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

ANTHONY ALLEN,

Petitioner,

No. CIV S-07-2781 WBS DAD P

vs.

D.K. SISTO, et al.,

Respondents.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the Board of Parole Hearings’ decision to deny him parole. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner’s application for habeas corpus relief be denied.

PROCEDURAL BACKGROUND

On January 24, 1994, petitioner pled guilty in the San Mateo County Superior Court to second degree murder. The trial court sentenced him to an indeterminate term of fifteen years to life in state prison. (Pet. at 2; Answer Ex. 1.)

On July 27, 2006, the Board of Parole Hearings (hereinafter “Board”) conducted petitioner’s first subsequent parole suitability hearing. The Board found that petitioner was not suitable for parole and denied him parole for four years. (Answer Ex. 2.)

1 Petitioner challenged the Board’s decision in three petitions for writ of habeas
2 corpus filed in ascending order in state court. First, petitioner challenged the 2006 denial of
3 parole in a petition for writ of habeas corpus filed with the San Mateo County Superior Court.
4 On February 15, 2007, the Superior Court denied the petition, reasoning as follows:

5 The Board based its decision to deny parole, in part, on the
6 underlying crime itself, the gang style battle in which one victim
7 was killed and four victims injured by gunfire. This alone was
8 sufficient to justify the decision to deny parole. ‘[T]he gravity of
9 the commitment offense or offenses alone *may* be sufficient basis
10 for denying a parole application, so long as the Board does not fail
11 to consider other relevant factors.’ (*In re Ramirez* (2001) 94
12 Cal.App.4th 549, 569, overruled on other grounds in *In re*
13 *Dannenberg* (2005) 34 Cal. 4th 1061, 1100; citing *In re Seabock*
14 (1983) 34 Cal.App.3d 29, 37-38.)

15 In *In re Dannenberg* (2005) 34 Cal. 4th 1061, 1071, the California
16 Supreme Court held: “Accordingly, we conclude that the Board,
17 exercising its traditional broad discretion, may protect public safety
18 *in each discrete case* by considering the dangerous implications of
19 a life-maximum prisoner’s crime individually. While the Board
20 must point to factors beyond the minimum elements of the crime
21 for which the inmate was committed, it need engage in no further
22 comparative analysis before concluding that the particular facts of
23 the offense make it unsafe at that time, to fix a date for the
24 prisoner’s release.” (*Id.*)

25 Since Petitioner has been committed to CDC Custody for fifteen
26 years to life, there is no merit to Petitioner’s argument that the
denial of parole unlawfully converted Petitioner’s sentence to a life
sentence. The Board advised Petitioner on the record that it was
placing him on the July 2010 calendar for his next subsequent
parole hearing. (R.T. 73:9-11.)

CONCLUSION

 The record establishes that there existed “some evidence”
supporting each of the Board’s findings, each of which
independently sufficed as grounds supporting the finding that
Petitioner would present a threat to society, and therefore justifying
the denial of parole.

(Pet. (Main Doc.) Exs. at 61-63.)¹

¹ The cited page numbers are those reflected in the court’s electronic file.

1 Next, petitioner filed a petition for writ of habeas corpus challenging the 2006
2 parole denial in the California Court of Appeal for the First Appellate District. (Answer Ex. 4.)
3 On April 10, 2007, the court summarily denied the petition. (Pet. Exs. at 55.) Finally, petitioner
4 filed a petition for writ of habeas corpus in the California Supreme Court. (Answer Ex. 5.) On
5 November 14, 2007, the court summarily denied that petition. (Pet. Exs. at 53.)

6 **FACTUAL BACKGROUND**

7 At petitioner's parole hearing, the Board summarized the evidence surrounding
8 his offense of conviction as follows:

9 On October 14th, 1992, at approximately 9:21 p.m. the East Palo
10 Alto Police Department and San Mateo County Sheriff's
11 Department responded to 1985 Clarke Avenue in East Palo Alto
12 regarding a reported multiple gunshot victim. There were four
13 victims. Each appeared to have suffered from gunshot wounds.
14 John McGeehee appeared to be suffering from a gunshot wound to
15 the right side of his neck and was not breathing. He subsequently
16 expired. The cause of death was quote, 'transection of the carotid
17 artery with a sanguination perforation gunshot wound to the neck,'
18 end quotes. Darren Trehan appeared to have several gunshot
19 wounds to the abdomen. He is now a paraplegic and confined to a
20 wheelchair. Jason McGeehee suffered from several gunshot
21 wounds to his torso. Lisa Page suffered a single gunshot wound to
22 her upper right leg. The area in front of 1985 Clarke Avenue was
23 littered with empty cartridge casings from five different weapons,
24 including a 9-millimeter, a 45-caliber, a 38 – 380-caliber, and a 40-
25 caliber pawns (a Glock) end pawns. The vehicle parked in front of
26 the house was riddled with bullet holes. Witness Derrick Murphy
told police that Darren Trehan, one of the victims, was involved
with a woman called Kathy Calt who had a child by Travis Outlaw.
Travis was extremely jealous of Darren Trehan. On April 12th,
1992, Travis Outlaw went to a party at Calt's house, pointed a
weapon at Darren Trehan and fired ten to fifteen rounds, not
striking anyone. Two days later on April 14th, 1992, Darren
Trehan allegedly received a telephone call from Travis Outlaw who
stated, quote 'you're dead. I am going to kill you. If I can't have
her, pawns (Calt) end pawns, no one can have her,' end pawns.
The police made various other contacts with people who knew the
situation. They verified that Outlaw had contacted Trehan and
supposedly said the next time he saw him he was going to kill him.
On April 13th, 1992, while D. Trehan and J. McGeehee were
driving eastbound over University off ramp, they were confronted
by Outlaw and Lamont Scarborough in another car. Scarborough
fired an unknown type of weapon at their vehicle. Trehan and J.
McGeehee escaped without injury. Darren Trehan was interviewed

