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

TODD R LOVE,	)	
	)	
Petitioner,	)	No C 07-1160 VRW (PR)
	)	
v	)	ORDER DENYING PETITION
	)	FOR A WRIT OF HABEAS
BEN CURRY, Warden,	)	CORPUS
	)	
Respondent.	)	
_____	)	

Petitioner Todd R Love, a state prisoner incarcerated at the Correctional Training Facility in Soledad, California seeks a writ of habeas corpus under 28 USC section 2254 challenging the California Board of Parole Hearings' ("board") February 15, 2005 decision to deny him parole.

Per order filed on July 27, 2007, the court (Jenkins, J) found petitioner's claim that the board violated his due process and equal protection rights colorable under section 2254, when liberally construed, and

1 ordered respondent to show why a writ of habeas corpus  
2 should not be granted. Respondent has filed an answer and  
3 petitioner has filed a traverse.  
4

5 I

6 On June 20, 1993, petitioner fatally shot his  
7 sister's boyfriend. Doc #7, Ex 4. The shooting occurred  
8 after petitioner and the victim had been drinking beer and  
9 began to fight physically. Id. During a break in the  
10 fight, petitioner retrieved a gun from his bedroom and shot  
11 the victim twice. Id. At trial, the prosecution played a  
12 recording of a 911 emergency call which had recorded  
13 petitioner's repeated statements that he was going to kill  
14 the victim and the actual shots being fired. Id.

15 On November 9, 1993, petitioner was convicted of  
16 first degree murder and use of a firearm to commit the  
17 crime. Cal Penal Code §§ 187, 12022.5. Petitioner filed a  
18 motion for a new trial and modification of the verdict.  
19 Id. The trial judge denied the new trial motion, but  
20 reduced the jury verdict to second degree murder. Id.  
21 Petitioner was sentenced to a prison term of 18 years-to-  
22 life: 15 years-to-life on the murder charge and an  
23 additional 3 year term for the use of a firearm during the  
24 offense. Id.

25 On February 15, 2005, petitioner appeared before  
26 the board for his first parole consideration hearing. Doc  
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1 #7, Ex 3. The board found petitioner unsuitable for  
2 parole. ("PAROLE DENIED TWO YEARS") Hr'g Tr at 73 (Doc #7,  
3 Ex 3).

4 Petitioner unsuccessfully challenged the board's  
5 decision in the state superior, appellate and supreme  
6 courts. Doc #1. On December 13, 2006, the California  
7 Supreme Court summarily denied petitioner's petition for  
8 review. This federal petition for a writ of habeas corpus  
9 followed.

## 10 II

11 The Antiterrorism and Effective Death Penalty Act  
12 of 1996 ("AEDPA"), codified under 28 USC section 2254,  
13 provides "the exclusive vehicle for a habeas petition by a  
14 state prisoner in custody pursuant to a state court  
15 judgment, even when the [p]etitioner is not challenging his  
16 underlying state court conviction." White v Lambert, 370  
17 F3d 1002, 1009-10 (9th Cir 2004). Under AEDPA, this court  
18 may entertain a petition for habeas relief on behalf of a  
19 California state inmate "only on the ground that he is in  
20 custody in violation of the Constitution or laws or  
21 treaties of the United States." 28 USC section 2254(a).

22 The writ may not be granted unless the state  
23 court's adjudication of any claim on the merits: "(1)  
24 resulted in a decision that was contrary to, or involved an  
25 unreasonable application of, clearly established Federal  
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1 law, as determined by the Supreme Court of the United  
2 States; or (2) resulted in a decision that was based on an  
3 unreasonable determination of the facts in light of the  
4 evidence presented in the State court proceeding." 28 USC  
5 § 2254(d). Under this deferential standard, federal habeas  
6 relief will not be granted "simply because [this] court  
7 concludes in its independent judgment that the relevant  
8 state-court decision applied clearly established federal  
9 law erroneously or incorrectly. Rather, that application  
10 must also be unreasonable." Williams v Taylor, 529 US 362,  
11 411 (2000).

