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United States District Court  
For the Northern District of California

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

VONDELL L. LEWIS, No. C-07-5976 TEH (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS

BEN CURRY, Warden

Respondent.

\_\_\_\_\_ /

Pro se Petitioner Vondell Lewis, a state prisoner incarcerated at the California Correctional Training Facility in Soledad, California, seeks a writ of habeas corpus under 28 U.S.C. section 2254 challenging the California Board of Parole Hearings' ("BPH") May 5, 2006 decision to deny him parole, which, for the reasons that follow, the Court denies.

I

The California Court of Appeal summarized the factual background of the case in an unpublished opinion as follows:  
during the early morning hours of August 30, 1990,

1 appellant, Edna Gonzales and Curtis Fairley were  
2 consuming cocaine and beer outside a house belonging  
3 to "A-Day." Gonzales, the only eyewitness, stated  
4 that she had not slept and had been using cocaine and  
5 drinking beer for the previous 24 hours. She also  
6 testified that a "problem" between A-Day and Fairley  
7 developed and A-Day ordered Fairley off of the  
8 property. Fairley refused to leave and he and A-Day  
9 argued for approximately one hour. Appellant joined  
10 in and also ordered Fairley to leave. When Fairley,  
11 who was "loaded" and crying, still refused to leave,  
12 appellant, who was "kind of buzzed," struck him.  
13 Gonzales could not recall whether appellant or  
14 Fairley was the man who brandished a knife, but  
15 Fairley picked up and threw a bottle at appellant.

9 Appellant left the area and returned  
10 approximately 15 minutes later carrying a sock  
11 which apparently contained a gun. Appellant  
12 resumed the argument with Fairley, then suddenly  
13 ran inside the house, leaving Fairley outside.  
14 Inside, appellant appeared angry and pointed the  
15 gun at the others present and stated that he  
16 would shoot Fairley if Fairley continued  
17 "messing" with him. Appellant then went back  
18 outside, pointed the gun at Fairley and stated,  
19 "I'll put this through your . . . head."  
20 Appellant then fired the gun, fatally wounding  
21 Fairley. The autopsy revealed recent cocaine  
22 use by Fairley and concluded death was caused by  
23 a single bullet wound.

17 Doc. #1, Attachment Two.

18 On May 6, 1991, Petitioner was sentenced to 20 years to  
19 life in state prison following his conviction of second degree  
20 murder with an attached firearm enhancement. Doc. #7-3 at 60. His  
21 minimum eligible parole date was September 20, 2003. Id.

22 On May 5, 2006, Petitioner appeared before BPH for his  
23 second parole suitability hearing and elected to represent himself.  
24 Doc. #7-3 at 60, 61-62; Doc. #7-4 at 42. At that hearing, BPH found  
25 Petitioner was "not suitable for parole and would pose an  
26 unreasonable risk of danger to society or a threat to public safety  
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1 if . . . released from prison." Doc. #7-4 at 68. BPH cited several  
2 reasons to support its decision, including: (1) that the commitment  
3 offense "was carried out in an especially cruel and callous manner"  
4 and demonstrated "an exceptionally callous disregard for human  
5 suffering" in that "the victim was shot in the head while being  
6 unarmed;" (2) that Petitioner was convicted of voluntary  
7 manslaughter as a juvenile for a crime that also involved the use of  
8 a handgun; (3) that Petitioner "failed previous grants of probation  
9 and parole and cannot be counted upon to avoid criminality" and  
10 "failed to profit from society's previous attempts to correct [his]  
11 criminality, including the [California Youth Authority] commitment,  
12 adult probation;" (4) Petitioner's history of substance abuse and  
13 association with gangs; and (5) an "unfavorable" psychological  
14 evaluation. Doc. #7-4 at 68-72.

15           Petitioner unsuccessfully challenged BPH's decision in the  
16 state superior and appellate courts. Doc. #7-2 at 2-3; Doc. #7-5 at  
17 2. On October 24, 2007, the California Supreme Court summarily  
18 denied Petitioner's Petition for Review. Doc. #7-7 at 2. This  
19 federal Petition for a Writ of Habeas Corpus followed. Doc. #1.

