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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

LARRY M. JOHNSON,)	No. C 06-04233 JW (PR)
Petitioner,)	
vs.)	ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS
ANTHONY KANE, Warden,)	
Respondent.)	
_____)	

Petitioner, a prisoner at the Correctional Training Facility, seeks a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the 2003 decision by the Board of Prison Terms (“the Board”) finding petitioner unsuitable for parole.¹

BACKGROUND

In 1983, petitioner was convicted by a jury in the Superior Court of the State of California in and for the County of Los Angeles of murder, attempted robbery and burglary. Petitioner was sentenced to a term of 26 years to life in state prison.

After a parole suitability hearing in 2003, the Board found petitioner

¹ Petitioner later filed another habeas petition in which he is proceeding pro se. That petition, Case No. 06-06958 JW (PR), challenges a later decision by the Board in 2004 denying parole.

1 unsuitable for parole. Petitioner challenged the Board’s decision by way of habeas
2 petitions filed in all three levels of the California courts, with the state high court
3 denying review on December 21, 2005. Petitioner filed the instant petition on June
4 28, 2006.²

6 DISCUSSION

7 A. Standard of Review

8 This Court will entertain a petition for a writ of habeas corpus “in behalf of a
9 person in custody pursuant to the judgment of a State court only on the ground that
10 he is in custody in violation of the Constitution or laws or treaties of the United
11 States.” 28 U.S.C. § 2254(a). The petition may not be granted with respect to any
12 claim adjudicated on the merits in state court unless the state court’s adjudication of
13 the claim: “(1) resulted in a decision that was contrary to, or involved an
14 unreasonable application of, clearly established federal law, as determined by the
15 Supreme Court of the United States; or (2) resulted in a decision that was based on
16 an unreasonable determination of the facts in light of the evidence presented in the
17 State court proceeding.” Id. § 2254(d).

18 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if
19 the state court arrives at a conclusion opposite to that reached by [the Supreme]
20 Court on a question of law or if the state court decides a case differently than [the]
21 Court has on a set of materially indistinguishable facts.” Williams (Terry) v. Taylor,
22 529 U.S. 362, 412-413 (2000). “Under the ‘reasonable application clause,’ a
23 federal habeas court may grant the writ if the state court identifies the correct
24 governing legal principle from [the] Court’s decisions but unreasonably applies that
25 principle to the facts of the prisoner’s case.” Id. at 413.

26 “[A] federal habeas court may not issue the writ simply because that court

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28 ² Petitioner filed the instant petition in the Central District of California. The
petition was subsequently transferred to this court on July 10, 2006. (See Docket
No. 1.)

1 concludes in its independent judgment that the relevant state-court decision applied
2 clearly established federal law erroneously or incorrectly. Rather, that application
3 must also be unreasonable.” Id. at 411. “[A] federal habeas court making the
4 ‘unreasonable application’ inquiry should ask whether the state court’s application
5 of clearly established federal law was ‘objectively unreasonable.’” Id. at 409.

6 A federal habeas court may grant the writ if it concludes that the state court’s
7 adjudication of the claim “results in a decision that was based on an unreasonable
8 determination of the facts in light of the evidence presented in the State court
9 proceeding.” 28. U.S.C. § 2254(d)(2). The court must presume correct any
10 determination of a factual issue made by a state court unless the petitioner rebuts the
11 presumption of correctness by clear and convincing evidence. 28. U.S.C. §
12 2254(e)(1).

13 Where, as here, the highest state court to consider the petitioner’s claims
14 issued a summary opinion which does not explain the rationale of its decision,
15 federal review under § 2254(d) is of the last state court opinion to reach the merits.
16 See Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991); Bains v. Cambra, 204 F.3d
17 964, 970-71, 973-78 (9th Cir. 2000). In this case, the last state court opinion to
18 address the merits of petitioner’s claim is the opinion of the California Court of
19 Appeal. (Resp. Ex. 9 (In re Larry Johnson, No. B177716, Sept. 7, 2005).)

20 B. Claims and Analysis

21 Petitioner claims that the Board’s denial of parole violated his Fourteenth
22 Amendment right to due process because: (1) the Board’s decision was not
23 supported by some evidence; (2) the Boards’s finding that the commitment offense
24 was egregious is unconstitutional; and (3) the Board’s decision was based solely on
25 the commitment offense.

