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

PAUL E. HYDE,

Petitioner,

No. CIV S-08-1365-FCD-TJB

vs.

STEVE MOORE,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

I. INTRODUCTION

Petitioner Paul E. Hyde is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, it is recommended that habeas relief be denied.

II. PROCEDURAL HISTORY

Petitioner is currently serving a sentence of seven years to life. Pet'r's Pet. 1, ECF No. 1. "In 1973, at age 19, in the Los Angeles County Superior Court case No. A068239, [Petitioner] was convicted of first degree murder (§ 187; count 5), four counts of robbery of the first degree (§ 211; counts 1, 2, 6 & 7), assault with a deadly weapon with the intent to commit murder (former § 217; count 3), and assault by means of force likely to produce great bodily injury and with a deadly weapon (§ 245, subd. (a)(1); count 4), each with the personal use of a firearm (§

1 12022.5).” *In re Hyde*, 154 Cal. App. 4th 1200, 1202, 65 Cal. Rptr. 3d 162 (2007). In the instant
2 action, Petitioner challenges the decision by the California Board of Parole Hearings (the
3 “Board”) denying Petitioner parole. Petitioner appeared before the Board on November 9, 2005.

4 On February 3, 2006, Petitioner filed a petition for writ of habeas corpus with the Los
5 Angeles County Superior Court challenging the Board’s decision. *See Resp’t’s Answer Ex. A*,
6 pt. 1, at 6-149, ECF No. 13.

7 On January 3, 2007, the Superior Court granted habeas relief. *See Resp’t’s Answer Ex.*
8 *A*, pt. 2, at 139-40. The Superior Court found “that petitioner’s continual parole denials have
9 been based mainly on the gravity of the commitment offense, the circumstances of which can
10 never change.” *Id.* at 140. The Superior Court reasoned that “[a]fter more than three decades of
11 incarceration, reliance upon such unchanging circumstances violates due process because these
12 immutable circumstances become unreliable predictors of petitioner’s dangerousness such that
13 they can no longer fulfill the ‘some evidence’ standard.” *Id.* at 139. Accordingly, the Superior
14 Court determined “there is no evidence that petitioner’s release on parole unreasonably
15 endangers the public.” *Id.*

16 Additionally, the Superior Court recognized that Petitioner “has been discipline free for
17 14 years and a 2005 psychological report indicates that petitioner’s ‘dangerousness . . . if released
18 into the community is significantly below average in comparison with other inmates.” *Id.* The
19 Superior Court also pointed out that while the Board must consider “that the district attorney
20 opposed parole[,] . . . that opposition is not a factor on which the Board may rely to deny parole.”
21 *Id.* at 140 (citation omitted). The Superior Court decided that “the Board’s continued reliance on
22 unchanging factors will essentially convert petitioner’s original sentence to life with the
23 possibility of parole into a sentence of life without the possibility of parole,” and “Petitioner has
24 no chance of obtaining parole unless the Board holds that his crime was not serious enough to
25 warrant a denial of parole.” *Id.*

26 On February 2, 2007, Respondent filed a notice of appeal in the California Court of

1 Appeal, Second Appellate District. *Id.* at 141-42.

2 On August 7, 2007, the Court of Appeal reversed the Superior Court's decision. *In re*
3 *Hyde*, 154 Cal. App. 4th at 1218, 65 Cal. Rptr. 3d 162. The Court of Appeal found that
4 Petitioner's "crimes are collectively so grave that we cannot find their remoteness has resulted in
5 a loss of reliability as predictors of future dangerousness." *Id.* at 1216, 65 Cal. Rptr. 3d 162. The
6 Court of Appeal elaborated that even if the "1972 to 1973 offenses were too remote in time to be
7 reliable, the superior court here also erred because it failed to consider [Petitioner's] 1990
8 conviction" for "possession of a piece of aluminum that he had fashioned into [a] 15-inch
9 stabbing instrument" *Id.* The Court of Appeal thereby concluded that "[t]he 1990 offense
10 renders the 1973 offenses considerably more probative in supporting a conclusion of an
11 unreasonable risk of danger to society than if the 1972 to 1973 offenses are considered in
12 isolation." *Id.* at 1217, 65 Cal. Rptr. 3d 162.

13 On October 9, 2007, Petitioner sought relief in the California Supreme Court, which
14 denied the petition without a written opinion on December 12, 2007. *See* Resp't's Answer Exs.
15 F-G.

16 On June 17, 2008, Petitioner filed the instant federal petition for writ of habeas corpus.
17 Respondent filed an answer to the petition on October 10, 2008, to which Petitioner filed a
18 traverse on October 22, 2008.¹

19 III. FACTUAL BACKGROUND

20 A. Commitment Offenses

21 In December 1972 and January 1973, at age 18, [Petitioner] had
22 moved away from his parents' Los Angeles residence after a

23 ¹ On January 28, 2009, Petitioner filed an amended petition challenging his parole denial
24 at his April 19, 2007 hearing. *See* Pet'r's Am. Pet. 87, ECF No. 15. On November 20, 2009, an
25 order was issued by the Honorable Edmund F. Brennan, acknowledging that the "June 17, 2008
26 petition challenges a 2005 Board of Parole Hearings decision, while the January 28, 2009
petition challenges a 2007 Board of Parole Hearings decision." Order 1, Nov. 20, 2009, ECF No.
19. The Clerk of the Court was directed to open a new action for the January 28, 2009 petition,
id. at 2, which the Clerk did under No. 2:09-cv-03240-FCD-KJN.

1 quarrel and rented an apartment in Santa Monica. During these
2 months, he went on a robbery spree with a firearm. He preyed on
3 at least four local businesses and their employees or owners in
4 order to obtain the funds he needed to pay his living expenses.
5 There were two victims during the robbery of Bill's Bike Shop,
6 and during that robbery, at gunpoint, [Petitioner] threatened to kill
7 the husband/owner if the wife/owner did not remain in the
8 bathroom. During the robbery of the Red Ball gas station, for no
9 apparent reason, [Petitioner] shot the unresisting female employee
10 in the back with a through-and-through shot, causing her to fall.
11 Then, he shot her again in the thigh while she lay on the floor. The
12 second bullet lodged in her groin. Later, he fatally shot a
13 63-year-old shoe repair business owner in the chest and abdomen.
14 [Petitioner] apparently was not charged with a robbery in
15 connection with the murder as it was not entirely clear whether he
16 had robbed the victim. Then, during two successive later
17 robberies, [Petitioner] used a gun, confronting two employees in
18 one robbery, and confronting one employee in the other. In total,
19 [Petitioner] obtained less than \$ 250 during the robbery spree.²

20 *In re Hyde*, 154 Cal. App. 4th at 1203-04, 65 Cal. Rptr. 3d 162.

21 At the hearing, Petitioner's counsel stated:

22 [Petitioner will] be happy to discuss the post-condition factors
23 involved and parole plans. We respectfully decline to discuss the
24 commitment offense. We're satisfied that the record previously
25 made on the eight previous hearings is satisfactory and an adequate
26 record. So, he's accepted his responsibility and (indiscernible)[.]

Resp't's Answer Ex. A, pt. 1, at 53; Parole Hr'g Tr. 9.

Accordingly, the Board read from the "board report of [the] November 2003 calendar"
when addressing Petitioner's remorse. Resp't's Answer Ex. A, pt. 1, at 54; Parole Hr'g Tr. 10,
Nov. 9, 2005. The report stated Petitioner "accepts responsibility for the robberies at the
businesses." Resp't's Answer Ex. A, pt. 1, at 59; Parole Hr'g Tr. 15. The report noted Petitioner
"attributes his actions to the fact that he had recently quarreled with his family, left home, moved
to the Santa Monica area, and was having difficulty finding a steady job and was too proud to

² These facts are from the California Court of Appeal opinion, filed on August 7, 2007.
In re Hyde, 154 Cal. App. 4th at 1203-04, 65 Cal. Rptr. 3d 162. Pursuant to the Antiterrorism
and Effective Death Penalty Act of 1996, a determination of fact by the state court is presumed to
be correct unless Petitioner rebuts that presumption with clear and convincing evidence. 28
U.S.C. § 2254(e)(1); see *Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2009); *Davis v.*
Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

1 return home.” Resp’t’s Answer Ex. A, pt. 1, at 59; Parole Hr’g Tr. 15. In the report, Petitioner
2 alleged “he attempted to solve his problems by engaging in criminal conduct,” and at that time,
3 “he was not concerned about his victims.” Resp’t’s Answer Ex. A, pt. 1, at 59-60; Parole Hr’g
4 Tr. 15-16. However, “[n]ow [Petitioner] can understand how they must have felt and has
5 expressed remorse for his actions.” Resp’t’s Answer Ex. A, pt. 1, at 60; Parole Hr’g Tr. 16.

