

FILED

NOV X 4 2009

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

GERMAN ZAMORA,

No 1-08-cv-01130 VRW

Petitioner,

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

v

JAMES D HARTLEY,

Respondent.

Petitioner German Zamora, an incarcerated state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus under 28 USC § 2254 challenging a 2006 decision by the Board of Parole Hearings ("the Board") to deny him parole. Doc #1. Respondent James D Hartley opposes the issuance of the writ. Doc #20.

For the reasons stated herein, the petition for habeas corpus is DENIED.

I

A

Petitioner is a citizen of Mexico who was residing in Orange County in August 1993 when he committed the homicide for

1 which he is now serving a sentence of seventeen years to life. The
2 facts underlying petitioner's commitment offense were set forth in
3 the September 11, 2007 opinion of the Orange County superior court
4 denying his habeas petition:

5 By the early hours of August 12, 1993, petitioner and
6 his friend had consumed a significant amount of beer.
7 Sometime after 2 am, the two left a restaurant heading
8 towards the friend's home. Shortly thereafter, the
9 friend observed police lights behind them and
10 repeatedly asked petitioner to stop the car. An
11 intoxicated petitioner ignored his friend's pleas and
12 began to aggressively evade police while reaching
13 speeds in excess of 100 miles per hour and running
14 several stop lights.

15 Without stopping for another red light, petitioner
16 struck another vehicle in an intersection while
17 traveling between 80 and 100 miles per hour. The
18 victim's vehicle flipped over from the impact. The
19 driver of the vehicle suffered a broken rib, a broken
20 elbow, a head injury, and had his spleen removed. A
21 passenger in the same car died. Petitioner's blood
22 alcohol content was .16.

23 At trial, petitioner admitted having sustained a prior
24 driving under the influence conviction and also being
25 aware that he could not drive without a license or with
26 alcohol in his system. Though he does not recall the
27 accident itself, petitioner admits having fled from
28 police because his license was suspended at the time
and he did not want to be arrested.

19 Doc #20 Ex 2.

20 In March 1994, petitioner was convicted by a jury of
21 second degree murder (Cal Penal Code § 187(a)), driving under the
22 influence and causing great bodily harm to another (Cal Vehicle
23 Code § 23153(a) and § 23153(a)). Ptn (Doc #1) at 2. In July 1994,
24 petitioner was sentenced to seventeen years to life in prison with
25 the possibility of parole. Id. Petitioner states that he did not
26 appeal his judgment, id, but the Board quoted extensively from a
27 "Court of Appeals document dated November 13, 1995" that contains a
28 lengthy description of the crime; given the date and content, this

1 opinion was presumably written in response to a direct appeal.
2 Board hearing transcript dated December 19, 2006 ("Board RT"), Doc
3 #1 Ex B, at 13-18.

4 Petitioner's first parole hearing took place on October
5 22, 2003. The Board denied him parole for three years. Board RT
6 at 25.

7 At petitioner's next parole hearing in December 2006,
8 petitioner testified through an interpreter that: he had never
9 attended court-ordered Alcoholics Anonymous sessions after his
10 first DUI conviction (Board RT at 17); he had been out looking for
11 a prostitute on the night of the crime (id at 18); he drank "maybe
12 four times a year" before the crime (id at 21); he had entered the
13 United States illegally in 1991 and was working as a waiter in a
14 restaurant in 1994 (id); and he was subject to an "INS hold" that
15 would result in his deportation to Mexico upon his release (id at
16 25, 59).

17 The Board reviewed petitioner's disciplinary record,
18 noting that he had no "115's and no 128(a)'s" (in-prison
19 disciplinary write-ups) (id at 25), and his educational and
20 vocational programs in prison, noting that petitioner was working
21 toward his GED and had completed training in upholstery and "mill
22 and cabinet" and was then being trained in vocational office
23 services. Id at 26. The Board reviewed petitioner's self-help and
24 therapy programs and noted he had completed fifty-five months of
25 Alcoholics Anonymous, thirty-six months of Narcotics Anonymous and
26 all the lessons in Criminon. Id at 27-30.