26 The Ninth Circuit has determined that a California prisoner with a sentence of
27 a term of years to life with the possibility of parole has a protected liberty interest in
28 release on parole and therefore a right to due process in the parole suitability

1 proceedings. See McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002) (citing
2 Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Inmates of Nebraska
3 Penal & Corr. Complex, 442 U.S. 1 (1979)). See also Irons v. Carey, 505 F.3d 846,
4 851 (9th Cir.), reh’g and reh’g en banc denied, 506 F.3d 951 (9th Cir. 2007); Sass v.
5 California Board of Prison Terms, 461 F.3d 1123, 1127-28 (9th Cir. 2006), reh’g
6 and reh’g en banc denied, No. 05-16455 (9th Cir. Feb. 13, 2007); Biggs v. Terhune,
7 334 F.3d 910, 915-16 (9th Cir. 2003). It matters not that, as is the case here, a
8 parole release date has never been set for the inmate because “[t]he liberty interest is
9 created, not upon the grant of a parole date, but upon the incarceration of the
10 inmate.” Biggs v. Terhune, 334 F.3d 910, 914-16 (9th Cir. 2003) (finding initial
11 refusal to set parole date for prisoner with 15- to- life sentence implicated prisoner’s
12 liberty interest).³

13 A parole board’s decision must be supported by “some evidence” to satisfy
14 the requirements of due process. Sass, 461 F.3d at 1128-29 (adopting “some
15 evidence” standard for disciplinary hearings outlined in Superintendent v. Hill, 472
16 U.S. 445, 454-55 (1985)). The standard of “some evidence” is met if there was
17 some evidence from which the conclusion of the administrative tribunal could be
18 deduced. See Hill, 472 U.S. at 455. An examination of the entire record is not
19 required, nor is an independent assessment of the credibility of witnesses nor
20 weighing of the evidence. Id. The relevant question is whether there is any
21 evidence in the record that could support the conclusion reached by the Board. See
22 id. The court “cannot reweigh the evidence;” it only looks “to see if ‘some
23 evidence’ supports the BPT’s decision.” Powell v. Gomez, 33 F.3d 39, 42 (9th Cir.
24 1994).

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26 ³ The Supreme Court of California’s opinion in In re Dannenberg, 34 Cal. 4th
27 1061 (2005), does not compel a different conclusion. Dannenberg supports, rather
28 than rejects, the existence of a constitutional liberty interest in parole in California.
Accord Machado v. Kane, No. C 05-1632 WHA (PR), 2006 WL 449146, at **2-4
(N.D. Cal. Feb. 22, 2006) (rejecting argument that Dannenberg construed section
3041 as no longer creating an expectancy of release).

1 Due process also requires that the evidence underlying the parole board's
2 decision have some indicia of reliability. Biggs, 334 F.3d at 915; McQuillion, 306
3 F.3d at 904; Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987).
4 Relevant in this inquiry is whether the prisoner was afforded an opportunity to
5 appear before, and present evidence to, the board. See Pedro v. Oregon Parole Bd.,
6 825 F.2d 1396, 1399 (9th Cir. 1987). In sum, "if the Board's determination of
7 parole suitability is to satisfy due process there must be some evidence, with some
8 indicia of reliability, to support the decision." Rosas v. Nielsen, 428 F.3d 1229,
9 1232 (9th Cir. 2005) (citing McQuillion, 306 F.3d at 904).

10 Recently, the Ninth Circuit reheard en banc the panel decision in Hayward v.
11 Marshall, 512 F.3d 536 (9th Cir.), reh'g en banc granted, 527 F.3d 797 (9th Cir.
12 2008), which presented a state prisoner's due process habeas challenge to the denial
13 of parole. The panel had concluded that the gravity of the commitment offense had
14 no predictive value regarding the petitioner's suitability for parole and held that
15 because the Governor's reversal of parole was not supported by some evidence, it
16 resulted in a due process violation. 512 F.3d at 546-47. The Ninth Circuit has not
17 yet issued an en banc decision in Hayward. Since the en banc hearing on June 24,
18 2008, the Ninth Circuit has ordered briefing, inter alia, at to whether the order
19 granting rehearing en banc should be vacated and submission of the matter deferred
20 pending the California Supreme Court's decisions in In re Lawrence, No. S154018,
21 and In re Shaputis, No. S155872, both of which cases were argued on June 4, 2008.
22 Hayward v. Marshall, No. 06-55392, slip op. at 2 (9th Cir. July 10, 2008).