20           Per order filed on March 26, 2008, the Court found  
21 Petitioner's claim that BPH violated his due process rights, when  
22 liberally construed, colorable under section 2254, and ordered  
23 Respondent to show cause why a writ of habeas corpus should not be  
24 granted. Doc. #4. Respondent has filed an Answer and Petitioner  
25 has filed a Traverse. Doc. ## 7 & 8.

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II

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified under 28 U.S.C. section 2254, provides "the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying state court conviction." White v. Lambert, 370 F.3d 1002, 1009-10 (9th Cir. 2004). Under AEDPA, this Court may entertain a petition for habeas relief on behalf of a California state inmate "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

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

While circuit law may provide persuasive authority in determining whether the state court made an unreasonable application

1 of Supreme Court precedent, the only definitive source of clearly  
2 established federal law under 28 U.S.C. section 2254(d) rests in the  
3 holdings (as opposed to the dicta) of the Supreme Court as of the  
4 time of the state court decision. Williams, 529 U.S. at 412; Clark  
5 v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

6  
7 III

8 Petitioner seeks federal habeas corpus relief from BPH's  
9 May 5, 2006 decision finding him unsuitable for parole and denying  
10 him a subsequent parole suitability hearing for one year on the  
11 ground that the decision does not comport with due process.

12  
13 A

14 Under California law, prisoners like Petitioner who are  
15 serving indeterminate life sentences for noncapital murders, i.e.,  
16 those murders not punishable by death or life without the  
17 possibility of parole, become eligible for parole after serving  
18 minimum terms of confinement required by statute. In re Dannenberg,  
19 34 Cal. 4th 1061, 1077-78 (2005). At that point, California's  
20 parole scheme provides that BPH "shall set a release date unless it  
21 determines that the gravity of the current convicted offense or  
22 offenses, or the timing and gravity of current or past convicted  
23 offense or offenses, is such that consideration of the public safety  
24 requires a more lengthy period of incarceration." Cal. Penal Code §  
25 3041(b). Regardless of the length of the time served, "a life  
26 prisoner shall be found unsuitable for and denied parole if in the  
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1 judgment of the panel the prisoner will pose an unreasonable risk of  
2 danger to society if released from prison." Cal. Code Regs. tit.  
3 15, § 2402(a). In making this determination, BPH must consider  
4 various factors, including the prisoner's social history, past  
5 criminal history, and base and other commitment offense, including  
6 behavior before, during and after the crime. See Id. § 2402(b)-(d).

7 California's parole scheme "gives rise to a cognizable  
8 liberty interest in release on parole" that cannot be denied without  
9 adequate procedural due process protections." Sass v. California  
10 Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); McQuillion  
11 v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002). It matters not that a  
12 parole release date has not been set for the inmate because "[t]he  
13 liberty interest is created, not upon the grant of a parole date,  
14 but upon the incarceration of the inmate." Biggs v. Terhune, 334,  
15 F.3d 910, 915 (9th Cir. 2003).

16 Petitioner's due process rights require that "some  
17 evidence" support BPH's decision finding him unsuitable for parole.  
18 Sass, 461 F.3d at 1125. This "some evidence" standard is  
19 deferential, but ensures that "the record is not so devoid of  
20 evidence that the findings of [the board] were without support or  
21 otherwise arbitrary." Superintendent v. Hill, 472 U.S. 445, 457  
22 (1985). Determining whether this requirement is satisfied "does not  
23 require examination of the entire record, independent assessment of  
24 the credibility of witnesses, or weighing of the evidence." Id. at  
25 455. Rather, "the relevant question is whether there is any  
26 evidence in the record that could support the conclusion reached by  
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1 the disciplinary board." Id. at 455-56.

