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

CHARLES H. CARR, JR.,
Petitioner, No. 2:05-cv-1870 MCE JFM (HC)

vs.

JEANNE WOODFORD, BOB HOREL,
Acting Warden,
Respondents.

_____ /

CHARLES H. CARR,
Petitioner, No. 2:05-cv-1871 MCE JFM (HC)

vs.

BOB HOREL, Acting Warden,
Respondents.

_____ /

CHARLES H. CARR,
Petitioner, No. 2:04-cv-0584 MCE JFM (HC)

vs.

D.K. SISTO,
Respondent.

_____ /

1 FINDINGS AND RECOMMENDATIONS

2 Petitioner is a state prisoner proceeding through counsel with three applications
3 for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. These applications challenge the 2002
4 and 2004 denials of parole, and the 2003 Governor’s reversal of the grant of parole, but all rely
5 on the same evidence. Accordingly, the court will begin its analysis with the Governor’s reversal
6 of the grant of parole.

7 Petitioner is serving a sentence of life with the possibility of parole¹ following his
8 1969 Butte County conviction on charges of first degree murder. In Case No. 2:05-cv-1870,
9 petitioner challenges the Governor’s October 17, 2003 reversal of the May 22, 2003 decision by
10 the California Board of Prison Terms (“Board”) finding petitioner suitable for parole. (Answer,
11 Exs. 3 & 4.) Petitioner contends that there was no evidence to support the Governor’s decision
12 that petitioner continues to pose an unreasonable risk of danger to society, and that the denial was
13 a violation of petitioner’s due process rights. Petitioner is 62 years old (answer, ex. 5), and has
14 served over 35 years in state prison. The Board assessed petitioner’s prison term at 148 months
15 (pet., Ex. A, at 52-53); thus he has served over 23 years beyond his minimum eligible parole
16 date.

17 This court finds that the continued denial of parole, nineteen different times by the
18 year 2004, based on the unchanging factors of petitioner’s childhood, his commitment offense
19 and his criminal history, has violated petitioner’s due process rights, and recommends that the
20 habeas petition be granted.

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25 ¹ Petitioner was initially sentenced to death, but on January 4, 1973, his death sentence
26 was modified to a life sentence with the possibility of parole by the California Supreme Court.
(Answer, Ex. 2.)

1 ANALYSIS

2 I. Standards for a Writ of Habeas Corpus

3 Federal habeas corpus relief is not available for any claim decided on the merits in
4 state court proceedings unless the state court's adjudication of the claim:

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

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

9 28 U.S.C. § 2254(d).

10 Under section 2254(d)(1), a state court decision is “contrary to” clearly
11 established United States Supreme Court precedents if it applies a rule that contradicts the
12 governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially
13 indistinguishable from a decision of the Supreme Court and nevertheless arrives at different
14 result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406
15 (2000)).

16 Under the “unreasonable application” clause of section 2254(d)(1), a federal
17 habeas court may grant the writ if the state court identifies the correct governing legal principle
18 from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the
19 prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ
20 simply because that court concludes in its independent judgment that the relevant state-court
21 decision applied clearly established federal law erroneously or incorrectly. Rather, that
22 application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, ___ U.S. ___, 123
23 S.Ct. 1166, 1175 (2003) (it is “not enough that a federal habeas court, in its independent review
24 of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”)

25 The court looks to the last reasoned state court decision as the basis for the state
26 court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court

1 reaches a decision on the merits but provides no reasoning to support its conclusion, a federal
2 habeas court independently reviews the record to determine whether habeas corpus relief is
3 available under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

4 Petitioner contends that there was no evidence to support the Governor’s decision
5 to reverse the grant of a parole date and that the decision was contrary to applicable provisions of
6 state and federal law. Petitioner further claims that there was substantial evidence to support
7 application of the suitability factors to him, and that the evidence showed he would pose very
8 little danger to the community if released.

9 The Board’s May 22, 2003 parole decision, reversed by the Governor on October
10 17, 2003, was made at a subsequent parole consideration hearing. (See Exhibit 4 to Answer to
11 Petition for Writ of Habeas Corpus, filed December 20, 2006.) In his decision, the Governor
12 concluded the following:

13 Petitioner “continues to pose an unreasonable risk of danger to society.”
14 (Ex. 3 to Answer, at 13-16.) The Governor relied principally on petitioner’s
15 commitment offense and criminal record, noting that during petitioner’s second
16 escape from prison in 1977 he again hit an elderly man over the head, which is
17 how petitioner killed his first victim in 1969. (Id. at 14.) Despite the fact that
18 petitioner’s “conduct in prison has sometimes been good and even exemplary in
19 some respects, he has also engaged in serious incidents of misconduct.” (Id.) It
20 was troubling that petitioner told a 2003 Board panel that he had “taken to the
21 Board 20 years of clean time, disciplinary free,” because he failed to acknowledge
22 “serious incidents of misconduct prior to that time, including his two successful

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1 escapes,² a later escape attempt³ and a serious disciplinary report in 1983 for
2 possession of cash related to his sale of cigarettes to fellow inmates. (Id.)
3 Petitioner had received three reports for minor misconduct within the past 20
4 years, including one as recent as 2000. (Id.) Petitioner continues to pose an
5 unreasonable risk of danger to society based on petitioner's history of institutional
6 behavior. (Id.)

7 The Governor also based his reversal on evidence suggesting petitioner's
8 serious gambling addiction had not been addressed, particularly considering the
9 1969 murder was the result of his addiction to gambling and the 1977 robbery was
10 committed to obtain money to offset gambling losses. (Id.) He discounted recent
11 psychosocial evaluations as unreliable because the 2003 report failed to address
12 petitioner's childhood abuse and the 2001 report reflected petitioner denied he
13 suffered childhood abuse, despite the 1991, 1993, 1994 and 1997 psychological
14 evaluations that noted he suffered childhood abuse. (Id. at 15.) None of the
15 recent psychiatric reports explained the "abrupt turnabout in the findings in the
16 most recent reports" from petitioner's 1991 Psychological Evaluation indicating
17 petitioner needed therapy to

18 include exploration of all predisposing factors, from excessively
19 harsh parental discipline, exposure to gambling as accepted social
20 behavior, high value placed on material and financial symbols, to
21 lack of family emphasis on saving, planning, and budgeting. He

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22 ² While held in jail, petitioner escaped by scaling a wall around the exercise yard.
23 Petitioner was found hiding in a tree about twenty minutes later. (Docket No. 23-2 at 12.) In
24 1973, petitioner allegedly sawed through the bars of his cell window and escaped with two other
25 inmates. (Docket No. 23-2 at 13.)

26 ³ On March 10, 1978, prison guards noticed the bars of petitioner's cell had been cut.
(Docket No. 23-2 at 13; Docket No. 38-4 at 50.) Petitioner received a 115 for violation of 15
C.C.R. Section 3005, a provision requiring inmates to follow prison rules. (C-File at 485.) The
San Joaquin County District Attorney's Office declined to prosecute petitioner for attempted
escape based on insufficient evidence. (C-File at 483.)

1 also needs to identify high risk situations and viable coping
2 responses for himself in order to abstain from gambling.

3 (Id. at 16.) Recent reports also failed to address the 1998 and 1999 Life Prisoner
4 Evaluation Reports that concluded petitioner posed an unpredictable degree of
5 threat to the public. (Id.) Petitioner failed to address and resolve issues through
6 self-help programs such as VORG and NA, specifically citing the 2002 Board's
7 concerns that petitioner "never seemed to really get to [his] innermost feelings.
8 That [petitioner] just ha[sn't] quite gotten it." (Id.)

9 The fifth reason the Governor found petitioner still poses an unreasonable
10 risk of danger to society was based on petitioner's past and present attitude toward
11 his crimes. (Id.) Although petitioner has since 1997 expressed remorse for killing
12 the victim, petitioner had offered varying statements concerning the murder prior
13 to 1997. (Id.) The most recent psychiatric report was flawed because it
14 erroneously stated petitioner had always admitted responsibility for his crime.
15 (Id.) Recent psychosocial evaluations failed to reflect any change or progress on
16 petitioner's "key psychological defense mechanisms revolv[ing] around denial,
17 externalization, and projection, . . . [or] inflexibility and rigidity." (Id.)

18 The sixth reason the Governor cited was that petitioner's parole plans were
19 inadequate because "without solid parole plans, [petitioner] poses an unreasonable
20 risk of danger to society." (Id. at 17.) The Governor opined that "[i]n the absence
21 of solid employment plans, and with his gambling addiction issues not addressed,
22 he could easily find himself in a desperate financial situation and return to
23 criminal activity as a means of support." (Id.)

24 By stark contrast, in 2003, the Board found petitioner did not pose an
25 unreasonable risk of danger to society or a threat to public safety if petitioner were released from
26 prison. (Answer, Ex. 4 at 47; Pet., Ex. A at 47.) The Board specifically found petitioner had

1 no juvenile record of assaulting others. While imprisoned, he has
2 enhanced his ability to function within the law upon release
3 through participation in educational programs. He acquired his
4 GED early on. He also participated in college courses. Through
5 his participation in self-help and therapy programming, and
6 including one-on-one therapy, the rigorous CCat-X program,
7 through MVP, Men's Violence Prevention, VORG, and many
8 years with NA, Narcotics Anonymous. He's enhanced his ability
9 through vocational programs, having acquired his certification as
10 an Electrician, as well as his many years serving in institutional job
11 assignments, relative to his performance as a Clerk, where he
12 always received exceptional work reports. He, because of
13 maturation, growth, and greater understanding, has a reduced
14 probability of recidivism. And he has realistic parole plans, which
15 include family support. He has maintained close family ties while
16 imprisoned via letters. And he has maintained positive
17 institutional behavior, which indicates significant improvement in
18 self-control. And I would note for the record that this includes a
19 total of four 115s over the course of – over 30 years, and the last
20 115 was a little over 20 years ago. And he shows signs of remorse.
21 He has indicated that he understands the nature and the magnitude
22 of the offense and accepts responsibility for the criminal behavior
23 and has a desire to change towards good citizenship. And although
24 he didn't speak to the Panel today about his remorse, it is contained
25 sufficiently, in the Panel's mind, in the various reports in the files.
26 The psychiatric report, dated February 25th, 2003, by John T.
Rouse, . . . Ph.D., appears to support release. Dr. Rouse says:

“Whatever anti-personality traits he has had prior to
his incarceration has lessened significantly. And he
seems to have made significant gains in
understanding his life crime, as well as his life prior
to his incarceration. He has, as reported by other
examiners, compiled a record of conformity,
stability, and productivity and as such, [petitioner]
no longer presents as a risk to the community. His
risk of dangerousness at this point is negligible and
less than that of the average inmate incarcerated
here at CSP, Solano.”