23 Unless or until the en banc court overrules the holdings in Biggs, Sass, and
24 Irons, it is the law in this circuit that 1) California's parole scheme creates a
25 federally protected liberty interest in parole and therefore a right to due process, and
26 2) that the right is satisfied if some evidence supports the Board's parole suitability
27 decision. Sass, 461 F.3d at 1128-29. These cases also hold that the Board may rely
28 on immutable events, such as the nature of the conviction offense and pre-conviction

1 criminality, to find that a prisoner is not currently suitable for parole. Id. at 1129.
2 Biggs and Irons further suggest, however, that over time, the commitment offense
3 and pre-conviction behavior become less reliable predictors of danger to society
4 such that repeated denial of parole based solely on immutable events, regardless of
5 the extent of rehabilitation during incarceration, could violate due process at some
6 point after the prisoner serves the minimum term on his sentence. See Irons, 505
7 F.3d at 853-54.

8 California Code of Regulations, title 15, section 2402(a) states that “[t]he
9 panel shall first determine whether the life prisoner is suitable for release on parole.
10 Regardless of the length of time served, a life prisoner shall be found unsuitable for
11 and denied parole if in the judgment of the panel the prisoner will pose an
12 unreasonable risk of danger to society if released from prison.” Cal. Code of Regs.,
13 tit. 15, § 2402(a). The regulations direct the panel to consider “all relevant, reliable
14 information available.” Cal. Code of Regs., tit. 15, § 2402(b). Further, the
15 regulations enumerate various circumstances tending to indicate whether or not an
16 inmate is suitable for parole, *e.g.*, the prisoner’s social history, past criminal history,
17 and base and other commitment offenses, including behavior before, during and
18 after the crime. See Cal. Code of Regs., tit. 15, § 2402(c)-(d).⁴

19 The record shows that on October 23, 2003, petitioner appeared with counsel
20 before the Board for his second parole consideration hearing. The presiding
21 commissioner explained that in assessing whether petitioner was suitable for parole,
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23 ⁴ The circumstances tending to show an inmate’s unsuitability are: (1) the
24 commitment offense was committed in an “especially heinous, atrocious or cruel
25 manner;” (2) previous record of violence; (3) unstable social history; (4) sadistic
26 sexual offenses; (5) psychological factors such as a “lengthy history of severe
27 mental problems related to the offense;” and (6) prison misconduct. Cal. Code of
28 Regs., tit. 15, § 2402(c). The circumstances tending to show suitability are: (1) no
juvenile record; (2) stable social history; (3) signs of remorse; (4) commitment
offense was committed as a result of stress which built up over time; (5) Battered
Woman Syndrome; (6) lack of criminal history; (7) age is such that it reduces the
possibility of recidivism; (8) plans for future including development of marketable
skills; and (9) institutional activities that indicate ability to function within the law.
Cal. Code of Regs., tit. 15, § 2402(d).

1 the panel would consider factors such as petitioner’s commitment offense, his prior
2 criminal and social history, and his behavior and programming since his
3 commitment. (Resp’t Ex. 4 at 6.) The commissioner also explained that petitioner
4 would be given an opportunity to correct or clarify anything in his file, and that
5 petitioner and his counsel would be given the opportunity to make final statements
6 regarding petitioner’s parole suitability. Finally, the commissioner confirmed with
7 petitioner that he had no objections to the Board members. (Id. at 7.)

8 After deliberations, the Board concluded that petitioner was “not suitable for
9 parole and would pose an unreasonable risk of danger to society or a threat to public
10 safety if released from prison.” (Id. at 64.) Specifically, the Board found that the
11 offense was carried out in a “vicious, brutal manner” which “demonstrates
12 exceptionally [callous] disregard for human suffering.” (Id.) The Board also found
13 that the motive for the crime was “inexplicable” and “very trivial in [relation] to the
14 offense.” (Id.) Petitioner was involved with a preplanned and failed robbery
15 attempt which resulted in petitioner’s partner shooting the victim twice with a
16 handgun. Petitioner and partner fled the scene without completing the robbery.
17 (Id. at 65.) The Board noted petitioner’s “unstable social history of prior
18 criminality” which involved a conviction for receiving stolen property. (Id.)
19 Furthermore, the Board found that petitioner had not sufficiently participated in self-
20 help and therapy programming “to better understand the causative factors.” (Id.)
21 The Board also considered that petitioner lacked realistic parole plans in the last
22 county of legal residence or acceptable employment plans. (Id. at 66.) The Board
23 commended petitioner for remaining relatively free of disciplinary actions and
24 having a favorable psychiatric evaluation. (Id.) Nonetheless, the Board found that
25 the positive aspects did not outweigh the factors for unsuitability and determined
26 that a one-year denial was necessary for petitioner to make more positive gains. (Id.
27 at 67.)

