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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

ERNEST M. BARELA,

Petitioner,

v

CLAUDE FINN, Warden,

Respondent.

NO. C-08-0592-VRW

ORDER DENYING PETITION FOR A
WRIT OF HABEAS CORPUS

Petitioner Ernest M Barela, a state prisoner incarcerated at the Deuel Vocational Institution in Tracy, CA, seeks a writ of habeas corpus under 28 USC § 2254 challenging the California Board of Prison Terms' ("BPT") March 29, 2007 decision to deny him parole.

Per order filed on July 15, 2008, the court (Goldner, MJ) ordered respondent to respond to the petition for writ of habeas corpus. Respondent has filed an answer addressing the merits of the petition and petitioner has filed a traverse.

I

In 1979, petitioner pleaded guilty to kidnap for robbery in the Superior Court of the State of California in and for the County of Stanislaus and was sentenced to an indeterminate term of seven years to life in state prison.

Petitioner has previously been found not suitable for parole when he has appeared before the BPT. On March 29, 2007, the BPT again found him not suitable for parole and denied him a subsequent hearing for one year. Petitioner then challenged the BPT's March 29, 2007 decision in the state courts. After the Supreme Court of California denied his final state habeas petition, the instant petition for a writ of habeas corpus followed.

II

A

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified under 28 USC 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 [p]etitioner is not challenging his underlying state court conviction." White v Lambert, 370 F3d 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 USC section 2254(a).

The writ may not be granted unless the state court's

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

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

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21 B

22 Petitioner seeks federal habeas corpus relief from the
23 BPT's March 29, 2007 decision finding him not suitable for parole
24 and denying him a subsequent hearing for one year, on the ground
25 that the decision does not comport with due process. Petitioner
26 claims that the BPT improperly based its decision on the

1 unchanging facts of his commitment offenses and past criminal
2 history and that the evidence cited by the BPT is not reliable
3 evidence that he poses a current danger to society. Petitioner
4 also claims that his continued incarceration violates the terms
5 of his plea agreement.

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

25 California's parole scheme "gives rise to a cognizable
26 liberty interest in release on parole which cannot be denied
27 without adequate procedural due process protections." Sass v

1 California Bd of Prison Terms, 461 F3d 1123, 1128 (9th Cir 2006);
2 McQuillion v Duncan, 306 F3d 895, 902 (9th Cir 2002). It matters
3 not that a parole release date has not been set for the inmate
4 because "[t]he liberty interest is created, not upon the grant of
5 a parole date, but upon the incarceration of the inmate." Biggs
6 v Terhune, 334 F3d 910, 914-15 (9th Cir 2003).

7 Petitioner's due process rights require that "some
8 evidence" support the board's decision finding him unsuitable for
9 parole. Sass, 461 F3d at 1125. This "some evidence" standard is
10 deferential, but ensures that "the record is not so devoid of
11 evidence that the findings of [the board] were without support or
12 otherwise arbitrary." Superintendent v Hill, 472 US 445, 457
13 (1985). Determining whether this requirement is satisfied "does
14 not require examination of the entire record, independent
15 assessment of the credibility of witnesses, or weighing of the
16 evidence." Id at 455-56.

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

1
2 Petitioner claims that the board's finding that he was
3 unsuitable for parole is not supported by any evidence in the
4 record or by an individualized consideration of his
5 circumstances. The record shows, however, that the BPT afforded
6 petitioner and his counsel an opportunity to speak and present
7 their case at the hearing, gave them time to review petitioner's
8 central file, allowed them to present relevant documents and
9 provided them with a reasoned decision in denying parole. As
10 discussed below, the facts detailed by the board constitute "some
11 evidence" to support the board's conclusion.

12 In finding petitioner unsuitable for parole, the board
13 explained that it found that the facts of the crime of conviction
14 showed particular "disregard for the safety and welfare of other
15 people", was "especially psychologically damaging" and targeted
16 people who were "especially vulnerable." Hr'g Tr at 66 (Resp't
17 Ex C). Petitioner kidnapped a pregnant woman and her two young
18 sons (ages eight and five) and threatened them with a shotgun.
19 There was also evidence that the female victim was forced to
20 copulate petitioner orally during the crime.