6 The report also stated that Petitioner asserted both shootings were accidental. For the
7 shoe repair victim, Petitioner “accepts total responsibility for the death of the victim, [and]
8 regrets that the incident occurred.” Resp’t’s Answer Ex. A, pt. 1, at 55; Parole Hr’g Tr. 11.
9 Petitioner, however, claimed “he did not enter the store” to rob the victim. Resp’t’s Answer Ex.
10 A, pt. 1, at 55; Parole Hr’g Tr. 11. Rather, according to Petitioner, “he was trying to get away
11 from some local youths who were pursuing him.” Resp’t’s Answer Ex. A, pt. 1, at 55; Parole
12 Hr’g Tr. 11. “The victim startled him and he fired, . . . and never robbed him.” Resp’t’s Answer
13 Ex. A, pt. 1, at 55; Parole Hr’g Tr. 11. Petitioner left the premises immediately and “made no
14 attempt to aid the victim.” Resp’t’s Answer Ex. A, pt. 1, at 55; Parole Hr’g Tr. 11.

15 Likewise, in the report, Petitioner asserted that “shooting the female victim was an
16 accident.” Resp’t’s Answer Ex. A, pt. 1, at 60; Parole Hr’g Tr. 16. Petitioner stated “he was
17 holding back the hammer of the gun when he was startled, the gun slipped and went off and he
18 did not know [the female victim] had been shot.” Resp’t’s Answer Ex. A, pt. 1, at 60; Parole
19 Hr’g Tr. 16. Petitioner “heard her whimpering and thought she was only pregnant.” Resp’t’s
20 Answer Ex. A, pt. 1, at 60; Parole Hr’g Tr. 16. Petitioner “attempted to pull the hammer back
21 again because he thought this was the way he was supposed to handle a gun.” Resp’t’s Answer
22 Ex. A, pt. 1, at 60; Parole Hr’g Tr. 16. Petitioner alleged “he did not [know] she was hurt, but if
23 he had he would have helped her.” Resp’t’s Answer Ex. A, pt. 1, at 60; Parole Hr’g Tr. 16.

24 When the Board asked Petitioner “what made [him] decide to slow down” so that his
25 prison disciplinary record was “clean for 14 years,” Petitioner eventually provided some insight
26 into the commitment offenses. Resp’t’s Answer Ex. A, pt. 1, at 84-85; Parole Hr’g Tr. 40-41.

1 Petitioner first answered, “Some people in here, they’re [sic] whole world is creating conflict . . .
2 . [A]t some point you just have to grow up, if you ever want to get out of this place.” Resp’t’s
3 Answer Ex. A, pt. 1, at 85; Parole Hr’g Tr. 41. Petitioner elaborated:

4 [Y]ou see things around you and you think “that’s disgusting” but
5 when you think about it, that’s you too. . . . So if you don’t want to
6 be disgusting or if you don’t want to hurt people or do things, be
7 part of the chaos, then you gotta change your activities. You can’t
8 wait for somebody else to do it, and you can’t blame somebody
9 else. One of the biggest mistakes I made when I came in here was
10 thinking that everything that happened to me was somebody else’s
11 fault, and that I bore no responsibility for it. The gentleman I was
12 living with, for example, Larry Moss, . . . was the one who
13 introduced me to crime in the first place. I initially blamed him for
14 what I did. All he did was introduce me to it. It was me who made
15 the decision to do these things. And I had to understand that and I
16 had to accept responsibility for that. I can show you anything, it’s
17 up to you whether or not you accept it. And that’s what happened
18 with me. I just had to stand up and be a man and accept
19 responsibility for my actions.

20 Resp’t’s Answer Ex. A, pt. 1, at 90-91; Parole Hr’g Tr. 46-47.

21 B. Petitioner’s Background

22 Petitioner’s “minimum parole date was January 13, 1980.” *In re Hyde*, 154 Cal. App. 4th
23 at 1204, 65 Cal. Rptr. 3d 162. Prior to the November 9, 2005 hearing, Petitioner was found
24 unsuitable for parole nineteen times. *Id.* “The record fails to disclose the reasons for the earlier
25 findings of unsuitability, except that at the prior April 15, 2004, suitability hearing, the presiding
26 commissioner had commented that apart from the gravity of the offense, [Petitioner] had ‘not
sufficiently participated in beneficial self-help at this time.’” *Id.*

1. Social History

Petitioner is the third of six children. *See* Resp’t’s Answer Ex. A, pt. 1, at 62; Parole
Hr’g Tr. 18. Petitioner’s father “was a veteran of World War II” and was disabled. Resp’t’s
Answer Ex. A, pt. 1, at 62; Parole Hr’g Tr. 18. Petitioner’s mother described his father “as a
paranoid schizophrenic” who “received 100 percent disability compensation from the
government.” Resp’t’s Answer Ex. A, pt. 1, at 62; Parole Hr’g Tr. 18. According to Petitioner,

1 his father died on September 2, 1979 of lung disease. Resp't's Answer Ex. A, pt. 1, at 62; Parole
2 Hr'g Tr. 18. Petitioner's mother "worked steadily until 1969," when she left her job "at the
3 terminal annex post office for what [Petitioner] describes as a nervous breakdown." Resp't's
4 Answer Ex. A, pt. 1, at 62; Parole Hr'g Tr. 18. At the time of the hearing, Petitioner was "still
5 very close to his mother and maintains contact via visits, letters and phone calls." Resp't's
6 Answer Ex. A, pt. 1, at 62; Parole Hr'g Tr. 18.

7 Petitioner added "that the family remains very supportive of him." Resp't's Answer Ex.
8 A, pt. 1, at 63; Parole Hr'g Tr. 19. According to Petitioner, he was the "only person in the family
9 who has ever been arrested." Resp't's Answer Ex. A, pt. 1, at 63; Parole Hr'g Tr. 19. At the
10 time of the hearing, one brother was a "computer technician;" another was a "federal marshall
11 [sic];" and one other was a "dean of a computer college in Virginia." Resp't's Answer Ex. A, pt.
12 1, at 63; Parole Hr'g Tr. 19. "One sister is a bank officer and the other is a manager of a
13 department store." Resp't's Answer Ex. A, pt. 1, at 63; Parole Hr'g Tr. 19. Petitioner's family
14 wrote letters in support of his release, including offers of residence and jobs. Resp't's Answer
15 Ex. A, pt. 1, at 68-74; Parole Hr'g Tr. 24-30.

16 Petitioner was unmarried at the time of the offense, but was married twice since his
17 incarceration. Resp't's Answer Ex. A, pt. 1, at 65; Parole Hr'g Tr. 21. On August 10, 1977,
18 Petitioner married Ramona McCann, who he met through another inmate. Resp't's Answer Ex.
19 A, pt. 1, at 65; Parole Hr'g Tr. 21; *see* Resp't's Answer Ex. A, pt. 1, at 121. On December 28,
20 1982, they divorced because, according to Petitioner, "she could not handle being married to a
21 life prisoner." Resp't's Answer Ex. A, pt. 1, at 65; Parole Hr'g Tr. 21. "No children were born
22 to this union." Resp't's Answer Ex. A, pt. 1, at 65; Parole Hr'g Tr. 21. On January 24, 1983,
23 Petitioner married Theresa Gossaway, another inmate's sister.³ Resp't's Answer Ex. A, pt. 1, at
24 65; Parole Hr'g Tr. 21. They had one child, Bridget, who was approximately twenty-four years

25
26 ³ Petitioner met his current wife in 1981, and they "were friends before the relationship
became serious." Resp't's Answer Ex. A, pt. 1, at 121 (internal quotation marks omitted).

1 old at the time of the hearing, and two grandchildren. Resp't's Answer Ex. A, pt. 1, at 65; Parole
2 Hr'g Tr. 21. Petitioner's current wife also had two younger children from another relationship.
3 Resp't's Answer Ex. A, pt. 1, at 65; Parole Hr'g Tr. 21. Petitioner maintains contact with his
4 current wife, their daughter, and their grandchildren. Resp't's Answer Ex. A, pt. 1, at 65-66;
5 Parole Hr'g Tr. 21-22.

6 2. Education, Self-Help Programming, and Vocational Training

7 The Court of Appeal noted that Petitioner "appears to have participated in every available
8 educational and self-improvement class or activity available to him." *In re Hyde*, 154 Cal. App.
9 4th at 1205, 65 Cal. Rptr. 3d 162. Prior to incarceration, Petitioner "completed the 12th grade,
10 but did not receive a diploma because he was five units short of the requirement to graduate."
11 Resp't's Answer Ex. A, pt. 1, at 63; Parole Hr'g Tr. 19. While in prison, Petitioner "received his
12 high school diploma in 1975." Resp't's Answer Ex. A, pt. 1, at 63; Parole Hr'g Tr. 19. At the
13 time of the hearing, Petitioner had sixty-two or sixty-three college credits. Resp't's Answer Ex.
14 A, pt. 1, at 63; Parole Hr'g Tr. 19. To obtain his degree, Petitioner needed to complete an
15 algebra class in which Petitioner was enrolled. Resp't's Answer Ex. A, pt. 1, at 64; Parole Hr'g
16 Tr. 20.