1 and stated that on April 14th, 1992, he went to the McGeehee
2 residence and was talking to Jason and John McGeehee when
3 Kathryn Calt came by. He stayed a short time and left. Two other
4 women came by; Lisa Page and Emica McKnight. The group was
5 standing in front of the house on Clarke Street. Shortly thereafter a
6 white vehicle came by without the headlights on. The vehicle
7 stopped. Anthony Allen left the vehicle firing a firearm in Jason
8 and John McGeehee's direction. The vehicle started up then
9 stopped again. This time Outlaw jumped out of the car firing a
10 handgun. Trehan stated this incident stemmed from a previous
11 party at Kathryn Calt's house when Outlaw shot off a gun in a fit of
12 jealousy. Darren Trehan stated that at the party there was an
13 exchange of gunfire and he shot Outlaw in the shoulder. He also
14 stated that on April 10th, 1992 he and John McGeehee were
15 driving east on Bayshore when they passed a white vehicle
16 containing M. period Griffin, that's G-R-I-F-F-I-N, and A. period
17 Allen. Allen stopped his car, stood at the head of the vehicle and
18 shot at them. This, according to Trehan. Darren Trehan identified
19 the driver as Manny Griffin, the right front passenger as Anthony
20 Allen, the left rear passenger as Eddie Lee Pratt, that's P-R-A-T-T ,
21 and the right rear passenger as Travis Outlaw. Allen was the first
22 out of the vehicle with a firearm in his hand, firing his weapon.
23 Darren states that he was shot first by Allen, and second by Travis
24 Outlaw. It was confirmed by two of the defendants that Lamont
25 Scarborough, that's S-C-A-R-B-O-R-O-U-G-H, parens, (not Travis
26 Outlaw) end parens, was present at the 1985 Clarke, that's C-L-A-
R-K-E, shooting. Jason McGeehee was interviewed and confirmed
the story, adding that he saw Eddie Lee Pratt leaning out of the
right rear passenger window with a handgun in his hand. Jason
believed that Eddie Lee Pratt fired the first shot. Jason stated he
saw Anthony Allen shoot his brother John and proceeded to shoot
Darren Trehan. Jason McGeehee further stated that after Darren
was shot, Allen looked in the direct – his direction and shot
multiple rounds at him. Jason stated that all of the perpetrators
were associated with the Middletown Gang in East Palo Alto.
Jason McGeehee gave a positive statement to the police that
Anthony Allen was in possession of a 40-caliber Glock gun and
was the one who killed John McGeehee.

21 (Answer Ex. 2 at 5-9.)

22 Petitioner admitted his involvement in the shootings. He also admitted that he
23 was affiliated or associated with the Midtown Area Gang. According to petitioner's version of
24 events, he together with Manny Griffin, Eddie Lee Pratt, and Lamont Scarborough were driving
25 to the Light Tree apartment complex to visit friends when unknown people fired multiple shots at
26 their vehicle. Because of the "ongoing war" between rival factions in East Palo Alto everyone

1 involved was armed with weapons. Petitioner was armed with a 9-millimeter semi-automatic
2 weapon. Petitioner stated that the vehicle in which he was riding crashed, and the occupants
3 retrieved their weapons and left the car. Petitioner stated that Jason McGeehee started shooting a
4 gun in their direction, and everyone ran towards Jason firing their weapons. After the incident,
5 petitioner and the others returned to the vehicle and drove away, dropping people off at various
6 locations. At the time of his arrest, petitioner was in possession of a Glock 40-caliber weapon.
7 (Answer Ex. 2 at 9-11.)

8 **STANDARDS OF REVIEW APPLICABLE TO HABEAS CORPUS CLAIMS**

9 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
10 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,
11 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.
12 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the
13 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
14 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas
15 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377
16 (1972).

17 This action is governed by the Antiterrorism and Effective Death Penalty Act of
18 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d
19 1062, 1067 (9th Cir. 2003). Title 28 S 2254(d) sets forth the following standards for granting
20 habeas corpus relief:

21 An application for a writ of habeas corpus on behalf of a
22 person in custody pursuant to the judgment of a State court shall
23 not be granted with respect to any claim that was adjudicated on
the merits in State court proceedings unless the adjudication of the
claim -

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

26 ////

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

4 See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362
5 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001).

6 The court looks to the last reasoned state court decision as the basis for the state
7 court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). Where the state
8 court reaches a decision on the merits but provides no reasoning to support its conclusion, a
9 federal habeas court independently reviews the record to determine whether habeas corpus relief
10 is available under section 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003);
11 Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). When it is clear that a state court has not
12 reached the merits of a petitioner’s claim, or has denied the claim on procedural grounds, the
13 AEDPA’s deferential standard does not apply and a federal habeas court must review the claim
14 de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160,
15 1167 (9th Cir. 2002).

