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28IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRANDEE TRIPP,

Petitioner,

v.

MATTHEW CATE, Secretary of the
California Department of
Corrections and Rehabilitation,Respondent.

No. C 07-05748 CW

ORDER GRANTING PETITION
FOR WRIT OF HABEAS CORPUS
AND DENYING RESPONDENT'S
MOTION TO DISMISS

On November 13, 2007, Petitioner BranDee Tripp, a prisoner then incarcerated at the California Institution for Women, through counsel, filed a petition for a writ of habeas corpus, alleging that the Governor violated her federally protected liberty interest when he reversed her grant of parole. The Court issued an order to show cause why the writ should not be granted. On June 23, 2008, Respondent Warden Dawn Davison filed an answer and on July 2, 2008 Petitioner timely filed a traverse. On September 25, 2008, Petitioner was released on parole. Soon after, Respondent Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, filed a motion to dismiss the

1 habeas petition as moot.¹ Petitioner opposes the motion. For the
2 reasons set forth below, the petition is GRANTED and the motion to
3 dismiss is DENIED.

4 BACKGROUND

5 On February 11, 1981, pursuant to a guilty plea to second
6 degree murder, Petitioner was sentenced to fifteen years to life
7 for the July 3, 1979 murder of ten-year-old Tameron Carpenter. At
8 the time, Petitioner was twenty years old.

9 At twelve hearings between 1986 and 2001, the Board of
10 Parole Hearings (Board) found Petitioner unsuitable for parole.
11 On November 6, 2002, at her thirteenth parole hearing, the Board
12 found Petitioner suitable for parole. On April 4, 2003, former
13 Governor Gray Davis reversed the Board's grant of parole. On May
14 17, 2004, at her fourteenth parole hearing, the Board again found
15 Petitioner suitable for parole. On October 11, 2004, Governor
16 Arnold Schwarzenegger reversed the Board's grant of parole.

17 Petitioner filed petitions challenging Governor
18 Schwarzenegger's decision in the Monterey County Superior Court
19 and the California Court of Appeal. On March 28, 2007, the Court
20 of Appeal issued a reasoned opinion affirming the Governor's

21 _____
22 ¹The proper respondent in a habeas case is the "state officer
23 having custody" of the petitioner. Ortiz-Sandoval v. Gomez, 81
24 F.3d 891, 894 (9th Cir. 1996) (quoting Rule 2(a) of the Rules
25 Governing Habeas Corpus Cases Under Section § 2254). Where the
26 petitioner is on probation or parole, he may name his probation or
27 parole officer "and the official in charge of the parole or
28 probation agency, or the state correctional agency, as
appropriate." Id. at 896. Therefore, the Court directs the Clerk
of the Court to substitute Matthew Cate, Secretary of the
California Department of Corrections and Rehabilitation as
Respondent in this action.

1 decision. See In re Tripp, 150 Cal. App. 4th 306 (2007). On
2 August 15, 2007, the California Supreme Court denied Petitioner's
3 petition for review without comment.

4 The Court of Appeal summarized the commitment offense as
5 follows:

6 On July 8, 1979, 10-year-old Tameron Carpenter was
7 strangled to death. Both Tameron and her 19-year-old
8 sister, Betty Ann Maddocks, were scheduled to testify
9 in a criminal case against 53-year-old William Record.
10 Mr. Record was accused of molesting both Tameron and
11 Ms. Maddocks. To eliminate them as witnesses, Mr.
12 Record offered to pay his stepdaughter's husband,
13 17-year-old Hilton Tripp, to kidnap and murder Tameron
14 and Ms. Maddocks. Mr. Tripp, his 20-year-old wife,
15 BranDee Tripp, and his friend Randy Cook first planned
16 to kidnap and kill Ms. Maddocks. That plan failed.
17 They then decided to kidnap and kill young Tameron.

18 Mrs. Tripp was a family friend and had access to
19 Tameron. On the day of the murder, she arranged to
20 take Tameron on a swimming trip. Before the trip, she
21 asked Tameron to go to the store and pick up some
22 drinks. Once Tameron was at the store, she encountered
23 Mr. Hilton and Mr. Cook who offered her a ride home.
24 Tameron accepted. The two men then drove Tameron to a
25 campsite where Mr. and Mrs. Tripp were living. They
26 took Tameron into the Tripps' tent, tied her up, and
27 placed a cord from the tent around her neck. Mr. Tripp
28 pulled on one side while Mr. Cook pulled on the other
-- until Tameron died. They then buried her in a grave
that they had dug near the tent.

