UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GREGORY A. JONES, Petitioner, v. B. CURRY, Respondent.

1:08-cv-01464-AWI-JMD-HC

FINDINGS AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS

OBJECTIONS DUE WITHIN THIRTY DAYS

Petitioner Gregory A. Jones ("Petitioner") is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Procedural History

In 1992, a jury convicted Petitioner of one count of second degree murder and three counts of assault with a firearm. (Answer, Ex. A). The sentencing court imposed a sentence of eighteen years to life. (Id.).

On September 11, 2006, Petitioner appeared before California's Board of Parole Hearings (BPH). The BPH denied Petitioner parole. (Doc. 28, Attachment 1).

Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court challenging the BPH's denial of parole. The Superior Court issued a reasoned decision denying Petitioner relief on October 5, 2007. (Pet. at 69).

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Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal on October 25, 2007; the Court of Appeal summarily denied the petition on November 10, 2007. (Pet. at 70).

On November 30, 2007, Petitioner filed a petition for writ of habeas corpus with the California Supreme Court. The California Supreme Court summarily denied the petition on June 11, 2008. (Pet. at 72).

Petitioner filed the instant federal petition for writ of habeas corpus on August 21, 2008. (Doc. 3). Respondent filed an answer to the petition on January 1, 2009. (Doc. 20). Petitioner filed and a traverse on February 3, 2009. (Doc. 24).

Factual Background

Petitioner does not challenge his underlying conviction or sentence in this action. Rather, Petitioner contends that the BPH's denial of parole to him at his 2006 hearing was not based on sufficient evidence of his current dangerousness and therefore violated his right to due process of the law.[1] Accordingly, the factual background relevant to resolution of Petitioner's claim concerns the process he was afforded at his parole hearing and the evidence relied upon by the BPH in denying Petitioner parole.

Petitioner appeared before the BPH on September 11, 2006 and was represented by counsel. The BPH received evidence proffered by Petitioner and afforded Petitioner an opportunity to be heard. (*See* Doc. 28, Attachment1). In assessing Petitioner's suitability for parole, the BPH relied on the description of Petitioner's commitment offense contained in the California Court of Appeal's opinion affirming Petitioner's conviction. (Id. at 7-10). As stated in the Court of Appeal's opinion, Petitioner was involved in an altercation with several individuals outside a McDonald's restaurant, pulled out a semiautomatic weapon, and open fired on the individuals as they attempted to flee the scene. (Id. at 9).

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[1] Petitioner purports to advance ten claims for relief. In fact, Petitioner's ten contentions are not distinct claims for relief but rather are ten reasons Petitioner feels the BPH's decision is not supported by some evidence. The Court need not reach each of Petitioner's contentions individually, as the relevant inquiry is whether "is *any* evidence in the record that could support the conclusion reached" by the parole board. *See Superintendent v. Hill*, 472 U.S. 445, 455-46 (1985)(emphasis added).

In addition to assessing the nature of Petitioner's commitment offense, the BPH evaluated Petitioner's central file, the most recent Life Prisoner Evaluation Report prepared for Petitioner, and a psychological report prepared in 2002. (Id. at 25). The BPH discussed Petitioner's participation in self-help and vocational training programs as well as his parole plans. (Id. at 34-37; 39-41). Finally, the BPH discussed Petitioner's history of disciplinary infractions while incarcerated. (Id. at 37-38).

Discussion

I. Jurisdiction and Venue

A person in custody pursuant to the judgment of a state court may file a petition for a writ of habeas corpus in the United States district courts if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a)[2]; 28 U.S.C. § 2241(c)(3); *Williams v. Taylor*, 529 U.S. 362, 375, n.7 (2000). Venue for a habeas corpus petition is proper in the judicial district where the prisoner is held in custody. *See* 28 U.S.C. § 2241(d).

Petitioner asserts that he is currently incarcerated at Corcoran State Prison in Kings County, California, in violation of his right to due process under the United States Constitution. As Kings County is within the Eastern District of California, the Court has jurisdiction to entertain the petition and venue is proper in the Eastern District. 28 U.S.C. § 84; 28 U.S.C. § 2241(c)(3).

II. Standard of Review

Section 2254 "is 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." *Sass v. California Board of Prison Terms*, 461 F.3d 1123, 1126 (9th Cir. 2006) (quoting *White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir. 2004)). Under section 2254, a petition for habeas corpus may not be granted unless the state court decision denying Petitioner's state habeas

[2] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to all petitions for writ of habeas corpus filed after its enactment. *Lindh v. Murphy*, 521 U.S. 320, (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586 (1997) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied,* 520 U.S. 1107, 117 S.Ct. 1114 (1997), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

petition "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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). "A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly...rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (citations omitted).

