

United States District Court
For the Northern District of California

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

KEITH HOLDER,

Petitioner,

v.

BEN CURRY, Warden,

Respondent.

No. C 08-2572 CW (PR)

ORDER GRANTING PETITION FOR
WRIT OF HABEAS CORPUS

INTRODUCTION

Pro se Petitioner Keith Holder, a state prisoner incarcerated at the Correctional Training Facility in Soledad, California, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging the October 26, 2006 decision of the California Board of Parole Hearings (BPH) denying him parole at his fifth parole suitability hearing. Doc. No. 1 at 3 & 24. At the time he was denied parole in 2006, Petitioner had served approximately sixteen years on his seven to life sentence, over nine years past his minimum eligible parole date of May 13, 1997. Doc. No. 1-1 at 103.

On September 10, 2008, the Court issued an Order to Show Cause

1 why the writ should not be granted. Doc. No. 3. On January 8,
2 2009, Respondent filed an Answer. Doc. No. 4. On February 11,
3 2009, Petitioner filed a Traverse. Doc. No. 5.

4 After the matter was submitted, on April 22, 2010, the Ninth
5 Circuit issued its decision in Hayward v. Marshall, 603 F.3d 546
6 (9th Cir. 2010) (en banc), which addressed important issues relating
7 to federal habeas review of BPH decisions denying parole to
8 California state prisoners. On May 6, 2010, the Court ordered the
9 parties to file supplemental briefing explaining their views of how
10 the Hayward en banc decision applies to the facts presented in
11 Petitioner's challenge to the BPH's decision denying him parole.
12 Doc. No. 6. Respondent filed supplemental briefing on May 28, 2010;
13 Petitioner filed his on June 17, 2010. Doc. Nos. 7 & 8.

14 Having considered the entire record before the Court and all of
15 the papers filed by the parties, the Court GRANTS the Petition and
16 remands the matter to the BPH. Within thirty (30) days from the
17 date of this Order, the BPH must set a parole date for Petitioner
18 unless it finds new evidence, arising after the 2006 hearing, of
19 current dangerousness. See Pirtle v. California Board of Prison
20 Terms, No. 07-16097, 2010 WL 2732888 at *8 (9th Cir. July 12, 2010).

21 BACKGROUND

22 I. The Commitment Offense and Petitioner's State Court Challenges
23 to His October 26, 2006 Denial of Parole

24 The BPH summarized the facts of Petitioner's commitment
25 offense, as derived from pages two and three of the initial
26 probation report, as follows:

27 On May 17th, 1990, Kiomi Takazato . . . spent

1 the day with her friend [Petitioner] Keith
2 Holder whom she ha[d] known for two years and
3 who ha[d] many lady friends in the Japanese
4 community. She left her baby in her home with
5 her live-in housekeeper and babysitter,
6 Mariquette Estelilla When [Takazato]
7 returned home with [Petitioner] at 12 or 12:30
8 a.m., she found the housekeeper, Estelilla bound
9 and gagged. She was handcuffed to a pole in the
10 living room. Estelilla told [Takazato] that a
11 man came into her room about 11 p.m., grabbed
12 her by the hand and led her into the living room
13 where he handcuffed, gagged her, and blindfolded
14 her. He told her not to call the police or he
15 would kill everyone in the house. He then took
16 the baby. [Petitioner] found a ransom note,
17 which read, ["I want \$400,000, 24 hours. I
18 will call. No cops or you never see baby.["]
19 They decided not to call the police. Later in
20 the morning, [Petitioner] told Kiomi that he had
21 received a call from a man who said the baby was
22 at the Compton Police Department and was all
23 right; however, because the kidnapper threatened
24 to return and kill everyone, they decided to
25 tell the police that the baby had been taken by
26 a friend, and that everything was okay. After
27 they got the baby, they would then tell the
28 police the truth. When they arrived at the
Compton Police Department, the police separated
[Petitioner and Takazato], and after questioning
both of them, arrested [Petitioner]. At 11:35
p.m. on May 17th 1990, witness Ronald Coleman
called the police regarding a kidnapping. He
told the police that the kidnapping was over a
mafia-type drug deal and that the baby was from
wealthy Chinese parents. He indicated that the
kidnapper was Steve Rose. With the help of the
witness, the police stopped Steve Rose at 11:45
p.m. while he was driving a blue BMW and the
victim's baby was found in the vehicle.

Doc. No. 1-1 at 13-14.

Following a jury trial, Petitioner was convicted of kidnap for
ransom and sentenced to seven years to life in state prison. Doc.
No. 1 at 2-3; Doc. No. 1-1 at 103. He was received by the
California Department of Corrections and Rehabilitation on March 1,
1991. Doc. No. 1-1 at 103. Prior to appearing before the BPH on

1 October 26, 2006, Petitioner had been denied parole four times. Id.
2 at 24.

3 Petitioner unsuccessfully challenged the BPH's decision denying
4 him parole for the fifth time in the state superior and appellate
5 courts. Doc. No. 1-1 at 103-08. On April 30, 2008, the California
6 Supreme Court summarily denied Petitioner's petition for review.
7 Doc. No. 4-12 at 2. This federal Petition for a Writ of Habeas
8 Corpus followed. Doc. No. 1.

