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

BRYON SUMMERSVILLE,

Petitioner,

No. CIV S-08-2098 JAM CHS P

vs.

D.K. SISTO, et al.,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

I. INTRODUCTION

Petitioner Bryon Summersville is a state prisoner proceeding pro se with a petition for writ of habeas corpus brought pursuant to 28 U.S.C. §§ 2254. Petitioner is currently serving a life sentence for a 1993 second degree murder conviction. Petitioner does not challenge the propriety of his conviction; rather, he challenges its execution, and specifically, the constitutionality of the January 3, 2007 decision of the Board of Parole Hearings (“Board”) finding him unsuitable for parole.

II. FACTUAL AND PROCEDURAL BACKGROUND

On direct appeal, the California Court of Appeal, Fourth District, summarized the facts of petitioner’s commitment offense as follows:

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1 On December 8, 1992, [the victims] Alberto Fox and Timothy
2 Burke drank beer and vodka kamikazes and smoked crack cocaine.
3 They then went to the home of [petitioner's crime partners] Don
4 Bailey and Dupree Allen, Burke's cocaine suppliers. Burke
5 claimed that Bailey and Allen owed him money.

6 ...Burke and Bailey conversed, then Burke yelled at Bailey about
7 the money and said he had a weapon. Fox and Burke left. They
8 went to a gas station where they drank more beer, then, with Fox
9 driving, they proceeded to the apartment where they lived with
10 Fox's sister.

11 Fox parked across the street from the apartment. Within seconds, a
12 car pulled up next to theirs, the doors flew open, and Bailey and
13 Allen jumped out. Also in the car was petitioner. Bailey and Allen
14 told Burke, who had apparently alighted from his car, that it was
15 "time to get fucked-up."

16 Petitioner alighted from Bailey and Allen's car, said "got
17 something for you" or "it is your time," and jabbed at Fox through
18 the open window of Burke's car. Petitioner lunged at Fox three or
19 four times as Fox tried to start the car. At first Fox thought that
20 petitioner was punching him, then he felt blood. Fox succeeded in
21 starting the car, drove to the back of the apartment complex, left
22 the car's engine running, and jumped out.

23 Bleeding badly, Fox walked cautiously down a walkway. He saw
24 Bailey and Allen's car pulling away. He saw Burke lying at the
25 side of the street and called to him but received no response. Fox
26 made it to his apartment and banged on the door. His sister
answered. He told her to call 911 because he and Burke had been
stabbed.

When the police arrived, Burke was still alive, but he died shortly
thereafter due to internal bleeding. He had suffered several stab
wounds. Fox survived the attack but sustained multiple stab
wounds to his armpit, elbow, and chest, including one that
penetrated the lung.

(Ex. F¹ at 2.)

At the January 3, 2007 hearing, petitioner denied any intent to seek out the victims
or other calculation on his part. (Ex. F at 20.) He stated that he thought he was getting a ride to
his own apartment when Bailey said they were "going to check something out" and the car was

¹ Except where otherwise noted, all citations to exhibits refer to the exhibits attached to
the pending petition.

1 driven to the scene of the crime. (*Id.* at 22-24.) Petitioner indicated that he jumped out of the car
2 and stabbed Fox with a folding knife that he carried on his belt buckle when he saw Bailey and
3 Allen get into a scuffle with victim Burke. (*Id.* at 25, 29.) At the time, petitioner believed that
4 he was defending himself and helping his crime partners by stopping Fox from exiting the car.
5 (*Id.* at 26.)

6 A jury found petitioner guilty of second degree murder of victim Burke under an
7 aiding and abetting theory. An enhancement was imposed for personal use of a knife. Petitioner
8 was also found guilty of assault with a deadly weapon on victim Fox with personal use of a knife
9 and personal infliction of great bodily injury. On direct appeal, the personal knife use
10 enhancements were stricken. Petitioner was sentenced to an aggregate term of 22 years to life.