12 While circuit law may provide persuasive  
13 authority in determining whether the state court made an  
14 unreasonable application of Supreme Court precedent, the  
15 only definitive source of clearly established federal law  
16 under 28 USC section 2254(d) rests in the holdings (as  
17 opposed to the dicta) of the Supreme Court as of the time  
18 of the state court decision. *Id* at 412; Clark v Murphy,  
19 331 F3d 1062, 1069 (9th Cir 2003).

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21 III

22 Petitioner seeks federal habeas corpus relief  
23 from the board's February 15, 2005 decision finding him  
24 unsuitable for parole and denying him a subsequent hearing  
25 for two years on the ground that the decision does not  
26 comport with due process and equal protection. Petitioner  
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1 argues that the board's decision was arbitrary because he  
2 was not provided with individualized consideration and that  
3 the decision was not supported by some evidence in the  
4 record. Petitioner also argues that he was denied due  
5 process because his right to a parole hearing with the  
6 board one year prior to his minimum eligible parole release  
7 date was not timely satisfied.

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9 A

10 Under California law, prisoners serving  
11 indeterminate life sentences, like petitioner, become  
12 eligible for parole after serving minimum terms of  
13 confinement required by statute. In re Dannenberg, 34 Cal  
14 4th 1061, 1069-70 (2005). At that point, California's  
15 parole scheme provides that the board "shall set a release  
16 date unless it determines that the gravity of the current  
17 convicted offense or offenses, or the timing and gravity of  
18 current or past convicted offense or offenses, is such that  
19 consideration of the public safety requires a more lengthy  
20 period of incarceration." Cal Penal Code § 3041(b).  
21 Regardless of the length of the time served, "a life  
22 prisoner shall be found unsuitable for and denied parole if  
23 in the judgment of the panel the prisoner will pose an  
24 unreasonable risk of danger to society if released from  
25 prison." Cal Code Regs tit 15, § 2402(a). In making this  
26 determination, the board must consider various factors,

1 including the prisoner's social history, past criminal  
2 history, and base and other commitment offense, including  
3 behavior before, during and after the crime. See Cal Code  
4 Regs tit 15, § 2402(b) - (d).

5 California's parole scheme "gives rise to a  
6 cognizable liberty interest in release on parole which  
7 cannot be denied without adequate procedural due process  
8 protections." Sass v California Bd of Prison Terms, 461  
9 F3d 1123, 1128 (9th Cir 2006); McQuillion v Duncan, 306 F3d  
10 895, 902 (9th Cir 2002). It matters not that a parole  
11 release date has not been set for the inmate because "[t]he  
12 liberty interest is created, not upon the grant of a parole  
13 date, but upon the incarceration of the inmate." Biggs v  
14 Terhune, 334, F3d 910, 914-15 (9th Cir 2003).

15 Petitioner's due process rights require that  
16 "some evidence" support the board's decision finding him  
17 unsuitable for parole. Sass, 461 F3d at 1125. This "some  
18 evidence" standard is deferential, but ensures that "the  
19 record is not so devoid of evidence that the findings of  
20 [the board] were without support or otherwise arbitrary."  
21 Superintendent v Hill, 472 US 445, 457 (1985). Determining  
22 whether this requirement is satisfied "does not require  
23 examination of the entire record, independent assessment of  
24 the credibility of witnesses, or weighing of the evidence."  
25 Id at 455-56.

26 Due process also requires that the evidence  
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1 underlying the parole board's decision have some indicia of  
2 reliability. Biggs, 334 F3d at 915; McQuillion, 306 F3d at  
3 904. Relevant to this inquiry is whether the prisoner was  
4 afforded an opportunity to appear before, and present  
5 evidence to, the board. See Pedro v Oregon Parole Bd, 825  
6 F2d 1396, 1399 (9th Cir 1987). If the board's  
7 determination of parole unsuitability is to satisfy due  
8 process, there must be some evidence with some indicia of  
9 reliability, to support the decision. Rosas v Nielsen, 428  
10 F3d 1229, 1232 (9th Cir 2005).