27 The Board considered evidence in the form of letters from
28 petitioner's family members offered to substantiate petitioner's

1 post-parole plan to return to his home town in Mexico, live with
2 his parents and earn a living using the vocational skills he had
3 learned in prison. Id at 36-45. The presiding commissioner asked
4 petitioner "part of the work in AA is making amends to your
5 victims. Have you done anything in regard to that?" to which
6 petitioner replied "No, but I have it in mind to do it." Id at 47.

7 The Board heard testimony from the Orange County deputy
8 district attorney arguing against parole based on petitioner's
9 "lack of insight into the causes of the commitment offense, namely,
10 he continues to view this as an accident or something that was
11 unplanned * * *" and that less than one year had elapsed between
12 the DUI conviction and the commitment offense. Id at 49-52.
13 Petitioner's attorney made a statement stressing his lack of
14 disciplinary problems in prison, his accomplishments while
15 incarcerated, his family support and the positive aspects of the
16 psychological report. Id at 52-54.

17 The Board reviewed a psychological evaluation by Dr
18 Stephen Walker dated September 18, 2003. The report, which runs to
19 just over nine single-spaced pages of small type, described
20 petitioner as "not sophisticated, either psychologically or
21 socially" and "not psychopathic, nor particularly criminally
22 minded, outside of a level of self-focused irresponsibility that
23 served as a central component of his alcoholism." Doc #1 Ex C at
24 8. In conclusion, the report was generally encouraging:

25 The index offense presents as a crime of reckless,
26 alcohol-saturated and self-centered violence, and was
27 committed on innocent bystanders while the inmate was
28 irresponsibly fleeing police officers to avoid being
caught for criminal behavior (DUI, reckless driving,
suspended license, illegal immigrant). The inmate had
no history of violent behavior prior to the instant
offense; however, he did have one prior arrest and

1 conviction for DUI less than a year prior to the life
2 crime. * * *

3 There are no signs of a mental disorder, either
4 historically or currently. His risk for harmful
5 behavior is clearly exacerbated by the use/abuse of
6 alcohol, and in association with related decreases in
7 judgment and reasoning. Alcohol use was a steady
8 component in the inmate's history, and he understands
9 himself to be an alcoholic, with a need for lifetime
10 abstinence in order to assure a life free of
11 devastating physical harm to himself or others. Mr.
12 Zamora has indicated his plans to continue with AA
13 meetings in Mexico, in order to help ensure his
14 continued abstinence. Nonetheless, due to the nature
15 of his proclivity for alcohol use, he will remain at a
16 higher risk for alcohol abuse than will people in the
17 general population.

18 Risk assessment measures suggest that the inmate poses
19 a low likelihood to become involved in a violent
20 offense if released into the free community. * * * In
21 addition, there is the caveat that such an assessment
22 is at least partially based on the likelihood of
23 continued abstinence from any substance abuse.

24 The inmate has been disciplinary-free for his entire
25 none-year incarceration, and has also been free of
26 counseling chrono write-ups. His classification/
27 placement score is zero (and has been since 2001),
28 suggesting a sustained behavioral ability to refrain
from blatantly undesirable activities, and an applied
capacity to focus on a more prosocial program.

Id at 9 (emphasis in original).

29 In rendering the Board's decision that petitioner was not
30 suitable for parole and would pose an unreasonable risk to society
31 or threat to public safety if released, the presiding commissioner
32 stated that the "first and foremost" factor was the commitment
33 offense itself, noting that multiple victims were involved, the
34 crime "was carried out in a manner which demonstrates the
35 exceptionally callous disregard for human suffering" and the motive
36 was "very trivial in relation to the offense." Board decision, Doc
37 #1 Ex B (& Doc #20 Ex 1 Ex B) at 56. The presiding commissioner
38 specifically discussed the Walker psychological report,

1 characterizing it as "not totally supportive of release" because
2 the "low" risk assessment was "at least partially based on the
3 likelihood of continued abstinence from alcohol which * * *
4 represents a conundrum for the panel that the panel still believes
5 that Mr Zamora does not seem to grasp [] that this was a crime
6 * * *." Id at 58-59. The Board found petitioner's residential
7 plans appropriate and commended him for his clean disciplinary
8 record in prison and his vocational training accomplishments,
9 noting them to be "exceptional" (id at 60), but noted that the
10 positive factors did not outweigh the factors for unsuitability and
11 "it is not reasonable to expect that parole will be granted during
12 the next three years." Id at 61.