9 II. The October 26, 2006 Parole Suitability Hearing

10 At Petitioner's October 26, 2006 parole suitability hearing,
11 the BPH recited the facts of Petitioner's commitment offense and
12 asked him to explain his involvement. Petitioner thanked the BPH
13 for this opportunity and stated:

14 I'm totally responsible for everything that
15 happened with this crime. And what caused me to
16 . . . take part in this crime was that at the
17 time, . . . I was in love with Kiomi and . . . I
18 was running a small sight seeing tour business.
19 And I knew at the time that I didn't . . . have
20 the financial ability to afford the kind of
21 lifestyle that she was used to. And the idea
22 was my idea, and it was all about just trying to
23 scare Mr. Takazato into thinking that the baby
24 was going to be harmed and the baby was not
25 going to be returned, and we was [sic] just
26 actually trying to embezzle money from him, so I
27 [could] invest the money into my business and
28 try to afford a lifestyle that I know she was
used to. So, I'm not going to shift blame to
anyone. I'm fully responsible for what I've
done, and I'm very sorry for what I've done. I
think the record will reflect from the very
first Board Hearing, I've always been
straightforward and honest about my part in this
crime. And I know I've done some things wrong.
And of course if I can make it right, if I can
change it, I would. I did that crime. It was
something that I know that I should not have
done and I was wrong for doing what I've done.

1 Doc. No. 1-1 at 15-16. Later in the hearing, Petitioner returned to
2 the subject of his remorse for the crime and gave the BPH some
3 insight into how his imprisonment had changed him, stating:

4 I know the difference between right and wrong.
5 I have not lived all my life being involved in
6 crime. . . . I've worked before. I'm from a
7 very solid family. I understand the [gravity]
8 of what I have done. I know that I can be [a]
9 much better person, and I don't want to live the
10 life of just living in prison or hurting other
11 people. . . . I would like to do unto others
12 that I would like others to do unto me. That's
13 the way I'm going to live my life from the day
14 [you decide] to give me a second chance. I'm
15 not going to be in trouble anymore. I know
16 that. I'm almost 50 years old . . . and this
17 [is] not the way I want to live my life. So, I
18 know that when I leave here, the day I leave
19 here, I'm going to live my life as a productive
20 member of society wherever I go. I'm never
21 going to be in trouble again, because I don't
22 want to be locked up and be away from my family.
23 My mom is old. My dad is old. I don't want to
24 be in prison when I lose them, you know? And I
25 just know that I'm never going to be in trouble
26 again. There's no doubt in my mind. I'm not
27 from that kind of background. I got myself
28 involved in a crime. I got caught, I did my
time, and while I was here, I wanted to show
people that I can be here without getting
involved in the things that you know, plague
most of the prison So, I believe that
when I get out, I won't have a problem.

20 Id. at 39-40. Still later in the hearing, Petitioner added:

21 I'm trying my best. I'm doing my best, and I
22 think that in [sixteen] years that I've been
23 down in prison, I think I have proven that I can
24 stay out of trouble. . . . I just want you to
25 know that I'm going to do unto others that I'd
26 like others to do unto me. And I understand
27 that this is a serious crime. And I've always
28 come here, and the times that I've [sat] in
front of you, I've always been straightforward
with you. But, there's nothing I can do to
change what I've done [sixteen] years ago
. . . . There's nothing I can do. But I can
tell you I'm a better person today. And I just

1 want to be able to get out and take care of my
2 mom . . . just whatever I have left. That's all
3 I want to do. I'm not going to be in handcuffs
4 again. I know that for a fact. I know you
5 don't know that because I'm sitting here,
6 because I did something terrible . . . to my
7 friend. . . . But I'm telling you, I know I'm
8 not going to be in trouble again, so whenever
9 you're ready to give me that chance, I hope I'll
10 be able to sit here in front of you and you say,
11 Keith, it's your time, you know. There's
12 nothing I can do. I can't change it. I can't
13 change it. I'm very sorry for what I've done,
14 and I think by just showing that I can be a
15 better person because I'm from that environment.
16 I'm not from the environment of drugs, alcohol,
17 guns, killing people, you know, I've done
18 something wrong. . . . it was a bad idea. I
19 take full responsibility for what I've done.
20 Full responsibility. I'm not shifting blame on
21 anybody. . . . I know I did a terrible crime.
22 . . . In my heart, . . . I know I'm going to be
23 a better person . . . when I leave this
24 place. . . . You [will] never pick up the
25 newspaper and see my name in it again.

