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

DONALD RAY JACKSON,

Petitioner,

No. 2: 02-cv-0946 FCD KJN P

vs.

TOM CAREY,

Respondent.

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner proceeding through counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1985 petitioner was convicted of second degree murder with an enhancement for use of a deadly weapon. Petitioner is serving a sentence of 16 years to life.

In the instant action, petitioner challenges the October 2000 decision by the California Board of Parole Hearings (“BPH”) finding him unsuitable for parole. This was petitioner’s sixth suitability hearing. This action is proceeding on the amended petition filed by petitioner without counsel on March 30, 2004. (Dkt. No. 10.) Petitioner raises the following claims: 1) two of the commissioners on the 2000 BPH panel had a conflict of interest; 2) insufficient evidence to support the decision finding petitioner unsuitable; 3) the parole

1 authority does not represent a cross-section of the population; 4) the suitability hearing was
2 untimely.

3 On June 10, 2005, respondent filed an answer. (Dkt. No. 14.) On July 6, 2005,
4 petitioner filed a pro se traverse. (Dkt. No. 16.) On December 21, 2007, petitioner’s counsel
5 filed a supplemental brief. (Dkt. No. 59.) After carefully considering the record, the undersigned
6 recommends that the petition be denied.

7 II. Anti-Terrorism and Effective Death Penalty Act (“AEDPA”)

8 In Williams (Terry) v. Taylor, 529 U.S. 362 (2000), the Supreme Court defined
9 the operative review standard in a habeas corpus action brought pursuant to 28 U.S.C. § 2254.
10 Justice O’Connor’s opinion for Section II of the opinion constitutes the majority opinion of the
11 court. There is a dichotomy between “contrary to” clearly established law as enunciated by the
12 Supreme Court, and an “unreasonable application of” that law. Id. at 405. “Contrary to” clearly
13 established law applies to two situations: (1) where the state court legal conclusion is opposite
14 that of the Supreme Court on a point of law; or (2) if the state court case is materially
15 indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is
16 opposite.

17 “Unreasonable application” of established law, on the other hand, applies to
18 mixed questions of law and fact, that is the application of law to fact where there are no factually
19 on point Supreme Court cases which mandate the result for the precise factual scenario at issue.
20 Id. at 407-08. It is this prong of the AEDPA standard of review which directs deference be paid
21 to state court decisions. While the deference is not blindly automatic, “the most important point
22 is that an *unreasonable* application of federal law is different from an incorrect application of
23 law....[A] federal habeas court may not issue the writ simply because that court concludes in its
24 independent judgment that the relevant state-court decision applied clearly established federal
25 law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 410-
26 11 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the

1 objectively unreasonable nature of the state court decision in light of controlling Supreme Court
2 authority. Woodford v. Viscotti, 537 U.S. 19 (2002).

3 “Clearly established” law is law that has been “squarely addressed” by the United
4 States Supreme Court. Wright v. Van Patten, 552 U.S. 120 (2008). Thus, extrapolations of
5 settled law to unique situations will not qualify as clearly established. See e.g., Carey v.
6 Musladin, 549 U.S. 70, 76 (2006) (established law not permitting state sponsored practices to
7 inject bias into a criminal proceeding by compelling a defendant to wear prison clothing or by
8 unnecessary showing of uniformed guards does not qualify as clearly established law when
9 spectators' conduct is the alleged cause of bias injection).

10 The state courts need not have cited to federal authority, or even have indicated
11 awareness of federal authority, in arriving at their decision. Early v. Packer, 537 U.S. 3 (2002).
12 Nevertheless, the state decision cannot be rejected unless the decision itself is contrary to, or an
13 unreasonable application of, established Supreme Court authority. Id. An unreasonable error is
14 one in excess of even a reviewing court’s perception that “clear error” has occurred. Lockyer v.
15 Andrade, 538 U.S. 63, 75-76 (2003). Moreover, the established Supreme Court authority
16 reviewed must be a pronouncement on constitutional principles, or other controlling federal law,
17 as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v.
18 Packer, 537 U.S. at 9.

19 However, where the state courts have not addressed the constitutional issue in
20 dispute in any reasoned opinion, the federal court will independently review the record in
21 adjudication of that issue. “Independent review of the record is not de novo review of the
22 constitutional issue, but rather, the only method by which we can determine whether a silent state
23 court decision is objectively unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.
24 2003).