11 Petitioner was received in state prison in December of 1993. His minimum
12 eligible parole date passed on September 2, 2007. Several months prior to that date, on January
13 3, 2007, a panel of the Board of Parole Hearings conducted petitioner's initial parole suitability
14 hearing and determined that he was unsuitable for parole. In finding petitioner to be unsuitable
15 for parole, the panel cited the nature of his commitment offense, stating that it was particularly
16 egregious because there was evidence of calculation and because multiple victims were involved.
17 (Ex. F at 74.) The panel also relied on petitioner's most recent psychological report, which it
18 characterized as negative. (*Id.* at 75.) The panel further found that petitioner's parole plans were
19 inadequately developed.² (*Id.* at 76.)

20 Petitioner raised his claims arising from the Board's denial in a petition for writ of
21 habeas corpus in the San Diego County Superior Court. The petition was denied. (Respondent's
22

23 ² The commissioner who gave the panel's decision briefly noted that petitioner had
24 received a total of six 128(a) counseling chronos during his incarceration. (Ex. F at 75.) It was
25 not clear, however, whether the panel was relying on petitioner's institutional behavior as a factor
26 for its decision. *See* 15 Cal. Code Regs. § 2281(c)(6) ("serious misconduct in prison or jail" is a
factor tending to indicate unsuitability). Because the Board's decision was supported by some
evidence with regard to at least one other unsuitability factor, petitioner's institutional behavior
need not be addressed here.

1 Ex. 1.) Petitioner presented his claims to the California Court of Appeal, Fourth Appellate
2 District, and the California Supreme Court, where they were likewise denied. (Respondent's Ex.
3 3 & 5.)

4 III. ISSUES PRESENTED

5 Petitioner contends that the Board's decision was arbitrary and unsupported by
6 any reliable evidence in the record. Petitioner further contends that the parole unsuitability
7 factors set forth in 15 Cal. Code Regs. § 2281 are void and unconstitutional. For the reasons that
8 follow, the petition should be denied.

9 IV. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

10 An application for writ of habeas corpus by a person in custody under judgment of
11 a state court can be granted only for violations of the Constitution or laws of the United States.
12 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
13 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (*citing Engle v. Isaac*, 456 U.S. 107, 119 (1982)).
14 This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to,
15 the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521
16 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). Under
17 AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in
18 state court proceedings unless the state court's adjudication of the claim:

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

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

23 28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*
24 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

25 This court looks to the last reasoned state court decision in determining whether the law applied
26 to a particular claim by the state courts was contrary to the law set forth in the cases of the United

1 States Supreme Court or whether an unreasonable application of such law has occurred. *Avila v.*
2 *Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 919 (2003).

3 V. DISCUSSION

4 A. Petitioner’s due process rights were not violated because the Board’s decision is
5 not arbitrary and is supported by some evidence.

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

12 A protected liberty interest may arise from either the Due Process Clause itself or
13 from state laws. *Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The United States
14 Constitution does not, in and of itself, create a protected liberty interest in a parole date. *Jago v.*
15 *Van Curen*, 454 U.S. 14, 17-21 (1981). However, where a state’s statutory parole scheme uses
16 mandatory language, it “creates a presumption that parole release will be granted” when or unless
17 certain designated findings are made, thereby giving rise to a constitutional liberty interest.
18 *McQuillion*, 306 F.3d at 901 (*quoting Greenholtz v. Inmates of Nebraska Penal*, 442 U.S. 1, 12
19 (1979)). The Ninth Circuit has conclusively determined that California state prisoners who have
20 been sentenced to prison with the possibility of parole have a clearly established, constitutionally
21 protected liberty interest in receipt of a parole release date. *Irons v. Carey*, 505 F.3d 846, 850-51
22 (9th Cir. 2007) (*citing Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006));
23 *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003); *McQuillion*, 306 F.3d at 903; and *Allen*,
24 482 U.S. at 377-78 (*quoting Greenholtz*, 442 U.S. at 12)).

25 The full panoply of rights afforded a defendant in a criminal proceeding is not
26 constitutionally mandated in the context of a parole proceeding. *See Pedro v. Or. Parole Bd.*,

1 825 F.2d 1396, 1398-99 (9th Cir. 1987). The Supreme Court has held that a parole board's
2 procedures are constitutionally adequate if the inmate is given an opportunity to be heard and a
3 decision informing him of the reasons he did not qualify for parole. *Greenholtz*, 442 U.S. at 16.
4 In addition, the Ninth Circuit has conclusively determined that Supreme Court law clearly
5 establishes that some evidence must support a parole decision. *Sass*, 461 F.3d at 1128-29;
6 *McQuillion*, 306 F.3d at 904.