16 **PETITIONER’S HABEAS CORPUS CLAIMS**

17 I. Due Process

18 Petitioner claims that the Board’s decision finding him unsuitable for parole
19 violated his right to due process. He argues that, at the time of his hearing, he “had accomplished
20 all of the requirements that the Panel required.” (Pet. Attach. at 3.) He claims the Board
21 nevertheless denied him parole based solely due to his commitment offense. Petitioner argues
22 that both the Board and the San Mateo County Superior Court failed to state how his
23 commitment offense demonstrates that his release on parole poses an unreasonable risk to public
24 safety. (Id. at 13.) According to petitioner, he has matured, acquired job skills, and gained
25 insight into his commitment offense thereby overcoming any negative factors associated with his
26 commitment offense. (Id. at 18-19.)

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1 II. No Parole Policy

2 Petitioner also claims that respondent is failing to adhere to Penal Code § 3041,
3 which states that parole dates “shall normally” be set. Petitioner argues that the state
4 discriminates against prisoners who are serving indeterminate sentences. Here, for example,
5 petitioner contends that the Board denied him parole, notwithstanding his efforts at rehabilitation
6 in prison. Petitioner maintains that he is a member of the class of inmates who are entitled to
7 release but have been denied parole based on this “no parole” policy. Petitioner summarily
8 argues that this policy violates his rights to due process and equal protection as well as his right
9 to be free from cruel and unusual punishment. (Pet. Attach. at 23-24.)

10 ANALYSIS

11 I. Standards Governing Petitioner’s Due Process Claim

12 The Due Process Clause of the Fourteenth Amendment prohibits state action that
13 deprives a person of life, liberty, or property without due process of law. A litigant alleging a
14 due process violation must first demonstrate that he was deprived of a liberty or property interest
15 protected by the Due Process Clause and then show that the procedures attendant upon the
16 deprivation were not constitutionally sufficient. Kentucky Dep’t of Corrections v. Thompson,
17 490 U.S. 454, 459-60 (1989); McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir. 2002).

18 A protected liberty interest may arise from either the Due Process Clause of the
19 United States Constitution “by reason of guarantees implicit in the word ‘liberty,’” or from “an
20 expectation or interest created by state laws or policies.” Wilkinson v. Austin 545 U.S. 209, 221
21 (2005) (citations omitted). See also Board of Pardons v. Allen, 482 U.S. 369, 373 (1987). The
22 United States Constitution does not, of its own force, create a protected liberty interest in a parole
23 date, even one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981). However, “a
24 state’s statutory scheme, if it uses mandatory language, ‘creates a presumption that parole release
25 will be granted’ when or unless certain designated findings are made, and thereby gives rise to a
26 constitutional liberty interest.” McQuillion, 306 F.3d at 901 (quoting Greenholtz v. Inmates of

1 Nebraska Penal, 442 U.S. 1, 12 (1979)). California’s parole scheme gives rise to a cognizable
2 liberty interest in release on parole, even for prisoners who have not already been granted a
3 parole date. Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); Biggs v.
4 Terhune, 334 F.3d 910, 914 (9th Cir. 2003); McQuillion, 306 F.3d at 903; see also In re
5 Lawrence, 44 Cal. 4th 1181, 1204, 1210, 1221 (2008). Accordingly, this court must examine
6 whether the state court’s conclusion that California provided the constitutionally required
7 procedural safeguards when it deprived petitioner of a protected liberty interest is contrary to or
8 an unreasonable application of federal law.

9 Because “parole-related decisions are not part of the criminal prosecution, the full
10 panoply of rights due a defendant in such a proceeding is not constitutionally mandated.”
11 Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987) (internal quotations and
12 citation omitted). Where, as here, parole statutes give rise to a protected liberty interest, due
13 process is satisfied in the context of a hearing to set a parole date where a prisoner is afforded
14 notice of the hearing, an opportunity to be heard and, if parole is denied, a statement of the
15 reasons for the denial. Id. at 1390 (quoting Greenholtz, 442 U.S. at 16). See also Morrissey v.
16 Brewer, 408 U.S. 471, 481 (1972) (describing the procedural process due in cases involving
17 parole issues). Violation of state mandated procedures will constitute a due process violation
18 only if the violation causes a fundamentally unfair result. Estelle, 502 U.S. at 65.

19 In California, the setting of a parole date for a state prisoner is conditioned on a
20 finding of suitability. Cal. Penal Code § 3041; Cal. Code Regs. tit. 15, §§ 2401 & 2402. The
21 requirements of due process in the parole suitability setting are satisfied “if some evidence
22 supports the decision.” McQuillion, 306 F.3d at 904 (citing Superintendent v. Hill, 472 U.S.
23 445, 456 (1985)). See also Powell v. Gomez, 33 F.3d 39, 40 (9th Cir. 1994) (citing Perveler v.
24 Estelle, 974 F.2d 1132, 1134 (9th Cir. 1992)). For purposes of AEDPA, Hill’s “some evidence”
25 standard is “clearly established” federal law. Sass, 461 F.3d at 1129 (citing Hill, 472 U.S. at
26 456). “The ‘some evidence’ standard is minimally stringent,” and a decision will be upheld if

1 there is any evidence in the record that could support the conclusion reached by the factfinder.
2 Powell, 33 F.3d at 40 (citing Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987)); Toussaint v.
3 McCarthy, 801 F.2d 1080, 1105 (9th Cir. 1986). However, “the evidence underlying the board’s
4 decision must have some indicia of reliability.” Jancsek, 833 F.2d at 1390. See also Perveler,
5 974 F.2d at 1134. Determining whether the “some evidence” standard is satisfied does not
6 require examination of the entire record, independent assessment of the credibility of witnesses,
7 or the weighing of evidence. Toussaint, 801 F.2d at 1105. The question is whether there is any
8 reliable evidence in the record that could support the conclusion reached. Id.