17 The record shows that Petitioner's self-programming was extensive. The Board
18 recounted, among others:

19 "March 2005, certificates of accomplishment for completing Know
20 Thyself, March 2005 certificates re: participation in correctional
network programs during the last month of March, okay.

21

22 Certificate of Completion, March 19, 2005. It's an eight week
23 class for marriage enrichment.

24

25 March 25, 2005[,] completing a personal purity course offered by
26 the Protestant Chapel; March 27, 2007[,] a laudatory chrono
written by an officer of the staff recommending you for your job
well done, your work. April 2005, participation in two additional

1 correctional network learning programs during the month of April.
2 Certificate of accomplishment for completing anger management
3 in 2005. April 2nd, 2005, reflecting successful completion of ethics
4 and values course offered by the parole facilities in connection
5 with program management.

6

7 May 14th, 2005, reflects another ethics and values course offered by
8 the parole May 2005, five correctional learning network
9 programs during the month of June. Another, May 2005 certificate
10 of accomplishment for completing the stress management. June
11 25, 2005, . . . a laudatory certificate of appreciation for being
12 involved in the . . . northern African event[.]

13

14 July 1st, 2005, completed 11 correctional learning network
15 [programs] during the month of April and June quarter. July 5
16 certificate reflects the participation of nine correctional learning
17 network programs. July 2005, a 128B African-American History
18 Committee at DVI, honoring you for utilizing educational
19 opportunities available to you. July 2005[,] certificate of
20 accomplishment for completing a nine hour curriculum systems
21 course. September of 2005[,] completion of lab respect course
22 offered by the Family Relations and Educational Enrichment
23 Program.

24

25 [T]he victim's awareness program completion [is] . . . dated
26 September 2005. This is offered through the Correctional Learning
Effort Program.

Resp't's Answer Ex. A, pt. 1, at 78-81; Parole Hr'g Tr. 34-37.

The record also reflects that Petitioner's vocational training in prison appears to be exceptional.⁴ In 2000, Petitioner had "entry level and advanced computer repair program

⁴ In Petitioner's closing argument, Petitioner also read reviews received during his vocational training. In 1981, Petitioner was the "lead man for both the utility and the cleanup crew" in the "kitchen area." Resp't's Answer Ex. A, pt. 1, at 104; Parole Hr'g Tr. 60. Petitioner "never seem[ed] to tire of working and [wa]s always willing to do any job asked of him." Resp't's Answer Ex. A, pt. 1, at 104; Parole Hr'g Tr. 60. He also "devote[d] his off work time to study." Resp't's Answer Ex. A, pt. 1, at 104; Parole Hr'g Tr. 60. In 1984, Petitioner "performed as a recreational aide, yard orderly, culinary worker, tier orderly," and clerical worker as the Mens' Advisory Council (MAC) chairman. Resp't's Answer Ex. A, pt. 1, at 105; Parole Hr'g Tr. 61. As a MAC chairman, Petitioner "submitted several proposals for new job positions" and

1 completion.” Resp’t’s Answer Ex. A, pt. 1, at 76; Parole Hr’g Tr. 32. In 2002, Petitioner
2 “transitioned to Prison Industries Authority (PIA). He began in the Wood Shop” Resp’t’s
3 Answer Ex. A, pt. 1, at 122. In 2004, Petitioner created and organized a breast cancer walkathon,
4 in which Petitioner walked thirty-one miles. Resp’t’s Answer Ex. A, pt. 1, at 106; Parole Hr’g
5 Tr. 62. The walkathon raised \$5000. Resp’t’s Answer Ex. A, pt. 1, at 106; Parole Hr’g Tr. 62.
6 Petitioner also received a certificate of proficiency, dated March 18, 2005, for “[p]ainting,
7 straight, fibercoat, finish. Number of hours is 1792 hours plus.” Resp’t’s Answer Ex. A, pt. 1, at
8 81; Parole Hr’g Tr. 37. In November 2005, Petitioner had “certificates of appreciation for
9 completing the training on set finish spray techniques, spray techniques washer unit, powder
10 coating techniques, spray gun maintenance use.” Resp’t’s Answer Ex. A, pt. 1, at 76; Parole
11 Hr’g Tr. 32.

12 At the time of the hearing, Petitioner was “working for the paint shop as a lead man” for
13 which he was paid. Resp’t’s Answer Ex. A, pt. 1, at 75-76; Parole Hr’g Tr. 31-32. David Quaid,
14 the Prison Industries Administrator, wrote, “[A]fter completing all areas of his training program
15 that . . . may be awarded . . . in the paint shop area,” Petitioner’s “skills can assist him on finding
16 employment upon release and is coordinated with the PIA Inmate Placement Program.

17 [Petitioner] developed this program, we are using it as a model in other shops in our factory to
18

19 “even requested extra work to remain busy.” Resp’t’s Answer Ex. A, pt. 1, at 105; Parole Hr’g
20 Tr. 61. “[N]ot a single shot had been fired since [Petitioner’s] appointment to the MAC
committee” Resp’t’s Answer Ex. A, pt. 1, at 106; Parole Hr’g Tr. 62.

21 In 1991, Petitioner worked “as an industrial artist and craftsperson.” Resp’t’s Answer Ex.
22 A, pt. 1, at 104; Parole Hr’g Tr. 60. The instructor was “somewhat skeptical about hiring this
inmate because he did not know the content of the program.” Resp’t’s Answer Ex. A, pt. 1, at
23 104-05; Parole Hr’g Tr. 60-61. However, the following day, Petitioner “returned, knowing the
full content and operational structures, methods, course, objectives and safety procure.” Resp’t’s
24 Answer Ex. A, pt. 1, at 105; Parole Hr’g Tr. 61. Since then, Petitioner “has re-written the course
outline” and lesson plans. Resp’t’s Answer Ex. A, pt. 1, at 105; Parole Hr’g Tr. 61. On July 22,
25 1997, Petitioner “attended vocational electronics classes” and “completed the program in a mere
47 days. This program normally requires 1200 hours or a year to complete.” Resp’t’s Answer
26 Ex. A, pt. 1, at 101; Parole Hr’g Tr. 57. Petitioner also “helped create materials for the literacy
and mathematics program.” Resp’t’s Answer Ex. A, pt. 1, at 101; Parole Hr’g Tr. 57.

1 develop additional painting programs.” Resp’t’s Answer Ex. A, pt. 1, at 80; Parole Hr’g Tr. 36.
2 Petitioner was also “involved in the Cal OSHA safety implementation in the institution,” and was
3 “part of the committee” that met “on the first Wednesday of each month.” Resp’t’s Answer Ex.
4 A, pt. 1, at 76-77; Parole Hr’g Tr. 32-33.

5 Petitioner was “confident” he could obtain employment in the computer field. Resp’t’s
6 Answer Ex. A, pt. 1, at 68; Parole Hr’g Tr. 24. Petitioner also possessed “plumbing, electronics,
7 glazing and painting skills.” Resp’t’s Answer Ex. A, pt. 1, at 68; Parole Hr’g Tr. 24. “His job
8 rating reports from the staff are exceptional, and the staff said that he is courteous to all, hard-
9 working, and a stabilizing factor in the prison population.” *In re Hyde*, 154 Cal. App. 4th at
10 1205, 65 Cal. Rptr. 3d 162; *see* Resp’t’s Answer Ex. A, pt. 1, at 75, 100-06; Parole Hr’g Tr. 31,
11 56-62. At the hearing, the Board recognized Petitioner “received several offers last year which
12 currently remain available.” Resp’t’s Answer Ex. A, pt. 1, at 24; Parole Hr’g Tr. 68.

13 3. Prior Criminal History

14 Petitioner “had no prior criminal history” before the commitment offenses. *In re Hyde*,
15 154 Cal. App. 4th at 1204, 65 Cal. Rptr. 3d 162. In 1971, a petition alleging grand theft was
16 filed against Petitioner in the juvenile court. *Id.* at 1204 n.1, 65 Cal. Rptr. 3d 162. “The victim,
17 another teenager, eventually admitted that she made the complaint because she had spent her
18 mother’s money without permission.” *Id.* The victim acknowledged making up the story “to
19 cover up her own wrongdoing, and the juvenile court dismissed the petition.” *Id.*

20 4. Prison Disciplinary History

21 A 115 violation indicates a serious rules violation. CAL. CODE REGS. tit. 15, § 3312(a)(3)
22 (“When misconduct is believed to be a violation of law or is *not minor* in nature, it shall be
23 reported on a CDC Form 115 (Rev. 7/88), Rules Violation Report.” (emphasis added)). While

24 ///

25 ///

26 ///

1 incarcerated, Petitioner received fourteen 115 violations from 1977, “the last being in 1991.”⁵
2 Resp’t’s Answer Ex. A, pt. 1, at 81; Parole Hr’g Tr. 37; *see In re Hyde*, 154 Cal. App. 4th at
3 1205, 65 Cal. Rptr. 3d 162. From mid 1977 through 1980, Petitioner received nine of those
4 fourteen 115 violations. Resp’t’s Answer Ex. A, pt. 1, at 122. From 1985 to 1986, Petitioner
5 received three of those fourteen 115 violations. *Id.* Petitioner explained he “was running a ‘2 for
6 1 Store,’” and several people owed him money. *Id.* According to Petitioner, those people “made
7 reports against [him] as retaliation to avoid repayment.” *Id.* at 122-23.