13 Petitioner filed a petition for a writ of habeas corpus
14 in superior court in Orange County challenging the Board's decision
15 on due process grounds. The superior court upheld the Board's
16 conclusion that petitioner was not suitable for parole:

17 The way in which the commitment offenses were carried
18 out and petitioner's motive for his actions reasonably
19 warrant the Board's on-going concern over petitioner's
20 suitability for release on parole at this time.
21 Despite having a suspended license and being on
22 probation for a prior driving under the influence
23 conviction, petitioner made the conscious decision to
24 drink alcohol to the point of intoxication and get
25 behind the wheel of an automobile.

26 Doc #20 Ex 2 at 2. The superior court also discussed the Walker
27 evaluation, expressing doubt about the favorable risk assessment
28 based on Walker's finding that petitioner's "risk for future
alcohol abuse remains high compared to the general population" and
concluding that the Board "cannot be said to have abused its
discretion" in its handling of the Walker evaluation. Id at 4.
The superior court also noted that the record reflected "due

1 consideration of petitioner's eligibility for parole and a
2 sufficient evidentiary basis for the Board's decision" and the
3 "individualized consideration of the specified criteria" required
4 by law. Id at 5-6. Applying the standard articulated in In re
5 Rosenkrantz, 29 Cal 4th 616, 658 (2002) ("courts may only inquire
6 whether some evidence in the record before the Board supports the
7 decision to deny parole, based upon the factors specified by
8 statute and regulation"), the court denied the petition.

9 Petitioner next filed in the court of appeal, which
10 summarily denied his petition on October 4, 2007. Doc #20 Ex 4.
11 Petitioner next filed in the California Supreme Court, which
12 summarily denied his petition on May 21, 2008. Doc #20 Ex 6.

13 Petitioner submitted his federal petition herein to the
14 clerk of the United States District Court for the Central District
15 of California on July 7, 2008; it was transferred and ultimately
16 filed in this court on August 5, 2008. Doc #1. Respondent filed
17 an answer opposing the issuance of a writ (Doc #20) and petitioner
18 filed a traverse. Doc #21.

19
20 II

21 28 USC § 2254 "is the exclusive vehicle for a habeas
22 petition by a state prisoner in custody pursuant to a state court
23 judgment, even when the petitioner is not challenging his
24 underlying state court conviction." Sass v California Board of
25 Prison Terms, 461 F3d 1123, 1126-27 (9th Cir 2006). The petition
26 cannot be granted unless the state court decision "was contrary to,
27 or involved an unreasonable application of, clearly established
28 Federal law, as determined by the Supreme Court of the United

1 States," or "was based on an unreasonable determination of the
2 facts in light of the evidence presented in the State court
3 proceeding." 28 USC § 2254(d) (West 2009).

4 California Penal Code § 3041 vests all California
5 prisoners whose sentences provide for the possibility of parole
6 with a constitutionally protected liberty interest in the receipt
7 of a parole release date. Irons v Carey, 505 F3d 846, 850 (9th Cir
8 2007). See also Sass, 461 F3d at 1128-29; McQuillion v Duncan, 306
9 F3d 895, 900 (9th Cir 2002).

10 The Supreme Court has held that "revocation of good time
11 does not comport with the 'minimum requirements of procedural due
12 process,' unless the findings of the prison disciplinary board are
13 supported by some evidence in the record." Superintendent,
14 Massachusetts Correctional Inst v Hill, 472 US 445, 454 (1984).
15 The Ninth Circuit has applied the Hill standard to the parole
16 context: "a parole board's decision deprives a prisoner of due
17 process with respect to this interest if the board's decision is
18 not supported by 'some evidence in the record.'" Irons, 505 F3d
19 846 at 851 (citing Sass, 461 F3d at 1128-29).