21 The board also noted that petitioner had a record going
22 back to the age of 15 and that from that time until he was 24
23 years old, he did not go a single year without a conviction. Id
24 at 67. The BPT confirmed that while those factors were static,
25 they were "factor[s] of unsuitabilty" for parole. Id at 68.

26 The board also found that petitioner had not given
27 sufficient indication that he understood "the nature and the
28

1 magnitude of the offense." Id at 69. The board stated that in
2 order for petitioner to prepare himself for eventual parole, he
3 needed to "explore the causation factors of such a violent crime
4 that was degrading by human standards for this poor woman." Id

5 The board also questioned whether petitioner's post-
6 parole plans to return to live with his mother were suitable.
7 The board noted that petitioner had engaged in significant
8 criminal activity while earlier living with his mother. Id at
9 72. The board stated that petitioner needed to demonstrate to
10 the panel a better understanding of "plans for the future" in
11 order to be considered for parole. Id

12 The board did commend the work petitioner had done in
13 prison and particularly noted his participation in Narcotics
14 Anonymous and Alcoholics Anonymous to treat his drug and alcohol
15 addictions. Id at 73. Nonetheless, the board concluded that
16 petitioner had "more work" to do and had to "sustain[] [his]
17 gains over a longer period of time." Id

18 The state superior court upheld the decision of the BPT
19 and the state appellate and supreme courts summarily affirmed.
20 The superior court stated that, after reviewing the petition and
21 underlying documents, it found "evidence to support the Board of
22 Parole Hearings' conclusion of unsuitability for parole and its
23 denial decision." Resp't Ex B. Petitioner has not demonstrated
24 that the state courts' rejection of petitioner's claim was
25 contrary to, or an unreasonable application of clearly
26 established federal law, nor has he demonstrated that it was
27 based on an unreasonable determination of facts. Petitioner has

1 also not demonstrated that an independent review of the record
2 reveals the state courts' decisions to be objectively
3 unreasonable. 28 USC § 2254(d).
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5 D

6 Petitioner also claims that his continued incarceration
7 violates the terms of his plea agreement. This claim is without
8 merit.

9 Plea agreements are contractual in nature and subject
10 to contract law standards of interpretation. In re Ellis, 356
11 F3d 1198, 1207 (9th Cir 2004) (citing United States v Hyde, 520
12 US 670, 677-78 (1997)). Thus, a petitioner may be entitled to
13 habeas relief if he or she enters into a plea agreement with a
14 state prosecutor and the prosecutor breaches the agreement. Gunn
15 v Ignacio, 263 F3d 965, 969-70 (9th Cir 2001). After sentencing,
16 however, a defendant who pleads guilty may not collaterally
17 challenge a guilty plea that was voluntary and intelligently
18 entered into with the advice of competent counsel. United States
19 v Broce, 488 US 563, 572 (1989). Nor may a defendant
20 collaterally attack the plea's validity merely because he or she
21 made what turned out to be, in retrospect, a poor deal. Bradshaw
22 v Stumpf, 545 US 175, 186 (2005).

23 Petitioner maintains that he expected that he would be
24 paroled after about six years if he went to prison, worked and
25 behaved. He does not allege, however, that the sentencing court
26 or prosecutor promised that the BPT would parole him on a
27 specific date, nor does he attach a copy of his plea agreement.
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1 The record shows that petitioner was sentenced pursuant to a plea
2 agreement to an indeterminate term of seven years to life.
3 Nothing in the record indicates that petitioner is entitled to
4 release at any time prior to a finding by the BPT that he is
5 suitable for parole. Therefore, petitioner's argument that his
6 plea agreement was violated fails.

7 III

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

10 The clerk shall enter judgment in favor of respondent
11 and close the file.

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13 IT IS SO ORDERED.

14 DATED: January 28, 2009

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18 Vaughn R Walker
19 United States District Chief Judge
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