When interviewed by police, Mrs. Tripp denied any
knowledge of Tameron's whereabouts. Mr. Tripp,
however, confessed to police that he was involved in
the kidnap-murder and subsequently took them to the
campsite where Tameron's body was buried. Mrs. Tripp
was arrested the next day. And Mr. Cook later
surrendered to the police.

In re Tripp, 150 Cal. App. 4th at 315.

At her parole hearing in 2004, at which the Board for the
second time concluded that Petitioner was suitable for parole, it
specifically noted that Petitioner

would not pose an unreasonable risk of danger to
society or a threat to public safety if released from
prison. The prisoner, while imprisoned, has enhanced
her ability to function within the law upon release

1 through participation in educational programs. She has
2 obtained a GED, [and participated in] vocational
3 programs. She has obtained a vocational certificate in
4 forklift operation and also in vocational word
5 processing. She's also, through self-help, taken the
6 following: She's been in AA and NA since . . . 1988.
7 She's been in the SOS program.² She's taken the Women
8 Against Abuse program, the American Bible Academy, Arts
9 and Correction Music Program, the Relapse Prevention
10 program, the HIV/AIDS prevention program, and Breaking
11 Barriers. . . . The prisoner lacks a significant
12 criminal history of violent crime. [The prisoner's]
13 maturation, growth, greater understanding, and advanced
14 age has reduced the probability of her recidivism. The
15 prisoner has realistic parole plans, which includes a
16 job offer and family support. [I w]ould say that I
17 would rate the parole plans as superior. . . . She has
18 had no 115s since 1988.³ Her last 115 was [for a]
19 failure to report to a work assignment. She also has
20 had a few 128-A [violations]. The last was in 1999 for
21 excessive clothing. And prior to that, was three
22 years, misuse of state property. And then the last was
23 in 1988 prior to that. So we feel that she has a good
24 disciplinary record while in custody. Prisoner shows
25 signs of remorse. She has indicated that she
26 understands the nature and the magnitude of the offense
27 and accepts responsibility for her criminal behavior
28 and has a desire to change towards good citizenship.

Pet. Ex. B at 65-67.

The Board also cited Petitioner's most recent psychological
evaluation performed in January, 2004. The report noted, "The

²SOS (Sharing our Stitches) is a program in which prisoners
knit blankets and clothing for the homeless.

³115 and 128-A refer to different CDC forms used by prison
officials to report rules violations.

Inmate misconduct shall be handled by:

(1) Verbal Counseling. Staff may respond to minor misconduct
by verbal counseling. When verbal counseling achieves
corrective action, a written report of the misconduct or
counseling is unnecessary.

(2) Custodial Counseling Chrono. When similar minor
misconduct recurs after verbal counseling or if documentation
of minor misconduct is needed, a description of the
misconduct and counseling provided shall be documented on a
CDC Form 128-A, Custodial Counseling Chrono. . . .

(3) Rules Violation Report. When misconduct is believed to
be a violation of law or is not minor in nature, it shall be
reported on a CDC Form 115

Cal. Code. Regs. tit. 15 § 3312(a).

1 inmate has not been dangerous within a controlled setting. I do
2 not believe she will be dangerous if released to the community."
3 Pet. Ex. D at 3. The report also stated that "the inmate has been
4 motivated in her self-discovery and has improved dramatically over
5 the years, to the point where she has matured significantly." Id.
6 The report concluded that "risk factors as always would be if she
7 was ever tempted to resort to acts of criminality though given her
8 level of peace and contentment, I would not suspect that to be the
9 case." Id.

10 On October 11, 2004, the Governor, pursuant to California
11 Penal Code § 3041.2, reviewed the evidence considered by the Board
12 and reversed the grant of parole. In his decision, the Governor
13 found that "after carefully considering each of the factors the
14 Board is required to consider, the gravity of the murder Mrs.
15 Tripp perpetrated upon young Tameron presently outweighs the
16 positive factors tending to support her parole." Pet. Ex. C. The
17 Governor also commented that "the manner in which this crime was
18 planned and carried out -- particularly against one so young and
19 vulnerable -- demonstrates exceptional depravity and an utterly
20 callous disregard for human life and suffering." Id.