20 Respondent asserts that the "some evidence" standard is
21 not clearly established law for purposes of AEDPA because the
22 Supreme Court has never used it in the context of parole
23 proceedings. Doc #20 at ¶¶ 8-11. But this court is bound by Ninth
24 Circuit rulings applying the Hill standard to parole suitability
25 determinations. See Irons, 505 F3d at 851; McQuillion, 306 F3d at
26 904; Biggs v Terhune, 334 F3d 910, 915 (9th Cir 2003).

27 In order to determine whether a state court's decision
28 was in fact an unreasonable application of clearly established

1 federal law, the federal court reviewing a habeas corpus petition
2 must "look through" to the last reasoned decision of the state
3 court. Ylst v Nunnemaker, 501 US 797, 803-04 (1991); Avila v
4 Galaza, 297 F3d 911, 918 (9th Cir 2002). Accordingly, this court
5 must examine the decision of the superior court.

6 Reviewing federal courts "must look to California law to
7 determine the findings that are necessary to deem a prisoner
8 unsuitable for parole, and then must review the record in order to
9 determine whether the state court decision holding that these
10 findings were supported by 'some evidence' constituted an
11 unreasonable application of the 'some evidence' principle
12 articulated in Hill." Irons, 505 F3d at 851.

13 California Penal Code § 3041(b) (West 2009) provides
14 that, when considering parole for a prisoner who has served the
15 minimum number of years to become eligible, the parole board "shall
16 set a release date unless it determines that the gravity of the
17 current convicted offense or offenses, or the timing and gravity of
18 current or past convicted offense or offenses, is such that
19 consideration of the public safety requires a more lengthy period
20 of incarceration * * *." California Code of Regulations § 2402(a)
21 (West 2009) sets forth the criteria for determining suitability for
22 parole: "[r]egardless of the length of time served, a life prisoner
23 shall be found unsuitable for and denied parole if in the judgment
24 of the panel the prisoner will pose an unreasonable risk of danger
25 to society if released from prison." Id. Information to be
26 considered includes all relevant, reliable information such as the
27 prisoner's social history, past and present mental state, past
28 criminal history, the base and other commitment offenses, past and

1 present attitude toward the crime and any other information which
2 bears on the prisoner's suitability. 15 Cal Code Regs § 2402(b).

3 Under these regulations, the circumstances tending to
4 show that a prisoner is unsuitable include: the commitment offense,
5 the offense having been committed in "an especially heinous,
6 atrocious or cruel manner"; prisoner's previous record of violence;
7 "a history of unstable or tumultuous relationships with others";
8 commission of "sadistic sexual offenses"; "a lengthy history of
9 severe mental problems related to the offense" and "serious
10 misconduct in prison or jail." 15 Cal Code Regs § 2402(c)(A)-(E).

11 Circumstances tending to show that a prisoner is suitable
12 for parole, on the other hand, include: lack of a juvenile record;
13 reasonably stable relationships with others; remorse; no
14 significant history of violent crime; "realistic plans for release
15 * * * or marketable skills that can be put to use upon release";
16 "[i]nstitutional activities indicat[ing] an enhanced ability to
17 function within the law upon release." 15 Cal Code Regs § 2402(d).

18 While the "some evidence" standard is deferential, it
19 ensures that "the record is not so devoid of evidence that the
20 findings of [the Board] were without support or otherwise
21 arbitrary." Superintendent v Hill, 472 US at 457. Determining
22 whether this requirement is satisfied "does not require examination
23 of the entire record, independent assessment of the credibility of
24 witnesses, or weighing of the evidence." *Id* at 455-56. Due
25 process does require that the evidence underlying the Board's
26 decision have some indicia of reliability. Biggs, 334 F3d at 915;
27 McQuillion, 306 F3d at 904. Due process is flexible and calls for
28 the procedural protections that particular situations demand; a

1 parole denial procedure that affords an opportunity to be heard and
2 that informs the prisoner in what respects he falls short of
3 qualifying for parole may be constitutionally sufficient.