8 On September 4, 1989, Petitioner received his thirteenth 115 violation for possession of
9 an inmate manufactured weapon. *Id.* at 123. At the hearing, the Board read the following from
10 the November 2003 Board report:

11 Additional commitment for the manufacture and sale of a weapon,
12 Solano County Case Number C28580, a prison offense two terms
13 to run concurrent with the Life Term. On 9/4/1989 at
14 approximately 11:25 a.m. at a California medical facility
15 Correctional Peace Officer Tidwell observed [Petitioner]
16 attempting to leave H1 housing. Officer Tidwell proceeded
17 towards [Petitioner] to observe an inmate-manufactured weapon in
18 his right hand. Officer Tidwell [activated her] personal emergency
19 alarm and, with the aid of responding staff, [Petitioner was stopped
20 on the first floor corridor]. Officer Greenfield talked [Petitioner]
21 into relinquishing the weapon to him. Officer Greenfield passed
22 the weapon over to Correctional Sergeant Hancock. [Petitioner]
23 was placed in mechanical restraints and taken to administrative
24 segregation. The inmate-manufactured weapon was aluminum. It
25 was later measured as approximately 15 and ½ inches in length,
26 one inch width, sharpened [o]n one end with five inches [o]n the
other end wrapped in masking tape, forming a handle. The case
was referred to the district attorney’s office for prosecution.
[Petitioner] was also found guilty at the institutional level on 3/2 of
1990. He was endorsed by the staff for a ten month [SHU]
[T]erm[], and on 8/31 of 1990 endorsed for an [indeterminate SHU
at PBSP due to Petitioner’s history of SHU placement and
continual negative behavior]. [Petitioner’s] version stated that he

24 ⁵ Petitioner’s 115 violations listed in his 2003 Board report were: “Disrespect, Running
25 from an officer when ordered to stop[,] Refusing to work, Threatening a C/O, Throwing a food
26 tray in the dining hall, Rights and Respect[] of others, Conduct, Deliberately Spitting on inmate
Tafua, Conduct That Could Lead to Violence, Force and Violence, Threatening an[d] Pressuring
other inmates, Inciting others to Use Force or Violence against PC inmates, Possession of an
Inmate Manufactured Weapon, Physical Altercation/Fighting.” Resp’t’s Ex. A, pt. 1, at 138.

1 purposely [displayed the weapon] to draw [the] staff's attention to
2 problems which were occurring at CMF.

3 Resp't's Answer Ex. A, pt. 1, at 60-61; Parole Hr'g Tr. 16-17; *see* Resp't's Answer Ex. A, pt. 1,
4 at 136.

5 On June 26, 1991, Petitioner received his fourteenth 115 violation for physical altercation
6 with another inmate. Resp't's Answer Ex. A, pt. 1, at 123. Petitioner fought with his cell mate
7 because his cell mate "was making sexual advances." *Id.* (internal quotation marks omitted).

8 Additionally, a 128 violation indicates minor misconduct. CAL. CODE REGS. tit. 15, §
9 3312(a)(2) ("When similar *minor misconduct* recurs after verbal counseling or if documentation
10 of *minor misconduct* is needed, a description of the misconduct and counseling provided shall be
11 documented on a CDC Form 128-A, Custodial Counseling Chrono." (emphasis added)).

12 Petitioner received ten 128 violations from 1977, "the last being [in] 1995." Resp't's Answer
13 Ex. A, pt. 1, at 81; Parole Hr'g Tr. 37. Petitioner's 128 violations listed in his 2003 Board report
14 were: "Verbal altercation with Sergeant, Canteen procedures, CDC 115 reduced to 128A for
15 Possession of Money, Phone Procedures, Contraband, Conduct, Disruptive behavior Curtain."
16 Resp't's Ex. A, pt. 1, at 138.

17 5. October 12, 2005 Psychological Report

18 At the hearing, the Board also reviewed Petitioner's most recent psychological report by
19 Dr. Patricia Miller, dated October 12, 2005. Dr. Miller noted that Petitioner's "Axis One
20 diagnosis is adult anti-social behavior," and it was "significantly improved." Resp't's Answer
21 Ex. A, pt. 1, at 82; Parole Hr'g Tr. 38. Petitioner had a Global Assessment of Functioning (GAF)
22 score of 90, where Petitioner had "good general functioning," and was "interested and involved
23 in bridal activities, socially connected, behaviorally and emotionally stable, [and] functioning
24 well with everyday problems and concerns." Resp't's Answer Ex. A, pt. 1, at 82; Parole Hr'g Tr.
25 38. Petitioner's assessment of dangerousness was "seen as significantly below average in
26 comparison with other inmates." Resp't's Answer Ex. A, pt. 1, at 82; Parole Hr'g Tr. 38. Dr.

1 Miller determined:

2 The inmate has shown significant development and emotional
3 maturity and control over his impulses through the years. He has
4 transformed himself from an immature self-referenced, impulsive
5 anti-social youth into a mature, confident and self-controlled adult
6 focused on helping others and leading a productive, non-violent
7 life in the community. He has shown initiative in advancing his
8 work skills in several marketable areas of employment. The
9 support of his family will be an important resource to him in
10 making a successful transition from incarceration to a productive
11 citizen.

12 Resp't's Answer Ex. A, pt. 1, at 82-83; Parole Hr'g Tr. 38-39.

13 Dr. Miller expressed concern that the father of the two other children "may be a
14 destabilizing influence for Theresa and his family," although Petitioner "voices no animosity for
15 this man." Resp't's Answer Ex. A, pt. 1, at 83; Parole Hr'g Tr. 39. However, "it is uncertain
16 whether the man continues to harbor anger towards the resigned inmate." Resp't's Answer Ex.
17 A, pt. 1, at 83; Parole Hr'g Tr. 39. Petitioner's current wife wrote a letter, dated October 21,
18 2005, clarifying she does not "feel that there will be any problems out of the kid's father. He has
19 accepted the fact that we moved on with my life and it is no longer his. So he is over that fact,
20 and we have talked and he has come to terms with me and my husband living together." Resp't's
21 Answer Ex. A, pt. 1, at 83-84; Parole Hr'g Tr. 39-40.

22 IV. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

23 An application for writ of habeas corpus by a person in custody under judgment of a state
24 court can be granted only for violations of the Constitution or laws of the United States. 28
25 U.S.C. § 2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
26 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)).
This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to,
the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521
U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359, 362 (9th Cir. 1999). Under
AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in

1 state court proceedings unless the state court's adjudication of the claim:

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

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

6 28 U.S.C. § 2254(d); *see also* *Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*
7 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

8 In applying AEDPA's standards, the federal court must "identify the state court decision
9 that is appropriate for our review." *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005).

10 Where more than one state court has adjudicated a petitioner's claims, a federal habeas court
11 analyzes the last reasoned decision. *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)
12 (finding presumption that later unexplained orders, upholding judgment or rejecting same claim,
13 rests upon same ground as prior order)). Thus, a federal habeas court looks through ambiguous
14 or unexplained state court decisions to the last reasoned decision to determine whether that
15 decision was contrary to, or an unreasonable application of, clearly established federal law.

16 *Bailey v. Rae*, 339 F.3d 1107, 1112-13 (9th Cir. 2003). "The question under AEDPA is not
17 whether a federal court believes the state court's determination was incorrect but whether that
18 determination was unreasonable--a substantially higher threshold." *Schriro v. Landrigan*, 550
19 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410). When no state court reached the merits
20 of a claim, the federal court must review that claim de novo. *See Chaker v. Crogan*, 428 F.3d
21 1215, 1221 (9th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) (applying de novo standard of
22 review to claim in habeas petition that was not adjudicated on merits by state court); *Lewis v.*
23 *Mayle*, 391 F.3d 989, 996 (9th Cir. 2004) (same); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th
24 Cir. 2002) ("[W]hen it is clear that a state court has not reached the merits of a properly raised
25 issue, we must review it de novo.").