7 Under the some evidence standard, a decision cannot be “without support” or
8 “arbitrary.” *McQuillion*, 306 F.3d at 904 (citing *Superintendent v. Hill*, 472 U.S. 445, 457
9 (1985)); *Biggs*, 334 F.3d at 915. It must have some indicia of reliability. *Id.* The standard is
10 “minimally stringent,” and a decision must be upheld if there is any evidence in the record that
11 could support the conclusion reached. *Powell v. Gomez*, 33 F.3d at 40 (citing *Cato v. Rushen*,
12 824 F.2d 703, 705 (9th Cir. 1987)); *Toussaint v. McCarthy*, 801 F.2d 1080, 1105 (9th Cir. 1986).
13 Examination of the entire record is not required. *Id.* The Supreme Court has specifically
14 directed reviewing courts not to assess the credibility of witnesses or re-weigh the evidence.
15 *Hill*, 472 U.S. at 455. The only relevant question is whether there is *any* reliable evidence in the
16 record that could support the decision reached. *See Id.*; *Toussaint*, 801 F.2d at 1105.

17 In evaluating whether some evidence supported the Board's decision, the analysis
18 “is framed by the statutes and regulations governing parole suitability determinations in the
19 relevant state.” *Irons*, 505 F.3d at 851. The court is bound by California's construction of its
20 own laws in this regard. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). The court “must look
21 to California law to determine the findings that are necessary to deem [a petitioner] unsuitable for
22 parole, and then must review the record to determine whether the state court decision holding
23 that these findings were supported by ‘some evidence’ [] constituted an unreasonable application
24 of the ‘some evidence’ principle.” *Id.*

25 Title 15, Section 2281 of the California Code of Regulations sets forth various
26 factors to be considered by the Board in its parole suitability findings for life prisoners. The

1 regulation is designed to guide the Board’s assessment of whether the inmate poses “an
2 unreasonable risk of danger to society if released from prison,” and thus whether he or she is
3 suitable for parole. *In re Lawrence*, 44 Cal.4th 1181, 1214, 1202 (2008). The Board is directed
4 to consider all relevant, reliable information available regarding

5 the circumstances of the prisoner’s social history; past and present
6 mental state; past criminal history, including involvement in other
7 criminal misconduct which is reliably documented; the base and
8 other commitment offenses, including behavior before, during and
9 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.

10 15 Cal. Code Regs. § 2281(b). The regulation also lists several specific circumstances which
11 tend to show suitability or unsuitability for parole. 15 Cal. Code Regs. § 2281(c)-(d). The
12 overriding concern is public safety and the focus is on the inmate’s *current* dangerousness. *In re*
13 *Lawrence*, 44 Cal. 4th at 1205. Thus, “the proper articulation of the standard of review is not
14 whether some evidence supports the *reasons* the Board cites for denying parole, but whether
15 some evidence indicates that a parolee’s release *unreasonably endangers public safety*. *See In re*
16 *Lawrence*, 44 Cal.4th at 1254. In other words, there must be some rational nexus between the
17 facts relied upon and the ultimate conclusion that the prisoner continues to be a threat to public
18 safety. *Id.* at 1227.

19 Here, the Board determined that petitioner was unsuitable for parole, in part,
20 because of the nature of his commitment offense. A prisoner’s commitment offense tends to
21 show unsuitability for parole where it was committed in an especially heinous, atrocious or cruel
22 manner. 15 Cal. Code Regs. § 2281(c)(1). Two of the relevant factors to this circumstance
23 which were found by the Board in this case are that multiple victims were attacked, injured or
24 killed (15 Cal. Code Regs. § 2281(c)(1)(A)), and that the offense was carried out in a
25 dispassionate and calculated manner (15 Cal. Code Regs. § 2281(c)(1)(B)).