25 When reviewing a state court’s summary denial of a claim, the court “looks
26 through” the summary disposition to the last reasoned decision. Shackleford v. Hubbard, 234

1 F.3d 1072, 1079 n. 2 (9th Cir. 2000).

2 III. Discussion

3 A. Insufficient Evidence

4 In claim two, petitioner alleges that there was insufficient evidence to support the
5 BPH's 2000 decision finding him unsuitable for parole. Respondent argues that this claim is
6 moot because petitioner has had three subsequent parole suitability hearings. Subsequent parole
7 denials do not render this claim moot. First, petitioner is still in custody as a result of the 2000
8 decision he challenges in this petition. Second, petitioner's claim challenging the denial of parole
9 fall within the "capable of repetition yet evading review" exception to mootness. See Hubbart v.
10 Knapp, 379 F.3d 773, 777 (9th Cir. 2004) (finding that a habeas petition challenging a two-year
11 commitment under California's Sexually Violent Predator Act "evaded review" because the
12 duration of the commitment was too short to be fully litigated prior to its expiration).
13 Accordingly, respondent's argument that this claim is moot is without merit.

14 The Due Process Clause of the Fourteenth Amendment to the United States
15 Constitution prohibits state action that "deprive[s] a person of life, liberty or property without
16 due process of law." U.S. Const. amend. XIV, § 2. A person alleging a due process violation
17 must demonstrate that he or she was deprived of a protected liberty or property interest, and then
18 show that the procedures attendant upon the deprivation were not constitutionally sufficient.
19 Kentucky Dep't. of Corrs. v. Thompson, 490 U.S. 454, 459-60 (1989); McQuillion v. Duncan,
20 306 F.3d 895, 900 (9th Cir. 2002). A protected liberty interest may arise from either the Due
21 Process Clause itself or from state laws. Board of Pardons v. Allen, 482 U.S. 369, 373 (1987).
22 In the context of parole, the United States Constitution does not, in and of itself, create a
23 protected liberty interest in the receipt of a parole date, even one that has been set. Jago v. Van
24 Curen, 454 U.S. 14, 17-21 (1981). However, when a state's statutory parole scheme uses
25 mandatory language, it "creates a presumption that parole release will be granted' when or
26 unless certain designated findings are made, thereby giving rise to a constitutional liberty

1 interest.” McQuillion, 306 F.3d at 901 (quoting Greenholtz v. Inmates of Neb. Penal, 442 U.S.
2 1, 12 (1979)).

3 Under California law, prisoners serving indeterminate prison sentences “may
4 serve up to life in prison, but they become eligible for parole consideration after serving
5 minimum terms of confinement.” In re Dannenberg, 34 Cal.4th 1061, 1078, 23 Cal.Rptr.3d 417
6 (2005). Generally, one year prior to an inmate's minimum eligible parole release date, the Board
7 will set a parole release date “in a manner that will provide uniform terms for offenses of similar
8 gravity and magnitude in respect to their threat to the public.” In re Lawrence, 44 Cal.4th 1181,
9 1202, 82 Cal.Rptr.3d 169 (citing Cal.Penal Code § 3041(a)). A release date will not be set,
10 however, if the Board determines “that the gravity of the current convicted offense or offenses, or
11 the timing and gravity of current or past convicted offense or offenses, is such that consideration
12 of the public safety requires a more lengthy period of incarceration...” Cal.Penal Code § 3041(b).

13 California state prisoners who have been sentenced to prison with the possibility
14 of parole have a clearly established, constitutionally protected liberty interest in receipt of a
15 parole release date. Allen, 482 U.S. at 377-78 (quoting Greenholtz, 442 U.S. at 12); Irons v.
16 Carey, 505 F.3d 846, 850-51 (9th Cir. 2007) (citing Sass v. Cal. Bd. of Prison Terms, 461 F.3d
17 1123, 1128 (9th Cir. 2006)); Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003); McQuillion,
18 306 F.3d at 903.

19 In the context of parole proceedings, it is well established that inmates are not
20 guaranteed the “full panoply of rights” afforded to criminal defendants under the Due Process
21 Clause. See Pedro v. Or. Parole Bd., 825 F.2d 1396, 1398-99 (9th Cir. 1987). Nonetheless,
22 inmates are afforded limited procedural protections. The Supreme Court has held that a parole
23 board's procedures are constitutionally adequate so long as the inmate is given an opportunity to
24 be heard and a decision informing him of the reasons he did not qualify for parole. Hayward v.
25 Marshall, 603 F.3d 546, 560 (9th Cir. 2010) (quoting Greenholtz, 442 U.S. at 16). As a matter of
26 state constitutional law, denial of parole to California inmates must be supported by “some