The previous report done by Dr. Dean J. Clair, . . . really no date on
it, but it's for the Subsequent number 16, March 2001 hearing, also
appears to support release. I believe I said that. The doctor writes
under Assessment of Dangerousness:

“Looking back, there is nothing positive that can be found
in either the nature of the crime or the inmate's lifestyle at
that stage of his development. He was a predator with few
apparent redeeming social qualities. He followed this
crime up with an escape and with an eventual capture in the
process of committing still another crime against property.

1 Now, in arriving at his fifties, the inmate has progressed
2 remarkably. He has compiled a record of conformity,
3 stability and productivity, as described above. He has
4 impressed both his family and others with his eagerness to
5 put his life together and to function as just another member
6 of the community. He is mentally stable and has never
7 been significantly addicted. As before, the writer feels that
8 this man is no longer dangerous.”

6 (Id. at 47-50.) The Board assessed petitioner’s prison term as 148 months, after crediting
7 petitioner for periods of good behavior. (Id. at 52-53.) The Board’s Decisional Review Unit
8 reviewed and approved the Board’s decision. (Pet., Ex. B.)

9 The last reasoned opinion by a California state court was issued by the Solano
10 County Superior Court on January 15, 2004. (Answer, Ex. 6.) The state court denied the petition
11 for writ of habeas corpus with the attached comment:

12 The court applies the “some evidence” standard when reviewing
13 the Governor’s decision to reverse a finding of the board of Prison
14 Terms. (**In re Rosenkrantz** (2002) 29 Cal.4th 616, 666[.] The
15 governor’s decision will be upheld so long as there is some basis in
16 fact to support the decision. Additionally, “The nature of the
17 prisoner’s offense, alone can constitute a sufficient basis for
18 denying parole.” (**In re Rosenkrantz** (2002) 29 Cal.4th 616,
19 682)[.] The Governor found that petitioner “continues to pose an
20 unreasonable danger to public safety if released at this time.” The
21 Governor based this finding, in part, on the commitment offense in
22 which petitioner beat an elderly man to death with a hammer.
23 These facts provide “some evidence” in the record to support the
24 governor’s decision. Accordingly, this petition for writ of habeas
25 corpus should be denied.

20 (Answer, Ex. 6, at 2.)

21 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
22 some transgression of federal law binding on the state courts, see Middleton v. Cupp, 768 F.2d
23 1083, 1085 (9th Cir.1985), and is unavailable for alleged errors in the interpretation or
24 application of state law, see Lewis v. Jeffers, 497 U.S. 764, 780 (1990). For this reason,
25 petitioner’s claims arising out of alleged violations of state law are not cognizable in this federal
26 habeas corpus action.

1 California's statutory scheme governing parole "creates in every inmate a
2 cognizable liberty interest in parole which is protected by the procedural safeguards of the Due
3 Process Clause." Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003); see also Sass v.
4 California Board of Prison Terms, 461 F.3d 1123, 1127-28 (9th Cir. 2006).

5 [T]he Supreme Court ha[s] clearly established that a parole board's
6 decision deprives a prisoner of due process with respect to this
7 interest if the board's decision is not supported by "some evidence
8 in the record," Sass, 461 F.3d at 1128-29 (citing Superintendent v.
9 Hill, 472 U.S. 445, 457, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985));
10 see also Biggs, 334 F.3d at 915 (citing McQuillion, 306 F.3d at
11 904), or is "otherwise arbitrary," Hill, 472 U.S. at 457, 105 S.Ct.
12 2768.

13 Irons v. Carey, 505 F.3d 846, 851 (9th Cir. 2007).

14 When reviewing a decision of the Board of Parole Hearings or the Governor
15 regarding a prisoner's suitability for parole, the relevant inquiry is "whether some evidence
16 supports the decision . . . that the inmate constitutes a current threat to public safety, and not
17 merely whether some evidence confirms the existence of certain factual findings." In re
18 Lawrence, 44 Cal.4th 1181, 1212, 82 Cal.Rptr.3d 169 (2008). The Board and Governor both
19 have authority to resolve conflicts in the evidence and decide the weight to be given to particular
20 evidence, and each has broad discretion that will only be disturbed when due consideration is not
21 given to the specified factors. Id. at 1204, 82 Cal.Rptr.3d 169.

22 In addition, the Board and Governor may rely on the nature of the commitment
23 offense as a basis to deny parole, but only when, considered in light of other facts in the record,
24 the offense continues to be predictive of current dangerousness. Id. at 1221, 82 Cal.Rptr.3d 169;
25 Cal.Code Regs., tit. 15, § 2402; see also Irons, 505 F.3d at 854 ("[I]n some cases, indefinite
26 detention based solely on an inmate's commitment offense, regardless of the extent of his
rehabilitation, will at some point violate due process, given the liberty interest in parole that
flows from the relevant California statutes."); Biggs, 334 F.3d at 917 ("A continued reliance in
the future on an unchanging factor, the circumstance of the offense and conduct prior to

1 imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could
2 result in a due process violation.”).

3 [T]he Board or the Governor may base a denial-of-parole decision
4 upon the circumstances of the offense, or upon other immutable
5 facts such as an inmate’s criminal history, but some evidence will
6 support such reliance only if those facts support the ultimate
7 conclusion that an inmate continues to pose an unreasonable risk to
8 public safety. [Citation.] Accordingly, the relevant inquiry for a
reviewing court is not merely whether an inmate’s crime was
especially callous, or shockingly vicious or lethal, but whether the
identified facts are probative to the central issue of current
dangerousness when considered in light of the full record before
the Board or the Governor.

9 In re Lawrence, 44 Cal.4th at 1221, 82 Cal.Rptr.3d 198. Facts relevant to determining the
10 predictive value of the commitment offense include the amount of time since the offense, the
11 prisoner's history before and after the offense, and the prisoner's current demeanor and mental
12 state. In re Lawrence, 44 Cal.4th at 1211, 1214, 1219, 1221, 82 Cal.Rptr.3d 169.

13 First, the court must look to the last reasoned state court opinion to determine if it
14 was an unreasonable application of the facts or contrary to controlling principles of United States
15 Supreme Court authority. Here, unfortunately, the Superior Court decision is barely more than a
16 pro forma denial. (Answer, Ex. 6.) The Superior Court decision denies the petition and appends
17 an eleven-line “comment” that concludes there is some evidence, based solely on the
18 commitment offense, to support the governor’s decision. (Answer, Ex. 6.) This opinion
19 provides nothing to evaluate as it is simply a conclusion without analysis.

20 “[D]ue consideration” of the specified factors requires more than
21 rote recitation of the relevant factors with no reasoning establishing
22 a rational nexus between those factors and the necessary basis for
23 the ultimate decision—the determination of current dangerousness.
“It is well established that a policy of rejecting parole solely upon
the basis of the type of offense, without individualized treatment
and due consideration, deprives an inmate of due process of law.”

24 In re Lawrence, 44 Cal.4th at 1210, 82 Cal.Rptr.3d 168, quoting Rosenkrantz, 29 Cal.4th at 684.
25 Accordingly, this court must conduct an independent review the record. Delgado v. Lewis, 223
26 F.3d 976, 982 (9th Cir. 2000).

1 Petitioner was received in state prison on May 12, 1969, following his conviction
2 of first degree murder. (Ex. 1 to Answer.) Petitioner was initially sentenced to death, but on
3 January 4, 1973, his death sentence was modified to a life sentence with the possibility of parole
4 by the California Supreme Court. (Id.) Petitioner’s initial parole consideration hearing was held
5 on January 23, 1979, at which time parole was denied for a period of one year. (Ex. 2 to Answer,
6 at 2.) The Board’s May 2003 decision was made at petitioner’s eighteenth parole hearing.
7 (September 26, 2006 Supp. Briefing, at 12.)⁴

8 As noted above, the Governor relied principally on the commitment offense, his
9 criminal history (both prior to the commitment offense and after), and institutional behavior to
10 support the denial of parole. The record reflects that there was some evidence before the
11 Governor to support the description of petitioner’s commitment offense and his criminal history.
12 However, petitioner claims that these unchanging factors alone are insufficient to support a
13 finding of present dangerousness required to justify the denial of parole. Specifically, petitioner
14 contends that he has been free from serious disciplinaries since 1983, the last time he incurred a
15 115 disciplinary, and his most recent act of violence was the 1977 robbery, over thirty years ago.
16 Petitioner argues the evidence shows he poses little threat to the community.

17 Indeed, the record before the Board at the time of the 2003 hearing contains
18 substantial evidence contrary to the Governor’s conclusion that petitioner would pose an
19 unreasonable risk of danger to society.

20 Petitioner was born on July 3, 1946, and was the oldest of eight children. (Pet’r’s
21 Supp. Brief, at 4 [docket no. 20].) Petitioner’s parents “became very religious and puritanical in
22 their views” when petitioner was 14 years old, forbidding their children from reading magazines,
23 going to movies or dating. (Id.) Petitioner “has acknowledged that his parents were strict

24
25 ⁴ On August 11, 2004, the Board denied petitioner parole for a period of two more years.
26 Carr v. Horel, CIV S-05-1871 MCE JFM P. A court may take judicial notice of court records.
See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson,
631 F.2d 118, 119 (9th Cir. 1980).

1 disciplinarians who sometimes used corporal punishment which today would be considered
2 abusive.” (Id.) Petitioner enlisted in the United States Marines, working in warehousing and
3 supplies for two years. (Id.) Petitioner was discharged with an “Other than Honorable
4 Discharge” after serving a six month sentence for stealing an 8 mm movie camera and suffering
5 other disciplinary problems while housed in the military prison. (Id.) Petitioner returned to
6 civilian life in 1966 and sustained no criminal offenses, other than traffic violations, until his
7 commitment offense in 1969. (Id. at 5.)

8 Petitioner has spent almost thirty-five years in prison. Petitioner was 57 at the
9 time of his 2003 parole hearing and will be 63 in 2009. Although petitioner admittedly got off to
10 a rocky start during his initial years of incarceration, he began to turn his life around in 1984. In
11 1987, he received a laudatory chrono for informing CDC staff of a prison-made knife, or shank,
12 he found in a dental clinic file cabinet while working as a clerk in the clinic. (Pet., Ex. A, at 42-
13 43.) In 1991, petitioner was commended for pointing out a prison employee’s misplaced wallet
14 containing cash, credit cards and identification. (Supp. Brief, C-File, at 723.)