9 When a federal court assesses whether a state parole board’s suitability
10 determination was supported by “some evidence” in a habeas case, the analysis “is framed by the
11 statutes and regulations governing parole suitability determinations in the relevant state.” Irons
12 v. Carey, 505 F.3d 846, 851 (9th Cir. 2007). This court must therefore:

13 look to California law to determine the findings that are necessary
14 to deem a prisoner unsuitable for parole, and then must review the
15 record in order to determine whether the state court decision
16 holding that these findings were supported by “some evidence” in
17 [petitioner’s] case constituted an unreasonable application of the
18 “some evidence” principle articulated in Hill.

17 Id.

18 The state regulation that governs parole suitability findings for life prisoners states
19 as follows with regard to the statutory requirement of California Penal Code § 3041(b):

20 “Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied
21 parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to
22 society if released from prison.” Cal. Code Regs. tit. 15, § 2281(a). In California, the overriding
23 concern in determining parole suitability is public safety. In re Dannenberg, 34 Cal. 4th at 1086.
24 This “core determination of ‘public safety’ . . . involves an assessment of an inmates current
25 dangerousness.” In re Lawrence, 44 Cal. 4th at 1205 (emphasis in original). Accordingly,

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1 when a court reviews a decision of the Board or the Governor, the
2 relevant inquiry is whether some evidence supports the decision of
3 the Board or the Governor that the inmate constitutes a current
threat to public safety, and not merely whether some evidence
confirms the existence of certain factual findings.

4 Id. at 1212 (citing In re Rosenkrantz, 29 Cal. 4th at 658; In re Dannenberg, 34 Cal. 4th at 1071;
5 and In re Lee, 143 Cal. App. 4th 1400, 1408 (2006)).

6 Under California law, prisoners serving indeterminate prison sentences “may
7 serve up to life in prison, but [] become eligible for parole consideration after serving minimum
8 terms of confinement.” In re Dannenberg, 34 Cal. 4th at 1078. The Board normally sets a parole
9 release date one year prior to the inmate’s minimum eligible parole release date, and does so “in
10 a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect
11 to their threat to the public.” In re Lawrence, 44 Cal. 4th at 1202 (citing Cal. Penal Code §
12 3041(a)). A release date must be set “unless [the Board] determines that the gravity of the
13 current convicted offense or offenses, or the timing and gravity of current or past convicted
14 offense or offenses, is such that consideration of the public safety requires a more lengthy period
15 of incarceration . . . and that a parole date, therefore, cannot be fixed” Cal. Penal Code §
16 3041(b). In determining whether an inmate is suitable for parole, the Board must consider all
17 relevant, reliable information available regarding

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

23 Cal. Code Regs., tit. 15, § 2281(b).

24 The regulation identifies circumstances that tend to show suitability or
25 unsuitability for release. Id., § 2281(c) & (d). The following circumstances are identified as
26 tending to show that a prisoner is suitable for release: the prisoner has no juvenile record of

1 assaulting others or committing crimes with a potential of personal harm to victims; the prisoner
2 has experienced reasonably stable relationships with others; the prisoner has performed acts that
3 tend to indicate the presence of remorse or has given indications that he understands the nature
4 and magnitude of his offense; the prisoner committed his crime as the result of significant stress
5 in his life; the prisoner's criminal behavior resulted from having been victimized by battered
6 women syndrome; the prisoner lacks a significant history of violent crime; the prisoner's present
7 age reduces the probability of recidivism; the prisoner has made realistic plans for release or has
8 developed marketable skills that can be put to use upon release; institutional activities indicate an
9 enhanced ability to function within the law upon release. Id., § 2281(d).

10 The following circumstances are identified as tending to indicate unsuitability for
11 release: the prisoner committed the offense in an especially heinous, atrocious, or cruel manner;
12 the prisoner had a previous record of violence; the prisoner has an unstable social history; the
13 prisoner's crime was a sadistic sexual offense; the prisoner had a lengthy history of severe mental
14 problems related to the offense; the prisoner has engaged in serious misconduct in prison. Id., §
15 2281(c). Factors to consider in deciding whether the prisoner's offense was committed in an
16 especially heinous, atrocious, or cruel manner include: multiple victims were attacked, injured, or
17 killed in the same or separate incidents; the offense was carried out in a dispassionate and
18 calculated manner, such as an execution-style murder; the victim was abused, defiled or
19 mutilated during or after the offense; the offense was carried out in a manner that demonstrated
20 an exceptionally callous disregard for human suffering; the motive for the crime is inexplicable
21 or very trivial in relation to the offense. Id., § 2281(c)(1)(A) - (E).