1 evidence” demonstrating future dangerousness. Hayward, 603 F.3d at 562 (citing In re
2 Rosencrantz, 29 Cal.4th 616, 128, 128 Cal.Rptr.2d 104 (2002)); see also In re Lawrence, 44
3 Cal.4th 1181, 1191, 82 Cal.Rptr.3d 169 (2008) (recognizing the denial of parole must be
4 supported by “some evidence” that an inmate “poses a current risk to public safety”); In re
5 Shaputis, 44 Cal.4th 1241, 1254, 82 Cal.Rptr.3d 213 (2008) (same). “California’s ‘some
6 evidence’ requirement is a component of the liberty interest created by the parole system of [the]
7 state,” Cooke v. Solis, 606 F.3d 1206, 1213 (9th Cir. 2010), and compliance with this
8 evidentiary standard is, therefore, mandated by the federal Due Process Clause. Pearson v.
9 Muntz, 606 F.3d 606, 611 (9th Cir. 2010). Thus, a federal court undertaking review of a
10 “California judicial decision approving the ... decision rejecting parole” must determine whether
11 the state court’s decision “was an ‘unreasonable application’ of the California ‘some evidence’
12 requirement, or was ‘based on an unreasonable determination of the facts in light of the
13 evidence.’” Hayward, 603 F.3d at 562-63 (quoting 28 U.S.C. § 2254(d)(2)).

14 When assessing whether a state parole board’s suitability decision was supported
15 by “some evidence,” the analysis “is framed by the statutes and regulations governing parole
16 suitability determinations in the relevant state.” Irons, 505 F.3d at 851. The court must
17 look to California law to determine what findings are necessary to deem a petitioner unsuitable
18 for parole, and then must review the record to determine whether the state court decision holding
19 that these findings were supported by “some evidence” or whether it constituted an unreasonable
20 application of the “some evidence” principle. Id.

21 Title 15, Section 2402 of the California Code of Regulations sets forth various
22 factors to be considered by the Board in its parole suitability findings for murderers. The
23 regulation is designed to guide the Board’s assessment regarding whether the inmate poses an
24 “unreasonable risk of danger to society if released from prison,” and thus whether he or she is
25 suitable for parole. In re Lawrence, 44 Cal.4th at 1202, 82 Cal.Rptr.3d 169. The Board is
26 directed to consider all relevant, reliable information available, including the circumstances of

1 the prisoner's: social history; past and present mental state; past criminal history, including
2 involvement in other criminal misconduct which is reliably documented; the base and other
3 commitment offenses, including behavior before, during and after the crime; any conditions of
4 treatment or control, including the use of special conditions under which the prisoner may safely
5 be released to the community; and any other information which bears on the prisoner's suitability
6 for release. 15 Cal.Code Regs. § 2402(b).

7 The regulation also lists several specific circumstances which tend to show
8 suitability or unsuitability for parole. 15 Cal.Code Regs. § 2402(c)-(d). The overriding concern
9 is public safety, In re Dannenberg, 34 Cal.4th 1061, 1086, 23 Cal.Rptr.3d 417 (2005), and the
10 focus is on the inmate's current dangerousness. In re Lawrence, 44 Cal.4th at 1205, 82
11 Cal.Rptr.3d 169. Thus, under California law, the standard of review is not whether some
12 evidence supports the reasons cited for denying parole, but whether some evidence indicates that
13 a parolee's release would unreasonably endanger public safety. In re Shaputis, 44 Cal.4th 1241,
14 1254, 82 Cal.Rptr.3d 213 (2008). Therefore, “the circumstances of the commitment offense (or
15 any of the other factors related to unsuitability) establish unsuitability if, and only if, those
16 circumstances are probative to the determination that a prisoner remains a danger to the public.”
17 In re Lawrence, 44 Cal.4th at 1212, 82 Cal.Rptr.3d 169. In other words, there must be some
18 rational nexus between the facts relied upon and the ultimate conclusion that the prisoner
19 continues to be a threat to public safety. Id. at 1227, 82 Cal.Rptr.3d 169.