15 Petitioner has participated in numerous prison programs, demonstrated his ability
16 to work hard, and made positive contributions at the prison. In 1990, petitioner completed 30
17 hours of program participation in a self-help program called “Breaking Barriers.” (Supp. Brief,
18 C-File at 732, 2177.) Since January of 1992, petitioner has been a member of the Victims/
19 Offenders Reconciliation Group (“VORG”). (Supp. Brief, CDC, at 51, 96, 100, 106; C-File, at
20 614, 680.) In 1994, the Catholic Chaplain who facilitated VORG noted petitioner’s participation
21 had “served not only himself but the group at large. VORG looks forward to his continued
22 attendance.” (Supp. Brief, C-File, at 680.) In 1993, petitioner successfully completed
23 the following VORG workshops: Stress Management, Decision-Making and Conflict
24 Resolution, Parenting Skills and Values Clarification. (Supp. Brief, C-File, at 704, 2182.)

25 Petitioner has participated in Narcotics Anonymous consistently and actively
26 since 1990. (Supp. Brief, CDC at 36-37, 68-69, 92- 96, 100, 111, 115; C-File at 555-56, 559-60,

1 562, 570-71, 603, 607, 609 & 612.) Petitioner’s Narcotics Anonymous sponsor has frequently
2 noted that petitioner “has been an active participant and has shown an honest desire to help
3 himself through the self-help program.” (Supp. Brief, CDC at 87, 98, 105; C-File at 612-13.)
4 Petitioner has acknowledged his gambling addiction and “been awakened to the amount of
5 damage to the community and to the individual caused by gambling.” (Psychological Report,
6 Pet., Ex. J, at 2-3.) Petitioner acknowledged that gambling was an addiction for him much like
7 drinking alcohol is an addiction for an alcoholic, and that he needs to forever abstain from
8 gambling. (Id. at 3.)

9 In 1999, petitioner successfully completed the Men’s Violence Program seminar.
10 (Supp. Brief, CDC, at 69.) This program was described as follows:

11 an extensive training seminar and self-help group for men who
12 want to end their violence. . . . Specific procedures for handling
13 and averting the expression of violence is taught. Accompanying
14 signs of anger are studied and techniques for changing attitudes are
15 learned.

16 (Supp. Brief, CDC, at 605.)

17 Petitioner earned his high school diploma in prison in 1972. Prior to February,
18 1993, petitioner participated in the Solano College Sociology Program. (Supp. Brief, C-File at
19 705.) In 1991, petitioner received an “A” in a three unit Introduction to Computers class. (Supp.
20 Brief, C-File at 716.) In 1992, petitioner received an “A” in Sociology I,” and his professor
21 stated petitioner was “very interested, motivated and did all of his homework. He really paid
22 attention. A very rewarding student to teach.” (Supp. Brief, C-File, at 717.)⁵

23 From 1989 to 1990, petitioner successfully completed several units within a
24 Vocational Industrial Electric class and his “progress . . . [was] above average.” (Supp. Brief,
25 CDC, at 101, 104; C-File at 727, 2178-81.) In 1992, petitioner earned a certificate of completion
26 for a Residential-Electrical Wiring program. (Supp. Brief, C-File, at 711, 2648.) That same

⁵ Due to budget cuts, this program was terminated in 1993. (Supp. Brief, C-File at 705.)

1 year, petitioner received a Certificate of Achievement for work in Electricity 3, DC Motors, and
2 Vocational Industrial Electric. (Supp. Brief, C-File, at 2647.) The instructor noted that
3 petitioner “has consistently demonstrated good study habits, work performance and an excellent
4 attendance record. (Supp. Brief, C-File at 845.) Petitioner was also commended in 1992 on his
5 success in installing fluorescent lights in the Vocational Welding Shop. (Supp. Brief, C-File at
6 712.) His instructor observed that petitioner “had a professional demeanor, cleaned up after the
7 job, and ended up with a satisfied customer. Keep up the good work.” (Id.)

8 From September of 1989 to the present, petitioner maintained Medium A custody
9 status,⁶ worked at various positions within the Department of Corrections, received reports
10 ranging from exceptional to satisfactory from his supervisors, and had no serious rules violations.
11 (Supp. Brief, CDC at 36-37, 42-43, 48-49, 50, 56, 62, 68, 74, 79, 86, 88, 98, 104, 111 & 115.)

12 From 1982 to 1983, petitioner worked as an Occupational Therapy Aide; his supervisor
13 described petitioner as

14 a consistently excellent worker. Carr has a wide range of
15 capabilities which he was able to utilize to some degree while
16 working in the O.T. Shop. He gets along exceptionally well with
17 both Staff and Inmates, and is a capable teacher of Crafts. Carr
18 was also extremely valuable in keeping the Shop a peaceful place
in which to work In working with the A-3 inmates, Carr was
kind, attentive, and demonstrated a great deal of self-control. He
was the best aide who has ever worked in the O.T. PTU Shop, and
his work is greatly appreciated.

19 (Supp. Brief, C-File, at 779.) In 1985, petitioner worked in the CMF-South law library.

20 Petitioner received an “excellent” performance rating and his supervisor noted petitioner was
21 important to the effectiveness of the library and described petitioner as “dependable,
22 conscientious, and responsive to inmate and staff needs.” (Supp. Brief, C-File at 862-63.)

24 ⁶ On August 4, 1997, petitioner’s case was reviewed for Close B custody criteria and,
25 pursuant to a CDC-wide directive affecting all inmates with a prior escape, he was assigned to
26 Close B custody. Effective December 19, 1997, petitioner’s case was re-reviewed per current
Close B custody criteria and his custody was reduced to Medium A custody. (Supp. Brief, CDC,
at 80.)

1 From 1986 to 1987, petitioner worked in P.I.A. micrographics, and his supervisor
2 noted petitioner had:

3 shown the ability to get along well with his peer employees as well
4 as all free staff personnel alike within his place of assignment.
5 Throughout the period he has been assigned, Mr. Carr has never
6 shown any type of negative behavior, and he has always been very
7 polite and courteous to everyone. His demonstrated work
8 performance and applied skills are “above average”, Along
9 with performing all tasks in a diligent manner, Inmate Carr does
10 not have any problem accepting instruction from our Production
11 Leadmen or his Supervisor . . . [he] has shown enthusiasm in
12 learning all aspects of this highly technical professional field.

13 (Supp. Brief, C-File, at 764.)

14 During petitioner’s previous work as a clerk, petitioner received excellent work
15 reports. Between 1987 and 1989, petitioner worked as a clerk in the dental department of Old
16 Folsom prison, where he again received an “exceptional” grade in all areas of performance and
17 attitude. (Supp. Brief, C-File, at 755, 856.) His supervisor described petitioner as “an asset to
18 the dental office. Continue[s] to get the job done.” (Id.) In 1990, his supervisor noted petitioner
19 “has a strong work ethic. He is well-mannered, exhibits a willingness to accommodate reception
20 center staff in any assignments that may arise, while maintaining a positive attitude.” (Supp.
21 Brief, C-File at 729.) Another supervisor noted in February of 1991 that petitioner “demonstrates
22 an uncommon demand to get the most out of his work product.” (Supp. Brief, C-File at 851.) In
23 May of 1991, a Work Supervisor’s Report “commented highly” on petitioner’s “clerical skills
24 and work assignment participation.” (Supp. Brief, CDC at 111.) Petitioner’s supervisor wrote
25 petitioner was an “excellent unit clerk. Helped unit run very smooth and organized. Maintained
26 records, typed reports, and was an asset to the unit.” (Supp. Brief, C-File at 849.)

27 A Prison Industries Administrator wrote petitioner a laudatory chrono in May of
28 1995, stating that petitioner

29 is to be commended for the excellent job performance. He has
30 displayed a sense since his assignment in May 1994. During this
31 time, inmate Carr has learned all phases of the PIA Accounting

1 Procurement Department. This has allowed Carr to be able to fill
2 in when another inmates [sic] were not at works [sic]. Carr has
3 continuously displayed excellent work habit in all assignments
4 given to him. He has worked well with other inmates and staff,
5 and he is an asset to CSP-SOL, PIA Administration Operations.

6 (Supp. Brief., CDC at 91; C-File at 645.)

7 Prison records also demonstrate that petitioner benefitted from therapy while in
8 prison. In 1969, petitioner refused to be interviewed by psychiatric department members. On
9 September 30, 1969, the neuropsychiatric committee provided an examination summary “based
10 on information obtained from the records of the probation officer, court appointed psychiatrists
11 and Navy records; also the communications he has had with fellow inmates, with the supervisory
12 [personnel] and [their] consultations with medical, custodial and other personnel who [were] in
13 contact with [petitioner].” (Docket No. 35-2 at 1.) Petitioner was diagnosed as having
14 “Sociopathic Personality, Dyssocial Type. He also has been called Emotionally Unstable, with
15 Passive-Aggressive, Paranoid and Antisocial Elements.” (Id.) The committee declared petitioner
16 was not insane. (Id.)

17 In 1990, the Board referred petitioner to the “Category X” program. (Supp. Brief,
18 C-File at 733.) On April 30, 1990, petitioner was diagnosed with Simple and Social Phobia that
19 caused him to panic in certain situation, but as part of his treatment learned “Progressive
20 Relaxation and Desensitization techniques.” (Supp. Brief, C-File at 733 & Docket No. 34-3 at
21 16.) His treating physician noted that petitioner’s “motivation has been high and progress[ed]
22 about 75% when treatment had to be stopped due to my job change.” (Supp. Brief, C-File at
23 733-34 & Docket No. 34-3 at 16.) The doctor noted that petitioner did not appear to have a
24 diagnosable personality disorder and that his mental status was stable. (Supp. Brief, C-File at
25 734 & Docket No. 34-3 at 16.)

26 On March 11, 1991, Ranald Bruce, Ph.D. provided a Category X Psychological
Evaluation, specifically addressing questions posed by the Board:

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1 1. Violence Potential: Under ordinary circumstances when he is
2 able to cope with life stresses in a constructive, positive manner,
3 [petitioner's] violence potential is judged to be below average for
4 an inmate with a life term. During the nearly four year period of
5 his escape, [petitioner] remained violence free until his gambling
 again plunged him into desperate financial circumstances, as it had
 done previously when he committed the capital crime. His
 potential for violence is, therefore, unpredictable if he should again
 take up gambling.

6 2. Significance of Alcohol and Drugs: [Petitioner] described
7 himself as a social drinker, and drug or alcohol use appear
 unrelated to his antisocial acts.