26 Id. at 58-59.

27 The August 2, 2006 psychological evaluation conducted in
28 anticipation of Petitioner's October 26, 2006 parole suitability
hearing by psychologist W.K. Marek, upon which the BPH relied in
rendering its decision to deny Petitioner parole, substantiated his
feelings of remorse, noting: "[Petitioner] took full responsibility
for his role in the kidnapping. He exhibited remorse and had good
insight into the harm that was caused. His remorse for his crime
appears to be genuine and appropriate." Doc. No. 1-1 at 85; see id.
at 41. The BPH also noted that Dr. Marek found Petitioner's
potential for violence to be no higher than the average citizen in
the community. Doc. No. 1-1 at 41; see id. at 85. Further, the BPH
noted Dr. Marek's observation that Petitioner's involvement in the

1 commitment offense was "essentially an aberration" and that "there
2 [were] no obvious or significant violence precursors for him."
3 Id. The BPH also observed that Dr. Marek commended Petitioner for
4 his "continued participation in Alcoholics Anonymous" and recent
5 completion of an Anger Management course, and noted that he did not
6 have a mental health disorder that required treatment either during
7 his incarceration or on parole. Doc. No. 1-1. at 85; see id. at
8 41-42.

9 The BPH went on to discuss Petitioner's parole plans, citing at
10 least fifteen recent letters of support he received from family
11 members and friends, which included several firm offers of
12 employment, and financial support, as well as a place to live should
13 Petitioner be granted parole. See Doc. No. 1-1 at 44-51.

14 The BPH also noted that Petitioner's only prior contact with
15 the criminal justice system was in 1984 when he received two years
16 of summary probation for misdemeanor fraudulent use of a credit
17 card. Doc. No. 1-1 at 19. The evidence at the hearing also
18 reflected that Petitioner had not received any serious rules
19 violation reports throughout the entire period of his incarceration,
20 and that the last infraction he received was in 1999, some seven
21 years earlier. Id. at 69-70. Finally, the BPH noted Petitioner's
22 recent programming in prison, which included completion of the "Cage
23 Your Rage" anger management program and Dr. Thomas Gordon's Family
24 Effectiveness Training, Harmony in the Home self-help anger
25 management program. Doc. No. 1-1 at 25-26. The BPH also recognized
26 that Petitioner held several jobs while in prison, including Porter,
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28

1 Adult Basic Education, Culinary and Janitorial, and that he
2 "maintained good work reports" while employed.¹ Id. at 27.
3 Petitioner's attorney added that Petitioner does volunteer work in
4 the prison. Id. at 27. The BPH also acknowledged Petitioner's
5 longstanding participation in the Alcoholics Anonymous and Narcotics
6 Anonymous Twelve-Step programs since 1995. Doc. No. 1-1 at 36.
7 Petitioner explained that he has never had an addiction to drugs or
8 alcohol, but described his participation in these programs as:

9 spiritual . . . I ma[k]e amends to all. . . . I
10 made a list of all these people that I've harmed
11 and [am] willing to make amends to them all,
12 which is step eight, because I feel that [step
13 eight is] very important for my life; [for] what
14 I've done. And the program that I go to, NA and
15 AA, it's a program that I go to and I listen to
16 other people's . . . testimonies and things, and
17 maybe I'll get something out of it, but I'm not
18 a drug user. I've never been in alcohol
19 problems, and I've never been involved in
20 anything illegal when it[] [comes] to any kind
21 of illegal substance. So if I go to AA, it
22 helps me out spiritually. It helps me out with
23 things . . . that I've done. . . . It helps
24 . . . because I know that I've done some wrong
25 things and I want to recognize those things.
26 And I've recognized those things.

27 Id. at 37.

28 Regarding his participation in the twelve-step programs, the
29 BPH's Deputy Commissioner Harmon asked Petitioner if he had
30 memorized all twelve steps. Petitioner explained, "I have one to
31 eight memorized, but I['m] going to be truthful, I really gave more
32

33 ¹ When asked if he had a current prison job assignment,
34 Petitioner explained that he has not held a job since 2004 when he was
35 transferred from North Facility and that he is on a waiting list for
36 work because the institution has no available jobs. Doc. No. 1-1 at
37 26-27.

1 attention to step eight; make a list of all . . . to make amends to
2 them all. I thought that was very important. And on step five is
3 that I admit to God and to ourselves, and to other human beings the
4 exact nature of my wrong." Doc. No. 1-1 at 36. Later in the
5 hearing, Commissioner Harmon returned to the subject of Petitioner's
6 participation in the twelve-step programs, which they apparently had
7 discussed at Petitioner's prior parole suitability hearing in 2003:

8 I asked you about the steps and at the time [of
9 your 2003 hearing], . . . I said to you, did you
10 ever learn the steps? And you said, some of the
11 steps. And I said to you, you don't know them
12 all? All the years you've been in it and you
13 don't know the steps? . . . And then you go to
14 explain all the steps and all, but it was
15 obviously a concern and all that. And we
16 discussed the same things. So it's not that
17 we're picking on you, it's just that we just
18 can't get an understanding of why you're in the
19 program, and yet, you still can't -

20 Id. at 54. At this point, Petitioner interrupted Commissioner
21 Harmon, and said:

22 Look, Mr. Harmon, I told you that I enjoy
23 going to the program. I listen to a lot of the
24 testimonies that the guys [give] and I feel that
25 it will help me in a way that, if I met someone
26 someday that is involved in drugs or alcohol,
27 and et cetera, I can share verbally the
28 experiences that I have heard through
29 testimonies from the other guys what drugs and
30 alcohol do to them.