20 The BPH found petitioner unsuitable for parole in 2000 for the following reasons.
21 First, the BPH stated that the “number one” reason for finding petitioner unsuitable was the
22 gravity of the offense which it characterized as an “extended brutal and violent attack on the
23 victim...” (Dkt. No. 14-5, p. 47.) The BPH also found that petitioner did not have adequate
24 parole plans. (Id., p. 48.) The BPH further found that petitioner needed additional therapy to
25 deal with the causative factors of the offense. (Id., p. 49.) In order to determine whether these
26 findings were supported by “some evidence,” the undersigned will summarize the testimony and

1 evidence from the 200 suitability hearing.¹

2 At the beginning of the 2000 hearing, the BPH described petitioner's crime:

3 At 11:45 p.m. on October 24, 1984, Elizabeth Wilson, a resident of 2100 East 99th
4 Place in the Jordan Downs Housing Project of Los Angeles was awakened by
5 shouting outside of the residence. She heard Ray Brown, whom she had know[n]
6 for five years, repeated[ly] yelling, in quote, I'm not going, unquote. She got up
7 from her bed, went downstairs and looked outside. She saw appellant – in this
8 case, Mr. Jackson, and Brown, fist fighting but did not see that either man had a
9 weapon. Wilson went upstairs to get her robe and returned to the front door about
10 three minutes later. She observed Brown laying on the ground. Jackson was
11 bending over him, cutting his face. She did not see a knife in Jackson's hand.
12 Wilson said, don't do that, don't do that. Jackson looked at her and moved away
13 from Brown. He pointed a finger at her and said, move that car, in an apparent
14 reference to Brown's car. Brown lay motionless on the ground. Wilson returned
15 to her residence to get her door key and then went to Betsy House's home. She
16 asked Mrs. House, the mother of Jackson's girlfriend, to stop the fight. Mrs.
17 House sent her son Curtis to walk back to the fight scene with Wilson. Wilson
18 testified that Jackson was still cutting and kicking Brown when she and Curtis
19 House reached the scene of the fight. Curtis asked Jackson, can't you see you're
20 killing the man? Jackson stood up and responded quote, he deserved to die,
21 unquote. He also said that Curtis would, quote, get the same, unquote, if he did
22 not get away from him. Curtis testified that Jackson was standing over Brown,
23 holding a knife, when he and Wilson arrived at the scene of the fight. He told
24 Jackson, look what you have done, the man is dying. Jackson responded, if only
25 you knew what he'd done. He also said, you deserve to die. You will die too.

15
16 ¹ In 2005, petitioner filed a habeas corpus petition in the United States District Court for
17 the Central District of California challenging the 2003 decision by the BPH finding him
18 unsuitable for parole. See Jackson v. Carey, 2:05-cv-3327 NM E. In that case, petitioner argued
19 that the 2003 decision finding him unsuitable based on the circumstances of his commitment
20 offense was not supported by sufficient evidence. The Central District Court found that the BPH
21 properly relied on the circumstances of the offense to find petitioner unsuitable. Id., Dkt. No. 28,
22 p. 7 of 12. In 2007, the Ninth Circuit affirmed the Central District:

23 Jackson contends that the California Board of Prison Terms' (the "Board")
24 decision to deny him parole violated his due process rights. We disagree because
25 there was "some evidence" to support the Board's denial of parole, including not
26 only the gravity of the commitment offense, but also inadequate parole plans and a
failure to adequately participate in self-help programs such as Alcoholics
Anonymous. See Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th
Cir.2006).

Jackson v. Carey, No. 05-56734, 2007 WL 2088279 at * 1 (9th Cir. 2007).

Because the law regarding due process in the parole suitability context has been recently clarified, the undersigned will consider the merits of petitioner's claims rather than adopt the reasoning of the Central District and Ninth Circuit.

1 (Id., pp. 7-9.)

2 Petitioner told the committee that he did not remember making the statements
3 quoted above, but it was possible that he made them. (Id., p. 10.) Petitioner stated that he did
4 not remember making the statements because it had been 16 years and he had been drinking
5 alcohol and smoking marijuana on the night of the killing. (Id.) Petitioner went on to tell the
6 committee that on the night of the killing he and Brown, who he had met that day, went to a bar
7 together. (Id., p. 11.) Brown told petitioner that he wanted to drive his girlfriend home. (Id.)
8 Petitioner went with Brown and fell asleep in the car. (Id.) Petitioner told the committee that
9 when he woke up, Brown had petitioner's knife and wallet in his hand and was going through
10 petitioner's pockets. (Id., pp. 11-12.) The fight then ensued that led to petitioner stabbing
11 Brown. (Id., p. 11.) Petitioner was able to get the knife away from Brown. (Id.) Petitioner later
12 told the police that he acted in self-defense. (Id., p. 13.) Petitioner was found guilty after three
13 trials. (Id., p. 15.)

14 At the hearing, petitioner was asked by Commissioner Hepburn if he was trying to
15 kill Brown:

16 Commissioner: Were you trying to kill him?

17 Petitioner: I was kind of scared. You know how it is, when you're full of alcohol
18 and rambling out the mouth and fighting. It was a drunk fight.