8 3. Exploration of the Commitment Offense: [Petitioner] has
9 gained some intellectual understanding of the factors that led up to
10 the offense, but does not appear to have emotionally worked
11 through and come to terms with the underlying causes. More in-
12 depth exploration is indicated for a better understanding of the
13 dynamics underlying his propensity to gamble and to act-out
14 antisocially and violently. Therapy efforts thus far appear to have
15 focused more on symptoms than etiology. As a result of his
16 treatment at Vacaville, he has learned to channel his anger
17 constructively by jogging, working out, and lifting weights. He
18 also attempts to "talk out problems" and not "swallow his anger"
19 as he did in childhood.

 His treatment with Dr. Walk focused on coping with phobias
 through progressive relaxation and desensitization training. As
 reported by Dr. Walk, [petitioner] has "made strides confronting
 officials, psychiatrists, and psychologists, without feeling
 intimidated." [Petitioner] appears to have sufficiently progressed
 in therapy that he can now benefit from a more long term insight
 oriented therapy.

20 4. Need for Therapy: [Petitioner] was concerned that he would
21 have to remain incarcerated for a longer period of time if
22 recommendations were made for more therapy. He needs to be
23 reassured that after sufficient therapeutic progress is made, he can
24 be recommended for parole with the condition to continue therapy
25 on an outpatient basis. Given the fact that gambling is an addictive
26 behavior and was indirectly related to the capital offense,
 [petitioner] would certainly benefit from therapy to prevent relapse,
 particularly since he has not yet had any therapy specifically
 focused on it. Therapy should include exploration of all
 predisposing factors, from excessively harsh parental discipline,
 exposure to gambling as accepted social behavior, high value
 placed on material and financial symbols, to lack of family
 emphasis on saving, planning, and budgeting. He also needs to

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1 learn to identify high risk situations and viable coping responses
2 for himself in order to abstain from gambling.

3 (Docket No. 33-5 at 79.)

4 On March 28, 1991, the Category X psychiatric council report acknowledged
5 petitioner's past problems, but described petitioner as a man of "significant intelligence and
6 ability to look at himself objectively with few exceptions." (Supp. Brief, CDC at 186.) The
7 Council recommended petitioner receive individual psychotherapy and concluded that petitioner
8 had the

9 potential ability to resolve problems by using his intelligence, and
10 to delay immediate gratification or immediate impulsive behavior
11 to deal with internal conflicts. With the caveat of continued
12 psychotherapy prior to parole, and the assurance of some support
13 system for the subject after parole, we feel that he has a relatively
14 good prognosis for parole success.

15 (Supp. Brief, CDC at 187.)

16 On June 26, 1991, Dr. Walk wrote a letter to the Board confirming that petitioner
17 "does not have any diagnosable personality disorder. [His] primary Diagnoses have been both
18 (1) Social Phobia and (2) Simple Phobia." (Docket No. 33-6, at 7; Docket No. 34-5 at 42.) Dr.
19 Walk stated that with treatment by Systematic Desensitization to the Phobic Stimulus by using
20 combinations of relaxation techniques, breathing exercises and guided imagery, plaintiff was
21 about 75% improved when treatment was unexpectedly terminated. (Docket No. 34-5 at 43.) He
22 noted there could be some relapse, without continued treatment, but essentially petitioner was
23 "symptom free and a high functioning person when not in a phobic situation." (Id.) Dr. Walk
24 expressed a willingness to continue treating petitioner upon his parole. (Id. at 44.)

25 On June 20, 1992, a psychological evaluation was performed by Sophia
26 Konstantinou, Ph.D. (Docket No. 33-5, at 69-70.) She noted petitioner had "voluntarily sought
psychotherapy for symptoms of pervasive anxiety, panic, and what appears to be a social phobia"
and the focus of therapy was to "reduce [petitioner's] anxiety through progressive, systematic

1 desensitization accompanied by relaxation techniques.” (Id. at 69.) She attributed the sources of
2 petitioner’s anxiety to “group settings” and “environments [in which] he feels scrutinized by
3 others.” (Id.)

4 Dr. Konstantinou found petitioner had “programmed increasingly effectively,”
5 and had finished a Category X evaluation program (March 1991), upgraded educationally, and . .
6 . remained disciplinary free since 1983,” worked “full-time in the vocational industrial electric
7 trade and attend[ed] Narcotics Anonymous Meetings.” (Docket No. 33-5, at 69.) Petitioner
8 admitted guilt for the life offense, took responsibility for the “behavior and expressed an
9 appropriate level of remorse for the victim as well as the victim’s family members.” (Id.)
10 Although initially reserved, petitioner relaxed and spoke candidly. (Id.)

11 She noted that while Dr. Walk’s diagnosis was accurate, it appeared to be
12 “situationally induced and does not interfere with [petitioner’s] daily functioning or his cognitive
13 capabilities.” (Id.)

14 [Petitioner] expressed relatively good insight into the factors he
15 associates with regard to past behavior. At the time of the offense,
his thinking was marked by “gross irrationality and immaturity.”

16 Apparently, his lifestyle was a consequence of “poor judgment and
17 rebelliousness.” He “dabbled in playing cards and eventually quit
his job, thinking he could turn pro.”

18 (Id. at 69-70.) She found petitioner could be objective and had good insight into his past. (Id. at
19 70.) Petitioner had “matured, increased his insight with regard to the offense-related behaviors,
20 and ha[d] ultimately been able to make concrete parole plans with a realistic foundation.” (Id.)
21 His “past psychiatric diagnosis can be directly related to criminal behavior.” (Id.)

22 Dr. Konstantinou diagnosed petitioner with social phobia, in partial remission
23 (Axis I) and personality disorder, NOS, with inadequate features, by history only (Axis II). (Id.)

24 She concluded as follows:

25 In a less controlled setting, such as return to the community,
26 [petitioner] can be expected to maintain present gains. Violence
potential in the past is estimated to have been greater than average

1 based on his poor judgment, immaturity, and lack of goals at the
2 time. At present, violence potential is estimated to be decreased
3 and average for the general population based on his completion of
4 a salable vocational trade, documented job offers, and the
5 emotional support of his family and girlfriends. Should a parole
6 date be granted, it is recommended that [petitioner] be supervised
7 with regard to maintaining full-time employment within the
8 community. Until then, therapy on an informal, as-needed basis
9 would be suggested; however, [petitioner's] focus would be better
10 served if he expends his energy on completing a viable trade.

11 (Id.)

12 In August 1993, K. O'Meara, Ph.D. provided a psychological evaluation noting
13 there was "no evidence of a thought, mood, or perceptual disorder." (Docket No. 33-5 at 65-66.)

14 He is of average to above average intelligence although his
15 thinking is somewhat rigid and concrete. Judgment and impulse
16 control appear to be adequate in this environment. Level of
17 personal insight, on an intellectual level, is average.

18 A long-standing pattern of keeping his emotions at abeyance
19 remains present. To some extent this may be adaptive for him.
20 However, he seems to have difficulty in acknowledging that his
21 feelings are difficult for him to process. On the positive side he
22 appears to have assumed an increasing degree of responsibility for
23 his commitment offense.

24 (Docket No. 33-5 at 66.) Dr. O'Meara diagnosed petitioner with Social Phobia, in partial
25 remission (Axis I) and Personality Disorder, NOS with inadequate and avoidant features,
26 improving (Axis II). (Id.) Dr. O'Meara concluded:

27 In a less controlled setting such as return to the community,
28 [petitioner] can be expected to maintain present gains provided he
29 has psychosocial support and daily structure. Violence potential in
30 the past is estimated to have been greater than average based on his
31 lack of insight, impulsivity, lack of judgment and immaturity. At
32 present the violence potential is estimated to be decreased and
33 considered average for this population. Should a parole date be
34 granted it is recommended that he participate in 12-Step Program
35 focusing on addictive behaviors, and that he participate in ongoing
36 insight oriented psychotherapy.

37 (Docket No. 33-5, at 66.)

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1 Samuel G. Benson, M.D., prepared a report in February of 1994, that stated:

2 Carr is a 47 year old, Black, who does not and has not suffered
3 severe psychiatric illness such as Schizophrenia, Manic
4 Depression, or Organic Mental Disorder. My own evaluation and
5 recent psychological evaluation from the BPT, 1992 and 1993
6 confirm the above. He does have a mild form of anxiety disorder
7 known as Social Phobia which is in partial remission. Denies
8 suicidal homicidal or psychotic thoughts. In addition, he has
9 concerns that he meet his BPT goals of psychological therapy.
10 Inmate agrees to see me on regular basis every two to four weeks
11 for psychotherapy. Inmate agrees to consider my recommendation
12 that anti-anxiety medications could help.

13 (Supp. Brief, CDC at 99.)

14 Kathleen O'Meara, Ph.D., performed a psychological evaluation in October 1994,
15 and noted that petitioner had been seeing psychiatrist Dr. Benson since May 17, 1994, working
16 on issues of social phobia and exploring ADD. (Docket No. 33-5, at 61.) Dr. O'Meara described
17 petitioner as less guarded and more forthcoming than the previous year, and noted no evidence of
18 a mental or mood disorder. (Id.) "He appears to have made some progress in the past year in
19 dealing with feelings he had made a long standing effort to avoid." (Id.) Dr. O'Meara diagnosed
20 Personality Disorder, not otherwise specified, with inadequate and avoidant features (Axis II) and
21 concluded:

22 In a less controlled setting such as return to the community
23 [petitioner] can be expected to maintain present gains provided that
24 he has available structure and support. He has been incarcerated
25 for most of his adult life and his transition into society would
26 require a period of deinstitutionalization. His violence potential is
considered decreased and average for this population.

27 (Id.)

28 In December 1995, R. Horon, Ph.D., set forth petitioner's psychiatric history,
29 noting that "it appears there has been some shift over the years, with differences of opinion and
30 significant confusion at times." (Docket No. 33-5 at 56.) Dr. Horon found petitioner's March
31 1991 CAT "X" report to be the most in-depth. Petitioner

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1 is overly responsive to the opinions of others. . . is easily drawn
2 into being argumentative and litigious. . .in this mode he can be
3 fiercely stubborn and rigid, judgmental and critical of others. As
4 part of this paranoid disposition, he can be extremely wary of
5 losing control. . . or being open in such a way as to be taken
6 advantage of.

7 (Docket No. 33-5 at 56, quoting Dr. Bruce from 1991 CAT “X” report.) Petitioner was noted as
8 having a “guardedness and hyper-alertness” and “displaces aggressive impulses ‘by litigious
9 means.’” (Docket No. 33-5 at 56, quoting Dr. Ishida from 1991 CAT “X” report.)