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

11  
12 B

13 Petitioner claims that BPH's finding that he was  
14 unsuitable for parole violated his due process rights because BPH  
15 knowingly relied on false information contained in hearsay  
16 statements to deny him parole and that the superior court's denial  
17 of his petition was based upon an unreasonable determination of the  
18 facts in light of the evidence presented. Doc. #1 at 5. Put  
19 differently, Petitioner is disputing the sufficiency of the  
20 permissible evidence of BPH's decision to deny him parole. Implicit  
21 in his claim is the contention that BPH's decision was not supported  
22 by "some evidence."

23 As an initial matter, the Court notes that the record  
24 shows that BPH afforded Petitioner, who elected to represent himself  
25 at the hearing, an opportunity to speak and present his case,  
26 afforded him time to review documents relevant to his case and  
27

1 provided him with a reasoned decision in denying parole. Doc. #7-3  
2 at 63-65; Doc. #7-4 at 2-3, 5-6 & 68-76.

3 The record also shows that BPH relied on several  
4 circumstances tending to show unsuitability for parole and that  
5 these circumstances formed the basis for its conclusion that  
6 Petitioner was "not suitable for parole and would pose an  
7 unreasonable risk of danger to society or a threat to public safety  
8 if . . . released from prison." Doc. #7-4 at 68; see Cal. Code  
9 Regs. tit. 15, § 2402(a) (stating that a prisoner determined to be  
10 an unreasonable risk to society shall be denied parole).

11 First, regarding the commitment offense, BPH noted:

12 the offense was carried out in an especially  
13 cruel and callous manner. We have [the victim],  
14 23 at the time, the indications from all the  
15 records before the Panel is that he was unarmed,  
16 an argument ensued and he was shot in the head.  
17 The offense was carried out . . . in a  
18 dispassionate and calculated manner. And again,  
19 the victim was shot in the head while being  
20 unarmed. The offense was carried out in a  
21 manner that demonstrates an exceptionally  
22 callous disregard for human suffering, in that  
23 essentially, the victim was left on the ground  
24 and aid was summoned, but the indication, even  
25 from the paramedics that arrived to the police  
26 officers, that he would not likely survive his  
27 wounds, which he did not.

28 And the motive from the crime is very  
inexplicable. The only thing we have on the  
record is that apparently there was a dispute  
over drugs and some arguments that unfortunately  
escalated to the point where [the victim] was  
shot and killed."

Doc. #7-4 at 68-69; see Cal. Code Regs. tit. 15, § 2402(c)(1)(B) &  
(D) (listing "dispassionate and calculated manner" and  
"exceptionally callous disregard for human suffering" as factors



1 tending to show the commitment offense demonstrates an unsuitability  
2 for parole).

3           Second, BPH addressed Petitioner's previous record of  
4 violence, noting:

5           on a previous occasion, . . . [Petitioner]  
6 inflicted serious injury on the victim that  
7 ultimately led to the victim's death. It was in  
8 January 1981 . . . [when Petitioner was] a  
9 juvenile. [P]etitioner used a handgun, the  
10 victim was killed and [Petitioner was] convicted  
11 of voluntary manslaughter resulting in a record  
12 of violence or assaultive behavior.

13 Doc. #7-4 at 70; see Cal. Code Regs. tit. 15, § 2402(c)(2) (listing  
14 "previous record of violence" as factor tending to show  
15 unsuitability for parole, "particularly if the prisoner demonstrated  
16 serious assaultive behavior at an early age").

17           Third, BPH commented on Petitioner's social history,  
18 observing:

19           insofar as the history of relationships being  
20 unstable . . . those were a product of some of  
21 the unfortunate circumstances that were involved  
22 in [Petitioner's] formative years when [he] was  
23 being raised. [Petitioner] had failed previous  
24 grants of probation and parole and cannot be  
25 counted on to avoid criminality. [Petitioner]  
26 failed to profit from society's previous  
27 attempts to correct [his] criminality, and those  
28 included the CYA commitment, adult probation.