19 Commissioner: Well, I don't really know how it is, but you accept that that's
20 probably true, that you stabbed him?

21 Petitioner: Oh yes, Sir.

22 Commissioner: I mean, if had those injuries, you believe that you inflicted them?

23 Petitioner: Yes, yes.

24 Commissioner: All right. Give me one second here, because I'm looking back at
25 the transcript from '99.

26 Petitioner: Keep in mind now, it was a little knife. A little pocket knife.

(Id., pp. 39-40.)

1 At the conclusion of the hearing the deputy district attorney in attendance asked
2 petitioner why, if it was self-defense, did he then continue slashing at the victim’s face once the
3 victim had stopped attacking him, and why he continued stabbing the victim in the chest and
4 abdomen. (Id., p. 42.) Petitioner answered, “Insanity.” (Id.) When asked if he thought he was
5 crazy at the time, petitioner answered, “Yes. I mean, from his aggressions and the fight
6 pursuing, yes.” (Id.)

7 The committee later discussed petitioner’s psychological report dated August 16,
8 2000. A copy of this report is attached as an exhibit to the original petition filed May 2, 2002.
9 (Dkt. No. 1.) Dr. Taylor, who performed the psychological evaluation assessed petitioner’s
10 future dangerousness as follows:

11 In 1991, it was noted that he had programmed favorably with no disciplinary
12 write-ups. He was found to “be relatively well adjusted and stable personality
13 without any manifestations of anger or hostility,” and “There was no evidence of a
14 potential for violence,” in a report of June 1995. He currently has a classification
15 score of 0 with a “familiarity with staff” disciplinary note in 1995. He completed
16 courses in welding (multiple aspects), and has been active in the past such as in
17 AA and NA, and it was reported that there are a number of laudatory chronos in
18 his file.

19 He appears to minimize, to some degree, the intensity of the assault on the victim,
20 but also voices intentions of better decision making in the future and has been
21 active in dealing with substance abuse issues. He appears to have adjusted and
22 performed well while in prison with little evidence of difficulties controlling any
23 feelings of anger, acting impulsively or aggressively, or resisting custody
24 regulations and demands.

25 (Dkt. No. 1, attached exhibits).

26 During the hearing, the committee also noted that petitioner had no criminal
record as an adult or juvenile. (Dkt. No. 14-15, p. 17.)

 The committee also discussed petitioner’s prison record, which was favorable. In
particular, petitioner had participated in Alcohol and Narcotics Anonymous programs. (Id., p.
24.) Petitioner had also become a certified welder and participated in legal studies. (Id., pp. 24-
25.) Petitioner had received several laudatory work chronos. (Id., p. 28.) Petitioner had received
only one prison disciplinary while in prison and that was in 1995. (Id., p. 31.) Petitioner also

1 had three “very dated” counseling chronos. (Id.)

2 The committee told petitioner that its report indicated that he had no clear parole
3 plans. (Id., p. 32.) Petitioner told the committee that he had been working on his parole plans
4 since 1998. (Id.) Petitioner gave the committee a copy of his form requesting that his county of
5 parole be transferred to a different county. (Id., pp. 32-33.) Petitioner told the committee that he
6 had not yet received a response to the request. (Id., p. 33.) This request was dated August 7,
7 2000. (Id., p. 34.) The committee also noted that petitioner had no letters of support from family
8 members in Richmond, where he wanted his parole transferred. (Id., p. 35.) Petitioner told the
9 committee that his family had written letters in support of his 1998 suitability hearing. (Id., p.
10 36.) The committee told petitioner that each time he had a hearing, he had to have new letters of
11 support. (Id.)

12 The undersigned first considers whether “some evidence” supported the BPH’s
13 finding that petitioner required additional therapy to deal with the “causative factors” of the case.
14 (Dkt. No. 14-5, p. 49.) In making this finding, the committee went on to state that,

15 Mr. Jackson, I think the Panel believes that you’re still having difficulty coming to
16 terms with the facts of the case, at least as they are known and as they are written
17 in the appellate decision. And certainly what the – what the jury concluded
18 occurred in this case, because they did find you guilty of murder, and that is
19 inconsistent with your version of what occurred. And hopefully, you’ll be able to
20 develop additional insight into the factors that caused this incident.

19 (Id.)

20 In essence, the BPH found petitioner unsuitable because he minimized the
21 circumstances of the offense. The 2000 psychological report made this finding which was also
22 reflected in petitioner’s testimony at the hearing. While petitioner admitted stabbing Brown, he
23 told the BPH that he only used a “little pocket knife.” Petitioner’s statement that the fight was
24 caused by his drinking and that it was a “drunk fight” also minimized his involvement.

25 The BPH cannot require petitioner to admit guilt in order to be found suitable for
26 parole. Cal.Penal Code § 5011(b); 15 Cal Code Regs. § 2236. However, the BPH must consider

1 his “past and present attitude toward the crime” and any lack of remorse or understanding of the
2 nature and magnitude of the offense (15 Cal. Code Regs. tit. 15, §§ 2402(b), 2402(d)(3).
3 Cal.Code Regs. § 2402(d)(3)). See In re McClendon, 113 Cal.App.4th 315, 322, 6 Cal.Rptr.3d
4 278 (2003); see also In re Shaputis, 44 Cal.4th 1241, 1261 n. 20, 82 Cal.Rptr.3d 213 (2008)
5 (“petitioner's failure to take full responsibility for past violence, and his lack of insight into his
6 behavior, establish that the circumstances of petitioner's crime and violent background continue
7 to be probative to the issue of his current dangerousness.”) “Lack of insight” is probative of
8 unsuitability only to the extent that it is both (1) demonstrably shown by the record and
9 (2) rationally indicative of the inmate’s current dangerousness. In re Calderon, 184 Cal.App.4th
10 670 690, 109 Cal.Rptr.3d 229 (2010).

11 Petitioner’s comments to the BPH at the hearing, as well as the psychological
12 report, demonstrated a lack of understanding of the magnitude of the offense. In addition,
13 petitioner’s lack of insight, as demonstrated by his minimizing his involvement, is rationally
14 indicative of his current dangerousness. Petitioner’s lack of insight is directly related to his
15 conduct during the offense. Accordingly, the finding that petitioner required additional therapy
16 to address this lack of insight was supported by some evidence.

17 The BPH also relied on the circumstances of the 16 year-old-offense to find
18 petitioner unsuitable. In its decision, the BPH stated,

19 And the number one reason was the gravity of the commitment offense, which the
20 Panel finds was an extended brutal and violent attack on the victim in this
21 particular case. And these conclusions are drawn from the Statement of Facts,
22 wherein the prisoner had a knife and according to him, he was intoxicated at the
23 time, and he attacked the victim, according to the Statement of Facts. And he
24 repeatedly slashed and stabbed the victim, resulting in extensive injuries,
including four deep stab wounds to the victim’s upper torso, resulting in the
victim’s death. And this occurred over an extended period of time because
witnesses yelled at him to stop, and he continued doing what he was doing and
witnesses approached him while all this was going on. And they did testify that it
was continued over a period of time.

25 (Dkt. No. 14-15, pp. 47-48.)

26 The reliance on the circumstances of the offense was not improper because

1 petitioner's continued lack of insight regarding his participation in the offense indicated that the
2 violent nature of the offense was still probative of the risk he posed to public safety.

3 Finally, the BPH found petitioner unsuitable because he did not have adequate
4 plans for release. See Cal. Code Regs. tit. 15, § 2402(d)(8) (realistic plans for release tends to
5 show suitability). In particular, the BPH found that petitioner had not properly completed the
6 parole transfer process and did not have updated letters of support from his family. This finding
7 was supported by some evidence.

8 For the reasons discussed above, some evidence supported the 2000 decision by
9 the BPH finding petitioner unsuitable parole. After conducting an AEDPA review, the
10 undersigned recommends that this claim be denied.

11 In support of claim two, petitioner also argues that he was not provided with one-
12 third time credits to reduce his sentence. Petitioner makes no other argument in support of this
13 claim. In any event, for the following reasons, petitioner is not entitled to earn credits at this time
14 for the reasons stated herein:

15 To fully appreciate the limitations of Petitioner's credit-earning capacity as a life
16 prisoner as it relates to the term of his incarceration, it is necessary to examine
17 how California's parole system for life prisoners interacts with a life prisoner's
18 credit-earning potential. A life prisoner's "Minimum Eligible Parole Date," or
19 "MEPD," is the "earliest date on which an Indeterminate Sentence Law or life
20 prisoner may be legally released on parole." See Cal.Code Regs., titl. 15, § 3000;
21 see also Cal.Code Regs., tit. 15, § 2000(b)(67). The CDCR determines the MEPD.
22 See Cal.Code Regs., tit. 15, § 2400. Conversely, "[t]he length of time a prisoner
23 must serve prior to actual release on parole is determined by the [BPH]." Id.

24 California law provides that, one year prior to a prisoner's MEPD, a BPH panel
25 shall meet with the prisoner and shall set a release date "unless it determines that
26 the gravity of the current convicted offense or offenses, or the timing and gravity
of current or past convicted offense or offenses, is such that consideration of the
public safety requires a more lengthy period of incarceration for this individual,
and that a parole date, therefore, cannot be fixed at this meeting." Cal.Penal Code
§ 3041(a). Thus, the prisoner's MEPD is the basis for the timing of the initial
suitability hearing.