31 Id. Commissioner Harmon responded, "Okay, that's wonderful. That's
32 wonderful. I guess what I'm worried about is another kidnapping."

33 Id. at 55. Commissioner Harmon continued:

34 No, I'm telling you right up front. What
35 you did was one of the most conniving serious
36 crimes that could happen to innocent people in
37 their own home; a place of shelter, a place that
38 should never ever be attacked. And if I have a

1 person that's sitting before me and I believe
2 . . . that person's being deceptive, that's a
3 real concern of mine. And so that's why I'm
4 asking you these questions. Because . . . when
5 I look through these [prior parole suitability
6 hearing] transcripts, [I feel] I'm being snowed.
7 That's what I look at is that there's a lot of
8 verbiage going on, but nothing's happening. I
9 mean everybody knows the words remorse and
10 insight, and all that kind of stuff, but I want
11 to get down to the nitty gritty because the
12 crime that you committed is one of the worst
13 crimes that can happen in my mind to an innocent
14 child and people. So that's why I'm asking you
15 these things.

9 Id.

10 At the conclusion of the evidentiary portion of the hearing,
11 the BPH rendered its decision, and found that Petitioner was "not
12 suitable for parole and would pose an unreasonable risk of danger
13 to society or a threat to public safety if released from prison at
14 this time." Doc. No. 1-1 at 76. The BPH explained the reasons for
15 the one-year denial:

16 This was a cruel offense. Multiple victims were
17 involved in the same incident. It was carried
18 out in a pretty calculated manner . . . which
19 demonstrated a callous disregard for human
20 suffering, particularly related to the maid, Ms.
21 Estelilla. The conclusions are drawn from the
22 statement of facts, which was taken from the
23 probation officer's report, pages two to three
24 which I'm incorporating by reference. . . . As
25 far as institutional behavior goes, the Panel
26 believes that you have not yet sufficiently
27 participated in beneficial self-help or therapy
28 programs. And we do note the misconduct while
incarcerated was sixteen 128A counseling
chronos, the last of which was August 25th ,
1999 for manipulating staff, which was more than
seven years ago.

25

26 Other information bearing unsuitability includes
27 other factors of past mental state, past and

1 present attitude towards the crime, signs of
2 remorse, involvement in any other criminal
3 misconduct, which is reliably documented and any
4 other relevant reliable information or
5 circumstances, which taken alone, may not firmly
6 establish unsuitability, but which when taken
7 together contribute to a pattern which results
8 in unsuitability at this time.

9

10 We really believe you're on the right track and
11 [we] really want to emphasize that with you. We
12 really feel that you've made excellent progress,
13 and the Panel believes you just need to develop
14 some further insight into your behavior related
15 to the life crime and remorse for all the
16 victims including Ms. Estelilla who was
17 terrorized more than anybody else in the whole
18 crime.

19 Id. at 77.

20 The BPH then made the following findings:

21 The prisoner needs further therapy in order to
22 face, discuss, understand and cope with stress
23 in a non-destructive manner. Until additional
24 progress is made, the prisoner continues to be
25 unpredictable and a threat to others.
26 Nevertheless, the prisoner should be commended
27 for his recent completion of Cage Your Rage and
28 particularly for having no serious
disciplinaries the entire time [he's] been in
prison, however, these positive aspects of [his]
behavior don't outweigh the factors of
unsuitability at this time.

Id. at 78.

Commissioner Harmon concluded the hearing by stating the
following:

I think I've been very clear to
[Petitioner] what . . . my expectations of him
would be. He can't put that many years into
that particular program and not really gather
from it what I think he should be able to. You
know, . . . if you're going to come back to the
Board, and I'm going to be on that Panel, I'm
sure going to expect you to be able to at least

1 tell me those steps that don't apply to drinking
2 and alcohol as you see them, but how the other
3 ones may benefit you. Other than that, I'm
4 wondering if the other programs you've been
5 going through, you have not picked up on what
6 those programs represent either. So you know,
7 if you're going to come in and represent
8 something, I sure want to know what you've
9 learned from those programs. But other than
10 that, I mean you know, in the big scheme of
11 things, I do believe you're on the right track
12 as the Commissioner said. You've got work to
13 do. I can envision you at some point being
14 released from prison and I encourage you to
15 listen to what I say . . . in terms of what my
16 expectations are . . . if you were going to come
17 back before me. I was disappointed today. You
18 know, you gave me the same song and dance you
19 gave me a few years ago, and then I pull up the
20 initial hearing and I see you did the same thing
21 then. And I can pull out the other ones too,
22 and I'm sure they're also talking about the same
23 areas, so you know, one thing I don't want to do
24 is mislead you. You're serving a life term and
25 I'm not trying to play God, but I sure want to
26 make sure that when you walk out that door that
27 you're a different person than the person who
28 came in. If that makes any sense to you. My
first obligation is to public safety.