26 ///

1 V. CLAIMS FOR REVIEW

2 The petition for writ of habeas corpus sets forth four grounds for relief, all of which are
3 due process claims. First, Petitioner argues that the Board erred because of “continued reliance
4 on the commitment offense which will never change.” Pet’r’s Pet. 6. Second, Petitioner asserts
5 he is entitled to parole because he served “beyond the maximum time contained in the matrix.”
6 *Id.* Third, Petitioner claims his due process rights were violated at the parole hearing. *Id.*
7 Fourth, Petitioner alleges there is “no evidence of current risk.” *Id.* For the following reasons,
8 Petitioner’s allegations lack merit.

9 A. Legal Standard for Parole Denial

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

16 1. Liberty Interest in Parole

17 A protected liberty interest may arise from either the Due Process Clause itself or from
18 state laws. *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The United States Constitution
19 does not, in and of itself, create for prisoners a protected liberty interest in the receipt of a parole
20 date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). The full panoply of rights afforded a
21 defendant in a criminal proceeding is not constitutionally mandated in the context of a parole
22 proceeding. *See Pedro v. Or. Parole Bd.*, 825 F.2d 1396, 1398-99 (9th Cir. 1987). The Supreme
23 Court has held that a parole board’s procedures are constitutionally adequate if the inmate is
24 given an opportunity to be heard and a decision informing him of the reasons he did not qualify
25 for parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979). If a
26 state’s statutory parole scheme uses mandatory language, however, it “creates a presumption that

1 parole release will be granted’ when or unless certain designated findings are made,” thereby
2 giving rise to a constitutional liberty interest. *McQuillion*, 306 F.3d at 901 (quoting *Greenholtz*,
3 442 U.S. at 12).

4 Section 3041 of the California Penal Code sets forth the state’s legislative standards for
5 determining parole for life-sentenced prisoners. Subsection (a) provides that “[o]ne year prior to
6 the inmate’s minimum eligible parole release date a panel . . . shall again meet with the inmate
7 and shall normally set a parole release date” Subsection (b) provides an exception to the
8 regular and early setting of a life-sentenced individual’s term, if the Board determines “that the
9 gravity of the current convicted offense or offenses, or the timing and gravity of current or past
10 convicted offense or offenses, is such that consideration of the public safety requires a more
11 lengthy period of incarceration” Based on this statute, California state prisoners who have
12 been sentenced to prison with the possibility of parole have a clearly established, constitutionally
13 protected liberty interest in receipt of a parole release date. *Allen*, 482 U.S. at 377-78 (quoting
14 *Greenholtz*, 442 U.S. at 12); *Irons v. Carey*, 505 F.3d 846, 850-51 (9th Cir. 2007) (citing *Sass v.*
15 *Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006)); *Biggs v. Terhune*, 334 F.3d 910,
16 914 (9th Cir. 2003); *McQuillion*, 306 F.3d at 903.

17 2. Scope of Due Process Protection

18 Additionally, as a matter of California state law, denial of parole to state inmates must be
19 supported by at least “some evidence” demonstrating future dangerousness. *Hayward v.*
20 *Marshall*, 603 F.3d 546, 562-63 (9th Cir. 2010) (en banc) (citing *In re Lawrence*, 44 Cal. 4th
21 1181, 82 Cal. Rptr. 3d 169, 190 P.3d 535 (2008); *In re Shaputis*, 44 Cal. 4th 1241, 82 Cal. Rptr.
22 3d 213, 190 P.3d 573 (2008); *In re Rosenkrantz*, 29 Cal. 4th 616, 128 Cal. Rptr. 2d 104, 59 P.3d
23 174 (2002)). California’s “some evidence” requirement is a component of the liberty interest
24 created by the state’s parole system. *Cooke v. Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010). The
25 federal Due Process Clause requires, in turn, that California comply with its own “some
26 evidence” requirement. *Pearson v. Muntz*, 606 F.3d 606, 609 (9th Cir. 2010) (per curiam).

1 Thus, a reviewing court such as this one must “decide whether the California judicial decision
2 approving the . . . decision rejecting parole was an ‘unreasonable application’ of the California
3 ‘some evidence’ requirement, or was ‘based on an unreasonable determination of the facts in
4 light of the evidence.’” *Hayward*, 603 F.3d at 562-63 (quoting 28 U.S.C. § 2254(d)(2)).

5 The analysis of whether some evidence supports the denial of parole to a California state
6 inmate is framed by the state’s statutes and regulations governing parole suitability
7 determinations. *See Irons*, 505 F.3d at 851. A reviewing court “must look to California law to
8 determine the findings that are necessary to deem [a petitioner] unsuitable for parole, and then
9 must review the record to determine whether the state court decision holding that these findings
10 were supported by ‘some evidence’ [] constituted an unreasonable application of the ‘some
11 evidence’ principle.” *Id.*

12 3. California’s Parole Scheme

13 The “ISL,” or “Indeterminate Sentence Law,” “refers to sections of the Penal Code and
14 other Codes as they were operative prior to July 1, 1977.” CAL. CODE REGS. tit. 15, §
15 2000(b)(59). Under the ISL, which was California’s pre-1977 sentencing regime, “almost all
16 convicted felons received indeterminate terms, often with short minimums and life maximums.
17 Within this broad range, the parole authority was given virtually unbridled statutory power to
18 determine and redetermine, after the actual commencement of the imprisonment, what length of
19 time, if any, such person shall be imprisoned,” and when to allow those prisoners to be released
20 on parole. *In re Dannenberg*, 34 Cal. 4th 1061, 1088, 23 Cal. Rptr. 3d 417, 104 P.3d 783 (2005)
21 (internal quotation marks omitted). An “ISL Prisoner” is “[a] person sentenced to prison for a
22 crime committed on or before June 30, 1977, who would have been sentenced pursuant to Penal
23 Code section 1170 if he had committed the crime on or after July 1, 1977.” CAL. CODE REGS. tit.
24 15, § 2000(b)(1); *cf.* CAL. PENAL CODE § 1170(a)(1) (declaring court should impose, with
25 specified discretion, “*determinate sentences* fixed by statute in proportion to the seriousness of
26 the offense as determined by the Legislature” (emphasis added)). Currently, parole consideration

1 criteria and guidelines for ISL prisoners are governed by title 15, sections 2315 *et seq.*, of the
2 California Code of Regulations.

3 In the 1970s, California replaced its ISL system with a determinate sentencing scheme.
4 The “DSL,” or “Uniform Determinate Sentencing Act of 1976,” “refers to sections of the Penal
5 Code and other Codes as they became operative July 1, 1977.” CAL. CODE REGS. tit. 15, §
6 2000(b)(37). A “DSL Prisoner” is “[a] person sentenced to prison pursuant to Penal Code
7 section 1170 for a crime committed on or after July 1, 1977.” *Id.* § 2000(b)(2). Under section
8 2000(b)(2), “once an ISL prisoner has received a retroactively calculated DSL release date[,] all
9 rules applying to DSL prisoners apply to the ISL prisoner’s DSL release date and parole.”

10 Here, in 1973, Petitioner “was convicted of first degree murder, four counts of robbery in
11 the first degree, assault with a deadly weapon with the intent to commit murder, and assault by
12 means of force likely to produce great bodily injury and with a deadly weapon, each with the
13 personal use of a firearm.” *In re Hyde*, 154 Cal. App. 4th at 1202, 65 Cal. Rptr. 3d 162 (citations
14 omitted). “The trial court sentenced [Petitioner] pursuant to the *Indeterminate Sentencing Law* to
15 a term of life for the count 5 first degree murder.” *Id.* (emphasis added). Petitioner’s “1973
16 convictions predate the enactment of the 1977 Determinate Sentencing Law.” *Id.* at 1203 n.3, 65
17 Cal. Rptr. 3d 162.

18 Further, Petitioner never “received a retroactively calculated DSL release date.” CAL.
19 CODE REGS. tit. 15, § 2000(b)(2). The Board and the Court of Appeal both acknowledged
20 “[Petitioner’s] minimum parole date was January 13, 1980.” *In re Hyde*, 154 Cal. App. 4th at
21 1204, 65 Cal. Rptr. 3d 162; *see* Resp’t’s Answer Ex. A, pt. 1, at 45; Parole Hr’g Tr. 1. Section
22 2000(b)(2), which provides that “all rules applying to DSL prisoners” apply to ISL prisoners who
23 “received a retroactively calculated DSL release date,” is irrelevant here.