IV. Petitioner's Due Process Claim

A. The Due Process Framework

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits states from depriving persons of protected liberty interests without due process of law. *See, e.g., Sass*, 461 F.3d at 1127. The Court must "analyze Petitioner's due process claim in two steps: 'the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Id.* (quoting *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) *partially overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995)).

California law vests prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date. *Irons v. Carey*, 505 F.3d 846, 850-51 (9th Cir. 2007); *Sass*, 461 F.3d at 1128; *McQuillion v. Duncan*, 306 F.3d 895, 903 (9th Cir. 2002) (citing *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979)); *Biggs v. Terhune*, 334 F.3d 910, 915 (2003). Although California's parole statute creates a liberty interest protected by the Due Process Clause, *Irons*, 306 F.3d at 903, "since the setting of a minimum term is not part of a criminal prosecution, the full panoply of rights due a defendant in [a criminal prosecution proceeding] is not constitutionally mandated" in the parole context, *Pedro v. Oregon Parole Bd.*, 825 F.3d 1396, 1399 (9th Cir. 1987). Due process requires that a parole board's denial of parole to a prisoner be supported by "some evidence."[3] *Irons*, 505 F.3d at 851 (citing *Sass*,

[3] The Ninth Circuit is currently considering the "some evidence" standard en banc. *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008) *reh'g en banc granted*, 527 F.3d 797 (2008).

461 F.3d at 1128-29 (quoting *Superintendent v. Hill*, 472 U.S. 445, 457(1985)); *see also Biggs*, 334 F.3d at 915; *McQuillion*, 306 F.3d at 904. The requirement that the parole board's denial of parole to Petitioner be supported by some evidence is clearly established federal law.[4] *See Irons*, 505 F.3d at 851 (citing *Sass*, 461 F.3d at 1128-29 (quoting *Hill*, 472 U.S. at 457); *see also Biggs*, 334 F.3d at 915; *McQuillion*, 306 F.3d at 904.[5]

The "some evidence" standard is minimal, and is meant only to "[assure] that 'the record is not so devoid of evidence that the findings of...[the] board were without support or otherwise arbitrary.'" *Sass*, 461 F.3d at 1129 (quoting *Hill*, 472 U.S. at 457). "Ascertaining whether [the some evidence] standard is satisfied does not require...weighing of the evidence. ..the relevant question is whether there is any evidence in the record that could support the conclusion reached." *Hill*, 472 U.S. at 455-456. Want of due process is not established by showing merely that incompetent evidence was received and considered. *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927).[6] "Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced." *Id.* "The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact." *Hill*, 472 U.S. at 456 (citations omitted).

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[4] Respondent contends that no clearly established federal law requires that California parole decisions be supported by "some evidence." "The Supreme Court need not have addressed the identical factual circumstances at issue in a case in order for it to have created 'clearly established' law governing that case....rather, it is enough that the Supreme Court has prescribed a rule that plainly governs the petitioner's claim." *McQuillion*, 306 F.3d at 901 (citations omitted). Further, this Court is not authorized to disregard the settled law of the Ninth Circuit, which holds that the "some evidence" requirement is clearly established federal law in the parole context. *See id.*

[5] The Attorney General's reliance on *Biggs*, *Irons*, and *Sass* as authority for Respondent's contention that "the Ninth Circuit's use of the some-evidence [sic] standard is not clearly established federal law and is not binding on this court," is a flagrant miscitation. (Answer at 6). In each of these cases, the Ninth Circuit concluded that the some evidence standard is clearly established federal law in the parole context and applied the standard to petitions under AEDPA. *See Irons*, 505 F.3d at 851; *Sass*, 461 F.3d at 1128-29; *Biggs*, 334 F.3d at 915. The Court reminds counsel that by presenting to the Court a pleading, an attorney certifies that to the best of the person's knowledge, information, and belief the legal contentions are warranted by a nonfrivolous argument. Fed. R. Civ. P. 11(b)(3).

[6] *Vajtauer* concerned a collateral challenge to an immigration decision. The Supreme Court cited *Vajtauer* in support of its formulation of the some evidence standard set forth in *Hill*. 472 U.S. at 455.