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1 Although petitioner denies any premeditation or calculation on his part, his
2 participation in the attack can certainly be characterized as dispassionate. Petitioner claims that
3 he did not know either of the victims except through his crime partners, that he was not then
4 aware of any dispute between the victims and his crime partners, and that he was the initial
5 aggressor in the attack on Fox, who did nothing to provoke him. (Ex. F at 26-27, 32, 61.)

6 Moreover, the Board properly considered that multiple victims were attacked in
7 the same incident, even though there is no evidence that petitioner personally attacked both
8 victims. While the relevant regulation refers specifically to the conduct of the individual prisoner
9 (calling on the Board to consider whether “[t]he prisoner committed the offense in an especially
10 heinous, atrocious, or cruel manner” (emphasis added)), the relevant factor whether multiple
11 victims were attacked, injured or killed appears to focus on the criminal act as a whole rather
12 than one individual’s actions. *See* 15 Cal. Code Regs. § 2281(c)(1)(A). In addition, the panel is
13 specifically directed to consider “the number of victims of the crime for which the prisoner was
14 sentenced...” 15 Cal. Code Regs. § 2280. At the same time, petitioner must be given
15 individualized consideration of all specified criteria. *In re Rosenkrantz*, 29 Cal.4th 616, 677
16 (2002).

17 At least one district court has found that it is enough to support a finding that the
18 crime was “especially heinous, atrocious, or cruel” that two victims were attacked by a habeas
19 corpus petitioner and his crime partners. *See Jackson v. Horel*, No. 07-1334, slip. op. at 8 (N.D.
20 Cal. March 31, 2009); *see also Biggs*, 334 F.3d at 912, 916 (where prisoner had refused to
21 actually kill the victim but agreed to be involved in the ruse to murder him, was present during
22 the murder, paid money to the co-conspirators, and returned with the killer in an attempt to better
23 conceal the body, the Ninth Circuit noted that “[w]hile Biggs did not commit the murder himself,
24 he was intertwined with the conspiracy from the very beginning”). Moreover, both Fox and
25 Burke were victims of crimes for which petitioner was sentenced based on this incident. Where
26 petitioner admits that he attacked Fox in an effort to help or assist his crime partners who were

1 attacking Burke, the Board’s determination that petitioner’s individual participation in the crime
2 was especially heinous, atrocious, or cruel because more than one victim was attacked has
3 support in the record.

4 Where the facts of a commitment offense are especially heinous or particularly
5 egregious, the commitment offense can by itself be a sufficient basis for denying parole. *In re*
6 *Rosenkrantz*, 29 Cal.4th 616, 682 (2002); *see also Biggs v. Terhune*, 334 F.3d 910, 913-16 (9th
7 Cir. 2003); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1126 (9th Cir. 2006); *Irons v.*
8 *Carey*, 505 F.3d 846, 852-53 (9th Cir. 2007).³ After an inmate has “served the minimum number
9 of years required by his sentence” (*Irons*, 505 F.3d at 853), however, extended reliance solely on
10 unchanging factors, such as the circumstances of the offense and conduct prior to imprisonment,
11 runs contrary to the rehabilitative goals espoused by the prison system and could result in a due
12 process violation. *Biggs*, 334 F.3d at 917.

13 In this case, the 2001 hearing at issue was petitioner’s initial parole consideration
14 hearing and it was held prior to his minimum eligible parole date of September 2, 2007. In *Irons*,
15 the Ninth Circuit noted that

16 in all the cases in which we have held that a parole board’s
17 decision to deem a prisoner unsuitable for parole solely on the
18 basis of his commitment offense comports with due process, the
19 decision was made before the inmate had served the minimum
20 number of years required by his sentence. Specifically, in *Biggs*,
21 *Sass*, and here, the petitioners had not served the minimum number
22 of years to which they had been sentenced at the time of the
challenged parole denial by the Board. All we held in those cases
and all we hold today, therefore, is that, given the particular
circumstances of the offenses in these cases, due process was not
violated when these prisoners were deemed unsuitable for parole
prior to the expiration of their minimum terms.

23 ³ In another case, *Hayward v. Marshall* (512 F.3d 536, 546-47 (9th Cir. 2008)), a panel of
24 the Ninth Circuit determined that under the “unusual circumstances” of that case, the unchanging
25 factor of the gravity of the petitioner’s commitment offense did not, by itself, constitute some
26 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 vacated the decision in order to rehear it en banc. *Hayward v. Marshall*, 527 F.3d 797
(9th Cir. 2008). Therefore, the panel decision in *Hayward* is no longer citable precedent.