24 Rather than applying sections 2315 *et seq.*, for ISL prisoners, the Board, Superior Court,
25 and Court of Appeal considered parole suitability and unsuitability factors for “life prisoners”
26 under title 15, section 2281 of the California Code of Regulations. *In re Hyde*, 154 Cal. App. 4th

1 at 1210-11, 65 Cal. Rptr. 3d 162 (Court of Appeal); Resp't's Answer Ex. A, pt. 2, at 140
2 (Superior Court); Resp't's Answer Ex. A, pt. 1, at 49; Parole Hr'g Tr. 5 (Board). A "Life
3 Prisoner" is "[a] prisoner serving a sentence of life with the possibility of parole." CAL. CODE
4 REGS. tit. 15, § 2000(b)(3). The "Life Prisoner" definition lists crimes for which "[I]f
5 sentences may be imposed," *id.*, including (A) "[f]irst degree murder (Penal Code section 187);"
6 and (B) "[s]econd degree murder (Penal Code section 187) committed on or after November 8,
7 1978." *Id.* § 2000(b)(3)(A)-(B) (emphasis added). Since a "Life Prisoner" includes prisoners
8 convicted of first degree murder with no time constrictions, Petitioner, who was convicted of first
9 degree murder, is a "Life Prisoner" under a strict interpretation of section 2000(b)(3)(A). Parole
10 guidelines for life prisoners under section 2281 appear to apply here.

11 But, new DSL regulations amended section 2281(c) (listing circumstances tending to
12 show unsuitability), meaning section 2281 applies to DSL, not ISL, prisoners. *See* Cal. Admin.
13 Reg. 79, No. 26 (June 28, 1979); *see also In re Duarte*, 143 Cal. App. 3d 943, 948-49, 193 Cal.
14 Rptr. 176 (1983); *In re Seabock*, 140 Cal. App. 3d at 38-39, 189 Cal. Rptr. 310 (1983). Sections
15 2315 *et seq.*, for ISL prisoners, rather than section 2281 under the new DSL regulations, should
16 apply here because Petitioner's "1973 convictions predate the enactment of the 1977 Determinate
17 Sentencing Law." *See In re Hyde*, 154 Cal. App. 4th at 1203 n.3, 65 Cal. Rptr. 3d 162.

18 However, in *Connor v. Estelle*, the Ninth Circuit held that applying DSL, rather than ISL,
19 suitability criteria does not violate due process because "ISL and DSL guidelines apply identical
20 criteria in determining parole suitability." 981 F.2d 1032, 1034-35 (9th Cir. 1992) (citing *In re*
21 *Duarte*, 143 Cal. App. 3d at 951, 193 Cal. Rptr. 176 (1983)). For consistency purposes, section
22 2281 is the legal standard recited here.

23 Title 15, section 2281 of the California Code of Regulations sets forth various factors to
24 be considered by the Board in its parole suitability findings for life prisoners. "All relevant,
25 reliable information available to the [Board] shall be considered in determining suitability for
26 parole." CAL. CODE REGS. tit. 15, § 2281(b). This includes:

1 [T]he circumstances of the prisoner's: social history; past and
2 present mental state; past criminal history, including involvement
3 in other criminal misconduct which is reliably documented; the
4 base and other commitment offenses, including behavior before,
5 during and after the crime; past and present attitude toward the
6 crime; any conditions of treatment or control, including the use of
7 special conditions under which the prisoner may safely be released
8 to the community; and any other information which bears on the
9 prisoner's suitability for release.

6 *Id.* The regulation also lists specific circumstances which tend to show suitability or unsuitability
7 for parole. *Id.* § 2281(c)-(d).

8 Under section 2281(c)(1), factors relating to a commitment offense tend to show
9 unsuitability for parole where (A) multiple victims were attacked, injured or killed; (B) the
10 offense was carried out in a dispassionate and calculated manner, such as an execution-style
11 murder; (C) the victim was abused, defiled or mutilated; (D) the offense was carried out in a
12 manner which demonstrates an exceptionally callous disregard for human suffering; or (E) the
13 motive for the crime is inexplicable or very trivial in relation to the offense. *Id.* § 2281(c)(1)(A)-
14 (E).

15 Other circumstances tending to indicate unsuitability include:

16 (2) Previous Record of Violence. The prisoner on previous
17 occasions inflicted or attempted to inflict serious injury on a
18 victim, particularly if the prisoner demonstrated serious assaultive
19 behavior at an early age.

19 (3) Unstable Social History. The prisoner has a history of unstable
20 or tumultuous relationships with others.

20 (4) Sadistic Sexual Offenses. The prisoner has previously sexually
21 assaulted another in a manner calculated to inflict unusual pain or
22 fear upon the victim.

22 (5) Psychological Factors. The prisoner has a lengthy history of
23 severe mental problems related to the offense.

24 (6) Institutional Behavior. The prisoner has engaged in serious
25 misconduct in prison or jail.

25 *Id.* § 2281(c)(2)-(6).

26 Section 2281(d) sets forth circumstances tending to show suitability, which include:

1 (1) No Juvenile Record. The prisoner does not have a record of
2 assaulting others as a juvenile or committing crimes with a
potential of personal harm to victims.

3 (2) Stable Social History. The prisoner has experienced reasonably
4 stable relationships with others.

5 (3) Signs of Remorse. The prisoner performed acts which tend to
6 indicate the presence of remorse, such as attempting to repair the
7 damage, seeking help for or relieving suffering of the victim, or the
prisoner has given indications that he understands the nature and
8 magnitude of the offense.

9 (4) Motivation for Crime. The prisoner committed his crime as the
10 result of significant stress in his life, especially if the stress had
11 built over a long period of time.

12 (5) Battered Woman Syndrome. At the time of the commission of
13 the crime, the prisoner suffered from Battered Woman Syndrome,
14 as defined in section 2000(b), and it appears the criminal behavior
15 was the result of that victimization.

16 (6) Lack of Criminal History. The prisoner lacks any significant
17 history of violent crime.

18 (7) Age. The prisoner's present age reduces the probability of
19 recidivism.

20 (8) Understanding and Plans for Future. The prisoner has made
21 realistic plans for release or has developed marketable skills that
22 can be put to use upon release.

23 (9) Institutional Behavior. Institutional activities indicate an
24 enhanced ability to function within the law upon release.

25 *Id.* § 2281(d)(1)-(9).

26 The overriding concern is public safety and the focus is on the inmate's *current*
dangerousness. *In re Lawrence*, 44 Cal. 4th at 1205, 82 Cal. Rptr. 3d 169, 190 P.3d 535. Thus,
the proper articulation of the standard of review is not whether some evidence supports the stated
reasons for denying parole, but whether some evidence indicates that the inmate's release would
unreasonably endanger public safety. *In re Shaputis*, 44 Cal. 4th at 1254, 82 Cal. Rptr. 3d 213,
190 P.3d 573. There must be a rational nexus between the facts relied upon and the ultimate
conclusion that the prisoner continues to be a threat to public safety. *In re Lawrence*, 44 Cal. 4th

1 at 1227, 82 Cal. Rptr. 3d 169, 190 P.3d 535.

2 B. State Court Decision

3 Here, because the California Supreme Court summarily denied the petition, the state court
4 decision appropriate for review is the California Court of Appeal’s decision. Under AEDPA’s
5 standards, the Court of Appeal properly held that “some evidence” showed Petitioner “presents
6 an unreasonable risk of danger to the public.” *In re Hyde*, 154 Cal. App. 4th at 1217, 65 Cal.
7 Rptr. 3d 162.

8 1. Grounds One, Three and Four: Due Process and Some Evidence

9 In Grounds One, Three, and Four, Petitioner claims “[t]here is no evidence to support
10 [p]arole [d]enial and no nexus between the reasons stated for parole denial and Petitioner’s
11 current level of dangerousness to the community if released at this time.” Pet’r’s Pet. 11
12 (internal quotation marks omitted). Petitioner also argues that “[c]ontinued reliance on the
13 Commitment Offense . . . violat[es] Due Process at the Parole Consideration Hearing.” *Id.* at 16.

14 “[T]he fundamental consideration in parole decisions is public safety,” *In re Lawrence*,
15 44 Cal. 4th at 1205, 82 Cal. Rptr. 3d 169, 190 P.3d 535, not whether Petitioner’s commitment
16 offense alone can be sufficient to deny parole. *See In re Shaputis*, 44 Cal. 4th at 1254, 82 Cal.
17 Rptr. 3d 213, 190 P.3d 573. “[T]he aggravated nature of a commitment offense does not, in
18 every case, provide relevant evidence that an inmate remains dangerous, and a focus upon the
19 egregiousness of the commitment offense to the exclusion of other relevant evidence has proved
20 in practice to obscure the core statutory emphasis upon *current* dangerousness . . .” *Id.* (citing
21 *In re Lawrence*, 44 Cal. 4th at 1213, 82 Cal. Rptr. 3d 169, 190 P.3d 535). The Board may have
22 improperly based its parole denial on the commitment offense rather than risk of public safety
23 when it stated, “All our weight went on the crime.” Resp’t’s Answer Ex. A, pt. 1, at 54; Parole
24 Hr’g Tr. 10.