28 In its order denying habeas relief, the state appellate court determined that the

1 record contained some evidence to support the Board’s finding that petitioner was
2 unsuitable for parole. The court made the following observations:

3 The Board’s decision denying parole to [petitioner] manifests
4 individualized consideration of all applicable factors; at the least,
5 “some evidence” supports its decision. (Citation omitted.) The record
6 plainly supports the Board’s initial finding that [petitioner]’s
7 commitment offenses were carried out in a vicious and brutal manner:
8 The murder, attempted robbery and burglary demonstrated a callous
9 disregard for human suffering; the motive for the crimes was trivial.
10 [Petitioner], who was unemployed, instigated the robbery and enlisted
11 the help of another individual he knew was carrying a gun. He
12 planned the robbery for the morning when the check cashing store was
13 just opening to catch the victim off guard. When the robbery when
14 awry because of the victim’s hesitation and [petitioner]’s crime partner
15 shot the victim, [petitioner] fled the scene. These circumstances
16 demonstrate aggravating facts beyond the minimum elements of the
17 commitment offenses. (Citation omitted.)

18 The record of the suitability hearing shows the Board credited
19 [petitioner] for participating in numerous programs and activities in
20 prison and for remaining discipline free for 12 years prior to his 2003
21 suitability hearing. The Board also noted [petitioner]’s limited prior
22 criminal record. The Board, however, determined [petitioner]’s
23 continued participation in institutional activities was necessary to
24 finding him suitable for parole. Despite the positive psychological
25 evaluation and report from his correctional counselor, the Board’s
26 reliance on [petitioner]’s minimization of his participation in the
27 commitment offenses and his inability to demonstrate he had realistic
28 post-parole plans for his place of residence to determine his release
would pose an unreasonable risk of danger to society or a threat to
public safety if released was well within its discretion. (Citation
omitted.)

Under well-established Supreme Court precedent, judicial
review of the Board’s decision denying parole is both limited and
deferential. We are not permitted to reweigh the circumstances
evaluated by the Board and make our own assessment as to which
factors might deserve more credit. (Citation omitted.) Because “some
evidence” supports the Board’s decision finding [petitioner] unsuitable
for and denying parole, his habeas petition must be denied.

(Resp. Ex. 9 at 9-10.)

As noted by the state appellate court, the Board denied petitioner parole not
solely because of the callous nature of his commitment offense but also on the basis
of the other factors identified above which lead the Board to conclude that petitioner
would pose an unreasonable risk of danger to society if released on parole.

Moreover, in light of the present case law, the Board properly considered the nature

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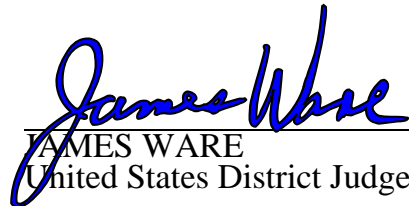
of petitioner's commitment offense. See In re Rosenkrantz, 29 Cal. 4th 616, 682-83 ("the [Board] properly may weigh heavily the degree of violence used and the amount of viciousness shown by a defendant"). Cal. Code of Reg., tit. 15, § 2402(a); see supra at 6. Accordingly, it appears that the Board's decision finding petitioner unsuitable for parole is supported by "some evidence," including the egregiousness of the crime, and the evidence underlying the Board's decision has some "indicia of reliability." Rosas v. Nielsen, 428 F.3d at 1232.

This Court concludes that Petitioner's right to due process was not violated by the Board's decision to deny parole. The state courts' denial of petitioner's claims was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED on the merits.

DATED: September 28, 2009



JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

LARRY JOHNSON,

Petitioner,

v.

ANTHONY KANE, Warden,

Respondent.

Case Number: CV06-04233 JW

CERTIFICATE OF SERVICE

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

That on 10/2/2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Marc Jonathan Zilversmit
Attorney at Law
523 Octavia Street
San Francisco, CA 94102

Dated: 10/2/2009

Richard W. Wieking, Clerk
/s/By: Elizabeth Garcia, Deputy Clerk