10 Dr. Horon noted petitioner was “quite guarded and tense, and there was an
11 episode of tearfulness (similar to what have been noted in previous evaluations). . . .His
12 intellectual abilities were estimated to be in the average to above average range.” (Docket No.
13 33-5 at 57.) During the interview, petitioner explained he was young, immature and irrational at
14 the time of his life crime and his actions led to the tragic death of another man. (Id.) Petitioner
15 stated he had gained insight from VORG and AA as to the tragic consequences involved in those
16 types of behaviors. (Id.) Petitioner stated he had improved his social phobia, noting that a few
17 years prior he would have found ways to leave the interview whereas now he is able to stay and
18 complete the interview. (Id. at 58.) Petitioner concluded by stating:

19 I feel that it’s important for those concerned to understand that part
20 of the maturation process is to both to appreciate past wrong
21 doings and to learn about the insight and come to grips with
22 appreciating the tragic misfortune that befell the victim and how it
23 impacted the public in general and also come to realize over the
24 years there’s a lot of pain associated with one’s criminal misdoings
25 which have far reaching consequences for both the victim and
26 myself. One pays a hell of a price for youthful indiscretions, for
instance, I would have had the opportunity to participate in my
parent’s wedding anniversary, September 12. They were
celebrating their 50th wedding anniversary, it was a painful
experience for me to still be here, everyone gathered around for the
reunion.

(Id.) Dr. Horon diagnosed petitioner with Delusional Disorder, Persecutory Type (Axis I), no
diagnosis on Axis II or III, problems related to interaction with the legal system/crime (Axis IV).

(Id.) Dr. Horon explained that the delusional disorder

1 is marked by non-bizarre delusions related to a prevalent theme . . .
2 [involving] “the person’s belief that he or she is being conspired
3 upon. . . maliciously maligned, harassed, or obstructed in the
4 pursuit of a long-term goal. Small slights may be exaggerated and
5 become the focus of a delusional system. The focus of the
delusion is often on some injustice that must be remedied by legal
action (‘querulous paranoia’) and the affected person may engage
in repeated attempts to obtain satisfaction by appeal to the courts
and other government agencies.”

6 (Id. at 58-59, quoting DSM-IV, pp. 298)⁷ However, Dr. Horon noted that he is “generally
7 functioning reasonably well in social and work situations (the presence of a delusional disorder
8 does not require significant impairments in daily functioning).” (Id. at 59.) Dr. Horon concluded
9 that petitioner had a “clear case of a Delusional Disorder, Persecutory Type. This diagnosis is
10 very difficult to make, and can cause a great deal of diagnostic confusion—largely due to the fact
11 that the delusions themselves are not bizarre in nature, and functioning in most areas is usually
12 intact.” (Id. at 59-60.)

13 However, Dr. Horon found petitioner’s “potential for violence is considered
14 below average when compared with other inmates at this time based purely upon his disciplinary
15 history.” (Id. at 60.) Petitioner’s “aggression is displaced through litigation, which has helped
16 his overall adjustment. His potential for violence outside incarceration can be reduced with
17 careful parole planning.” (Id.) Dr. Horon suggested petitioner avail himself of psychiatric
18 counseling because “[c]hanging symptoms of depression, anxiety, and phobias are often
19

20 ⁷ Dr. Horon documented this diagnosis by reviewing legal materials contained in
21 petitioner’s central file. One example cited was petitioner’s lawsuit over a disciplinary action
22 taken when, in 1986, petitioner attempted to order a handbook on locks and security from a
23 prison library despite the institution librarian’s permission to do so. (Id.) The order was
24 cancelled and petitioner was disciplined because of his escape history. (Id.) Petitioner argued
25 that the disciplinary was a mistake of the librarian’s and caused him psychological and emotional
26 damage; petitioner maintained he suffered a complete mistrust of staff at Folsom Prison and that
the disciplinary action would haunt his annual parole consideration hearings. (Id.) Dr. Horon
opined that this lawsuit documented the delusional disorder in three ways: (1) the interpretation
of the disciplinary as an intentional injustice or harassment which could only be remedied
through legal means; (2) the statement of mistrust related to this incident meant petitioner felt
conspired upon or maliciously maligned; and (3) the lawsuit expresses petitioner’s resentment of
being harassed as evidenced by his request for \$300,000.00 in damages. (Id.)

1 associated with this disorder and often confuse diagnosis, as in this case.” (Id.) “[I]ndividuals
2 with this diagnosis can be successful [on parole] if their disorder is recognized, if psychosocial
3 supports are available (i.e. financial and other agency supports), and if the individual is able to
4 maintain an open-ended (as opposed to time-limited) relationship with a mental health clinician,
5 even if visits are infrequent.” (Id.)

6 Following the 1995 report, petitioner sought a supplemental consultation and Dr.
7 Horon issued an addendum clarifying some of the points contained therein. (Docket No. 33-5 at
8 53-54.) Petitioner “stated that his diagnosis did not take into account his work as a law library
9 clerk and as a ‘jailhouse lawyer.’” (Id. at 53.) Petitioner argued that if someone in the
10 community had been subjected to incidents such as the one reviewed in the 1995 report, litigation
11 would be involved there as well. (Id.) Petitioner also stated that his review and study of law
12 books helped him cope and he had been “instrumental in training other law clerks within the
13 CDC.” (Id. at 54.)

14 Dr. Horon clarified that petitioner appeared

15 to feel that a diagnosis of a psychiatric condition de-values his
16 humanity or his worth as a jailhouse lawyer. This is not the case
17 per se. The psychic defense of turning unacceptable impulses into
18 pro-social behaviors (sublimation), in this case paranoid or
19 aggressive impulses, is a positive response which is both valuable
20 and quite human. The diagnosis of a psychiatric condition does not
21 represent a de-valuing of the evaluatee, rather it represents a
22 description of behavioral and/or intrapsychic phenomena.

23 (Id.)

24 In the March 1997 psychological evaluation prepared by Kathleen O’Meara,
25 Ph.D., petitioner’s mental status was described as overall friendly. (Docket No. 33-5 at 51.) She
26 noted he “appears reluctant to fully explore the crime he committed,” which she thought related
“to his long standing pattern of avoiding strong and painful feelings.” (Id.) “[H]is key
psychological defense mechanisms revolve around denial, externalization, and projection. His
thinking is characterized by inflexibility and rigidity.” (Id.)

1 His understanding of his gambling addiction, although improved,
2 remains somewhat superficial and cloaked in defensiveness. When
3 asked if he considered himself a compulsive gambler (his history
4 indicates this is the case,) he replied, “Why haven’t I been thrown
5 in the hole if I’m a pathological gambler?” He seemed to
6 adamantly believe that the absence of the behavior indicated that
7 the problem had been eradicated.

8 (Id. at 51-52.) Her final diagnosis was Axis I, Pathological Gambling, in remission, and Axis II,
9 antisocial personality disorder, improving. (Id. at 52.)

10 Dr. O’Meara concluded that petitioner’s

11 reluctance to thoroughly address the instant offense bodes for a
12 guarded prognosis with respect to violence potential. The instant
13 offense was very violent and [petitioner] continues to have
14 difficulty accepting and integrating hostile affects. To his credit, in
15 a controlled environment, he has exhibited no aggressive
16 behaviors. Also, he appears to be maturing and there have been no
17 indications of impulsivity.

18 If he is to be paroled and released, it is recommended that he
19 remain in ongoing treatment for compulsive behavior (gambling)
20 and that he seek assistance through the parole out-patient clinic.

21 (Id.)

22 On November 25, 1997, Michael Vasquez, Ph.D., performed a mental status
23 examination on petitioner and found he had “little or no violent tendencies and has a highly
24 effective intellectual capacity that is not being utilized to its fullest. Whatever antisocial
25 personality traits he had 30 years ago have been lessened significantly throughout his years of
26 incarceration.” (Docket No. 33-5 at 48.)

27 Dean J. Clair, Ph.D., on November 20, 1998, issued a psychosocial evaluation
28 stating that “the only indication of a mental health problem was a diagnosis of “Delusional
29 Disorder” made at a 1995 evaluation.” (Docket No. 33-5 at 47.) Dr. Clair found no evidence of
30 any other major mental disorder. Petitioner admitted having a “social phobia” or “tendency to
31 freeze psychologically when he finds himself in certain types of group settings.” (Id.)
32 Petitioner’s feelings of depression were successfully treated by supportive therapy with mental
33 health staff. (Id.) Dr. Clair concluded that he had little to add to his 1997 conclusions; petitioner

1 “is above average in intelligence. He has grown well beyond the predatory and antisocial
2 behavior he exhibited thirty years ago. If paroled, [Dr. Clair believes] he would pose a negligible
3 threat to the public order.” (Id.; Docket No. 37-6 at 24.)

4 In his March 16, 2000 psychosocial evaluation, Dr. Clair noted that petitioner had
5 “not been charged with a single act of violence in the course of his entire incarceration.”
6 (Docket No. 33-5 at 45.) Although violence potential was a problem for petitioner in his early
7 twenties, petitioner

8 has now matured past that condition and he is now motivated
9 purely [by] a need to do whatever he must do to regain his
10 freedom. The writer continues to feel that he is no longer
‘dangerous.’ ¶ . . . There are no psychological findings that would
reduce this man’s suitability for parole.

11 (Docket No. 33-5 at 45.)

12 Dean J. Clair, Ph.D. issued a psychosocial evaluation for petitioner on December
13 5, 2000. Dr. Clair noted that early in his incarceration, petitioner was found to have differing
14 personality disorders, all relating to various forms of sociopathy. (Docket No. 33-5 at 41.) In his
15 forties, petitioner “became increasingly involved in various therapy programs, one of which was
16 ‘relaxation therapy.’” (Id.) Staff was satisfied with his progress and participation. (Id.) In 1995,
17 petitioner developed a “delusional disorder” where he was periodically litigious. (Id.) Then,
18 petitioner struggled with a “‘social phobia’ where one manifestation was an inability to perform
19 either major excretory function in the presence of other people.” (Id.) “Most recently, he
20 became reactively depressed. Again, none of these conditions interfered with his work schedule
21 or incapacitated him in any way.” (Id.)

22 As noted above, Dr. Clair noted that petitioner has “‘progressed remarkably,”
23 compiling a “record of conformity, stability, and productivity. . . .He is mentally stable and has
24 never been significantly addictive. As before, the writer feels that this man is no longer
25 ‘dangerous.’” (Docket No. 33-5 at 42.)