1 Furthermore, we note that in *Sass* and in the case before us there
2 was substantial evidence in the record demonstrating rehabilitation.
3 In both cases, the California Board of Prison Terms appeared to
4 give little or no weight to this evidence in reaching its conclusion
5 that *Sass* and *Irons* presently constituted a danger to society and
6 thus were unsuitable for parole. We hope that the Board will come
7 to recognize that in some cases, indefinite detention based solely
8 on an inmate's commitment offense, regardless of the extent of
9 rehabilitation, will at some point violate due process, given the
10 liberty interest in parole that flows from the relevant California
11 statutes.

12 *Irons*, 505 F.3d at 853-54 (internal citations omitted).

13 Like the petitioner in *Sass* (461 F.3d at 1125), the petitioner in the pending case
14 was convicted of second degree murder. Petitioner's offenses are at least as heinous and cruel as
15 the offenses committed by *Sass*, who caused the death of another person in a hit and run drunk
16 driving accident and was convicted of second degree murder, gross vehicular manslaughter, hit
17 and run death, causing injury while driving under the influence, and felony drunk driving. *See*
18 *Id.* In this case, the record does not demonstrate that, at the time of the 2001 hearing, the Board
19 had relied for an extended time solely on petitioner's commitment offense or other unchanging
20 factors; rather, the 2001 hearing was petitioner's initial parole consideration hearing. A denial of
21 parole based solely on the gravity of petitioner's commitment offense would not, on the facts of
22 this case, violate petitioner's right to due process.

23 Nevertheless, the Board relied on additional factors and circumstances in finding
24 petitioner to be unsuitable for parole. Specifically, the Board relied on findings set forth in
25 petitioner's most recent psychological report, and on his parole plans, which it found to be
26 inadequately developed.

Psychological factors tend to indicate unsuitability for parole where "[t]he
prisoner has a lengthy history of severe mental problems related to the offense." 15 Cal. Code
Regs. § 2281 (c)(5). In this case, petitioner has no history of mental problems. The preparer of
his most recent psychological report wrote, for an assessment of his dangerousness, as follows:

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1 Prior to his incarceration Mr. Summersville's risk factors or
2 significant determinates for violence were minimal as a result of
3 his development and maintenance of a stable personal family and
4 work life. There was no history of serious criminality, mental
5 health or substance abuse issues. Mr. Summersville appears to
6 have been able to work as a supervisor in a manufacturing
7 company from the time when he was 20 years old up until the time
8 he was incarcerated. He had three children and close relationships
9 with the mothers of these children. There was no history of
10 criminality as a juvenile nor as an adult other than a minor vehicle
11 code violation and he has no mental health issues, never
12 complained of any mental health issue nor had he ever been
13 diagnosed or treated for any. He also had no history of substance
14 abuse issues. Subsequent to his incarceration he has had no serious
15 disciplinary actions and those he did acquire he was able to explain
16 in a rational and logical manner. Mr. Summersville has willingly
17 and whole-heartedly involved himself in educational and
18 vocational endeavors, which by his own admission had been
stabilizing and growth factors in his maturation and social
development. In addition to demonstrating an openness, a self-
evaluative manner and the development of appropriate personal
values, Mr. Summersville appears to have a clear understanding and
good insight into the causative factors that led up to his life crime.
Finally, Mr. Summersville expressed what appears to this examiner
to be [a] genuine sense of guilt, shame and remorse for his life
crime. As a result of all these factors there is a high reasonable
probability that Mr. Summersville's risk of dangerousness is
significantly lower than that of the average inmate incarcerated
here at CSP Solano and average for those individuals who have
committed similar offenses and had successful paroles in the
community. Again, Mr. Summersville has no mental health issues
or psychopathology that would be related to his suitability for
parole thus any considerations the board would make in regards to
his suitability should be related solely to his ability to comply with
the conditions of parole.