In assessing whether the parole board's denial of parole to Petitioner is supported by "some evidence," the Court's analysis "is framed by the statutes and regulations governing parole suitability determinations in [California]." *Irons*, 505 F.3d at 851. Accordingly, the Court must look to California law "to determine the findings that are necessary to deem a prisoner unsuitable for parole, and then must review the record in order to determine whether the state court decision holding that these findings were supported by 'some evidence' in Petitioner's case constituted an unreasonable application of the 'some evidence' principle articulated in *Hill*." *Id.*

Under California law, the paramount inquiry in determining whether to grant a prisoner parole is whether the prisoner "will pose an unreasonable risk of danger to society if released from prison." CAL. CODE. REGS. TIT 15, § 2402(a) (2008); *In Re Lawrence*, 44 Cal. 4th 1181, 1202 (Cal. 2008). Title 15, section 2402 of the California Code of Regulations sets forth the factors to be considered by the BPH in applying California's parole statute to Petitioner. Section 2402 provides in part:

> All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.

CAL. CODE. REGS., tit. 15, § 2402(b) (2008). Factors supporting a finding of unsuitability for parole include an especially heinous commitment offense, serious misconduct while incarcerated, and psychological risk factors. CAL. CODE REGS., tit. 15, § 2402(c).

The factors listed in section 2402(c) "establish unsuitability [for parole] if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public." *Lawrence*, 44 Cal.4th at 1212. "When a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the decision ...that the inmate constitutes a current threat to public safety...not merely whether some evidence confirms the existence of certain

factual findings." *Id.* A rational nexus between the unsuitability factors applicable to the prisoner and the ultimate determination of dangerousness must exist. *See id.* at 1227.

B. Review of Petitioner's State Habeas Proceeding

The Los Angeles County Superior Court issued the last reasoned decision denying Petitioner habeas relief. As the California Court of Appeal and the California Supreme Court both denied Petitioner's state habeas petitions without analysis, the Court must "look through" the summary dispositions to the last reasoned decision issued by the State. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991). Accordingly, the Court reviews the reasoned decision of the Los Angeles Superior Court denying Petitioner relief.

The Superior Court held that the BPH's denial of parole to Petitioner is supported by some evidence of Petitioner's current dangerousness. (Pet. at 69). Specifically, the Superior Court noted the BPH's permissible reliance on the nature of Petitioner's commitment offense, Petitioner's serious disciplinary infraction while incarcerated, Petitioner's failure to upgrade vocationally, and the district attorney's opposition to Petitioner's parole. (Id.). After careful review of the record, the Court cannot say that the Superior Court's determination was objectively unreasonable, as the Court finds that each of the factors relied upon by the BPH to deny Petitioner parole bares a rational nexus to the BPH's finding of dangerousness and is supported by evidence in the record.

The record demonstrates that in 2001, only five years prior to the parole denial at issue in this action, Petitioner was found guilty of possession of escape paraphernalia, a serious disciplinary infraction. (Pet. at 225). The California legislature has determined that serious misconduct while incarcerated tends to demonstrate unsuitability for parole. *See* CAL. CODE REGS., tit. 15, § 2402(c)(6). The record also supports the BPH's determination that Petitioner failed to upgrade vocationally. According to Petitioner, the reason he has not completed vocational training is that a foot injury precludes him from wearing the boots necessary to do so. (Doc. 28, Attachment 1 at 51). The BPH noted that, given Petitioner's health and vocational training, Petitioner's parole plans were "unrealistic in that the employment plans are not work duties that Mr. Jones is physically capable of doing at this time." (Id. at 73).

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The California legislature has determined that whether or not a prisoner has developed marketable skills and has realistic plans for release is relevant in determining parole suitability. *See* CAL. CODE REGS., tit. 15, § 2402(d)(8).

As noted by the Superior Court, the BPH also considered the argument advanced by the district attorney in denying Petitioner parole. (Pet. at 69). The district attorney's opposition was based on the fact that Petitioner has given various inconsistent accounts of his crime at his parole hearings. (Doc. 28, Attachment 1 at 53-55). The BPH was troubled by Petitioner's inconsistent versions of the crime. The BPH stated:

> Mr. Jones, we reviewed the transcript from your last hearing and we were concerned because in the transcript it indicates that you told the Panel that you were shooting while you were on the ground. And we didn't get that from you today...It's as though there are so many different versions of what happened that you haven't become comfortable with what actually did happen....The Panel is troubled by there being so many versions.

(Id. at 74). California Code of Regulations title 15 section 2402(b) provides that the parole board *shall* consider the prisoner's "past and present attitude toward the crime." Section 2402(d)(3) also expressly directs the parole board to consider whether a prisoner "understands the nature and magnitude of the offense." A prisoner's lack of insight into the crime or attempt to minimize the crime may constitute some evidence of current dangerousness. *See In re Shaputis*, 44 Cal.4th 1241, 1257 n. 14 (Cal. 2008) (attempts to minimize crime may support finding of unsuitability). Here, the BPH's concern that Petitioner had not really come to grips with the crime is supported by Petitioner's inconsistent and possibly dishonest statements to the BPH at his various parole hearings.