16 Id. at 79-80.

17 III. The State Court Decisions Regarding Petitioner's Challenges to
18 the BPH's October 26, 2006 Denial of Parole

19 The state superior court affirmed the decision of the BPH to
20 deny Petitioner parole. Doc. No. 1-1 at 103. The court noted:

21 The Board found the Petitioner unsuitable
22 for parole after a parole consideration hearing
23 held on October 26, 2006. The Petitioner was
24 denied parole for one year. The Board concluded
25 that the Petitioner was unsuitable for parole
26 and would pose an unreasonable risk of danger to
27 society and a threat to public safety. The
board based its decision primarily upon his
commitment offense.

26 The Court finds that there is some evidence
27 to support the Board's findings that multiple
28 victims were attacked during the commitment

1 offense and that the offense was carried out in
2 a dispassionate and calculated manner.
3 [Citations.] Ms. Estelilla was bound and gagged
4 and made to fear for her life during the
5 kidnapping. Additionally, Ms. Takazato's baby
6 was kidnapped from his home. Although no one
7 was harmed during the offense, these victims
8 were certainly traumatized by the kidnapping.
9 The Petitioner admits that he planned the
10 kidnapping for a couple of weeks. He and his
11 accomplice plotted together and committed the
12 offense in a dispassionate and calculated
13 manner.

14 Id. at 103-04 (emphasis added).

15 The court further found, however, that there was

16 no evidence to support the Board's finding that
17 the commitment offense demonstrated an
18 exceptionally callous disregard for human
19 suffering. [Citations.] Although the
20 kidnapping was certainly a very serious offense,
21 it was not more aggravated or more violent than
22 an ordinary kidnapping for ransom. Therefore,
23 it did not demonstrate an exceptionally callous
24 disregard for human suffering. [Citation.]

25 Id. at 104 (emphasis added).

26 The court further observed:

27 The Board also considered the Petitioner's
28 prior grand theft conviction and the Board's
perception that he needs more therapy and self-
help in order to gain insight about his offense.
While these factors may not justify a finding of
unsuitability, the Board may properly consider
them as relevant to a determination of whether
the Petitioner is suitable for parole.

The Board also considered the Petitioner's
post-conviction gains, including his
participation in several anger management and
other self-help programs; his two completed
vocations; his multitude of job offers in the
United States and Trinidad; as well as his
commendable ability to remain free of any
serious discipline throughout his incarceration.
However, [the Board] still concluded that the
Petitioner would pose an unreasonable threat to
public safety. [Citation.] . . . The nature of

1 of the [decision to deny parole] is "extremely
2 deferential."

3 Hayward, 603 F.3d at 561-62 (footnotes and citations omitted).

4 The court further explained,

5 Subsequent to Hayward's denial of parole, and
6 subsequent to our oral argument in this case,
7 the California Supreme Court established in two
8 decisions, In re Lawrence . . . and In re
9 Shaputis, . . . that as a matter of state law,
10 "some evidence" of future dangerousness is
11 indeed a state sine qua non for denial of parole
12 in California. We delayed our decision in this
13 case so that we could study those decisions and
14 the supplemental briefs by counsel addressing
15 them. As a matter of California law, "the
16 paramount consideration for both the Board [of
17 Prison Terms] and the Governor under the
18 governing statutes is whether the inmate
19 currently poses a threat to public safety."
20 . . . There must be "some evidence" of such a
21 threat, and an aggravated offense "does not, in
22 every case, provide evidence that the inmate is
23 a current threat to public safety." . . . The
24 prisoner's aggravated offense does not establish
25 current dangerousness "unless the record also
26 establishes that something in the prisoner's
27 pre- or post-incarceration history, or his or
28 her current demeanor and mental state" supports
the inference of dangerousness. . . . Thus, in
California, the offense of conviction may be
considered, but the consideration must address
the determining factor, "a current threat to
public safety."

20 Hayward, 603 F.3d at 562 (footnotes and citations omitted).

21 After providing this background on California law as it applies
22 to parole suitability determinations, the court then explained the
23 role of a federal district court charged with reviewing the decision
24 of either the BPH or the governor denying a prisoner parole.
25 According to the Ninth Circuit, this Court must decide whether a
26 decision "rejecting parole was an 'unreasonable application' of the
27 California 'some evidence' requirement, or was 'based on an

1 unreasonable determination of the facts in light of the evidence.'"
2 Hayward, 603 F.3d at 562-63 (citations omitted); see also Cooke v.
3 Solis, 606 F.3d 1206, 1208, n. 2 & 1213 (9th Cir. 2010) (applying
4 Hayward and explicitly rejecting the state's argument that "the
5 constraints imposed by AEDPA preclude federal habeas relief" on
6 petitioner's claim; noting that in Hayward, the court "held that due
7 process challenges to California courts' application of the 'some
8 evidence' requirement are cognizable on federal habeas review under
9 AEDPA").