22 In the end, under current California law as recently clarified by the California
23 Supreme Court,

24 the determination whether an inmate poses a current danger is not
25 dependent upon whether his or her commitment offense is more or
26 less egregious than other, similar crimes. (Dannenberg, supra, 34
 Cal. 4th at pp 1083-84 [parallel citations omitted].) Nor is it
 dependent solely upon whether the circumstances of the offense

1 exhibit viciousness above the minimum elements required for
2 conviction of that offense. Rather, the relevant inquiry is whether
3 the circumstances of the commitment offense, when considered in
4 light of other facts in the record, are such that they continue to be
5 predictive of current dangerousness many years after commission
6 of the offense. This inquiry is, by necessity and by statutory
7 mandate, an individualized one, and cannot be undertaken simply
8 by examining the circumstances of the crime in isolation, without
9 consideration of the passage of time or the attendant changes in the
10 inmate's psychological or mental attitude. [citations omitted].

11 In re Lawrence, 44 Cal. 4th at 1221.

12 In addition, in recent years the United States Court of Appeals for the Ninth
13 Circuit has concluded that, given the liberty interest that California prisoners have in release on
14 parole, a continued reliance upon an unchanging factor to support a finding of unsuitability for
15 parole over time may constitute a violation of due process. The court has addressed this issue in
16 three significant cases, each of which will be discussed below.

17 First, in Biggs, the Ninth Circuit Court recognized that a continued reliance on an
18 unchanging factor, such as the circumstances of the offense, could at some point result in a due
19 process violation.² While the court in Biggs rejected several of the reasons given by the Board
20 for finding the petitioner in that case unsuitable for parole, it upheld three: (1) petitioner's
21 commitment offense involved the murder of a witness; (2) the murder was carried out in a
22 manner exhibiting a callous disregard for the life and suffering of another; and (3) petitioner
23 could benefit from therapy. Biggs, 334 F.3d at 913. However, the court in Biggs cautioned that
24 continued reliance solely upon the gravity of the offense of conviction and petitioner's conduct
25 prior to committing that offense in denying parole could, at some point, violate due process. In
26 this regard, the court observed:

As in the present instance, the parole board's sole supportable
reliance on the gravity of the offense and conduct prior to

² That holding has been acknowledged as representing the law of the circuit. Irons v. Carey, 505 F.3d 846, 853 (9th Cir. 2007); Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1129 (9th Cir. 2006).

1 imprisonment to justify denial of parole can be initially justified as
2 fulfilling the requirements set forth by state law. Over time,
3 however, should Biggs continue to demonstrate exemplary
4 behavior and evidence of rehabilitation, denying him a parole date
5 simply because of the nature of Biggs' offense and prior conduct
6 would raise serious questions involving his liberty interest in
7 parole.

8 Id. at 916. The court in Biggs also stated that “[a] continued reliance in the future on an
9 unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs
10 contrary to the rehabilitative goals espoused by the prison system and could result in a due
11 process violation.” Id. at 917.

12 Next, in Sass, the Board had found the petitioner unsuitable for parole at his third
13 suitability hearing based on the gravity of his offenses of conviction in combination with his
14 prior offenses. 461 F.3d at 1126. Citing Biggs, the petitioner in Sass contended that reliance on
15 these unchanging factors violated due process. The court disagreed, concluding that these factors
16 amounted to “some evidence” to support the Board's determination. Id. at 1129. The court
17 provided the following explanation for its holding:

18 While upholding an unsuitability determination based on these
19 same factors, we previously acknowledged that “continued reliance
20 in the future on an unchanging factor, the circumstance of the
21 offense and conduct prior to imprisonment, runs contrary to the
22 rehabilitative goals espoused by the prison system and *could* result
23 in a due process violation.” Biggs, 334 F.3d at 917 (emphasis
24 added). Under AEDPA it is not our function to speculate about
25 how future parole hearings could proceed. Cf. id. The evidence of
26 Sass' prior offenses and the gravity of his convicted offenses
constitute some evidence to support the Board's decision.
Consequently, the state court decisions upholding the denials were
neither contrary to, nor did they involve an unreasonable
application of, clearly established Federal law as determined by the
Supreme Court of the United States. 28 U.S.C. § 2254(d).

23 Id.

24 Finally, in Irons the Ninth Circuit sought to harmonize the holdings in Biggs and
25 Sass, stating as follows:

26 //

1 Because the murder Sass committed was less callous and cruel than
2 the one committed by Irons, and because Sass was likewise denied
3 parole in spite of exemplary conduct in prison and evidence of
4 rehabilitation, our decision in Sass precludes us from accepting
5 Iron's due process argument or otherwise affirming the district
6 court's grant of relief.

7 We note that in all the cases in which we have held that a parole
8 board's decision to deem a prisoner unsuitable for parole solely on
9 the basis of his commitment offense comports with due process,
10 the decision was made before the inmate had served the minimum
11 number of years required by his sentence. Specifically, in Biggs,
12 Sass, and here, the petitioners had not served the minimum number
13 of years to which they had been sentenced at the time of the
14 challenged parole denial by the Board. Biggs, 334 F.3d at 912;
15 Sass, 461 F.3d at 1125. All we held in those cases and all we hold
16 today, therefore, is that, given the particular circumstances of the
17 offenses in these cases, due process was not violated when these
18 prisoners were deemed unsuitable for parole prior to the expiration
19 of their minimum terms.