11  
12 B

13 Petitioner claims that the board's finding that  
14 he was unsuitable for parole is not supported by any  
15 evidence in the record or an individualized consideration  
16 of his circumstances. But the record shows that the board  
17 found three circumstances tending to show unsuitability for  
18 parole and that these circumstances formed the basis for  
19 its conclusion that petitioner posed "an unreasonable risk  
20 of danger to society and a threat to public safety if  
21 released from prison." Hr'g Tr at 69; see Cal Code Regs  
22 tit 15, § 2402(a) (stating that a prisoner determined to be  
23 an unreasonable risk to society shall be denied parole).  
24 The record also shows that the board afforded petitioner  
25 and his counsel an opportunity to speak and present  
26 petitioner's case at the hearing, gave them time to review  
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1 petitioner's central file, allowed them to present relevant  
2 documents and provided them with a reasoned decision in  
3 denying parole. Hr'g Tr at 7-8.

4 First, the board examined the commitment offense  
5 and found that the offense "was carried out in an  
6 especially callous, cruel manner. The offense was  
7 dispassionate \* \* \* [showing] a callous disregard for  
8 another human being." Id at 69. The board also noted that  
9 the "motive for the crime was inexplicable or very  
10 trivial." Id; see Cal Code Regs tit 15, § 2401(c)(1)(D) -  
11 (E) (listing callous disregard for human suffering and  
12 trivial motive as factors tending to show unsuitability for  
13 parole). The board drew its conclusion from the fact that  
14 the offense was committed when petitioner was drinking beer  
15 and that the provocation for the shooting was a fistfight.  
16 Hr'g Tr at 69. The board cited the letter written by the  
17 district attorney in opposition to parole and the  
18 transcript of the 911 call during which the petitioner  
19 repeatedly stated his intent to kill the victim as  
20 particularly "powerful" in compelling it's decision to deny  
21 parole at this time. Id at 72.

22 Second, the board cited four disciplinary write-  
23 ups as a factor in its decision to deny parole. The write-  
24 ups were issued between 1994 and 1997 and concerned: (1)  
25 entering an unauthorized cell; (2) manufacturing alcohol in  
26 a cell; (3) willful resistance; and (4) refusing a direct  
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1 order. Doc #7, Ex 8. The board noted that, as of the time  
2 of the hearing, petitioner had been "disciplinary free for  
3 almost six and a half years, so he appears to be smoothing  
4 it out." Hr'g Tr at 70-71. But, in its judgment, this did  
5 not outweigh the other factors contributing to petitioner's  
6 parole denial. Id.

7 Third, and related, is that the board determined  
8 that petitioner "had not sufficiently participated in  
9 substance abuse programs." Id at 70. Specifically, the  
10 board found that petitioner "needs to continue to  
11 participate in programs that would enable him to be able to  
12 face, discuss, understand and cope with stress in a non-  
13 destructive manner." Id. While commending petitioner on  
14 the vocational and rehabilitative strides he had made, the  
15 board noted that, as yet, he had not "completed the  
16 necessary programming which is essential to his  
17 adjustment." Id.

18 The board considered other factors tending to  
19 support suitability for parole including: petitioner's  
20 favorable psychological evaluation which indicated a  
21 reduced level of dangerousness and that he was on the right  
22 track; that he had been discipline free for over six years;  
23 that he had support from family who would help him with his  
24 residential and employment plans; and his participation in  
25 vocational courses. Hr'g Tr at 70-71. The board found  
26 that these factors showed that petitioner was making  
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1 progress, but that these positive aspects did not "outweigh  
2 the fact of his unsuitability." Hr'g Tr at 71.

3 The state superior court affirmed the decision of  
4 the board. The superior court examined the board's  
5 considerations and concluded that the board based its  
6 determination of unsuitability for parole on some evidence.  
7 Doc #7, Ex 10. This evidence included the "four serious  
8 disciplinary write-ups during his state prison confinement,  
9 and further that petitioner had not sufficiently  
10 participated in substance abuse programs." Id (citing Hr'g  
11 Tr at 70, 72) (internal quotations omitted). Further, the  
12 superior court agreed that the gravity of the crime and its  
13 surrounding facts justified further incarceration. Id.  
14 The state appellate and supreme courts summarily denied  
15 petitioner's request for habeas corpus relief.

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18 The state courts' rejection of petitioner's due  
19 process claim was not contrary to, nor did it involve an  
20 unreasonable application of clearly established federal  
21 law, and it was not based on an unreasonable determination  
22 of the facts. See 28 USC § 2254(d).

23 The record shows that the board had some reliable  
24 evidence to support its finding of unsuitability. Because  
25 this was petitioner's first parole hearing, the  
26 circumstances surrounding the murder, which suggested a  
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1 callous disregard for human suffering as well as a trivial  
2 motive were particularly relevant to the board's decision.  
3 Accord Irons v Carey, 505 F3d 846, 850 (9th Cir 2007)  
4 (upholding denial of parole based solely on gravity of  
5 offense). It is also relevant that petitioner had not yet  
6 served the minimum 18 year determinate part of his  
7 sentence. See *id* at 853 (denial of parole based on  
8 commitment offense where petitioner has not yet served the  
9 minimum number of years required by his sentence will  
10 generally comport with due process). In addition, the  
11 previous disciplinary write-ups and a finding that  
12 petitioner had not sufficiently participated in substance  
13 abuse programs reasonably contributed to the board's  
14 determination that he was unsuitable for parole. See Hill,  
15 474 US at 455-56.

16 The board's detailed findings rebut petitioner's  
17 allegation that the board did not afford him individualized  
18 consideration and that its decision was mere boilerplate.  
19 While lauding his recent vocational and behavioral gains,  
20 the board reasonably concluded that petitioner was not yet  
21 suitable for parole. It is not up to this court to  
22 "reweigh the evidence." Powell v Gomez, 33 F3d 39, 42 (9th  
23 Cir 1994).

26 Petitioner's invocation of equal protection does  
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1 not form a basis for federal habeas relief either. An  
2 equal protection challenge under the Fourteenth Amendment  
3 requires allegations that parole statutes distinguish  
4 between categories of criminal offenders. These statutes  
5 are reviewed under a rational basis test because prisoners  
6 are not a suspect class and there is no fundamental  
7 constitutional right to parole. See Glauner v Miller, 184  
8 F3d 1053, 1054 (9th Cir 1999) (Nevada legislature did not  
9 lack a rational basis for requiring more scrutiny of sexual  
10 offenders in parole matters than other classes of criminals  
11 due to heightened recidivism concerns).

12 Petitioner vaguely alleges that prisoners  
13 sentenced to life terms are routinely denied parole and  
14 that this constitutes a violation of due process and equal  
15 protection. But the record makes clear that the board  
16 provided ample justification for its denial of parole.  
17 There is a rational basis supporting the weight given to  
18 petitioner's commitment offense, especially at an initial  
19 parole hearing. There is no evidence that the board's  
20 decision was arbitrary or based solely on petitioner's  
21 status as a life-term prisoner.

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23 C

24 Petitioner seeks federal habeas relief on the  
25 ground that his parole hearing was less than one year prior  
26 to his minimum eligible parole date, in violation of  
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1 California Penal Code section 3041(a).

2 The record shows that petitioner's parole  
3 consideration hearing was conducted on February 15, 2005,  
4 five months prior to his minimum eligible parole date. Not  
5 surprisingly, the California superior court denied  
6 petitioner's claim, noting that the hearing "was conducted  
7 well in advance of his minimum eligible parole release  
8 date." Doc #7, Ex 10 at 1.

9 Petitioner is not entitled to federal habeas  
10 relief for alleged violations of state law. See Estelle v  
11 McGuire, 502 US 62, 67-68 (1991). Moreover, this court is  
12 bound by the superior court's interpretation of state law.  
13 See Bradshaw v Richey, 546 US 74, 76 (2005).

14  
15 IV

16 For the reasons set forth above, the petition for a  
17 writ of habeas corpus is DENIED.

18 The clerk shall enter judgment in favor of respondent  
19 and close the file.

20  
21 SO ORDERED.

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23   
24 VAUGHN R WALKER  
25 United States District Chief Judge  
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