26 ////

1 On February 25, 2003, John T. Rouse, Ph.D. provided a psychosocial assessment
2 evaluation for the Board of Prison Terms. (Docket No. 33-5 at 35-38.) Dr. Rouse assigned no
3 diagnosis on Axis I, and found petitioner had a personality disorder not otherwise specified (with
4 antisocial features resolved) on Axis II. Dr. Rouse reviewed petitioner's life crime and noted:

5 Whatever antipersonality traits he has had prior to his incarceration
6 has lessened significantly and he seems to have made significant
7 gains in understanding his life crime as well as his life prior to his
8 incarceration. He has, as reported by other examiners, compiled a
9 record of conformity, stability, and productivity and as such, Mr.
Carr no longer presents as a danger to the community. His risk of
dangerousness at this point is negligible and less than that of the
average inmate incarcerated here at CSP-Solano.

10 (Id. at 37.) Dr. Rouse concluded that petitioner

11 has no current diagnosed psychopathology which would be related
12 to his life crime. He has never been diagnosed as having a severe
13 mental disorder. Thus, any parole consideration the Board would
ponder for Mr. Carr would be related to factors other than mental
health issues.

14 (Id. at 38.)

15 Petitioner's classification score dropped to zero in May of 1995. (Docket No. 33-
16 5 at 41; Docket No. 38-8 at 25.)

17 Most of the Governor's findings were based on static factors that petitioner is
18 powerless to change: petitioner's underlying crime and his criminal history. Most of these
19 factors took place prior to 1969, over thirty years ago. While petitioner's crime was, indeed,
20 heinous and his early years of incarceration and escape are of concern, petitioner's last act of
21 violence occurred in the 1977 robbery. Petitioner has not sustained a serious rules violation since
22 1983.

23 The 2003 decision to deny petitioner parole was the eighteenth denial of parole
24 premised almost entirely on petitioner's commitment offense and criminal history. Without
25 additional factors demonstrating petitioner presents a current danger to society, the continued

26 ////

1 denial of parole violates petitioner's right to due process. The court will address the Governor's
2 reasons seriatim.

3 a. History of Institutional Behavior

4 There is no question that petitioner's early institutional behavior was problematic.
5 However, it was error for the Governor to find petitioner failed to acknowledge his prior
6 misconduct when petitioner told the 2003 Board that he had "taken to the Board 20 years of clean
7 time, disciplinary free." It was unfair of the Governor to discount petitioner's twenty years of
8 good conduct based on events in 1977, 1978 and 1983. Petitioner's prior misconduct does not
9 preclude petitioner from taking credit for being disciplinary-free for the subsequent twenty-year
10 period.

11 It was also error for the Governor to rely on reports of minor misconduct. The
12 regulations specifically refer to "serious" misconduct, for example, serious rule violations or
13 115s, as a basis for finding an inmate unsuitable for parole. 15 C.C.R. § 2402(c)(6).

14 In addition, the Governor took petitioner's statement out of context. (Supp. Brief,
15 at 32.) Petitioner asked the Board to consider the Governor's recent grant of parole to Richard
16 Kemp who had 19 years of clean time, and note by comparison petitioner's 20 years of clean
17 time. (Pet., Ex. J at 45; see also Supp. Brief, Ex. 3.) Petitioner stated: "I close by saying that
18 taking . . . notice of Mr Davis granting parole, he noted that Kemp's record is second to none. I
19 ask the Board to consider my record third to none." (Pet., Ex. J at 45.) Mr. Kemp beat a
20 longtime friend to death during an argument over drug money in 1982; Governor Davis approved
21 his parole in 2003. (Supp. Brief, Ex. 3.) Governor Davis described Mr. Kemp's crime as
22 "shockingly brutal." (Id.)

23 Petitioner's legitimate claim to twenty years of good time does not provide some
24 evidence to support the Governor's decision. Rather, petitioner's twenty years of good conduct
25 supports his release on parole and demonstrates he no longer poses a risk of danger to society.

26 ////

1 b. Gambling

2 Gambling was indirectly related to petitioner's life offense. After receiving an
3 "other than honorable" discharge from the military, petitioner began work at Georgia Pacific
4 where he worked as a tail sawyer in a sawmill on the 1400 - 2200 shift. (Docket No. 33-5, at 79.)
5 He started hanging out at the union hall before work and gambling, playing pinochle or poker.
6 (Id.) This resulted in bad consequences; he was broke most of the time. He stopped making
7 payments on gifts to his parents and they were repossessed. He became estranged from his
8 family. His brother refused to let him spend the night. He started living off his parents until he
9 refused to give them \$40.00 which they needed; they asked him to return the house key and
10 leave. At that point, he moved in with a maternal uncle and continued to gamble. (Docket No.
11 33-5, at 79.)

12 Petitioner took up with an ex-convict from San Quentin who was burglarizing
13 homes with his girlfriend. (Id. at 80.) They saw an old man gambling a large sum of money,
14 followed him home, then returned the following night to rob him. Petitioner left with \$740.00.
15 (Id.)

16 On August 27, 1973, petitioner escaped from prison for four years. (Docket No.
17 38-4 at 50.) Four years after he escaped, he committed a robbery by hitting another elderly man
18 over the head while the victim was opening a business safe. (Docket No. 23, Ex. 3 at 13.)
19 Petitioner stole \$3,000.00 to \$4,000.00 while armed with a gun. (Id.) Petitioner revealed the
20 motive for the 1977 robbery was to obtain money to offset gambling losses. (Id. at 15.)
21 Petitioner was "heavily involved in gambling as a sole means of support at the time both
22 robberies were committed." (Id. at 15.)

23 In 1983, petitioner revealed that the 1969 murder was the result of his addiction to
24 gambling. (Docket No. 23, Ex. 3 at 15.) In 1979, he revealed the motive for the 1977 robbery
25 was to gain money to offset gambling losses. (Id. at 15.) In 1997, he admitted having an
26 addiction to gambling. (Pet., Ex. J, at 2-3.)

1 In 1983, petitioner received a California Department of Corrections disciplinary
2 (115) which was later reduced to a 128 for possession of \$160 that he admits was gained from
3 “running a three for two loan sharking operation.” (1987 Board Report at 3; Docket No. 38-4 at
4 50.)

5 In the Board’s review of the 17th subsequent parole hearing decision, the review
6 unit found that

7 The hearing panel failed to discuss with the prisoner his gambling
8 addiction. During the psychological evaluation dated March 1997,
9 the prisoner admitted his addiction to gambling. Also, in his
10 Category X evaluation, the prisoner’s gambling addiction was seen
11 as an underlying cause of the offense. Due to the possible
12 consequences of a return to gambling by the prisoner if released on
13 parole, this issue needs more discussion.

14 (Docket No. 35-4, at 52.)

15 Rather than acknowledging that admitting the gambling addiction was a major
16 step toward addressing the addiction, the Governor found petitioner’s gambling addiction had not
17 been addressed. The Governor’s decision focused on petitioner’s admission in 1997 but failed to
18 note that in the March 1997 Psychological Evaluation, petitioner explained that he used the
19 addiction treatment program in NA for its relevance to his gambling addiction. (Pet., Ex. J at 1.)
20 The Governor failed to recognize petitioner’s consistent attendance at NA as well as his
21 voluntary participation in psychotherapy since 1997. A review of the entire record, in context,
22 demonstrates that petitioner has participated in ongoing NA sessions and mental health therapy.
23 The fact that he finally admitted his addiction and expressed the knowledge that he must forever
24 refrain from gambling (Docket No. 33-5, at 51), also demonstrates great strides in recovering
25 from the addiction.

26 Indeed, there is no evidence in the record that petitioner has continued to gamble
while in prison after 1983, or that he has denied a need to refrain from gambling or attend
Narcotics Anonymous or seek mental health counseling; rather, the record demonstrates a long
and continued history of attendance and participation in NA since at least 1990. The prison has

1 no program specifically tailored to gambling, yet petitioner “uses the addiction treatment
2 program for its relevance to his gambling addiction.” (Docket No. 33-5 at 49.) In Dr. O’Meara’s
3 March 1997 psychological evaluation, petitioner stated at the time of his life crime he was
4 addicted to gambling, but he isn’t now. (Id. at 51.) “I no longer gamble at all, during that time I
5 had a gambling problem that was 25 years ago, and when I was on escape when I thought I could
6 win money after losing my job.” (Id.) He still attended NA on a weekly basis. (Docket No. 33-5
7 at 50.)

8 While the record is clear that there was a strong causal connection between
9 petitioner’s gambling problem and his violent commitment offense, his gambling addiction does
10 not by itself reasonably establish current unsuitability because there is no additional evidence to
11 complete a chain of reasoning between his gambling and a finding that because of it he currently
12 poses an unreasonable risk of danger if released. In other words, in the absence of some evidence
13 to support a reasonable belief that petitioner might start gambling again, the fact that he gambled
14 25 years ago does not by itself represent some evidence that he is currently dangerous.

15 Moreover, here the record does not contain any evidence to support reasonable
16 grounds to believe petitioner might start gambling if released. There is no evidence that
17 petitioner’s former desire for gambling might still be present or that he refused, failed, or did
18 poorly in NA; rather the record demonstrates an active participation therein. Based on
19 petitioner’s admission that he had a gambling addiction, the Board can require petitioner to
20 attend Gamblers’ Anonymous meetings as a condition of his parole. Indeed, at least three
21 psychologists have noted that certain conditions can be placed on petitioner’s parole to address
22 this concern. For example, on March 11, 1991, Dr. Bruce suggested petitioner should continue
23 his psychiatric treatment on parole as petitioner’s violence potential increases if he takes up
24 gambling again. (Docket No. 33-5, at 79.) In 1992, Dr. Konstantinou recommended petitioner
25 be supervised regarding full-time employment and receive therapy on an as-needed basis.
26 (Docket No. 33-5, at 70.) Dr. O’Meara suggested in 1993 that petitioner could be required to

1 participate in a 12 step program to focus on his addictive behaviors. (Docket No. 33-5, at 66.) In
2 1997, she recommended that petitioner remain in ongoing treatment for compulsive behavior
3 (gambling) and that he seek assistance through the parole out-patient clinic. (Docket No. 33-5 at
4 52.)

5 “[A]lthough the state expects prisoners to behave well in prison, the absence of
6 serious misconduct in prison and participation in institutional activities that indicate an enhanced
7 ability to function within the law upon release are factors that must be considered on an
8 individual basis by the Governor in determining parole suitability.” In re Rosenkrantz, 29
9 Cal.4th 616, 682, 128 Cal.Rptr.2d 104 (Cal. 2002). A review of petitioner’s mental health
10 records and progress through therapy demonstrate petitioner has been improving over time.