10 DISCUSSION

11 I. California Law Regarding Parole Suitability Determinations

12 When assessing whether California's parole board's suitability
13 determination was supported by "some evidence," the court's analysis
14 is framed by the "regulatory, statutory and constitutional
15 provisions that govern parole decisions in California." Cooke, 606
16 F.3d at 1213 (citing In re Rosenkrantz, 29 Cal. 4th 616 (2002)); see
17 Hayward, 603 F.3d at 561-62. Under California law, prisoners
18 serving indeterminate life sentences, like Petitioner, become
19 eligible for parole after serving minimum terms of confinement
20 required by statute. In re Dannenberg, 34 Cal. 4th 1061, 1069-70
21 (2005). Regardless of the length of the time served, "a life
22 prisoner shall be found unsuitable for and denied parole if in the
23 judgment of the panel the prisoner will pose an unreasonable risk of
24 danger to society if released from prison." Cal. Code Regs. tit.
25 15, § 2402(a). In making this determination, the BPH must consider
26 various factors, including the prisoner's social history, past and
27

1 present mental state, past criminal history, the base and other
2 commitment offenses, including behavior before, during and after the
3 crime, past and present attitude toward the crime and any other
4 information that bears on the prisoner's suitability for release.
5 See Cal. Code Regs. tit. 15, § 2402(b)-(d).

6 In considering the commitment offense, the BPH must determine
7 whether "the prisoner committed the offense in an especially
8 heinous, atrocious or cruel manner." Cal. Code Regs. tit. 15,
9 § 2402(c)(1). The factors to be considered in making that
10 determination include: "(A) Multiple victims were attacked, injured
11 or killed in the same or separate incidents; (B) The offense was
12 carried out in a dispassionate and calculated manner, such as an
13 execution-style murder; (C) The victim was abused, defiled or
14 mutilated during or after the offense; (D) The offense was carried
15 out in a manner which demonstrates an exceptionally callous
16 disregard for human suffering; (E) The motive for the crime is
17 inexplicable or very trivial in relation to the offense." Id.

18 As the Ninth Circuit observed in Hayward, the California
19 Supreme Court has held that, "the core statutory determination
20 entrusted to the Board and the Governor [in determining a prisoner's
21 parole suitability] is whether the inmate poses a current threat to
22 public safety" In re Lawrence, 44 Cal. 4th 1181, 1191
23 (2008). And, "the core determination of 'public safety' under the
24 statute and corresponding regulations involves an assessment of an
25 inmate's current dangerousness." Id. at 1205 (emphasis in original)
26 (citing Rosenkrantz, 29 Cal. 4th 616 and Dannenberg, 34 Cal. 4th
27
28

1 1061). The court further explained that:

2 a parole release decision authorizes the Board
3 (and the Governor) to identify and weigh only
4 the factors relevant to predicting "whether the
5 inmate will be able to live in society without
6 committing additional antisocial acts." . . .
7 These factors are designed to guide an
8 assessment of the inmate's threat to society, if
9 released, and hence could not logically relate
10 to anything but the threat currently posed by
11 the inmate.

12 Lawrence, 44 Cal. 4th at 1205-06 (citations omitted). The relevant
13 inquiry, therefore, is:

14 whether the circumstances of the commitment
15 offense, when considered in light of other facts
16 in the record, are such that they continue to be
17 predictive of current dangerousness many years
18 after commission of the offense. This inquiry
19 is, by necessity and by statutory mandate, an
20 individualized one, and cannot be undertaken
21 simply by examining the circumstances of the
22 crime in isolation, without consideration of the
23 passage of time or the attendant changes in the
24 inmate's psychological or mental attitude.

25 In re Shaputis, 44 Cal. 4th 1241, 1254-55 (2008).

26 The evidence of current dangerousness "must have some indicia
27 of reliability." In re Scott, 119 Cal. App. 4th 871, 899 (2004)
28 (Scott I). Indeed, "the 'some evidence' test may be understood as
meaning that suitability determinations must have some rational
basis in fact." In re Scott, 133 Cal. App. 4th 573, 590, n. 6
(2005) (Scott II).

Subsequent to Hayward, the Ninth Circuit issued decisions in
Cooke, 606 F.3d 1206, and Pirtle, 2010 WL 2732888, both of which
focused on the notion that the "some evidence" of current dangerous
must be reliable. In Cooke, the court ultimately reversed the
district court's denial of Cooke's challenge to the BPH's decision

1 denying him parole, finding that the BPH's stated reasons for
2 denying parole did not support the conclusion that Cooke posed a
3 current threat to public safety. Cooke, 606 F.3d at 1216.

4 Specifically, the court stated:

5 [E]ach of the Board's findings . . . lacked any
6 evidentiary basis. Nothing in the record
7 supports the state court's finding that there
8 was "some evidence" in addition to the
9 circumstances of the commitment offense to
10 support the Board's denial of Petitioner's
11 parole. The Parole Board's findings were
12 individually and in toto unreasonable because
13 they were without evidentiary support. When
14 habeas courts review the "some evidence"
15 requirement in California parole cases, both the
16 subsidiary findings and the ultimate finding of
17 some evidence constitute factual findings.
18 Here, there was no evidence that reasonably
19 supports either the necessary subsidiary
20 findings or the ultimate "some evidence"
21 finding. Accordingly, we hold that the state
22 court decision was "based on an unreasonable
23 determination of the facts in light of the
24 evidence.'" Hayward, 603 F.3d at 563 (quoting
25 28 U.S.C. § 2254(d)(2)). Cooke is entitled to a
26 writ of habeas corpus.