Following a parole denial, the BPH "shall hear each case annually thereafter,"
except that the BPH may schedule a subsequent hearing up to five years "after any
hearing at which parole is denied" if the prisoner has been convicted of murder
and the BPH finds "that it is not reasonable to expect that parole would be granted

1 at a hearing during the following years and states the bases for the finding in
2 writing.” Cal.Penal Code § 3041.5(b)(2).

3 Following a finding of parole suitability for an inmate convicted of a murder
4 committed on or after November 8, 1978, the BPH sets a base term “established
5 solely on the gravity of the base crime, taking into account all of the
6 circumstances of that crime.” Cal.Code Regs., tit. 15, § 2403(a). The BPH sets a
7 base term by taking into account the “matrix” of suggested base terms,
8 circumstances in aggravation and mitigation, and adjustments for enhancements
9 or other offenses. See Cal.Code Regs., tit. 15, § 2403-2411. However, the BPH
10 may impose a base term other than one provided in the matrix “if justified by the
11 particular facts of the individual case...” *Id.* Once a base term is set, the BPH may
12 consider awarding post-conviction credit to reduce the base term, up to four
13 months for each year served, depending on the prisoner's performance,
14 participation, and behavior while in prison. See Cal.Code Regs., tit. 15, §
15 2400-2410.

16 California Penal Code § 190(a) mandates the application of good behavior credits
17 by the CDCR against the minimum term for first degree murder, i.e., twenty-five
18 years, that is imposed by statute for purposes of establishing the MEPD. *In re*
19 *Dayan*, 231 Cal.App.3d 184, 188, 282 Cal.Rptr. 269 (1991). However, nothing in
20 the statute requires the BPH, or CDCR, to reapply those same credits to the actual
21 term it eventually sets for Petitioner's sentence if, and when, it determines that
22 Petitioner is eligible for parole. *Id.*; see also Cal.Code Regs., tit. 15, § 2400 (“The
23 [Department of Correction and Rehabilitation's] decisions pursuant to Penal Code
24 §§ 2930 et seq. do not affect the [BPH's] decision concerning post-conviction
25 credit pursuant to these rules.”). Thus, in theory, if a prisoner were determined to
26 be parole eligible at the earliest possible time, credits might be of some use in
actually reducing the amount of time a prisoner served before his initial parole
suitability hearing was set. See *People v. Rowland*, 134 Cal.App.3d 1, 13-14, 184
Cal.Rptr. 346 (1982). However, the question of Petitioner's actual release on
parole will be determined only by the BPH, and no matter how much time
Petitioner has served, he will not be released until he has been found suitable for
parole. Cal. Pen.Code § 3041(b); Cal.Code Regs., tit. 15, § 2281(a).

19 Burton v. Adams, No. 1: 09-cv-0354 JLT HC, 2010 WL 703182 at *5-6 (E. D. Cal. 2010).

20 Petitioner is not entitled to earn time credits at this time because he has already
21 passed his MEPD date. Once petitioner is found suitable for parole, the credits may reduce the
22 amount of time he must serve. Because petitioner has not been found suitable for parole, a claim
23 by petitioner that he is entitled to these credits is not ripe.

24 Petitioner's claim that he is entitled to earn time credits is without merit. After
25 conducting an AEDPA review, the undersigned recommends that this claim be denied.

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1 B Conflict of Interest

2 In claim one, petitioner alleges that two of the BPH members who attended the
3 2000 hearing, Commissioners Hepburn and Ortega, had a conflict of interest because they had
4 previously denied his appeal of the 1999 BPH decision finding him unsuitable. Respondent
5 argues that this claim is moot because petitioner has had three subsequent parole hearings. The
6 instant claim is not moot for the same reasons that petitioner’s claim challenging the sufficiency
7 of the evidence is not moot.

8 In essence, petitioner is arguing that Commissioners Hepburn and Ortega were
9 biased against him based on their participation in his appeal of the 1999 decision. Although
10 petitioner has a due process right to parole consideration by a neutral, impartial decision-maker,
11 his claim of bias must be supported by the record. See O’Bremski v. Maas, 915 F.2d 418, 422
12 (9th Cir. 1990) (an inmate is “entitled to have his release date considered by a Board that [is] free
13 from bias or prejudice”); Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995) (“[c]onclusory
14 allegations which are not supported by a statement of specific facts do not warrant habeas
15 relief.”).