19 (Ex. F at 56-57.) The Board found this report to be of questionable value because the evaluator's
20 risk assessment of petitioner's re-entry into free society did not compare him to the average
21 citizen in the community, instead comparing him to other prisoners. The Board indicated that,
22 based on this factor, it was choosing to view the report negatively.

23 The evaluator's assessment of petitioner's potential for dangerousness may indeed
24 have been more meaningful if petitioner had been compared to average citizens in the community
25 instead of current or former prisoners. The Board's characterization of the report as a negative
26 factor, however, is not supported by the record. After giving an overwhelmingly positive

1 assessment and estimating petitioner's risk to the community to be lower than the average inmate
2 and average compared to inmates who committed similar offenses and had successful paroles,
3 the evaluator specifically opined that "any considerations the board would make in regards to his
4 suitability should be related solely to his ability to comply with the conditions of parole." (Ex. F
5 at 57.) The evaluator's failure to assess petitioner in a specific manner which was not required
6 nor requested does not bear on petitioner's suitability for release, and the Board's conclusion that
7 petitioner was unsuitable for parole based on the content of his psychological report is
8 unsupported by any reliable evidence in the record.

9 As set forth above, there was one final factor relied upon by the Board in finding
10 petitioner unsuitable for parole. A prisoner's understanding and plans for the future are factors
11 tending to indicate suitability for parole where the prisoner has made realistic plans for release or
12 has developed marketable skills that can be put to use upon release. 15 Cal. Code Regs. §
13 2281(c)(8). At the hearing, petitioner stated that if paroled, he planned to reside with his sister in
14 her home. (Ex. F at 37.) He also planned to find employment within his sister's childcare and
15 development business. (*Id.* at 37.) Petitioner had no letters of support, however, from his sister
16 or anyone else, confirming his plans. (*Id.* at 37-38.)

17 A prisoner's understanding and plans for the future are, notably, a parole
18 *suitability* factor, as opposed to being an *unsuitability* factor where there are no such plans. The
19 Board, however, is entitled to consider any information which bears on petitioner's suitability for
20 release. 15 Cal. Code Regs. § 2281(b). A complete lack of evidence that petitioner has a place
21 to live, employment opportunities, or any support whatsoever, including emotional support, from
22 friends or family if released bears negatively on a determination of his suitability. Petitioner's
23 lack of concrete plans for parole was appropriately considered by the Board and it's conclusion
24 that he presents a risk of danger to society if released because he has no demonstrated plans for
25 the future has support in the record.

26 ////

1 Due process requires that the Board's decision be supported by some evidence in
2 the record and that modicum is present in this case. Based on the foregoing, there is some
3 support for the Board's conclusion that petitioner would pose a risk of danger to the public if
4 released, based on the nature of his commitment offense considered in conjunction with his
5 inadequately developed plans for parole. The Board's decision meets the minimally stringent test
6 set forth by the Ninth Circuit in *Biggs, Sass, and Irons*. The decision of the California courts
7 upholding the Board's denial of parole is not contrary to, or an unreasonable application of any
8 clearly established federal due process law. Accordingly, petitioner is not entitled to relief on his
9 claim that the Board's failure to find him suitable for parole at the January 3, 2007 parole
10 suitability hearing violated his right to due process.

11 B. The parole unsuitability factors set forth in 15 Cal. Code Regs. § 2281 are not
12 void or unconstitutional.

13 Petitioner claims that the Board has impermissibly used the parole unsuitability
14 factors set forth in the California Code of Regulations to enlarge the scope of its authority
15 granted under California Penal Code, section 3041. The California Court of Appeal found this
16 claim to be without merit, noting that the "regulations are derived from decades of decisional
17 law." (Respondent's Ex. 3 at 5 (citing *In re Seabock*, 140 Cal. App.3d 29, 33-38 (1st Dist.
18 1983)).

19 Petitioner cites no authority for this claim. He has failed to show that the decision
20 of the California Court of Appeal is contrary to, or an unreasonable application of any clearly
21 established federal law. *See Garlotte v. Fordice*, 515 U.S. 39, 46 (1995) (a petitioner bears the
22 burden on federal habeas corpus review to show that constitutional error occurred). No relief can
23 be granted.

24 V. CONCLUSION

25 For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's
26 application for a writ of habeas corpus be DENIED.