27 Id.; see also Pirtle, 2010 WL 2732888 at *8 (affirming the district
28 court's decision to grant habeas relief, concluding, "In sum, there
is no evidence in the record to support the Board's finding that
Pirtle poses a current threat to public safety. The Board's stated
reasons for the denial of parole either lacked evidentiary support,
had no rational relationship to Pirtle's current dangerousness, or
both.")

II. Analysis of Petitioner's Claim

Petitioner seeks federal habeas corpus relief from the BPH's
October 26, 2006 decision finding him unsuitable for parole on the
ground that the decision did not comport with due process. Doc. No.

1 1.

2 Respondent argues that Petitioner is not entitled to relief
3 because he has not demonstrated that the state court decision was
4 contrary to, or an unreasonable application of, the California "some
5 evidence" standard, or that it was based on an unreasonable
6 determination of the facts in light of the evidence. Doc. Nos. 4 &
7 7. In its supplemental post-Hayward briefing, Respondent notes that
8 the state appellate court was the highest state court to address the
9 merits of Petitioner's claim in a reasoned decision. That decision
10 read, in its entirety, "The court has read and considered the
11 petition for writ of habeas corpus filed January 15, 2008. The
12 petition is denied. The record submitted reflects some evidence to
13 support the challenged decision. In re Dannenberg (2005) 34 Cal.
14 4th 1061, 1071, 1080; In re Rosenkrantz (2002) 29 Cal. 4th 616, 664-
15 665."

16 Because in its decision denying Petitioner relief, the state
17 superior court provided not just a legal conclusion and unexplained
18 case citations, but analysis as well, it is that decision that the
19 Court analyzes under AEDPA. See LaJoie v. Thompson, 217 F.3d 663,
20 669 n.7 (9th Cir. 2000); Williams v. Rhoades, 354 F.3d 1101, 1106
21 (federal court may look to any lower state court decision that was
22 examined, and whose reasoning was adopted, by the highest state
23 court to address the merits of a petitioner's claim).

24 As the superior court noted in upholding the BPH's finding that
25 Petitioner was unsuitable for parole, the BPH "based its decision
26 primarily upon his commitment offense." The superior court
27

28

1 concluded that "[t]he nature of Petitioner's offense constitutes the
2 modicum of evidence required to support the Board's finding of
3 unsuitability." Doc. No. 1-1 at 103 & 105. As explained below,
4 after careful review of the record, the Court finds that the state
5 courts' approvals of the BPH's decision to deny Petitioner parole
6 were an unreasonable application of the California "some evidence"
7 standard, and were based on an unreasonable determination of the
8 facts in light of the evidence presented in the state courts. See
9 Hayward, 603 F.3d at 562-63.

10 Although the BPH relied almost solely on the commitment
11 offense, it noted other reasons for a finding of unsuitability,
12 which included "past mental state, past and present attitude towards
13 the crime, signs of remorse and involvement in any other criminal
14 misconduct." Doc. No. 1-1 at 77. But an examination of the record
15 shows these findings are not only unsupported by any evidence in the
16 record, but are, in fact, contradicted by it. See Cooke, 606 F.3d
17 at 1216 (when habeas courts review the "some evidence" requirement
18 in California parole cases, both the subsidiary findings and the
19 ultimate finding of some evidence must have reasonable factual
20 support); Pirtle, 2010 WL 2732888 at *8.

21 In his August 4, 2006 psychological evaluation prepared for and
22 submitted as evidence at Petitioner's October 26, 2006 parole
23 suitability hearing, under the heading "Current Mental
24 Status/Treatment Needs," Dr. Marek observed:

25 [Petitioner] was oriented to time, place
26 and person, evincing no symptomatology. He was
27 not depressed and exhibited congruent affect.
28 He was calm and cooperative. His behavior was

1 appropriate. His is estimated to be in the
2 average range of intellectual functioning. He
3 exhibited good insight and remorse, especially
4 as it relates to his crime.

5 Doc. No. 1-1 at 84. Under the heading "Clinical Observations/
6 Comments/Recommendations," the psychologist observed:

7 [Petitioner] is competent and responsible
8 for his behavior. He has the capacity to abide
9 by institutional standards and has done so for
10 the last several years. He does not have a
11 mental health disorder which would necessitate
12 treatment either during his incarceration or on
13 parole. He is to be commended for his continued
14 participation in [Alcoholics Anonymous]. Since
15 his last hearing, he says he has completed
16 another self-help group, Anger Management. No
17 treatment recommendations are being made because
18 he does not have a mental health disorder.
19 Parole decisions should be based on custody
20 factors.

21 Id. at 85; see id. at 41-42. The psychologist further noted that
22 the "prognosis is positive for [Petitioner] to be able to maintain
23 his current mental state in the community upon parole." Id. at 85.
24 And, as noted above, Dr. Marek's evaluation indicated Petitioner did
25 not require mental health treatment, either while in prison or on
26 parole, a statement that lies in direct contrast to the BPH's
27 factually unsupported conclusion that Petitioner "needs further
28 therapy in order to face, discuss, understand and cope with stress
in a non-destructive manner." Doc. No. 1-1 at 78.