16 That Commissioners Hepburn and Ortega participated in petitioner’s appeal of an
17 earlier BPH decision did not automatically render them biased at the 2000 hearing. Nothing in
18 the record demonstrates that Commissioners Hepburn and Ortega were biased at the 2000
19 hearing. See Bettencourt v. Knowles, 2009 WL 4755403, *17-18 (E.D.Cal. 2009) (unpublished)
20 (holding where petitioner has offered no evidence to support claim of parole bias his claim
21 should be denied). The BPH’s decision in this case was thorough and factually specific.

22 After conducting an AEDPA review, the undersigned recommends that this claim
23 be denied.

24 C. Cross Section/No Parole Policy

25 In claim three, petitioner alleges that he was denied parole pursuant to former
26 Governor Davis’ “no parole” policy. He also alleges that the members of the BPH do not reflect

1 a cross-section of the population. Petitioner argues that the BPH is made up of former police
2 officers.

3 Regarding petitioner’s claim that he was found unsuitable pursuant to former
4 Governor Davis’ “no parole policy,” the record indicates that petitioner has had at least one
5 parole suitability hearing since Governor Davis left office. Petitioner does not claim that the
6 BPH has operated under a no-parole policy for life prisoners since Governor Davis left office.
7 Therefore, petitioner has already received all the relief he would be entitled with respect to this
8 claim: a new parole hearing before a BPH panel that does not apply the no-parole policy
9 allegedly followed while Governor Davis was in office. Accordingly, petitioner is not entitled to
10 relief as to this claim.

11 Petitioner also alleges that the members of the BPH do not reflect a cross-section
12 of the general population. In essence, petitioner is alleging that the BPH is made up of biased
13 members. Respondent argues that this claim is moot because petitioner has had three subsequent
14 parole hearings. The instant claim is not moot for the same reasons that petitioner’s claim
15 challenging the sufficiency of the evidence is not moot.

16 As stated above, petitioner has a constitutional right to decision makers who are
17 unbiased. See O'Bremski v. Maas, 915 F.2d 418, 422 (9th Cir.1990). However, in support of the
18 instant claim petitioner does not allege that any of the BPH members at the 2000 hearing were
19 biased against him. The fact that the “cross-section of community” which petitioner desires has
20 not evidently been the source of selection for parole commissioners does not implicate a federal
21 constitutional claim for biased decision makers.

22 After conducting an AEDPA review, the undersigned recommends that this claim
23 be denied.

24 D. Untimely Hearing

25 Petitioner argues that the 2000 hearing was untimely. In particular, petitioner
26 argues that the 2000 hearing was held six months later than it was supposed to have been held.

1 Respondent argues that this claim is moot because petitioner has had three
2 subsequent parole hearings. The remedy for the BPH's failure to hold a timely parole hearing is
3 for the court to order a parole hearing. Because petitioner has received at least three parole
4 hearings since the 2000 hearing, the instant claim is moot.

5 Moreover, to demonstrate that the six month delay in his receipt of his parole
6 hearing violated due process, petitioner must demonstrate that the delay was unreasonable and
7 prejudicial. Hopper v. United States Parole Comm'n., 702 F.2d 842, 847 (9th Cir. 1983).
8 "However, due process 'does not include receiving a parole hearing in exact accordance with the
9 specific time period required by [state regulations.]" Johnson v. Pappozzi, 219 F.Supp.2d 635,
10 652 (D.N.J. 2002). The denial of a timely parole proceeding is not a per se violation due process.
11 Jefferson v. Hart, 84 F.3d 1314, 1316-17 (10th Cir. 1996). To show a due process violation from
12 a delayed hearing, a prisoner must show prejudice from the delay. Cf. Camacho v. White, 918
13 F.2d 74, 78-80 (9th Cir. 1990). Petitioner has failed to demonstrate that the six month delay in
14 his receipt of the 2000 suitability hearing was prejudicial.

15 After conducting an AEDPA review, the undersigned recommends that this claim
16 be denied.

17 Conclusion

18 The undersigned recommends that petitioner's application for a writ of habeas
19 corpus be denied. If petitioner files objections, he shall also address whether a certificate of
20 appealability should issue and, if so, why and as to which issues. A certificate of appealability
21 may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the
22 denial of a constitutional right." 28 U.S.C. § 2253(c)(3).

23 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a
24 writ of habeas corpus be denied.

25 These findings and recommendations are submitted to the United States District
26 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen

1 days after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
4 objections shall be filed and served within fourteen days after service of the objections. The
5 parties are advised that failure to file objections within the specified time may waive the right to
6 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 DATED: July 12, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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