25 The Court of Appeal subsequently reviewed the record to add that Petitioner’s 1990
26 conviction, combined with the commitment offenses, constituted “some evidence” demonstrating

1 current dangerousness. *See In re Hyde*, 154 Cal. App. 4th at 1216-18, 65 Cal. Rptr. 3d 162. At
2 first blush, the Court of Appeal seemed to deny habeas relief based on Petitioner's commitment
3 offenses, since the Court of Appeal held that Petitioner's "commitment offenses constitute a
4 reliable indicator that [Petitioner] presents an unreasonable risk of danger to the public." *Id.* at
5 1217, 65 Cal. Rptr. 3d 162. Importantly, however, the Court of Appeal determined the Superior
6 Court erred because "it failed to consider [Petitioner's] 1990 conviction," which "renders the
7 1973 offenses considerably more probative in supporting a conclusion of an unreasonable risk of
8 danger to society." *Id.* at 1216-17, 65 Cal. Rptr. 3d 162.

9 As stated earlier, on September 4, 1989, Petitioner received a 115 violation for possessing
10 a 15.5 inch inmate manufactured weapon made of aluminum and sharpened on one end. Resp't's
11 Answer Ex. A, pt. 1, at 60-61; Parole Hr'g Tr. 16-17. On March 2, 1990, Petitioner was "found
12 guilty" at the institutional level. Resp't's Answer Ex. A, pt. 1, at 61; Parole Hr'g Tr. 17. Under
13 the California parole regulations, Petitioner was disciplinary free for over fourteen years at his
14 2005 parole hearing, since he received his last 115 violation in 1991. CAL. CODE REGS. tit. 15, §
15 3000 ("Disciplinary Free means without any finding of guilt of a disciplinary infraction filed on a
16 CDC Form 115, Rule Violation Report, classified as either administrative or serious."). The
17 issue, therefore, is whether the Court of Appeal reasonably determined that Petitioner's 1990
18 conviction, combined with his commitment offenses, constituted "some evidence" of Petitioner's
19 current dangerousness at the time of the hearing. *See Schriro*, 550 U.S. at 473 ("The question
20 under AEDPA is not whether a federal court believes the state court's determination was
21 incorrect but whether that determination was unreasonable--a substantially higher threshold."
22 (citing *Williams*, 529 U.S. at 410)).

23 Generally, courts determine a petitioner is not currently dangerous where, *inter alia*: (1)
24 the petitioner's latest prison disciplinary infraction was non-violent; and (2) any serious
25 infraction usually occurred about a decade prior to the parole hearing. *See, e.g., Cooke*, 606 F.3d
26 at 1215 (granting habeas relief where petitioner had two "minor and non-violent" disciplinary

1 violations, one where petitioner refused to “clean up another’s [sic] man’s feces,” and another
2 where petitioner refused “to take food off another man’s tray,” nearly ten years prior to parole
3 hearing); *Hinkles v. Vaughn*, No. CV 05-0024-ODW (JEM), 2009 WL 6312276, at *18-19 (C.D.
4 Cal. Dec. 4, 2009) (granting habeas relief where: (1) petitioner “had not exhibited violent
5 behavior in prison;” (2) latest 115 violation was fourteen years old for possession of marijuana;
6 and (3) latest 128 violation was seven years old for “battery on an inmate,” but petitioner was
7 “the victim”); *Pacheco v. Davison*, No. CV 08-3019-SJO (JEM), 2009 WL 3122533, at *4, *12,
8 *14 (C.D. Cal. Sept. 25, 2009) (granting habeas relief where Board’s parole denial was based on
9 Petitioner’s commitment offense and non-violent disciplinary history, and last 115 violation
10 occurred more than eleven years prior to hearing, where “prison officials found drugs and a
11 syringe in her cell,” which petitioner attributed to cell mate and “tested negative for cocaine”);
12 *Branham v. Davison*, No. EDCV 06-1294-ODW (OP), 2009 WL 3055404, at *10, *18 (C.D.
13 Cal. Sept. 22, 2009) (granting habeas relief where petitioner “had no prison disciplinary actions
14 other than a 128 in 2005[,] [the same year as her parole hearing,] which she received because
15 photographs that were displayed in her cell did not conform to housing unit rules”); *Styre v.*
16 *Adams*, No. 1:07-CV-01436-WWS (HC), 635 F. Supp. 2d 1166, 1167, 1170 (E.D. Cal. 2009)
17 (granting habeas relief where petitioner received “three citations for non-violent disciplinary
18 infractions early in his prison term, but has remained discipline free” for about nine years since
19 parole board hearing at issue); *Hoffman v. Marshall*, No. CV 08-1427-R (RNB), 2009 WL
20 585437, at *11, *15 (C.D. Cal. Mar. 5, 2009) (granting habeas relief where petitioner “has not
21 had a serious violation since the year he was admitted to state prison in 1977,” and his “last
22 minor violation” for “disrespecting staff” occurred fifteen years prior to parole hearing at issue,
23 but “those things [128s] kind of happen” (internal quotation marks omitted)), *aff’d*, 362 Fed.
24 Appx. 667, 667-68 (9th Cir. 2010) (“The Board subsequently determined that [the petitioner] was
25 suitable for parole, the Governor declined to exercise his discretion to review the decision, and
26 [the petitioner] has now been released on parole. Therefore, this appeal is moot.”); *Tripp v. Cate*,

1 No. C 07-05748 CW, 2009 WL 248368, at *2, *12 (C.D. Cal. Feb. 2, 2009) (granting habeas
2 relief where petitioner’s (1) last 115 violation was for “failure to report to a work assignment”
3 about fourteen years prior to parole hearing at issue; and (2) last 128 violation was for “excessive
4 clothing” about three years prior to parole hearing).

5 Where a petitioner’s latest prison disciplinary infraction involves violence, which is
6 logically a better indicator of current dangerousness, courts have diverged as to whether the
7 petitioner’s release would endanger public safety. In *Chambers v. Sullivan*, the district court
8 found parole denial was proper where the Board relied on the commitment offense and a
9 disciplinary infraction involving a “violent altercation” from over fifteen years ago. No.
10 1:08-CV-00187 OWW JMD HC, 2009 WL 1439716, at *3, *6-7 (E.D. Cal. May 21, 2009). In
11 contrast, courts have granted habeas relief where they determined the petitioner’s latest serious
12 disciplinary violation, albeit violent, did not indicate petitioner’s current dangerousness. *See,*
13 *e.g., Liebb v. Ayers*, No. C 08-02643 CW, 2009 WL 4724238, at *2, *8, *11 (N.D. Cal. Dec. 2,
14 2009) (granting habeas relief where district court determined Board’s parole denial was only
15 based on commitment offense, not eighteen-year old 115 violation “for fighting with another
16 inmate”); *La Cava v. Marshall*, No. CV 05-8729-AG (OP), 2009 WL 2431592, at *1, *12 (C.D.
17 Cal. July 31, 2009) (“[T]he Court finds that this 1993 incident, [an assault on another inmate,]
18 even in conjunction with the 1981 murder, does not support the conclusion that Petitioner
19 *currently* poses a risk of danger to the public if released[,]” where 1993 incident occurred about
20 nine years prior to parole hearing); *Cowans v. Marshall*, No. CV 05-6276-RSWL (OP), 2009 WL
21 2824579, at *3, *16 (C.D. Cal. Aug. 25, 2009) (granting habeas relief where: (1) petitioner’s
22 “last 115 was in 1990 for fighting,” eleven years prior to 2001 parole hearing; and (2) petitioner
23 had no 128s since 1991), *aff’d* 2010 WL 2931132, at *1 (9th Cir. July 22, 2010); *Milot v. Haws*,
24 628 F. Supp. 2d 1152, 1170 (C.D. Cal. 2009) (granting habeas relief where: (1) only one 115
25 violation “involved . . . violence, while one other involved the attempted use of force;” (2)
26 petitioner’s remaining violations were “non-violent;” and (3) petitioner was “clear of serious

1 violations for nearly 20 years and non-serious incidents for nearly 10 years”).

2 The instant case is distinguishable from the earlier cited cases where habeas relief was
3 granted for petitioners without violent disciplinary infractions. Petitioner’s possession of a 15.5
4 inch “dirk or dagger” is more similar to a violent disciplinary infraction than a non-violent one.
5 *In re Hyde*, 154 Cal. App. 4th at 1205, 65 Cal. Rptr. 3d 162 (“In 1990 [Petitioner] suffered a
6 felony conviction for possessing a *dangerous* weapon, a dirk or dagger ([California Penal Code]
7 § 12020, subd. (a))” (emphasis added)); *see generally People v. Hayes*, 171 Cal. App. 4th
8 549, 552 n.2, 89 Cal. Rptr. 3d 821 (2009) (acknowledging officer’s testimony that “inmates
9 develop weapons for the purpose of attack or self-defense”); *People v. Martinez*, 67 Cal. App.
10 4th 905, 912, 79 Cal. Rptr. 2d 334 (1998) (affirming inmate’s conviction for possession of a
11 deadly weapon, to wit, “a ‘Swiss Army knife-type knife,’ a nail clipper with attachments, and a
12 Bic cigarette lighter” because, *inter alia*, “[t]he unauthorized possession of a potentially
13 dangerous instrument, alone, is sufficient to create the security risk”); *People v. Rodriguez*, 50
14 Cal. App. 3d 389, 393, 123 Cal. Rptr. 185 (1975) (“Weapons similar to the razor
15 blade/toothbrush found in [inmate’s] cell are commonly used in jail fights. They can inflict
16 serious injury. Prosecution witnesses testified such items are primarily used, if not solely used,
17 as weapons. These weapons can inflict neck wounds, causing profuse bleeding, which could
18 result in death if not immediately treated.”).