20 Furthermore, we note that in Sass and in the case before us there
21 was substantial evidence in the record demonstrating rehabilitation.
22 In both cases, the California Board of Prison Terms appeared to
23 give little or no weight to this evidence in reaching its conclusion
24 that Sass and Irons presently constituted a danger to society and
25 thus were unsuitable for parole. We hope that the Board will come
26 to recognize that in some cases, indefinite 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.

18 Irons, 505 F.3d at 853-54.³

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21 _____

22 ³ The California Supreme Court has also acknowledged that the aggravated nature of the
23 commitment offense, over time, may fail to provide some evidence that the inmate remains a
24 current threat to public safety. In re Lawrence, 44 Cal. 4th 1181, 1218-20 & n.20 (2008).
25 Additionally, a recent panel of the Ninth Circuit in Hayward v. Marshall, 512 F.3d 536, 546-47
26 (9th Cir. 2008), determined that under the “unusual circumstances” of that case the unchanging
factor of the gravity of the petitioner’s commitment offense did not constitute “some evidence”
supporting the governor’s decision to reverse a parole grant on the basis that the petitioner would
pose a continuing danger to society. However, on May 16, 2008, the Court of Appeals decided to
rehear that case en banc. Hayward v. Marshall, 527 F.3d 797 (9th Cir. 2008). Therefore, the
panel decision in Hayward is no longer citable precedent.

1 II. Petitioner's Due Process Claim

2 In reaching its decision that petitioner was unsuitable for parole, the Board stated
3 as follows:

4 PRESIDING COMMISSIONER BRYSON: The time is 1640 in
5 the matter of Anthony Allen. We have reconvened for the
6 Decision. Sir, the Panel reviewed all information received from
7 the public and from you, and relied on the following circumstances
8 in concluding that you are not yet suitable for parole, and you
9 would pose an unreasonable risk of danger to society or a threat to
10 public safety if released from prison. The offense was carried out
11 in a callous manner involving multiple victims in the same
12 incident, in the vicinity of 1985 Clarke Avenue in East Palo Alto at
13 about 9:21 p.m. Four victims suffered gunshot wounds. John
14 McGeehee, 20-year-old male, was shot in the right side of his neck,
15 quit breathing, and expired. The cause of death transection of the
16 carotid artery with a sanguination perforation gunshot wound to the
17 neck. Darren Trehan suffered several gunshot wounds to the
18 abdomen and became a paraplegic confined to a wheelchair. Jason
19 McGeehee suffered several gunshot wounds to his torso. Lisa Page
20 suffered a single gunshot wound to her upper right leg. The
21 offense was carried out in a dispassionate and calculated manner.
22 As the targeted victims were standing in front of the house on
23 Clarke Street, a white vehicle came by with its headlights off. The
24 vehicle stopped. Anthony Allen exited the vehicle firing in Jason
25 and John McGeehee's direction. After the melee, empty cartridge
26 casings were found from five different weapons deployed at the
scene including a 9-millimeter, a 48 – 45-caliber, a 380-caliber,
and a 40-caliber Glock. The offense was carried out in a manner
demonstrating exceptionally callous disregard for human suffering
and the offenders fled. Sir, you have a record of violence and
extensive prior criminal history including loaded firearm carries
(sic), theft, and the sale of narcotics. Basically it was a criminal
gang lifestyle and you failed societies (sic) previous attempts to
correct your criminality, including probation. As to your
institutional behavior you obtained your GED in 2005, and you are
to be commended for that – that's good. As to your prison work,
you are currently an ESL Clerk, and you are receiving exceptional
ratings, and that also – you are to be commended for that. In fact,
you have a history in PIA, Metal Fab, and you have done work –
vocation work as a Sandblaster and Grinder, and you have received
above average to exceptional work reports. Also, your work as a
Teaching Assistant is very important and you are to be commended
for that. Self-help and therapy, as was covered extensively by
Commissioner Weaver includes Anger Management, Stress
Management, and other programs in which you have participated.
You also have an excellent discipline record. You have one 115,
which was a non-violent 115. It was a failure to report, and that
was in 2000. That was your most recent. Since then you have

1 been disciplinary free for basically six years. As to your 128 A's,
2 they are minor disciplinaries. The last also occurred in the year
3 2000 – failure to appear for the TABE – T-A-B-E Test. That
4 again, was a minor offense. Sir, you are displaying positive
5 behaviors in prison. And this Panel is aware how difficult that is to
6 – to attain in prison. It is not an easy task, and we understand that
7 you are challenged every day with violence and dope on the inside.
8 As to the Psychological Report dated July 10, 2006 by Dr. Rouse,
9 R-O-U-S-E, you were given a Global Assessment of Functioning
10 of 90. That is very high. That is – is a very high assessment. With
11 a less than – or at least less than average risk of dangerousness
12 should you be paroled and be outside. As to Parole Plans, you
13 have made – obviously made outreach efforts and – for your
14 readjustment, and you have obtained a position at Free at Last
15 Transitional Housing which was a good choice. And that's what –
16 it is important that you continue to keep in touch with them and
17 keep that updated. As to acceptable employment plans, you have
18 not presented the panel with any employment plans or job offers at
19 this time. However, you clearly have marketable skills in
20 Computer Refurbishing and it – it would be advisable and you are
21 certainly capable of continuing your education. As to Penal Code
22 3042 Responses. Responses indicate opposition to a finding of
23 parole suitability, specifically by the District Attorney of San
24 Mateo County. In a separate Decision, the Hearing Panel finds that
25 it is not reasonable to expect that parole would be granted at a
26 hearing during the following four years. Specific reasons for this
finding are as follows: The offense was carried out in a callous
manner involving multiple victims in the same incident. The
vicinity of 1985 Clarke Avenue, in East Palo Alto, at night, at
about 9:21 p.m., four victims suffered gunshot wounds and those
victims included John McGeehee, Darren Trehan, Jason
McGeehee, and Lisa Page. The offense was carried out in a
dispassionate and calculated manner. Basically it was a classic
drive by gang shooting. After the melee empty cartridge casings
were found from five different weapons deployed at the scene,
including a 9-millimeter, 45-caliber, 38-caliber, and a 40-caliber
Glock. The offense was carried out in a manner demonstrating
exceptionally callous disregard for human suffering. The offenders
fled and nobody thought about what they had wreaked on that
group of people. Nobody sought any kind of medical aid for those
people. Public safety was at risk from the gunfire. Sir, you had a
clear opportunity to cease, and based on your background, you
know that you had that capability of ceasing but you chose to
continue. And you have been very frank today with admitting that,
in fact, you did choose that. Moreover the motive for the crime,
based on your relationship with some of the victims was
inexplicable. This was an extremely grave crime. This Panel
believes you need a significant period of time to demonstrate by
your actions that you are no longer a risk to public safety. In
denying you parole for four years, we are placing you on the July
2010 calendar for your next Subsequent Hearing. If this Decision

1 is final, you will not get paroled. The Board will send you a copy
2 of the Decision. It will indicate the reasons you did not get
3 paroled. If this Decision is not final, the Board will set up another
4 hearing. You can read the laws about your hearing in the
5 California Code of Regulations, Title 15, Section 2041. The Board
6 recommends no more 115's or 128 A's, get self-help, and we do
7 encourage you to participate in self help. Update your trade. Keep
8 it current because yours are perishable skills. And earn positive
9 chronos. And I would add, sir, that I think reaching out to others
10 and showing by your actions that you are thinking more of other
11 people than of yourself is very important for the next four years.
12 Commissioner Weaver, do you have anything else to add?

13
14 DEPUTY COMMISSIONER WEAVER: No, I think you have
15 covered it very well.

16
17 PRESIDING COMMISSIONER BRYSON: Good luck, sir. And
18 that concludes this hearing. And the time is now 1646.

19
20 (Answer Ex. 2 at 69-74.)

21
22 After taking into consideration the Ninth Circuit's decisions in Biggs, Sass, and
23 Irons, and for the reasons set forth below, this court concludes that petitioner is not entitled to
24 federal habeas relief with respect to his due process challenge to the Board's decision on July 27,
25 2006, to deny him parole.

26
27 First, and perhaps most importantly, at the time of petitioner's parole suitability
28 hearing, he had not yet served the minimum number of years required by his sentence. In 1994,
29 petitioner received a sentence of 15 years to life in state prison. Petitioner's parole suitability
30 hearing took place 12 years later, in 2006. Pursuant to the Ninth Circuit's holding in Irons, the
31 Board did not violate petitioner's right to due process when it deemed him unsuitable for parole
32 prior to the expiration of his minimum term. Irons, 505 F.3d at 665. Moreover, the Board's
33 decision that petitioner was unsuitable for parole and that his release would unreasonably
34 endanger public safety was supported by "some evidence" that bore "indicia of reliability."
35 Jancsek, 833 F.2d at 1390. The Board relied on the circumstances of petitioner's commitment
36 offense, his prior criminal history, his 115 and 128 A's in prison, and his lack of employment
37 plans or job offers. According to the cases cited above, these factors constitute "some evidence"

1 in support of the Board’s decision that petitioner was not yet suitable for parole, especially since
2 he had not served the minimum term required by his sentence. Sass, 469 F.3d at 1129; Irons, 505
3 F.3d at 665. This is true even though petitioner may have displayed positive behavior since he
4 was first imprisoned and had obtained a position at Free at Last Transitional Housing.

5 The Board’s decision that petitioner was unsuitable for parole and would pose a
6 danger to society if released meets the minimally stringent test set forth in Biggs, Sass, and Irons.
7 Accordingly, petitioner is not entitled to relief on his due process claim. Sass, 461 F.3d at 1129;
8 Irons, 505 F.3d at 664-65.

9 III. Petitioner’s No Parole Policy Claim

10 The Ninth Circuit has acknowledged that California inmates have a due process
11 right to parole consideration by neutral decision-makers. See O’Bremski v. Maass, 915 F.2d
12 418, 422 (9th Cir. 1990) (an inmate is “entitled to have his release date considered by a Board
13 that [is] free from bias or prejudice”). In this regard, parole board officials owe a duty to
14 potential parolees “to render impartial decisions in cases and controversies that excite strong
15 feelings because the litigant’s liberty is at stake.” Id. (quoting Sellars v. Proconier, 641 F.2d
16 1295, 1303 (9th Cir. 1981)). Indeed, “a fair trial in a fair tribunal is a basic requirement of due
17 process.” In re Murchison, 349 U.S. 133, 136 (1955).

18 Petitioner has submitted no evidence demonstrating that the Board operated under
19 a no-parole policy or was otherwise biased at his 2006 hearing. As detailed above, the Board
20 provided petitioner with an individualized assessment of his suitability for parole, and there was
21 “some evidence” in the record to support the Board’s decision to deny parole in this case. See,
22 e.g., In re Rosenkrantz, 29 Cal. 4th 616, 684-86 (2002) (California Supreme Court rejecting
23 petitioner’s claim that the former Governor’s reversal of the Board’s grant of parole resulted
24 from a blanket policy of denying parole in all murder cases because there was “some evidence”
25 to support the Governor’s decision). Accordingly, petitioner is not entitled to relief on this claim.

26 ////

1 In sum, for the reasons set forth above the court concludes that petitioner is not
2 entitled to habeas relief his federal petition for writ of habeas corpus should be denied.⁴

3 **OTHER MATTERS**

4 Petitioner has filed a request for leave to submit supplemental briefing addressing
5 the California Supreme Court’s decision in In re Lawrence. He also requests a stay of this action
6 until the Ninth Circuit issues its decision in Hayward v. Marshall, 512 F.3d 536 (9th Cir. 2008),
7 reh’g en banc granted, 527 F.3d 797 (9th Cir. May 16, 2008). Respondent has opposed
8 petitioner’s request for leave to submit supplemental briefing but agrees that a stay would be
9 proper in this action.

10 As noted above, this court is aware of the California Supreme Court’s decision in
11 In re Lawrence and has considered that case in issuing these findings and recommendations.
12 Supplemental briefing from the parties in this regard is unnecessary. As to petitioner’s request
13 for a stay pending the issuance of the en banc decision by the Ninth Circuit in Hayward, the court
14 has reviewed the record and the relevant case law and concludes that a stay in this case is

15
16 ⁴ Petitioner has presented another, somewhat unclear, argument under the heading
17 “Disproportionality” at the end of his petition. (Pet. Attach. at 24-25.) Insofar as the court has
18 not already addressed this argument in the analysis set forth above, the court will do so here. To
19 the extent that petitioner is arguing that the Board is required to compare other crimes of the
20 same type in deciding whether a prisoner is suitable for parole, petitioner is advised that the
21 California Supreme Court has rejected this argument. In re Dannenberg, 34 Cal. 4th at 1084,
22 1098 (the Board is not required to refer to its sentencing matrices or to compare other crimes of
23 the same type in deciding whether a prisoner is suitable for parole). Nor has petitioner cited any
24 federal authority for the proposition that a state parole board is required to set a parole date where
25 the Board members believe a prisoner poses an unreasonable risk of danger to society or engage
26 in a comparative analysis before denying parole suitability. The court also notes that petitioner
argues for the first time in his traverse that the Board’s failure to grant him parole violated his
plea agreement in the underlying criminal case. In this regard, petitioner now argues that central
to his plea agreement was his understanding that he would be released on parole if he met the
suitability criteria. Petitioner is advised that he may not raise new claims in his traverse. See
Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (“A Traverse is not the proper
pleading to raise additional grounds for relief.”); see also Greenwood v. Fed. Aviation Admin.,
28 F.3d 971, 977 (9th Cir. 1994) (“We review only issues which are argued specifically and
distinctly in a party’s opening brief”). Moreover, even if petitioner had properly raised this claim
in his petition, his argument is unpersuasive because it is based on the premise that he is suitable
for parole. For the reasons discussed above, the Board’s 2006 decision finding him unsuitable
for parole is supported by “some evidence.”

1 unwarranted. See Landis v. North American Co., 299 U.S. 248, 254 (1936) (a district court has
2 broad discretion in deciding whether to stay proceedings in its own court).

3 Finally, petitioner has filed a request that judicial notice be taken of the published
4 decision in In re Rico, 171 Cal. App. 4th 659 (2009). Petitioner argues that the facts presented in
5 that case in which habeas relief was granted by the California Court of Appeals are similar to his.
6 Petitioner is advised that the court has considered and applied all relevant case law in considering
7 his claims in this habeas action. Although unnecessary since it involves an officially published
8 decision of the California Court of Appeal, petitioner's request for judicial notice will be granted.
9 See Holder v. Holder, 305 F.3d 854, 866 (9th Cir. 2000) (Rule 201 of the Federal Rules of
10 Evidence allows a district court to take judicial notice of orders or decisions or proceedings of
11 any federal or state court).

12 CONCLUSION

13 IT IS HEREBY ORDERED that:

- 14 1. Petitioner's September 18, 2008 request for leave to submit supplemental
15 briefing (Doc. No. 13) is denied as unnecessary;
- 16 2. Petitioner's September 18, 2008 request for a stay of this action (Doc. No. 13)
17 is denied; and
- 18 3. Petitioner's March 10, 2009 request for judicial notice (Doc. No. 15) is
19 granted.

20 IT IS HEREBY RECOMMENDED that:

- 21 1. Petitioner's December 26, 2007 application for a writ of habeas corpus (Doc.
22 No. 1) be denied; and
- 23 2. This action be closed.

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

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

6 DATED: October 6, 2009.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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