4 Greenholz v Inmates of Nebraska Penal & Correctional Complex, 442
5 US 1 (1979).

6
7 III

8 Petitioner makes two general arguments in support of his
9 claim that the Board's decision violated his due process rights
10 under federal law: (1) the commitment offense was not "especially
11 heinous nor was it carried out in a manner which demonstrates an
12 exceptionally callous disregard for human suffering" and (2) the
13 Board's decision that petitioner would pose an unreasonable risk of
14 danger to public safety if he were released from prison was not
15 supported by "some evidence." Ptn at 1, 9.

16 The record of the Board's proceedings reflects that the
17 Board undertook an individualized consideration of petitioner's
18 case. Both petitioner and his attorney were given an opportunity
19 to speak. Petitioner was provided with an interpreter and spoke at
20 length on the record through the interpreter. The Board
21 acknowledged petitioner's absence of disciplinary problems and
22 exceptional record of achievement in prison, including his
23 participation in AA. Petitioner argues that he "was as recovered
24 from his alcoholism as it is possible for an individual to be."
25 Ptn at 10. But the Board's decision did not rest on a belief that
26 petitioner's alcoholism was currently active, but rather on doubts
27 that petitioner would abstain from alcohol in the future; these
28 doubts, in turn, rested on petitioner's own statements suggesting

1 that he had not fully taken responsibility for the choices he made
2 that caused the commitment offense. For example, the Board noted
3 that petitioner persisted in referring to the fatal collision as an
4 "accident."

5 The Board also gave focused consideration to the Walker
6 psychological report and made detailed findings about it,
7 specifically declining to accept its conclusion that petitioner
8 represented a "low" risk to the community if released and
9 explaining its reasons for doing so. The Board informed petitioner
10 of the reasons why he was deemed unworthy of parole and made
11 recommendations to him for receiving more favorable consideration
12 in a subsequent hearing.

13 In conclusion, the Board's finding that petitioner
14 currently poses a threat to public safety is supported by "some
15 evidence." The superior court's application of Rosenkrantz was
16 appropriate. Rosenkrantz sets forth a standard identical to the
17 federal standard applicable to parole cases as discussed above
18 herein. Accordingly, the state court's evaluation of petitioner's
19 claim did not "result in a decision that was contrary to, or
20 involved an unreasonable application of, clearly established
21 Federal law, as determined by the Supreme Court of the United
22 States" or was "a decision that was based on an unreasonable
23 determination of the facts in light of the evidence presented in
24 the State Court proceeding." 28 USC § 2254(d).

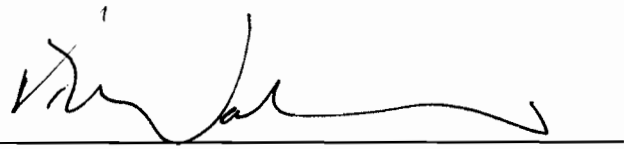
25 On the other hand, petitioner's record of exemplary
26 conduct and achievement in prison makes this case one in which
27 continued reliance on the circumstances of the commitment offense
28 will warrant increased judicial scrutiny in the habeas corpus

1 context in the event of one or more future denials of parole.
2 Given that petitioner had not yet served his minimum term at the
3 time of the parole denial at issue here, however, the court does
4 not find the concern to reach constitutional dimensions. Irons,
5 505 F3d at 853 (noting that in all of the cases in which court had
6 previously held that a denial of parole based solely on the
7 commitment offense comported with due process, prisoner had not yet
8 served the minimum number of years required by his sentence).
9 There is, therefore, no basis for federal habeas relief.

11 IV

12 For the reasons stated herein, the petition for a writ of
13 habeas corpus is DENIED. The clerk is directed to close the file
14 and terminate all pending motions.

16 IT IS SO ORDERED.

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19 _____
20 VAUGHN R WALKER
21 United States District Chief Judge
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