The Superior Court also concluded, reasonably, that the BPH's assessment of the nature of Petitioner's commitment offense is supported by the record. Whether the commitment offense was carried out in "an especially heinous, atrocious, or cruel manner" is a factor which tends to demonstrate unsuitability for parole. CAL. CODE REGS., tit. 15, § 2402(c)(1). The fact that multiple victims were attacked, injured, or killed during the commission of a crime may render the commission of the crime especially heinous, atrocious, or cruel. CAL. CODE REGS., tit. 15, § 2402(c)(1)(A). It is undisputed that Petitioner shot at multiple victims as they attempted to flee from Petitioner. (Doc. 28, Attachment 1 at 9-10). Accordingly, the BPH's conclusion that the nature of

the commitment offense tended to demonstrate Petitioner's unsuitability for parole is supported by the record. Although reliance solely on a prisoner's commitment offense to deny parole may, in some instances, violate the prisoner's due process rights, in the instant case, the commitment offense was one of several factors relied upon by the BPH to deny Petitioner parole. Under California law, factors "which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." CAL. CODE. REG. tit 15 § 2402(b).

As discussed above, each of the factors relied upon by the BPH to deny Petitioner parole is supported by evidence in the record. However, the mere existence of some evidence of particular unsuitability factors is insufficient to deny a Petitioner parole under California law, as a rational nexus between the unsuitability factors applicable to the prisoner and the ultimate determination of dangerousness must exist. *See Lawrence*, 44 Cal.4th at at 1227. Given the relatively short period of time between Petitioner's serious disciplinary infraction and the parole denial at issue here, the Court finds there was a rational nexus between Petitioner's possession of escape paraphernalia in prison and his dangerousness at the time of his 2006 parole denial. Additionally, the Court finds that the commitment offense also had a sufficient nexus with Petitioner's dangerousness at the time of his 2006 parole hearing. This is especially so given Petitioner's attitude towards his crime as evinced by his inconsistent accounts to the BPH, *see Shaputis*, 44 Cal.4th at 1257 n. 14. The nexus between Petitioner's commitment offense and his dangerousness at the time of his 2006 parole hearing is bolstered further by the fact that Petitioner had not yet served the minimum sentence imposed by the sentencing court at the time the BPH denied him parole in 2006. The Court notes that the Ninth Circuit has never held that a parole denial based solely on the commitment offense violates a prisoner's due process rights before the expiration of the prisoner's minimum term. *Irons*, 505 F.3d at 853-54. Finally, Petitioner's lack of realistic parole plans serves to increase his risk of dangerousness. *See In re Andrade*, 141 Cal. App. 4th 807, 817-819 (Cal. Ct. App. 2006) (discussing importance of realistic parole plans in parole considerations).[7]

[7] *Andrade* predates the California Supreme Court's decision in *Lawrence* and thus did not expressly discuss the nexus between realistic parole plans and dangerousness. It is axiomatic, however, that a prisoner released back into society without a realistic means of providing for himself poses a higher risk of relapsing into criminal activity than a prisoner who has arranged for employment and housing before release. Petitioner's inability to conform to prison rules combined with his lack

In light of the BPH's assessment of the nature of Petitioner's commitment offense, Petitioner's inconsistent and potentially dishonest accounts of his crime to the BPH, Petitioner's lack of realistic parole plans, and Petitioner's serious disciplinary infraction only five years prior to the denial at issue in this case, the Court cannot say that the Superior Court's finding that the some evidence standard was satisfied was objectively unreasonable. The precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the parole board, *see, e.g., Shaputis*, 44 Cal. 4th at 1260, and this Court is precluded from re-weighing the evidence, *Hill*, 472 U.S. at 456. Accordingly, Petitioner is not entitled to relief under section 2254. *E.g, Lockyer*, 538 U.S. at 75 (no relief under section 2254 unless state court adjudication was objectively unreasonable).

RECOMMENDATION

Based on the reasons stated above, the Court RECOMMENDS that the petition for writ of habeas corpus be DENIED WITH PREJUDICE and the Clerk of Court be DIRECTED to enter judgment for Respondent.

This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(c). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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of realistic parole plans suggests that Petitioner could easily lapse into criminal conduct and is therefore sufficient to establish a rational nexus between Petitioner's unsuitability factors and dangerousness.

IT IS SO ORDERED.

Dated: October 26, 2009 **/s/ John M. Dixon**
UNITED STATES MAGISTRATE JUDGE