29 Doc. #7-4 at 70-71 & id. at 26-29 (recounting Petitioner's  
30 neglectful and abusive upbringing); see Cal. Code Regs. tit. 15, §  
31 2402(c)(3) (listing "unstable social history" as factor tending to  
32 show unsuitability for parole). Fourth and somewhat related, BPH  
33 acknowledged Petitioner's history of substance abuse and association

1 with gangs. Doc. #7-4 at 71; see also id. at 28-31 (Petitioner  
2 started drinking alcohol at age eight and using drugs at age 14).

3 Fifth, BPH noted that Petitioner received an "unfavorable"  
4 psychological evaluation in April 2006 that gave him "a higher risk  
5 factor than the average citizen in the community for potentially  
6 dangerous behavior." Doc. #7-4 at 72; see also id. at 52-54; Doc.  
7 #7-3 at 30-33.

8 BPH also considered other factors tending to support  
9 suitability for parole including Petitioner's positive institutional  
10 behavior and his "limited" misconduct while in prison, and that he  
11 possessed a marketable skill and participated in self-help and  
12 educational programs while in prison. Doc. #7-4 at 71-72; see also  
13 id. at 42-50.

14 The state superior court affirmed the decision of BPH to  
15 deny Petitioner parole, finding that the record contained "some  
16 evidence" to support BPH's finding that Petitioner was unsuitable  
17 for parole. Doc. #7-2 at 2. Indeed, in addressing Petitioner's  
18 claim challenging BPH's decision, the superior court noted:

19 The Court finds that there is some evidence  
20 to support [BPH's] finding that "the offense was  
21 carried out in a dispassionate and calculated  
22 manner. [Citation.] Petitioner shot an unarmed  
23 victim during an altercation over drugs. Prior  
24 to the incident, [p]etitioner told the victim  
25 ". . . get out of my house, and if you come  
26 back, I'll shoot you in the neck. . . ."  
27 [Citation.] Petitioner then shot the victim in  
28 the head.

. . . .

The Court finds that there is some evidence  
to support [BPH's] finding that the motive was  
inexplicable in relation to the offense.

1 [Citation.] An inexplicable motive is "one that  
2 is unexplained or unintelligible, as where the  
3 commitment offense does not appear to be related  
4 to the conduct of the victim and has no other  
5 discernible purpose. [Citation.] In this case,  
6 [P]etitioner and the victim were arguing over  
7 drugs. The victim was unarmed. Petitioner  
8 fired one shot at the victim, killing him for no  
9 apparent reason.

6 An inmate may also be unsuitable for parole  
7 if the inmate has on "previous occasions  
8 inflicted or attempted to inflict serious injury  
9 on a victim, particularly if the prisoner  
10 demonstrated serious assaultive behavior at an  
11 early age." [Citation.] The record reflects  
12 that when [P]etitioner was a juvenile, he was  
13 convicted of voluntary manslaughter. . . .  
14 [P]etitioner shot the victim with a handgun.  
15 Petitioner was convicted of several other  
16 offenses that were related to drugs; however,  
17 the drug-related offenses did not involve crimes  
18 of violence.

13 An inmate also may be unsuitable for parole  
14 if the inmate has a "history of unstable or  
15 tumultuous relationships with others."  
16 [Citation.] The record reflects that  
17 [P]etitioner stated taking drugs at an early  
18 age. Prior to the commitment offense,  
19 [P]etitioner was convicted of several crimes  
20 related to drugs. Petitioner had several failed  
21 opportunities of grants of parole or probation.  
22 Petition[er] associated with members of a gang.  
23 . . . Petitioner's early drug use, involvement  
24 in criminal activity, lack of amenability to  
25 supervision, and gang associations is "some  
26 evidence" of an unstable social history.