11 The fact that gambling was involved in petitioner’s commitment offense 39 years
12 ago or his 115 sustained in 1983 does not constitute some evidence that petitioner might start
13 gambling and become violent again, and therefore that he currently poses an unreasonable risk of
14 danger without further treatment. Indeed, if petitioner’s past gambling established this
15 unsuitability, the Board could deny parole for the rest of petitioner’s life based on this
16 unchanging factor, without regard to subsequent evidence that petitioner has no current desire for
17 gambling and that there is little current likelihood of gambling relapse, let alone a return to
18 violent conduct as a result of it.

19 The Governor’s broad statement that petitioner’s serious gambling addiction had
20 not been addressed is belied by the record, ignores petitioner’s participation in Narcotics
21 Anonymous consistently and actively since 1990, (Supp. Brief, CDC at 36-37, 68-69, 92- 96,
22 100, 111, 115; C-File at 555-56, 559-60, 562, 570-71, 603, 607, 609 & 612), and demonstrates
23 he failed to appropriately acknowledge petitioner’s long and faithful commitment to the NA
24 program or to his decision to forever refrain from gambling. Thus, the Governor’s finding that
25 petitioner’s gambling addiction has not been addressed is not supported by some evidence.

26 ////

1 c. Childhood Abuse

2 The Governor refused to credit recent psychological evaluations because they
3 failed to address the issue of childhood abuse petitioner allegedly sustained.

4 Petitioner describes his youth as follows:

5 [Petitioner] was born in Missouri on July 3, 1946, to Charles Henry
6 Carr, a sawmill worker, and Margaret Patterson Carr. [Petitioner]
7 was the oldest of eight children. When [petitioner] was 11 years
8 old, the family moved from Missouri to California. When
9 [petitioner] was 14 years old his parents “became very religious
10 and puritanical in their views.” They forbade their children from
11 reading magazines, going to movies, and dating. . . . [Petitioner]
12 has no juvenile record. At numerous times during his incarceration
13 [petitioner] has acknowledged that his parents were strict
14 disciplinarians who sometimes used corporal punishment which
15 today would be considered abusive.

16 (Supp. Brief at 4 [internal citations omitted]; see, for example, 1997 Psychological Evaluation,
17 Pet., Ex. J.)

18 As petitioner points out, however, it would be difficult to quantify whether the use
19 of “excessively harsh parental discipline” and corporal punishment (use of a switch) constituted
20 child abuse when viewed through the perspective held in the 1940s through 1960s. (Supp. Brief
21 at 35.) Many parents adhered to a “spare the rod and spoil the child” perspective, particularly in
22 religious households. It was unreasonable for the Governor to latch on to prior psychologists’
23 mention of childhood abuse without crediting petitioner for his years of therapy and self-help
24 through his participation in VORG, NA and the Mens Violence Program. Indeed, the Governor
25 noted that petitioner had “made progress in overcoming his reluctance to address psychological
26 issues.” (Id. at 15.) The mere fact that the 2003 report did not mention childhood abuse does not
support the Governor’s finding that petitioner is not suitable for parole because of it. Most of the
psychologists have found that petitioner does not pose a danger to society if released based on his
maturation and progress achieved through therapy while incarcerated.

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1 d. 1998 and 1999 Life Prisoner Evaluation Reports

2 The Governor also noted that recent reports failed to address the 1998 and 1999
3 Life Prisoner Evaluation Reports that concluded petitioner posed an unpredictable degree of
4 threat to the public. A review of all the life prisoner evaluation reports reflects the use of a
5 boilerplate format, with no provision to analyze or explain a change in recommendation from one
6 year to the next. The regulations do not require the Board to comb through every record in an
7 inmate's history and address all prior findings by the correctional counselors in their life prisoner
8 evaluation reports. Indeed, such a process would be extremely time-consuming.

9 Despite the fact that the 2002 Board expressed concern that petitioner "never
10 seemed to really get to [his] innermost feelings," psychologists found petitioner has made
11 progress through therapy. Dr. Bruce in the Category-X performed in 1991 noted that petitioner
12 had made strides and progressed in therapy. (Docket No. 33-5 at 79.) Dr. Konstantinov in 1992
13 found petitioner had matured. (Docket No. 33-5 at 69-70.)

14 Indeed, Dr. O'Meara, in 1993, articulated the progress petitioner had made:

15 Violence potential in the past is estimated to have been greater than
16 average based on his lack of insight, impulsivity, lack of judgment
17 and immaturity. At present the violence potential is estimated to
be decreased and considered average for this population.

18 (Docket No. 33-5 at 66.) In March of 1997, she opined:

19 reluctance to thoroughly address the instant offense bodes for a
20 guarded prognosis with respect to violence potential. The instant
21 offense was very violent and [petitioner] continues to have
22 difficulty accepting and integrating hostile affects. To his credit, in
a controlled environment, he has exhibited no aggressive
behaviors. Also, he appears to be maturing and there have been no
indications of impulsivity.

23 (Docket No. 33-5 at 51.) However, in November of 1997, Dr. Vasquez found petitioner had
24 "little or no violent tendencies and has a highly effective intellectual capacity that is not being
25 utilized to its fullest. Whatever antisocial personality traits he had 30 years ago have been
26 lessened significantly throughout his years of incarceration." (Docket No. 33-5 at 48.) By

1 November 20, 1998, Dr. Clair found petitioner “has grown well beyond the predatory and
2 antisocial behavior he exhibited thirty years ago. If paroled, [Dr. Clair believes] he would pose a
3 negligible threat to the public order.” (Docket No. 33-5 at 47; Docket No. 37-6 at 24.)

4 On December 5, 2000, Dr. Clair concluded petitioner had “progressed
5 remarkably,” compiling a “record of conformity, stability, and productivity. . . .He is mentally
6 stable and has never been significantly addictive. As before, the writer feels that this man is no
7 longer ‘dangerous.’” (Docket No. 33-5 at 42.)

8 These psychological records more than adequately demonstrate how the
9 correctional counselors could have found, in 2000 and beyond, petitioner now posed only a
10 minimal threat rather than an unpredictable threat. Indeed, a review of the record demonstrates
11 that a better question is why the correctional officers in 1998 and 1999 found petitioner to be an
12 unpredictable threat when psychologists found petitioner was not a threat, and in view of the lack
13 of any violent disciplinaries during his incarceration and that his last act of violence occurred in
14 1977.

15 e. Past & Present Attitude Toward Crime

16 The Governor noted that petitioner has expressed remorse for killing the victim
17 since 1997, but found petitioner still posed an unreasonable risk of danger to society because of
18 his prior varying statements concerning the murder. In addition, the Governor found the most
19 recent psychiatric report was flawed because it erroneously stated petitioner had always admitted
20 responsibility for his crime. Also, he found recent psychosocial evaluations failed to reflect any
21 change or progress on petitioner’s “key psychological defense mechanisms revolv[ing] around
22 denial, externalization, and projection . . . [or] inflexibility and rigidity.” (Ex. 3 to Answer at
23 16.)

24 It was unreasonable for the Governor to find the recent psychiatric report flawed
25 because it stated petitioner had always taken responsibility for the crime, particularly because
26 petitioner confessed to the crime shortly after it was committed. People v. Carr, 8 Cal.3d 287,

1 104 Cal.Rptr. 705 (1972). “In the taped confession, [petitioner] said that he had asked to use the
2 decedent's telephone. Upon entering the house he waited for the opportunity and hit the decedent
3 over the head. [Petitioner] stated that he only wanted to hit the decedent hard enough for the
4 decedent to lose his memory of [petitioner's] presence.” Id., 8 Cal.3d at 293. The record also
5 reflects that over the years petitioner has expressed remorse for his actions and the victim’s
6 death. (CDC at 44, 59, 65, 122, 157, 166, 184.)

7 Moreover, as noted above, psychologists have found petitioner has matured,
8 progressed through therapy, and no longer poses a danger to society. Those findings post-date
9 Dr. O’Meara’s 1997 finding concerning petitioner’s inflexibility and rigidity. Indeed, on
10 February 25, 2003, Dr. Rouse found that petitioner “made significant gains in understanding his
11 life crime as well as his life prior to his incarceration.” (Docket No. 33-5 at 37.) Dr. Rouse
12 concluded petitioner’s “risk of dangerousness at this point is negligible and less than that of the
13 average inmate incarcerated here at CSP, Solano.” (Id.)

14 f. Inadequate Parole Plans

15 Finally, the Governor found petitioner posed an unreasonable risk of danger to
16 society because petitioner’s parole plans were inadequate; without solid employment plans, and
17 with his gambling addiction issues not addressed, petitioner could become financially desperate
18 and return to criminal activity to support himself.

19 However, as noted above, the record fails to support the Governor’s finding that
20 petitioner’s gambling problem has not been addressed. In addition, the Governor’s finding fails
21 to credit the assistance offered by petitioner’s siblings, in writing, to provide petitioner a place to
22 live as well as financial support. The Governor also failed to credit petitioner with the myriad
23 skills he has developed while in prison – he has obtained a certificate as an electrician, held many
24 different institutional job assignments, and received excellent work reviews relative to his
25 performance as a clerk.

26 /////

1 The United States Court of Appeals for the Ninth Circuit has held that after an
2 inmate has “served the minimum number of years required by his sentence,” Irons, 505 F.3d at
3 853, extended reliance solely “an unchanging factor, the circumstance of the offense and conduct
4 prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and
5 could result in a due process violation.” Biggs, 334 F.3d at 917.⁸ California state courts have
6 made similar observations:

7 [T]he commitment offense, this court has observed, is an
8 unsuitability factor that is immutable and whose predictive value
9 ‘may be very questionable after a long period of time [citation].’
10 [Citation.] We have also noted, as has our Supreme Court, strong
11 legal and scientific support that ‘predictions of future
12 dangerousness are exceedingly unreliable,’ even where the passage
of time is not a factor and the assessment is made by an expert.
[Citation.] Reliance on an immutable factor, without regard to or
consideration of subsequent circumstances, may be unfair, run
contrary to the rehabilitative goals espoused by the prison system,
and result in a due process violation. [Citation.]

13 In re Elkins, 144 Cal.App.4th 475, 498-499 (2006). Here, petitioner has served 23 years beyond
14 his minimum eligible parole date. (Pet., Ex. A, at 52-53).