19 However, it is unnecessary to resolve the divergence between habeas grants and denials
20 among petitioners with violent, serious disciplinary violations, nor even among petitioners with
21 serious disciplinary violations versus petitioners with only minor infractions. California law does
22 not require the Board to conduct a comparative analysis of the period of confinement served by
23 other prisoners with similar crimes. *See In re Dannenberg*, 34 Cal. 4th at 1084, 23 Cal. Rptr. 3d
24 417, 104 P.3d 783 (holding Board does not have to schedule inmate’s release “simply to ensure
25 that the length of the inmate’s confinement will not exceed that of others who committed similar
26 crimes”); *see also id.* at 1091 (finding California regulations “nowhere indicate that the Board

1 must determine an individual inmate’s suitability by reference to other offenders of the same
2 class, or to the minimum statutory term for the inmate’s offense”).

3 Instead, the Board must review the specific facts of each case to make an individualized
4 determination of whether that prisoner is suitable for parole. *See In re Lawrence*, 44 Cal. 4th at
5 1221, 82 Cal. Rptr. 3d 169, 190 P.3d 535. Additionally, federal courts “cannot re-weigh the
6 factors supporting parole suitability and the factors supporting parole unsuitability.” *See Powell*
7 *v. Gomez*, 33 F.3d 39, 42 (9th Cir. 1994) (“This court cannot reweigh the evidence, but looks
8 only [for] ‘some evidence’”); *In re Shaputis*, 44 Cal. 4th at 1260-61, 82 Cal. Rptr. 3d 213,
9 190 P.3d 573 (noting although it might be reasonable to conclude that petitioner’s many years of
10 sobriety, advanced age and health problems suggested he would never again consume alcohol
11 and engage in criminal conduct, court cannot reweigh evidence as long as record shows “*due*
12 *consideration of the specified factors* as applied to the individual prisoner in accordance with
13 applicable legal standards”).

14 Here, the Board may consider Petitioner’s 1990 conviction under title 15, section
15 2281(c)(6) of the California Code of Regulations, which labels serious misconduct by a prisoner
16 while incarcerated as a circumstance tending to show unsuitability. Section 2281(c)(6) does not
17 set a limit on how long a serious misconduct may be considered as an unsuitability factor.
18 Although past misbehavior may become irrelevant to parole suitability after a certain period of
19 time, no case or statute definitively provides when a serious, violent disciplinary violation should
20 no longer be considered. *See supra* pp. 24-27. Accordingly, the Court of Appeal was not
21 unreasonable for determining that the 1990 conviction, combined with the commitment offenses,
22 was probative of current dangerousness. *See Schriro*, 550 U.S. at 473; *cf. Chambers*, 2009 WL
23 1439716, at *3 (denying habeas relief where last violent disciplinary infraction occurred over
24 fifteen years ago).

25 Notably, the “some evidence” standard is minimal, and is meant only to “assure[] that
26 ‘the record is not so devoid of evidence that the findings of the disciplinary board were without

1 support or otherwise arbitrary.” *Sass*, 461 F.3d at 1129 (quoting *Superintendent, Mass. Corr.*
2 *Inst. at Walpole v. Hill*, 472 U.S. 445, 457 (1984)). The egregious nature of the commitment
3 offenses and Petitioner’s prison disciplinary record constitute sufficient evidence to meet this
4 minimal standard of judicial review. Consequently, Petitioner’s due process rights were not
5 violated, and he is not entitled to federal habeas relief.

6 2. Grounds Two and Three: Due Process and Matrix Argument

7 In Ground Three, Petitioner argues that his imprisonment “exceed[s] the maximum time
8 contained in the matrix utilized in setting the term of imprisonment and violate[s] Due Process . .
9 . .” Pet’r’s Pet. 16. California parole guidelines require setting a “base term for each life
10 prisoner who is found suitable for parole.” CAL. CODE REGS. tit. 15, § 2282(a). The “base term”
11 is “established by utilizing the appropriate matrix of base terms” provided in title 15, section
12 2282 of the California Code of Regulations. *Id.*

13 a. Exhaustion

14 Respondent contends that Petitioner failed to exhaust his due process and matrix
15 argument. Respondent admits Petitioner “exhausted his state court remedies regarding the claim
16 that the Board’s 2005 decision violated his due process rights on the ground that the decision was
17 not supported by the evidence.” Resp’t’s Answer 4. Respondent then denies in a lone sentence
18 that Petitioner “exhausted his claims to the extent they are interpreted more broadly to
19 encompass any systematic issues beyond this claim.” *Id.* Since Petitioner argues his due process
20 rights were also violated because his imprisonment “exceed[s] the maximum time contained in
21 the matrix,” Pet’r’s Pet. 16, Respondent implies that Petitioner failed to exhaust this claim. *See*
22 *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (“[W]e hold that a district court must dismiss habeas
23 petitions containing both unexhausted and exhausted claims.”).

24 Even if Petitioner’s claim was unexhausted, an application for a writ of habeas corpus
25 may be denied on the merits, notwithstanding the failure of the applicant to exhaust available
26 state remedies. 28 U.S.C. § 2254(b)(2). A federal court considering a habeas petition may deny

1 an unexhausted claim on the merits when it is perfectly clear that the claim is not “colorable.”
2 *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005). Here, it is recommended that federal
3 habeas relief be denied on the merits of Petitioner’s matrix claim.

4 b. Merits of Due Process and Matrix Argument

5 To the extent Petitioner contends the Board violated state law or regulations, Petitioner is
6 not entitled to habeas relief. A federal court may grant habeas corpus relief “only on the ground
7 that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United
8 States.” 28 U.S.C. § 2254(a). Mere errors in the application of state law are not cognizable on
9 habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see generally Langford v. Day*,
10 110 F.3d 1380, 1389 (9th Cir. 1996) (explaining federal petitioner may not “transform a state-law
11 issue into a federal one merely by asserting a violation of due process”), *cert. denied*, 522 U.S.
12 881 (1997).

13 In any event, Petitioner’s claim lacks merit under state law. Under California law, the
14 Board is not required to fix a base term until it finds an inmate suitable for parole. CAL. CODE
15 REGS. tit. 15, § 2282(a); *see Irons v. Carey*, 505 F.3d 846, 851 n.3 (9th Cir. 2007) (“A
16 ‘determination of an individual inmate’s suitability for parole under section 3041, subdivision (b)
17 [of the California Penal Code] must precede any effort to set a parole release date under the
18 uniform-term principles of section 3041, subdivision (a).’” (quoting *In re Dannenberg*, 34 Cal.
19 4th at 1079-80, 23 Cal. Rptr. 3d 417, 104 P.3d 783)); *In re Stanworth*, 33 Cal. 3d 176, 183, 654
20 P.2d 1311 (1982) (“Under both the 1976 and the current rules, a life prisoner must first be found
21 suitable for parole before a parole date is set.”); *see also* CAL. PENAL CODE § 3041(b) (The
22 Board “shall set a release date unless it determines that the gravity of the current convicted
23 offense or offenses, or the timing and gravity of current past convicted offense or offenses, is
24 such that consideration of the public safety requires a more lengthy period of incarceration for
25 this individual, and that a parole date, therefore, cannot be fixed at this meeting.”). Petitioner
26 was not found suitable for parole; the matrix did not need to be consulted. Additionally,

1 Petitioner's claim that there was no evidence to deny him parole is unavailing. *See supra* Part
2 V.B.1. Accordingly, Petitioner's claim is without merit.

3 VI. CONCLUSION

4 For the foregoing reasons, IT IS HEREBY RECOMMENDED that Petitioner's
5 application for writ of habeas corpus be DENIED.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one
8 days after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
11 shall be served and filed within seven days after service of the objections. Failure to file
12 objections within the specified time may waive the right to appeal the District Court's order.
13 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156-57
14 (9th Cir. 1991). In any objections he elects to file, Petitioner may address whether a certificate of
15 appealability should be issued in the event he elects to file an appeal from the judgment in this
16 case. *See* Rule 11(a), Federal Rules Governing Section 2254 Cases (district court must issue or
17 deny certificate of appealability when it enters final order adverse to applicant).

18 DATED: October 25, 2010.

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21 TIMOTHY J BOMMER
22 UNITED STATES MAGISTRATE JUDGE
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