21 The Governor also concluded that Petitioner "helped plan the
22 kidnap and murder" and that she was involved in the decision "to
23 kidnap and kill" Tameron. The Governor's conclusion about
24 Petitioner's role in the crime is based on her statements at the
25 May, 2004 parole hearing. The Governor stated that

26 Mrs. Tripp maintains that she did not intend for
27 Tameron to be killed. During her 2004 parole hearing,
28 she told the Board that her husband "promised me that

1 no one would get hurt" and that "in my head, I didn't
2 think that anything could go wrong, and I didn't think
3 far enough to know that her life would be taken." But
4 at that same hearing, she admitted to suggesting
5 various ways to kill Tameron, and explained, "I guess
6 that's why I ended up being considered the person in
7 charge." In her 1999 mental-health evaluation, Mrs.
8 Tripp said that she refused to be involved in the
9 physical abduction of Ms. Maddocks--but was willing to
10 help lure her outside to be kidnapped. She also was
11 agreeable to planning a way for her husband and Mr.
12 Cook to kidnap Tameron. Her statements are
13 inconsistent. Nevertheless, she says she accepts
14 responsibility and is sorry for Tameron's murder.

15 Id. Although the Governor described these inconsistent
16 statements, he did not rely on them to reverse the Board's parole
17 grant. As noted above, the Governor denied Petitioner parole
18 because "the gravity of the murder outweighs the positive factors
19 tending to support her parole." Id.

20 In the petition for a writ of habeas corpus that Petitioner
21 filed in the Monterey County Superior Court after the Governor
22 issued his decision, she alleged that the Governor's decision was
23 not supported by some evidence, and that its sole reliance on the
24 circumstances of the commitment offense violated her federal due
25 process rights. The court's denial of the writ explained that
26 "the Governor may deny parole based solely on the nature of the
27 commitment offense, so long as he identifies specific elements of
28 the commitment offense showing the inmate would pose an
unacceptable risk to the public." Resp. Ex. 5(G). The court
concluded that "the Governor's October 11, 2004 decision, which
contains a thorough description of Petitioner's commitment
offense, clearly meets this standard." Id.

On Petitioner's petition to the Court of Appeal, that court

1 noted that "the Governor's parole denial is based entirely on the
2 commitment offense." In re Tripp, 150 Cal. App. 4th 306, 314
3 (2007). The court then stated that "'denial of release solely on
4 the basis of the gravity of the commitment offense warrants
5 especially close scrutiny. [T]he gravity of the commitment offense
6 or offenses alone may be a sufficient basis for denying a parole
7 application, so long as the Board does not fail to consider all
8 other relevant factors.'" Id. at 320 (quoting In re Scott II, 133
9 Cal. App. 4th 573, 595 (2005)). Denying the writ, the court held
10 that "it appears that the Governor has provided petitioner with an
11 individualized consideration of the relevant factors," therefore,
12 "we cannot say that due process required the Governor to strike a
13 different balance." Id.

14 The court also concluded that there is "some evidence that
15 petitioner participated in planning not only the kidnapping, but
16 the 1979 murder of Tameron. This evidence also supports the
17 Governor's conclusion that petitioner, at age 45, remained
18 dangerous to public safety." Id. at 318.

19 As noted above, the California Supreme Court summarily denied
20 Petitioner's petition for review. Resp't Ex. 13, Aug. 15, 2007
21 California Supreme Court Order at 1.

22 In the petition now before this Court, Petitioner challenges
23 the Governor's reversal of the Board's decision. She argues that
24 the state appellate court decision affirming the Governor violated
25 her constitutional right to due process because it involved an
26 unreasonable application of federal law in that the Governor's
27 reversal was not supported by some evidence.

1 custody upon the legality of that custody, and . . . the
2 traditional function of the writ is to secure release from illegal
3 custody." Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).
4 However, federal courts "have a fair amount of flexibility in
5 fashioning specific habeas relief." Burnett v. Lampert, 432 F.3d
6 996, 999 (9th Cir. 2005). "A federal court is vested with the
7 largest power to control and direct the form of judgment to be
8 entered in cases brought up before it on habeas corpus. The court
9 is free to fashion the remedy as law and justice require and is
10 not required to order petitioner's immediate release from physical
11 custody." Id. (quoting Sandlers v. Ratelle, 21 F.3d 1446, 1461
12 (9th Cir. 1994).

13 Petitioner's habeas petition is not moot. Although she has
14 completed the institutional phase of her sentence, her current
15 status as a parolee prevents this case from being moot. As it
16 currently stands, Petitioner was released on a five year parole
17 term on September 25, 2008. Petitioner asks that, if she
18 prevails, the Court reinstate the Board's 2004 parole grant. If
19 the Court reinstates her 2004 parole grant, the parole board may
20 determine that her current parole term could end sooner than
21 September 25, 2013. Therefore, a favorable decision in this
22 petition could advance the end date of the parole term currently
23 being served, and the Court DENIES Respondent's motion to dismiss.

24 STANDARD OF REVIEW

25 The petition in this case was filed after the effective date
26 of the Antiterrorism and Effective Death Penalty Act of 1996
27 (AEDPA), so the provisions of that act apply. Lindh v. Murphy,

1 521 U.S. 320, 327 (1997); McQuillion v. Duncan, 306 F.3d 895, 901
2 (9th Cir. 2002).

3 Under AEDPA, a district court may not grant habeas relief
4 unless the state court's adjudication of the claim: "(1) resulted
5 in a decision that was contrary to, or involved an unreasonable
6 application of, clearly established Federal law, as determined by
7 the Supreme Court of the United States; or (2) resulted in a
8 decision that was based on an unreasonable determination of the
9 facts in light of the evidence presented in the State court
10 proceeding." 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S.
11 362, 412 (2000). The first prong applies both to questions of law
12 and to mixed questions of law and fact, Williams, 529 U.S. at 407-
13 09, while the second prong applies to decisions based on factual
14 determinations, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

15 A state court decision is "contrary to" Supreme Court
16 authority, that is, falls under the first clause of § 2254(d)(1),
17 only if "the state court arrives at a conclusion opposite to that
18 reached by [the Supreme] Court on a question of law or if the
19 state court decides a case differently than [the Supreme] Court
20 has on a set of materially indistinguishable facts." Williams,
21 529 U.S. at 412-13. A state court decision is an "unreasonable
22 application of" Supreme Court authority, under the second clause
23 of § 2254(d)(1), if it correctly identifies the governing legal
24 principle from the Supreme Court's decisions but "unreasonably
25 applies that principle to the facts of the prisoner's case." Id.
26 at 413. The federal court on habeas review may not issue the writ
27 "simply because that court concludes in its independent judgment
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1 that the relevant state-court decision applied clearly established
2 federal law erroneously or incorrectly." Id. at 411. Rather, the
3 application must be "objectively unreasonable" to support granting
4 the writ. See id. at 409.

5 "Factual determinations by state courts are presumed correct
6 absent clear and convincing evidence to the contrary." Miller-El,
7 537 U.S. at 340. A petitioner must present clear and convincing
8 evidence to overcome § 2254(e)(1)'s presumption of correctness;
9 conclusory assertions will not do. Id. Although only Supreme
10 Court law is binding on the states, Ninth Circuit precedent
11 remains relevant persuasive authority in determining whether a
12 state court decision is objectively unreasonable. See Clark v.
13 Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

14 When there is no reasoned opinion from the highest state
15 court to consider a petitioner's claims, the court looks to the
16 last reasoned opinion to analyze whether the state judgment was
17 erroneous under the standard of § 2254(d). Ylst v. Nunnemaker,
18 501 U.S. 797, 801-06 (1991); Shackleford v. Hubbard, 234 F.3d
19 1072, 1079 n.2 (9th Cir. 2000). In the present case, the last
20 state court opinion to address the merits of Petitioner's claim is
21 the reasoned opinion of the Court of Appeal.

22 DISCUSSION

23 As noted above, under California law, the Governor considers
24 the same factors as the Board in determining whether to affirm or
25 reverse the Board's decision. Cal. Const., art. V, § 8(b); In re
26 Rosenkrantz, 29 Cal. 4th 616, 660 (2002).

27 The Supreme Court has clearly established that a parole
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1 board's decision deprives a prisoner of due process with respect
2 to his constitutionally protected liberty interest in a parole
3 release date if the board's decision is not supported by "some
4 evidence in the record," or is "otherwise arbitrary." Sass v.
5 California Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir.
6 2006) (citing Superintendent v. Hill, 472 U.S. 445, 457 (1985)).
7 The standard of "some evidence" is met if there was some evidence
8 from which the conclusion of the administrative tribunal could be
9 deduced. Hill, 472 U.S. at 455. An examination of the entire
10 record is not required nor is an independent weighing of the
11 evidence. Id. The relevant question is whether there is any
12 evidence in the record that could support the conclusion reached
13 by the administrative board. Id.

14 Respondent argues that, under AEDPA, the "some evidence"
15 standard of Hill does not apply to parole suitability hearings
16 because the United States Supreme Court has not applied it in that
17 context. Respondent claims the due process protections to which
18 California prisoners are entitled by clearly established Supreme
19 Court authority are limited to an opportunity to be heard and a
20 statement of reasons for denial. This position, however, has been
21 rejected by the Ninth Circuit, which held in Sass that a
22 prisoner's due process rights are violated if the Board's decision
23 is not supported by "some evidence in the record," or is
24 "otherwise arbitrary." 461 F.3d at 1128-1129. The "some
25 evidence" standard identified is thus clearly established federal
26 law in the parole context for purposes of § 2254(d). Id.

27 When assessing whether a state parole board's suitability
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1 determination, or in the present case the Governor's reversal, was
2 supported by "some evidence," the court's analysis is framed by
3 the statutes and regulations governing parole suitability
4 determinations in the relevant state. Sass, 461 F.3d at 1128.
5 Accordingly, in California, the court must look to California law
6 to determine the findings that are necessary to deem a prisoner
7 unsuitable for parole, and then must review the record to
8 determine whether the state court decision constituted an
9 unreasonable application of the "some evidence" principle. Id.

10 California law provides that a parole date is to be granted
11 unless it is determined "that the gravity of the current convicted
12 offense or offenses, or the timing and gravity of current or past
13 convicted offense or offenses, is such that consideration of the
14 public safety requires a more lengthy period of
15 incarceration" Cal. Penal Code § 3041(b).

16 The California Code of Regulations sets out the factors
17 showing suitability or unsuitability for parole that the parole
18 authority is required to consider. See Cal. Code Regs. tit. 15,
19 § 2402(b) (2001). These include "[a]ll relevant, reliable
20 information available," such as:

21 the circumstances of the prisoner's social history;
22 past and present mental state; past criminal history,
23 including involvement in other criminal misconduct
24 which is reliably documented; the base and other
25 commitment offenses, including behavior before, during
26 and after the crime; past and present attitude toward
27 the crime; any conditions of treatment or control,
28 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. Circumstances which taken
alone may not firmly establish unsuitability for parole
may contribute to a pattern which results in a finding
of unsuitability.

1 Id.

2 Circumstances tending to show unsuitability for parole
3 include the nature of the commitment offense and whether "[t]he
4 prisoner committed the offense in an especially heinous, atrocious
5 or cruel manner." Id. § 2402(c). This includes consideration of
6 the number of victims, whether "[t]he offense was carried out in a
7 dispassionate and calculated manner," whether the victim was
8 "abused, defiled or mutilated during or after the offense,"
9 whether "[t]he offense was carried out in a manner which
10 demonstrates an exceptionally callous disregard for human
11 suffering," and whether "[t]he motive for the crime is
12 inexplicable or very trivial in relation to the offense." Id.

13 Other circumstances tending to show unsuitability for parole
14 are a previous record of violence, an unstable social history,
15 previous sadistic sexual offenses, a history of severe mental
16 health problems related to the offense, and serious misconduct in
17 prison or jail. Id.

18 Circumstances tending to support a finding of suitability for
19 parole include no juvenile record, a stable social history, signs
20 of remorse, that the crime was committed as a result of
21 significant stress in the prisoner's life, a lack of criminal
22 history, a reduced possibility of recidivism due to the prisoner's
23 present age, that the prisoner has made realistic plans for
24 release or has developed marketable skills that can be put to use
25 upon release, and that the prisoner's institutional activities
26 indicate an enhanced ability to function within the law upon
27 release. Id. § 2402(d).

28 Respondent argues that the appellate court properly found

1 that some evidence in the record supported the Governor's finding
2 that Petitioner admitted to helping plan the victim's kidnapping
3 and murder. Respondent also argues that the appellate court
4 correctly concluded that the Governor properly relied on the
5 commitment offense alone to deny parole because he provided
6 Petitioner with individual consideration and reviewed the relevant
7 factors favoring her release on parole.

8 The Court finds that the facts relating to Petitioner's
9 commitment offense alone do not satisfy the "some evidence"
10 standard, more than twenty-five years after she committed the
11 offense.

12 In Biggs v. Terhune and Sass, the Ninth Circuit addressed the
13 effect of continued denial of parole based solely on unchanging
14 factors such as the inmate's commitment offense. See Biggs v.
15 Terhune, 334 F.3d 910, 917 (9th Cir. 2003); Sass, 461 F.3d at
16 1129. In Biggs, the court, in dicta, stated that "continued
17 reliance in the future on an unchanging factor, the circumstance
18 of the offense and conduct prior to imprisonment, runs contrary to
19 the rehabilitative goals espoused by the prison system and could
20 result in a due process violation." Biggs, 334 F.3d at 917. The
21 Ninth Circuit's opinion in Irons v. Carey sheds further light on
22 whether continuous reliance on an immutable factor such as the
23 commitment offense may violate due process. 505 F.3d 846, 850
24 (9th Cir. 2007). In Irons, the District Court for the Eastern
25 District of California granted a habeas petition challenging the
26 parole board's fifth denial of parole where the petitioner had
27 served sixteen years of a seventeen years to life sentence for
28 second degree murder with a two-year enhancement for use of a

1 firearm, and where all factors indicated suitability for parole;
2 however, the Ninth Circuit reversed. 358 F. Supp. 2d 936, 947
3 (E.D. Cal. 2005), rev'd, 505 F.3d 846 (9th Cir. 2007). The Ninth
4 Circuit limited its holding to inmates deemed unsuitable prior to
5 the expiration of their minimum sentences and left the door open
6 for inmates deemed unsuitable after the expiration of their
7 minimum sentences. 505 F.3d at 854. The Ninth Circuit stated:

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

24 Id. at 853-54. The court recognized that, at some point after an
25 inmate has served his minimum sentence, the probative value of his
26 commitment offense as an indicator of an unreasonable risk of
27 danger to society recedes below the "some evidence" required by
28 due process to support a denial of parole. Id.

Unlike Biggs, Sass and Irons, at the time of the Board's
decision at issue here, Petitioner had served more than eight
years after the expiration of her minimum fifteen-year sentence.
Even under the Governor's version of the facts, much distinguishes
the present case from Biggs, Sass and Irons, and pushes it beyond
the point at which sole reliance on the commitment offense may be
said to constitute "some evidence" in compliance with due process.

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The record contains substantial evidence to support the Board's finding of parole suitability under the factors contained in the California Code of Regulations. Before reversing the Board's parole grant, the Governor accurately summarized Petitioner's positive factors tending to support parole.

While her first six years in prison included multiple serious-rules violations and an array of minor misconduct, she has been discipline free for the last 16 years and has worked to enhance her ability to function within the law upon release. She completed her GED and has obtained vocational certificates in word processing and forklift operation. She has participated in a number of self-help and therapy programs, including Women Against Abuse, the Relapse Prevention Program, Breaking Barriers, Anger Management, and Alcoholics Anonymous and Narcotics Anonymous consistently since 1988. She has received laudatory reports from various prison staff for her volunteer and self-help activities as well as receiving favorable Life Prisoner and mental-health evaluations. She has also established and maintained seemingly solid relationships with her mother and her daughter and has viable parole plans that include residence at a licensed treatment facility for recovering addicts and a job offer from a family friend.

Pet. Ex. C at 2.

The relevant factors listed in Title 15 of the California Code of Regulations § 2402(d) indicate that Petitioner was suitable for parole, including her signs of remorse, reduced possibility of recidivism due to her age at the time (forty-five), realistic plans for release, marketable skills that can be put to use upon release, and participation in institutional activities such as NA and AA and therapy that indicate an enhanced ability to function within the law upon release. See Cal. Code Regs. tit. 15, § 2402(d). The Governor also noted that, although Petitioner had a "turbulent pre-prison history, which included verbal, emotional, and sexual abuse, and prostituting herself, [she] had

1 no criminal record at the time of Tameron's murder." Pet. Ex. C
2 at 2.

3 Nevertheless, the Governor reversed the Board's findings
4 because of "circumstances surrounding this particularly monstrous
5 -- and premeditated -- crime." Id. In the reversal, the Governor
6 emphasized Petitioner's role in planning the victim's murder, not
7 just the kidnapping. The Governor also noted, "The manner in
8 which this crime was planned and carried out -- particularly
9 against one so young and vulnerable -- demonstrates exceptional
10 depravity and an utterly callous disregard for human life and
11 suffering." Id. According to Petitioner's 1992 mental health
12 evaluation, Petitioner was "the only one who was allowed to take
13 Tameron places alone." Id. at 3. Therefore, by sending Tameron
14 out on an errand by herself, knowing that Tameron would be
15 kidnapped, Petitioner "not only perpetrated a chilling and
16 revolting crime, she did so by violating her position of trust
17 with Tameron and Tameron's family." Id. In sum, the Governor
18 reversed the parole board's grant because the gravity of
19 Petitioner's offense outweighed the positive factors supporting
20 parole. Id.

21 Even if, for a certain period of time, the commitment offense
22 provided some evidence of unsuitability based upon Petitioner's
23 continuing danger to the community, the Governor's reversal does
24 not comport with federal due process standards because twenty-five
25 years later the commitment offense can no longer constitute the
26 sole reason for a finding of parole unsuitability. See Biggs, 334
27 F.3d at 917.

28 Although In re Dannenberg held that the Board may rely on the

1 commitment offense to deny parole by heavily weighing its degree
2 of violence and viciousness, the offense must be "particularly
3 egregious" to justify parole denial under California law. 34 Cal.
4 4th 1061, 1070 (2005). While the circumstances of this offense
5 were arguably more aggravated than the minimum necessary to
6 sustain a conviction for second degree murder, Petitioner did not
7 participate in the actual murder. Her role was limited to the
8 planning stages and getting the victim out of the house alone.

9 In a recent decision, In re Lawrence, the California Supreme
10 Court held that the assumption that "a particularly egregious
11 commitment offense always will provide the requisite modicum of
12 evidence supporting the Board's or the Governor's decision," as In
13 re Rosenkrantz and In re Dannenberg had been interpreted to imply,
14 was "inconsistent with the statutory mandate that the Board and
15 the Governor consider all relevant statutory factors when
16 evaluating an inmate's suitability for parole, and inconsistent
17 with the inmate's due process liberty interest in parole . . .
18 recognized in Rosenkrantz." In re Lawrence, 44 Cal. 4th 1181,
19 1191 (2008) (citing In re Rosenkrantz, 29 Cal. 4th at 664). The
20 Board found Lawrence suitable for parole for the fourth time,
21 after she had been in custody for twenty-four years on her life
22 sentence for first degree murder, and the Governor for the fourth
23 time relied upon the circumstances of the offense to justify his
24 reversal of the Board's decision. In re Lawrence, 44 Cal. 4th at
25 1197-1201. Lawrence filed a state habeas petition in the
26 California Court of Appeal and challenged on several grounds the
27 Governor's decision. Id. at 1201. The appellate court in a split
28 decision issued a writ vacating the Governor's reversal and

1 reinstating the Board's latest finding of parole suitability. Id.
2 The California Supreme Court affirmed, holding that the record
3 failed to support the Governor's conclusion that Lawrence remained
4 a current danger to public safety. The court further held that
5 the commitment offense alone did not constitute "some evidence"
6 that the prisoner posed a threat to public safety:

7 In some cases, such as this one, in which evidence of
8 the inmate's rehabilitation and suitability for parole
9 under the governing statutes and regulations is
10 overwhelming, the only evidence related to unsuitability
11 is the gravity of the commitment offense, and that
12 offense is both temporally remote and mitigated by
13 circumstances indicating the conduct is unlikely to
14 recur, the immutable circumstance that the commitment
15 offense involved aggravated conduct does not provide
16 "some evidence" inevitably supporting the ultimate
17 decision that the inmate remains a threat to public
18 safety.

19 Id. at 1191. The court found a due process violation and
20 concluded that:

21 although the Board and the Governor may rely upon the
22 aggravated circumstances of the commitment offense as a
23 basis for a decision denying parole, the aggravated
24 nature of the crime does not in and of itself provide
25 some evidence of current dangerousness to the public
26 unless the record also establishes that something in
27 the prisoner's pre- or post-incarceration history, or
28 his or her current demeanor and mental state, indicates
that the implications regarding the prisoner's
dangerousness that derive from his or her commission of
the commitment offense remain probative to the
statutory determination of a continuing threat to
public safety.

Id. at 1214 (emphasis in original).

In contrast, in the companion case of In re Shaputis, the
California Supreme Court did not find a due process violation, but
rather found "some evidence" of "current dangerousness," stating:

By statute, it is established that the gravity of the
commitment offense and petitioner's current attitude
toward the crime constitute factors indicating

1 unsuitability for parole, and because in this case these
2 factors provide evidence of the risk currently posed by
3 petitioner to the community, they provide "some
 evidence" that petitioner constitutes a current threat
 to public safety.

4 In re Shaputis, 44 Cal. 4th 1241, 1246 (2008) (citations omitted).

5 Following several unfavorable parole hearings and after rulings by
6 the Superior Court as well as the Court of Appeal, the Board found
7 Shaputis suitable for parole after he had been in custody for more
8 than eighteen years on his seventeen-years-to-life sentence for
9 the second degree murder of his wife. Id. at 1245, 1252-53. The
10 Governor reversed the Board's decision, concluding that Shaputis
11 constituted a threat to public safety and, specifically, that the
12 gravity of the offense as well as his lack of insight and failure
13 to accept responsibility outweighed the factors favoring
14 suitability for parole. Id. at 1253. In a split decision, the
15 Court of Appeal issued a writ vacating the Governor's reversal.
16 Id. at 1253-54. The California Supreme Court concluded that the
17 appellate court erred in setting aside the Governor's decision
18 because "the Court of Appeal majority improperly substituted its
19 own parole suitability determination for that of the Governor."
20 Id. at 1255. The state supreme court held that Shaputis's claim
21 that the shooting was an "accident," considered with "evidence of
22 [his] history of domestic abuse and recent psychological reports
23 reflecting that his character remains unchanged and that he is
24 unable to gain insight into his antisocial behavior despite years
25 of therapy and rehabilitative 'programming,'" all provided "some
26 evidence" in support of the Governor's conclusion that Shaputis
27 remained dangerous and was unsuitable for parole. Id. at 1260.

1 Here, Petitioner was found not suitable at twelve parole
2 consideration hearings prior to 2002. She was finally found
3 suitable for parole at her thirteenth hearing, after she had been
4 in custody for over twenty-three years on her fifteen years to
5 life sentence. The Governor looked at the same evidence as the
6 Board and reached the opposite conclusion. Then, in 2004, the
7 Board again found Petitioner suitable for parole, and the Governor
8 again reversed the Board's decision.

9 This case is analogous to In re Lawrence, and it is just the
10 sort of case the Ninth Circuit envisioned in Biggs, Sass and
11 Irons: where the commitment offense is relied on to deny parole
12 after service of considerably more than the minimum term,
13 notwithstanding the prisoner's exemplary behavior and evidence of
14 rehabilitation since the commitment offense. In light of the
15 extensive evidence of Petitioner's in-prison rehabilitation and
16 exemplary behavior, the reliance on the unchanging facts of the
17 murder to deny Petitioner parole for the fourteenth time -- over
18 twenty-three years into her minimum fifteen year sentence --
19 violated her right to due process. The "some evidence" standard
20 provides more protection than against fabricated charges or
21 bureaucratic mistakes; the "some evidence" standard also protects
22 against arbitrary decisions. See Hill, 472 U.S. at 454-55, 457.
23 The state court's conclusion that the commitment offense
24 constituted "some evidence" to support the Governor's decision
25 constituted an unreasonable application of Hill. Id.

26 Petitioner is entitled to relief under 28 U.S.C. § 2254(d)
27 because the Governor's reversal of the Board was not supported by
28

1 "some evidence" and the state court's decision was an unreasonable
2 application of federal law.

3 Accordingly, the Court GRANTS the petition for a writ of
4 habeas corpus.

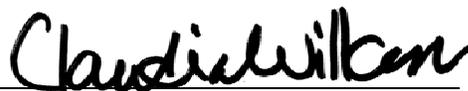
5 CONCLUSION

6 For the reasons stated above, the petition for writ of habeas
7 corpus is GRANTED. Directing Respondent to calculate a release
8 date would be futile because Petitioner was released on parole on
9 September 25, 2008. Therefore, the Court reinstates the Board's
10 2004 parole grant and remands to the California Department of
11 Corrections and Rehabilitation to calculate Petitioner's term of
12 parole.

13 The Clerk of the Court shall terminate all pending motions,
14 enter judgment and close the file. Each party shall bear his or
15 her own costs. The Court retains jurisdiction to insure
16 compliance with its order.

17
18 IT IS SO ORDERED.

19 DATED: 2/2/09



CLAUDIA WILKEN
United States District Judge

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