15 After thorough review of the record, this court finds that the Governor’s reversal
16 of the Board’s grant of parole was so devoid of evidence that his findings were without support
17 or otherwise arbitrary. See Hill, 472 U.S. at 457. Aside from the unchanging facts of the crime
18 itself, the Governor relied on the unchanging facts of petitioner’s childhood and 11 year criminal
19 history (1966-77). While it is true that petitioner’s life offense and subsequent robbery were
20 connected to his gambling addiction, the Governor ignored petitioner’s 13 year attendance at
21 Narcotics Anonymous, a 12 step program designed to address narcotics addiction, and for
22 petitioner, who doesn’t have a narcotics addiction, the only program available to address
23 addiction as there are no programs specifically addressing gambling addictions in prison. In
24 addition, the Governor ignored petitioner’s history of voluntary attendance at psychotherapy.

25 ⁸ The parole decision at bar was made almost thirty-four years after petitioner’s twenty-
26 five years to life sentence commenced.

1 While the Governor apparently spent much time combing through prior records in
2 petitioner's file and used those records to discount present psychological reports fully supporting
3 petitioner's release on parole and finding him a low threat of danger to society, the Governor
4 failed to acknowledge that petitioner has had no prison disciplinaries for gambling in prison since
5 1983 and has had no criminal offenses based on gambling since the robbery back in 1977.
6 Indeed, the Governor pointed to no evidence in the record supporting his position that further
7 therapy was required to address said addiction, but rather speculated that the fact that certain
8 recent reports failed to address the gambling addiction meant that petitioner's gambling addiction
9 was unresolved or untreated. On the contrary, the record reflects petitioner has acknowledged his
10 gambling problem and has been an active participant in Narcotics Anonymous since 1990. The
11 tools he has acquired through NA also translate to dealing with a gambling addiction. More
12 importantly, however, there is no record of petitioner having engaged in gambling in prison or
13 having any prison disciplinaries for gambling-related activities since 1983, over 25 years ago. In
14 light of petitioner's subsequent prison record there is nothing to substantiate the Governor's
15 reversal on this issue save for the unchanging fact that his commitment offense, which occurred
16 in 1969, and subsequent theft, which occurred in 1977, were related to petitioner's gambling
17 problem. There is nothing in the record that demonstrates gambling continues to be a problem
18 for petitioner over 25 years later.

19 The Governor unfairly attacked petitioner's claim of twenty years without
20 incurring a prison disciplinary, taking it out of context and trivializing petitioner's
21 accomplishment by rehashing petitioner's unchanging criminal history – it is rare and remarkable
22 for an inmate to survive in prison without a serious prison disciplinary for a period of twenty
23 years. The Governor's concern that petitioner did not have definite plans for parole is also not
24 supported by the record. Petitioner's sister wrote a letter offering financial support and his
25 brother wrote a letter offering to allow petitioner to live with him. In addition, it appears
26 petitioner has been saving money to assist himself should he be paroled. (C-File 225 "\$5800 in

1 mutual stock savings.”) Petitioner’s long history of excellent work habits in prison demonstrates
2 his work ethic and ability to perform a number of jobs should be he paroled.

3 In light of the above, this court finds that the petition in 2:05-cv-1870 MCE JFM
4 should be granted.

5 II. Petitioner’s Other Cases

6 A. Case No. 2:05-cv-1871 MCE JFM

7 In this petition, petitioner challenges the 2004 denial of parole by the Board,
8 which was based primarily on three factors: the commitment offense, the finding that petitioner
9 lacked insight into the brutality of his underlying commitment offense, and Dr. Rouse’s
10 psychiatric evaluation was inconclusive because it did not address the issue of gambling.
11 (Docket No. 20 at 91.) This denial of parole was the nineteenth denial of parole.

12 The Board placed great weight on the fact that the commitment offense was
13 “really brutal” and caused multiple skull fractures. (Id. at 92.) The Board found that the fact that
14 petitioner escaped from prison and then “did the very same type of assault on another little old
15 man, . . . show[ed] a real lack of insight into the kind of injury” (id.) petitioner could perform.
16 The Board also emphasized petitioner’s two escapes from custody.

17 However, this Board found petitioner had “good parole plans.” (Id.)

18 The last reasoned opinion issued in this action was the Butte County Superior
19 Court’s denial, dated November 17, 2004, which stated:

20 The first argument is that the Board’s decision to deny parole is not
21 supported by ‘some evidence’.

22 The record refutes this contention. There is more than a modicum
23 of factual support for the Board’s decision. Further there is no
24 legal prohibition to prevent the Board from considering petitioner’s
25 entire history and prison file.

26 The second argument is that the Board is required to submit its
decision denying parole to the Governor for review within 30 days
following the hearing.

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1 Review by the Governor is discretionary. The law does not require
2 the Board to provide the Governor with any decision. It may do so.
3 Likewise, the petitioner may do so, or the Governor may initiate
4 the review. Thus there was no violation of law by the Board.

5 The third argument is that Commissioner Fisher was biased and
6 that her decision was an abuse of discretion.

7 The Commissioner's past history was, among other things[,] that of
8 a victim's advocate. This is not a disqualification for appointment
9 to the Board. Her statement of decision set forth reference to the
10 petitioner's response to Governor Davis' parole grant reversal.
11 This was a legitimate topic especially since it was the petitioner
12 who made it to the central issue of his testimony at the parole
13 hearing.

14 The Petition on its face fails to establish a prima facie case for
15 relief on Habeas Corpus. The Petition is denied.

16 (Docket No. 20-5 at 2-3.) This denial is even more conclusory than the state court's denial in
17 2:05-cv-1870 MCE JFM, and does not attempt to demonstrate petitioner presents a current
18 danger to the community, as required by Lawrence, 44 Cal.4th at 1205-06; 1210.

19 This court cannot argue with the Board's evaluation of the brutality of the
20 underlying commitment offense, which appears to be the primary ground upon which it denied
21 parole. However, as explained in Lawrence, 44 Cal.4th at 1214, 82 Cal.Rptr.3d 169, "the
22 aggravated nature of the crime does not in and of itself provide some evidence of current
23 dangerousness to the public unless the record also establishes that something in the prisoner's
24 pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that
25 the implications regarding the prisoner's dangerousness that derive from his or her commission
26 of the commitment offense remain probative to the statutory determination of a continuing threat
to public safety." Id.

As discussed above, there is no relationship between petitioner's commitment
offense, which took place almost 40 years ago, and an assessment of his current dangerousness.
His last episode of violent behavior was in 1977, almost 32 years ago, which also bears no
relationship to his present dangerousness. Reliance on petitioner's escape from prison back in

1 1973 is similarly stale and offers no prediction that he poses a risk of present danger to society.
2 This lack of relationship is demonstrated by his disciplinary-free and productive 25 years of
3 stability while in prison since his last prison disciplinary in 1983, almost 26 years ago.

4 The Board's finding that petitioner lacks insight into his crime is similarly dated
5 as it evaluates petitioner's insight in 1977, not at the time of the Board hearing. Indeed, Dr.
6 Rouse's 2003 report noted that petitioner

7 admitted culpability for his life crime. He stated that he has never
8 denied the offense and indeed was not defensive or [minimalizing]
9 in his explanations to this examiner. He stated that he is very sorry
10 that this happened and that he has no excuse for what happened.
11 He stated that his life crime has affected the victim, the victim's
12 family, and his own family in turn. He stated that he learned in the
Victim Offender Reconciliation Group over the course of his years
of participation that such crimes as he committed have a
reverberating effect on the families of everyone, all the members of
the victim's family, including the family of the perpetrator.

13 (Pet'r's Supp. Brief, at 12 [Docket No. 18 at 17-18].) The Board also placed emphasis on
14 petitioner's effort to point out that in 1977 he hit the gentleman over the head with his hand and
15 used a toy pistol, not a real gun, to demonstrate petitioner lacked insight into "the point the
16 Governor was trying to make." (Docket No. 20-4 at 92.) As noted above, however, the Board
17 should not hold against petitioner his efforts to point out positives in a negative situation. The
18 flip side of the Board's argument is that petitioner did not kill the second victim and he did not
19 use a lethal weapon, which demonstrates petitioner was not engaged in an escalating pattern of
20 violence from his commitment offense.

21 The fact that Dr. Rouse, one psychologist among many, failed to comment on
22 petitioner's gambling is not sufficient to support a finding that petitioner presents a present
23 danger to society.

24 Accordingly, this petition should also be granted as petitioner has served 23 years
25 beyond his minimum eligible parole date, Irons, 505 F.3d at 853, and the denial of parole was
26 based on the repeated and continued reliance solely on the unchanging factors of petitioner's

1 commitment offense and early incarceration, in violation of his due process rights and contrary to
2 rehabilitative goals. These unchanging factors, when considered in light of other facts in the
3 record, have lost their ability to be predictive of current dangerousness.

4 B. Case No. 04-cv-0584 MCE JFM

5 In this petition, petitioner challenges the 2002 denial of parole by the Board,
6 which was based primarily on three factors: the commitment offense was “carried out in a cruel
7 manner, in a manner that demonstrates a disregard for human suffering”; “unstable social history
8 in that he was a gambler, and apparently, by all accounts, had a substantial problem[] with
9 gambling”; and (3) “the prisoner has not sufficiently participated in beneficial self-help
10 programs. . . the Panel concluded that it wasn’t that you hadn’t spent enough time in self-help,
11 but perhaps you weren’t getting quite to the point. . . . you never seemed to really get to your
12 innermost feelings. That you just haven’t gotten it.” (Docket No. 52 at 2, quoting Ex. A to First
13 Amended Petition, at 67-73.) This denial of parole was the seventeenth denial of parole.

14 The last reasoned state court opinion addressing this petition was issued by the
15 Solano County Superior Court on April 18, 2003. (First Amended Pet., Ex. G.) The state court
16 found there was “some evidence” to support the Board’s decision because the Board found that
17 the life offense was carried out in a cruel manner that demonstrates a disregard for human
18 suffering based on the gravity of the commitment offense, bludgeoning a seventy or seventy-five
19 year old man to death with a hammer, requiring a more lengthy period of incarceration. (Id. at 2.)
20 The state court found petitioner failed to make a prima facie showing that the Board’s finding
21 that petitioner had an “unstable social history in that he was a gambler” was arbitrary and
22 capricious. (Id.) The state court noted the Board’s findings that petitioner had a substantial
23 problem with gambling; the commitment offense was related to gambling, the District Attorney
24 testified at the parole hearing that petitioner committed the murder to obtain money so petitioner
25 could gamble. (Id.) The state court found this provided “some evidence” to support its
26 conclusion petitioner had an unstable social history due to his gambling.

