that the petition should be granted.
Answer, Ex. I.

1 on the Board's alleged violation of the Ex Post Facto Clause. While the parties were engaged in
2 discovery on the ex post facto claim, petitioner filed a habeas petition in state court challenging
3 the Board's 1999 decision to rescind his 2000 parole release date.

4 On January 15, 2002, petitioner, now proceeding through counsel, filed a motion for
5 summary judgment on his ex post facto claim. On February 6, 2002, petitioner filed a motion to
6 amend his petition to add his claim that he was his rights to due process and equal protection
7 were violated by the Board's 1999 rescission of his parole date. On July 30, 2002, the district
8 court denied petitioner's motion for summary judgment and his request for leave to amend his
9 habeas petition. Judgment was entered on behalf of respondent on September 9, 2002.

10 Petitioner appealed the district court's decision to the Ninth Circuit Court of Appeals. In
11 a published opinion, the Ninth Circuit concluded that petitioner's ex post facto claim was moot
12 but that petitioner should be granted leave to amend his habeas petition to add his due process
13 challenge to the Board's 1999 decision rescinding his 2000 parole release date. *Caswell v.*
14 *Calderon*, 363 F.3d 832, 834 (9th Cir. 2004). With respect to its decision allowing petitioner to
15 amend his habeas petition to challenge the Board's 1999 decision, the Ninth Circuit made the
16 following comments:

17 Second, based on the current record, we cannot conclude that
18 Caswell's due process claim is futile due to lack of merit.
19 Rescission of a prisoner's parole does not violate due process so
20 long as "some evidence supports the decision." *McQuillion*, 306
21 F.3d at 904 (quoting *Superintendent v. Hill*, 472 U.S. 445, 456,
22 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985) (emphasis in original)).
23 That is not an exacting standard, so Caswell faces a difficult
24 challenge in attempting to establish that the Board's rescission of
25 his parole release date violated due process. However, he is
26 entitled to try. In 2001, the California Court of Appeal examined
the rescinding panel's decision to revoke Caswell's parole. It
began its analysis with this observation:

The record of the Board's actions might suggest to
some readers that the 1999 panel had determined
Caswell's fate before the hearing commenced. The
en banc recommendation that a rescission hearing
be held-purportedly because the 1986 panel
improvidently granted parole-was made without

1 benefit of a transcript of the 1986 hearing, and the
2 rescinding panel did not have the 1982 and 1985
3 hearings' transcripts, at which the offenses and
4 Caswell's participation were extensively discussed.
5 In light of Caswell's exemplary conduct throughout
6 the period of his incarceration, one might question
7 whether the determinations of either panel
8 represented a pre-determined conclusion in search
9 of a justification, supported by little more than
10 makeweight rationalizations for the rescission.

11 *In re Caswell*, 92 Cal.App.4th at 1029-30, 112 Cal.Rptr.2d at 471.
12 The Court of Appeal proceeded to reject as constitutionally
13 deficient four of the five grounds the rescinding panel used to
14 justify its decision. *Id.* at 1030-34, 112 Cal.Rptr.2d 462, 472-475.

15 Even as to the one ground relied on by the rescinding panel that
16 the Court of Appeal did find was supported by "some evidence" –
17 namely, that the granting panel's conclusion was at odds with the
18 evidence at trial – the court noted that "reasonable minds could
19 differ." *Id.* at 1034, 112 Cal.Rptr.2d 462, 475. Indeed, the Court
20 of Appeal may have betrayed its own doubts about that finding by
21 describing itself as "*constrained* to agree [with the rescinding
22 panel that] there was 'some evidence' [that the granting] panel
23 failed to adequately consider the gravity of Caswell's criminal acts
24 against [one of the victims]." *Id.* at 1034-35, 112 Cal.Rptr.2d 462,
25 475 (emphasis added).

26 Caswell's argument that the rescinding panel did not base its
decision on any evidence raises questions of fact that require
examination of both the granting panel's and rescinding panel's
decisions. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th
Cir.1988) (holding that district court abused its discretion in
denying leave to amend answer to include affirmative defense of
settlement; proposed amendment was not futile because it raised
"[q]uestions of fact"). Unfortunately, the rescinding panel's
written decision is not in the district court file. This reinforces our
conclusion that Caswell's due process claim cannot be deemed
futile on its face.

Caswell, 363 F.3d at 839.

On July 26, 2004, petitioner filed an amended petition for a writ of habeas corpus, in
which he raised the sole claim that the Board violated his right to due process when it rescinded
his 2000 parole date. Respondent filed an answer on October 25, 2004, and petitioner filed a
traverse on December 30, 2004.

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1 **II. Discussion**

2 Petitioner requests that this court hold a status conference “regarding discovery
3 proceedings and an evidentiary hearing as to the merits of the claims.” Traverse at 3. He argues
4 that “the district court file as presently constituted lacks a number of crucial Board of Prison
5 Term documents, including the hearing transcripts of 1982, 1984, and 1985, all of which the
6 1986 granting panel relied on in finding suitability, and none of which were before the 1999
7 rescinding panel.” *Id.* at 4 (underscore in original). Petitioner contends that “this case requires
8 some discovery to establish a complete and legible record of the relevant hearing and rulings by
9 the Board of Prison Terms, accompanied by a detailed analysis of the trial evidence, the BPT
10 factual inquiry leading to the parole grant in 1986, and of the single reason on which the
11 California Court of Appeal sustained the parole rescission of 1999.” *Id.* at 5. He argues that
12 “the current record is incomplete and insufficient to permit full argument and adjudication on the
13 merits.” *Id.*

14 In light of these contentions and in light of comments made by several courts regarding
15 documents missing from the record, a status conference shall be scheduled to address whether
16 the court record should be expanded to include additional documents. In order to narrow the
17 issues for consideration at the hearing, the parties will be directed to file status reports, as
18 explained below.


19 Accordingly, good cause appearing, IT IS HEREBY ORDERED that:

- 20 1. A Status Conference is set for January 20, 2010, at 10:00 a.m.
- 21 2. Fourteen days prior to the date set for the status conference, the parties shall file status
22 reports which include the following:
- 23 (a) a description of the documents, if any, that the parties believe should be
24 added to the record currently before the court;
- 25 (b) legal analysis, including case citation, regarding the record this court may
26 appropriately consider in resolving petitioner’s claim challenging the Board’s 1999 decision;

1 specifically, whether the court is limited to the documents the 1999 panel had before it at the
2 rescission hearing; and

3 (c) legal analysis regarding whether the court record may be augmented under
4 the circumstances of this case.

5 DATED: December 17, 2009.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

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