21 Doc. #7-2 at 2-3. The superior court also found, however, that  
22 there was:

23 no evidence to support [BPH's] finding that "the  
24 offense was carried out in a dispassionate  
25 manner which demonstrates an exceptionally  
26 callous disregard for human suffering."  
27 [Citation.] An "exceptionally callous disregard  
28 for human suffering" means that "the offense in  
question must have been committed in a more  
aggravated or violent [manner] than that

1 ordinarily shown in the commission of second  
2 degree murder." [Citation.] Petitioner did the  
3 minimum to commit his crime, one shot to the  
4 victim's head. [Citation.] Petitioner fled the  
5 scene of the crime, after checking on the victim  
6 and summoning aid.

7 Doc. #7-2 at 2, emphasis added. The state appellate court summarily  
8 denied Petitioner's request for habeas corpus relief, Doc. #7-5 at  
9 2, and the state supreme court summarily denied his Petition for  
10 Review. Doc. #7-7 at 2.

11 On this record, the court finds that the state courts'  
12 rejection of Petitioner's due process claim that BPH's decision was  
13 not supported by "some evidence" was not contrary to, nor did it  
14 involve an unreasonable application of, clearly established federal  
15 law, and it was not based on an unreasonable determination of the  
16 facts. See 28 U.S.C. § 2254(d); Williams, 529 U.S. at 409.

17 The record shows that BPH had some reliable evidence to  
18 support its finding of unsuitability. BPH observed that Petitioner  
19 as a juvenile had a prior conviction of manslaughter involving the  
20 use of a handgun, multiple prior probation and parole failures, a  
21 history of substance abuse and association with gangs, and a  
22 psychological evaluation that gave him "a higher risk factor than  
23 the average citizen in the community for potentially dangerous  
24 behavior." Doc. #7-4 at 68-72. Based on these considerations,  
25 especially when viewed in conjunction with the nature of the  
26 commitment offense, this Court cannot say that BPH's finding that  
27 Petitioner was unsuitable for parole was "without support or  
28 otherwise arbitrary." See Hill, 472 U.S. at 457.

1           Additionally, there is no indication on the record that  
2 the allegedly false evidence about which Petitioner complains even  
3 factored into BPH's decision. In fact, when Petitioner addressed  
4 the issue during the hearing, one of the BPH panel members  
5 interrupted him, stating:

6           I'm going to have to stop you. I let you stray  
7 a little while to see if you were framing  
8 something that goes towards suitability.

8           . . . .

9           . . . The only things we can rely on are  
10 the documents that are before us. Issues that  
11 you're bringing up about any drug use by the  
12 witnesses, if there's nothing before us, we have  
13 nothing to go on. So, what I'm going to  
14 encourage you to do is use your time  
15 productively today, because we can't help you  
16 with your legal argument. That's not our job.  
17 We're here to see if you're an okay person who  
18 is suitable for parole, so I know you got all  
19 this built up in you and you want to tell  
20 somebody, I'm just telling you we're not the  
21 right people.

22 Doc. #7-4 at 63.

23           Based on the record before the Court, BPH reasonably  
24 concluded that Petitioner was not yet suitable for parole. See,  
25 e.g., Rosas, 428 F.3d at 1232-33 (upholding denial of parole based  
26 on gravity of offense and the petitioner's psychiatric reports  
27 documenting his failure to complete programming while in prison);  
28 Biggs, 334 F.3d at 916 (upholding denial of parole based on gravity  
of offense and the petitioner's conduct prior to imprisonment);  
Morales v. California Dep't. of Corrections, 16 F.3d 1001, 1005 (9th  
Cir. 1994), rev'd on other grounds, 514 U.S. 499 (1995) (upholding  
denial of parole based on the cruel nature of offense, the

1 petitioner's unstable and criminal history, and his need for further  
2 psychiatric treatment). It is not up to this Court to "reweigh the  
3 evidence." Powell v. Gomez, 33 F.3d 39, 42 (9th Cir. 1994).

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IV

For the reasons set forth above, the Petition for a Writ of Habeas Corpus is DENIED.

The Clerk shall terminate any pending motions as moot, enter judgment in favor of Respondent and close the file.

IT IS SO ORDERED.

DATED 07/01/09

  
\_\_\_\_\_  
THELTON E. HENDERSON  
United States District Judge