In the area of Assessment of Dangerousness, the psychologist
found that

[Petitioner's] violence potential is obviously
lower than the average inmate based on his good,
recent institutional adjustment. If released to
the community, his violence potential is
estimated to be no higher than the average
citizen in the community. It appears his

1 involvement in the incident offense was
2 essentially an aberration for him. There are no
3 obvious or significant violence precursors for
4 him.

5 Id. at 41; see id. at 85.

6 Petitioner's two prior psychological evaluations provided
7 similar conclusions regarding his mental state and lack of need for
8 treatment. In an evaluation dated December 5, 2002, under the
9 heading "Current Mental Status/Treatment Needs," a different
10 psychologist observed:

11 [Petitioner] was cooperative and alert. He
12 was appropriately dressed and groomed. His
13 speech was normally articulate and contextually
14 meaningful. His mood and affect were within
15 normal limits. His behavior was appropriate to
16 content. His intellectual functioning was
17 clinically estimated to be within average to
18 above average range. There was no evidence of a
19 mood or thought disorder. His judgment appeared
20 to be sound.

21 Id. at 89. This psychologist concluded: "[Petitioner's] prognosis
22 is positive for being able to maintain his current mental state in
23 the community upon parole." Id. In yet another psychological
24 evaluation dated March 27, 1996, a third psychologist concluded:

25 [Petitioner] has acquired a much more
26 positive attitude over the past two-three years.
27 There are no [serious disciplinary violations].
28 There is no diagnosable psychopathology.
Violence potential within the institutional
setting has been much less than average and in a
less controlled setting, such as return to the
community, violence potential would continue to
be much less than average.

29 Id. at 93.

30 Regarding Petitioner's signs of remorse, Dr. Marek, who
31 conducted Petitioner's most recent psychological evaluation,
32
33

1 observed that he "took full responsibility for his role in the
2 kidnapping. He exhibited remorse and had good insight into the harm
3 that was caused. His remorse for his crime appears to be genuine
4 and appropriate." Doc. No. 1-1 at 85; see id. at 41. And, as noted
5 earlier, at the hearing, Petitioner spoke at length regarding the
6 depths of his remorse over what he had done. See Doc. No. 1-1 at
7 15-16, 20, 39-40 & 57-59.

8 In light of this evidence regarding Petitioner's past and
9 present mental state and signs of remorse, as well as the
10 conclusions of three psychologists that Petitioner's violence
11 potential was no higher than that of the average citizen in the
12 community, the Court finds no evidence to support the BPH's
13 conclusion that Petitioner exhibited lack of remorse and poor
14 insight into his crime. See Cooke, 606 F.3d at 1216; Pirtle, 2010
15 WL 2732888 at *8 ("[t]he record contains no evidence that
16 contradicts [the] professional assessment [of the psychologist who
17 concluded the petitioner] was neither unstable [n]or potentially
18 dangerous"). Similarly, here, there was no reliable evidence to
19 suggest that if released on parole, Petitioner would pose an
20 unreasonable risk of danger to society or a threat to public safety.
21 See Cal. Code Regs. tit. 15, § 2402(a).

22 The Court therefore concludes that the state courts'
23 determinations that the BPH's findings constituted "some evidence"
24 of current dangerousness was an "'unreasonable application' of the
25 California 'some evidence' requirement, and was 'based on an
26 unreasonable determination of the facts in light of the evidence.'" "

1 Hayward, 603 F.3d at 562-63 (citations omitted); see Cooke, 606 F.3d
2 at 1216; Pirtle, 2010 WL 2732888 at *8. As a result, Petitioner is
3 entitled to federal habeas relief.

4 CONCLUSION

5 For the foregoing reasons, the Petition for a Writ of Habeas
6 Corpus is GRANTED. Within thirty (30) days from the date of this
7 Order, the BPH must set a parole date for Petitioner unless it finds
8 new evidence, arising after the 2006 hearing, of current
9 dangerousness. Within ten (10) days thereafter, Respondent must
10 file a notice with the Court confirming Petitioner's parole date.
11 Within seven (7) days after the parole date, Respondent must file a
12 notice informing the Court whether Petitioner was released on
13 parole. The Court retains jurisdiction to enforce its Order.

14 The Clerk of the Court shall terminate all pending motions,
15 enter judgment and close the file. Each party shall bear his own
16 costs.

17
18 IT IS SO ORDERED.

19
20 Dated: 8/6/2010



21 _____
22 CLAUDIA WILKEN
23 United States District Judge
24
25
26
27
28

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 KEITH HOLDER,

5 Plaintiff,

6 v.

7 BEN CURRY et al,

8 Defendant.

Case Number: CV08-02572 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
10 Northern District of California.

11 That on August 6, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in
13 the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's
14 office.

15 Keith Holder
16 E87291
17 P.O. Box 689 - FW233
18 Soledad, CA 93960

19 Dated: August 6, 2010

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk