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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JEROME TUCKER,

1:09-cv-01199-AWI-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 1]

JAMES D. HARTLEY, Warden

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation (CDCR) following 1990 conviction for attempted first degree murder and second degree robbery with use of a firearm. Petitioner was sentenced to seven years to life with the possibility of parole.

In the instant petition, Petitioner does not challenge the validity of his underlying conviction; rather, he challenges the Board of Parole Hearings' 2008 (Board) decision finding him unsuitable for release.

On December 2, 2009, Petitioner filed a petition for writ of habeas corpus in the Riverside County Superior Court, challenging the Board's 2008 decision. The petition was denied for failure to state a prima facie case. (Exhibits A & B, to Answer.)

1 Petitioner then filed state petitions in the California Court of Appeal and California
2 Supreme Court. (Exhibits C & E, to Answer.) Both petitions were summarily denied. (Exhibits
3 D & F, to Answer.)

4 Petitioner filed the instant federal petition for writ of habeas corpus on July 2, 2009.
5 (Court Doc. 1.) Respondent filed an answer to the petition on September 11, 2009, and
6 Petitioner filed a traverse on October 5, 2009. (Court Docs. 15, 18.)

7 STATEMENT OF FACTS

8 On May 2, 1989, Petitioner and his partner entered a jewelry store in Moreno Valley.
9 Petitioner's partner held a gun to the store manager-Charles Johnson-and ordered him to get
10 down. Mr. Johnson complied and provided keys to the jewelry display. Petitioner then obtained
11 a handgun that was located in the jewelry store. The two then began ransacking the store. At
12 one point during the robbery, Petitioner's crime partner broke a display case and demanded
13 another key. When Mr. Johnson stated that there was no other key, Petitioner said "kill him. He's
14 lying." Petitioner made the same statement again after his partner was unable to open the cash
15 register. In addition, Petitioner repeatedly pistol-whipped the victim to the point of
16 unconsciousness. Petitioner then dragged the victim by his hair to the back room and began
17 interrogating him about the video surveillance. The victim's hands were then bound behind his
18 back and his feet were bound together at the ankles with duck tape. Petitioner was then shot
19 three times, causing him to be paralyzed from the waist down. Petitioner and his partner fled the
20 scene.

21 (Exhibit A, to Answer, Transcript at 76-77.)

22 DISCUSSION

23 I. Standard of Review

24 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
25 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment.
26 Lindh v. Murphy, 521 U.S. 320 (1997), *cert. denied*, 522 U.S. 1008 (1997); Jeffries v. Wood,
27 114 F.3d 1484, 1499 (9th Cir. 1997), *quoting* Drinkard v. Johnson, 97 F.3d 751, 769 (5th
28 Cir.1996), *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by* Lindh v. Murphy,

1 521 U.S. 320 (1997) (holding AEDPA only applicable to cases filed after statute's enactment).

2 The instant petition was filed after the enactment of the AEDPA; thus, it is governed by its
3 provisions.

4 Petitioner is in custody of the California Department of Corrections pursuant to a state
5 court judgment. Even though Petitioner is not challenging the underlying state court conviction,
6 28 U.S.C. § 2254 remains the exclusive vehicle for his habeas petition because he meets the
7 threshold requirement of being in custody pursuant to a state court judgment. Sass v. California
8 Board of Prison Terms, 461 F.3d 1123, 1126-1127 (9th Cir.2006), citing White v. Lambert, 370
9 F.3d 1002, 1006 (9th Cir.2004) (“Section 2254 ‘is the exclusive vehicle for a habeas petition by a
10 state prisoner in custody pursuant to a state court judgment, even when the petition is not
11 challenging his underlying state court conviction.’”).

12 The instant petition is reviewed under the provisions of the Antiterrorism and Effective
13 Death Penalty Act which became effective on April 24, 1996. Lockyer v. Andrade, 538 U.S. 63,
14 70 (2003). Under the AEDPA, an application for habeas corpus will not be granted unless the
15 adjudication of the claim “resulted in a decision that was contrary to, or involved an unreasonable
16 application of, clearly established Federal law, as determined by the Supreme Court of the United
17 States” or “resulted in a decision that was based on an unreasonable determination of the facts in
18 light of the evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d); see Lockyer,
19 538 U.S. at 70-71; see Williams, 529 U.S. at 413.

20 As a threshold matter, this Court must "first decide what constitutes 'clearly established
21 Federal law, as determined by the Supreme Court of the United States.'" Lockyer, 538 U.S. at 71,
22 quoting 28 U.S.C. § 2254(d)(1). In ascertaining what is "clearly established Federal law," this
23 Court must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as
24 of the time of the relevant state-court decision." Id., quoting Williams, 529 U.S. at 412. "In other
25 words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or
26 principles set forth by the Supreme Court at the time the state court renders its decision." Id.

27 Finally, this Court must consider whether the state court's decision was "contrary to, or
28 involved an unreasonable application of, clearly established Federal law." Lockyer, 538 U.S. at

1 72, *quoting* 28 U.S.C. § 2254(d)(1). “Under the ‘contrary to’ clause, a federal habeas court may
2 grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme]
3 Court on a question of law or if the state court decides a case differently than [the] Court has on a
4 set of materially indistinguishable facts.” Williams, 529 U.S. at 413; *see also* Lockyer, 538 U.S.
5 at 72. “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if the
6 state court identifies the correct governing legal principle from [the] Court’s decisions but
7 unreasonably applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 413.

8 “[A] federal court may not issue the writ simply because the court concludes in its
9 independent judgment that the relevant state court decision applied clearly established federal law
10 erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411. A
11 federal habeas court making the “unreasonable application” inquiry should ask whether the state
12 court’s application of clearly established federal law was “objectively unreasonable.” Id. at 409.

13 Petitioner has the burden of establishing that the decision of the state court is contrary to
14 or involved an unreasonable application of United States Supreme Court precedent. Baylor v.
15 Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the
16 states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a
17 state court decision is objectively unreasonable. *See* Clark v. Murphy, 331 F.3d 1062, 1069 (9th
18 Cir.2003); Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir.1999).

19 AEDPA requires that we give considerable deference to state court decisions. The state
20 court's factual findings are presumed correct. 28 U.S.C. § 2254(e)(1). We are bound by a state's
21 interpretation of its own laws. Souch v. Schaivo, 289 F.3d 616, 621 (9th Cir.2002), cert. denied,
22 537 U.S. 859 (2002), rehearing denied, 537 U.S. 1149 (2003).

23 In this instance, the last reasoned decision of the Riverside County Superior Court denied
24 the petition for failure to state a prima case for relief. (Exhibit B, to Answer.)

25 II. Review of Claims

26 A parole release determination is not subject to all the due process protections of an
27 adversary proceeding. Pedro v. Oregon Parole Board, 825 F.2d 1396, 1398-99 (9th Cir. 1987);
28 *see also* Greenholtz, 442 U.S. at 12 (explaining that due process is flexible and calls for

1 procedural protections that particular situations demand). "[S]ince the setting of a minimum term
2 is not part of a criminal prosecution, the full panoply of rights due a defendant in such a
3 proceeding is not constitutionally mandated, even when a protected liberty interest exists." Pedro,
4 825 F.2d at 1399; Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir.1987). At a
5 state parole board proceeding, the only process to which an inmate is entitled is: 1) the inmate
6 must receive advance written notice of a hearing, Pedro, 825 F.2d at 1399; 2) the inmate must be
7 afforded an "opportunity to be heard," Greenholtz, 442 U.S. at 16; 3) if the inmate is denied
8 parole, the inmate must be told why "he falls short of qualifying for parole," Id.; and 4) the
9 decision of the Board must be supported by "some evidence" having an indicia of reliability.
10 Superintendent, Mass. Correc. Inst. v. Hill, 472 U.S. 445, 455 (1985); Cato v. Rushen, 824 F.2d
11 703, 705 (9th Cir.1987).

12 "In Superintendent v. Hill, the Supreme Court held that 'revocation of good time does not
13 comport with 'the minimum requirements of procedural due process,' unless the findings of the
14 prison disciplinary board are supported by some evidence in the record.' 472 U.S. 445, 454
15 (1985), *quoting* Wolff v. McDonnell, 418 U.S. 539, 558 (1974)." Sass, 461 F.3d at 1128. In
16 determining whether the "some evidence" standard is met, the Court need not examine the entire
17 record, independently assess the credibility of witnesses, or re-weigh the evidence. Id. Rather,
18 the Court must determine whether there is any evidence in the record that could support the
19 conclusion of the disciplinary board. Id., *citing* Superintendent v. Hill, at 455-56. Although Hill
20 involved the accumulation of good time credits, the same standard applies to parole, as both
21 situations "directly affect the duration of the prison term." Id., *citing* Jancsek v. Oregon Bd. of
22 Parole, 833 F.2d at 1390.

23 In making a determination whether an inmate is suitable for parole, the Board is guided by
24 the following regulations:

25 (a) General. The panel shall first determine whether the life prisoner is suitable for
26 release on parole. Regardless of the length of time served, a life prisoner shall be found
27 unsuitable for a denied parole if in the judgment of the panel the prisoner will pose an
28 unreasonable risk of danger to society if released from prison.

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

11 15 Cal. Code Regs. §§ 2402(a) and (b).

12 In this case, with regard to the procedural protections outlined in Greenholtz, Petitioner
13 was provided all that is required. Petitioner was given advance notice of the hearing, he was
14 offered representation by counsel at the hearing, he was granted an opportunity to submit
15 materials for the Board's consideration and an opportunity to be heard during the hearing, and he
16 was provided a written decision explaining the reasons why parole was denied.

17 The California Supreme Court clarified the standard of the review applicable to parole
18 decisions by the Board or Governor in In re Lawrence, 44 Cal.4th 1181 (2008). The applicable
19 standard "is whether some evidence supports the decision of the Board or the Governor that the
20 inmate constitutes a current threat to public safety, and not merely whether some evidence
21 confirms the existence of certain factual findings." Id. at 1212 (emphasis in original and
22 citations omitted). As to the circumstances of the commitment offense, the Court concluded that

23 although the Board and the Governor may rely upon the aggravated
24 circumstances of the commitment offense as a basis for a decision denying parole,
25 the aggravated nature of the crime does not in and of itself provide some evidence
26 of current dangerousness to the public unless the record also establishes that
27 something in the prisoner's pre- or post-incarceration history, or his or her current
28 demeanor and mental state, indicates that the implications regarding the
29 prisoner's dangerousness that derive from his or her commission of the
30 commitment offense remain probative to the statutory determination of a
31 continuing threat to public safety.

32 Id. at 1214.¹

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¹ To this end, the Court recognized that its prior determination of "a focus upon the egregiousness of the commitment offense to the exclusion of other relevant evidence has proved in practice to obscure the core statutory emphasis upon current dangerousness, the manner in which courts apply the some evidence standard in evaluating the evidentiary value of the gravity of the commitment offense requires some clarification." In re Shaputis, 44 Cal.4th 1241, 1254 (2008) (citing Lawrence, 44 Cal.4th at 1213-1214.)

1 At the 2008 hearing, the Board found Petitioner unsuitable for release based on the
2 circumstances of the commitment offense, criminal history, institutional misconduct, unstable
3 social history, and review of confidential information. (Exhibit A, to Answer, Transcript at 97-
4 103.)

5 First, the Board determined that Petitioner committed the offense in an especially heinous,
6 atrocious or cruel manner.² The Board found that the offense was committed in an especially
7 atrocious and cruel manner because it was carried out in a dispassionate and calculated manner.
8 15 Cal. Code Regs. § 2402(c)(1)(D). The Board also found the motive to be very trivial in
9 relation to the offense. Some evidence clearly supports the Board’s finding. After entering the
10 jewelry store, Petitioner’s partner held a gun to the store manager and ordered him to get down.
11 Mr. Johnson complied and provided keys to the jewelry display. Petitioner then obtained a
12 handgun that was located in the jewelry store. The two then began ransacking the store. At one
13 point during the robbery, Petitioner’s crime partner broke a display case and demanded another
14 key. When Mr. Johnson stated that there was no other key, Petitioner said “kill him. He’s lying.”
15 (Exhibit A, to Answer, Transcript at 76.) Petitioner made the same statement again after his
16 partner was unable to open the cash register. In addition, Petitioner repeatedly pistol-whipped the
17 victim to the point of unconsciousness. (Id. at 76-77.) Petitioner then drug the victim by the hair
18 to the back room and began interrogating him about the video surveillance. (Id. at 77.) The
19 victim’s hands were bound behind his back and his feet were bound together at the ankles with
20 duck tape. He was then shot three times which caused him to be paralyzed from the waist down.
21 There was no evidence that the victim did anything other than comply with the requests of

22
23 ² Pursuant to Title 15, of the California Code of Regulations, Section 2402(c) sets forth circumstances
24 tending to demonstrate unsuitability for parole when the prisoner committed the offense in an especially heinous,
25 atrocious or cruel manner. The factors to be considered include:

- 26 (A) Multiple victims were attacked, injured or killed in the same or separate incidents.
- 27 (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-
28 style murder.
- (C) The victim was abused, defiled or mutilated during or after the offense.
- (D) The offense was carried out in a manner which demonstrates an exceptionally callous
disregard for human suffering.
- (E) The motive for the crime is inexplicable or very trivial in relation to the offense.

15 Cal.Code Regs. § 2402(c)(1)(A)-(E).

1 Petitioner and his partner; yet, Petitioner and his partner continued their brutal and senseless
2 attack on him. Considering that the victim was bound, beaten, and shot several times, some
3 evidence supports the Board's finding that it demonstrated an exceptionally callous disregard for
4 human suffering, and when considered in light of the entire record it remains indicative of
5 Petitioner's current dangerousness.

6 The Board also found Petitioner's prior offenses to be an indicator of unsuitability, which
7 included a conviction for carrying a concealed weapon. 15 Cal. Code Regs. § 2402(c)(2).
8 Petitioner also failed to benefit from previous grants of adult probation, engaged in gang activity,
9 and had an alcohol and drug addiction. (Transcript at 99.)

10 The Board also determined that Petitioner's violent and serious misconduct during
11 incarceration indicated he remained a current risk of danger to the community. 15 Cal. Code
12 Regs. § 2402(c)(6). Petitioner received eight rules violation reports (CDC 115's), with most
13 recent in 1996 for mutual combat. (Transcript at 29-30.) Petitioner was also cited for assault and
14 battery on a peace officer, possession of a contraband, force and violence, possession of alcohol,
15 and other mutual combat. The Board also noted that Petitioner had received five negative
16 counseling chronos (CDC 128) during his incarceration. (Transcript at 30.) Given that
17 Petitioner's violent nature continued during his incarceration, there is some evidence to support
18 the Board's finding that it remains indicative of his current dangerousness.

19 The Board also found confidential reports to be reliable and indicative of Petitioner's
20 unsuitability for release. Because the Court finds the other factors provide some evidence to
21 support the Board's decision, it is not necessary to review such confidential information. See
22 Lawrence, 44 Cal.4th at 1212 (the relevant inquiry is not whether some evidence confirms the
23 existence of certain factual findings, but whether some evidence supports the Board's finding that
24 inmate poses current threat to public safety).

25 The Board also considered the factors in favor of suitability and commended Petitioner
26 for receiving vocational training in machine shop and cabinetry and completion of a small business
27 course. 15 Cal. Code Regs. § 2402(d). He had solid parole plans and had received above
28 average work evaluations. He was also making an effort to attend Alcoholics Anonymous and

1 was a participant in the Lifer Self-Help Seminar in April and May of 2008. However, the Board
2 concluded, on balance, that these factors did not outweigh the factors of unsuitability.

3 In sum, the circumstances of Petitioner's commitment offense, prior criminal history, and
4 institutional misconduct, in combination, support the Board's conclusion that Petitioner is a
5 current threat to public safety if released.

6 Petitioner's argument that the Board's continuing reliance on the unchanging
7 circumstances of the underlying offense violates his due process rights, is not persuasive. In Biggs
8 v. Terhune, 334 F.3d 910, 916-17 (9th Cir.2003), the Ninth Circuit stated that "[a] continued
9 reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior
10 to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could
11 result in a due process violation." As discussed above, however, the circumstances of the offense,
12 while significant, were not the only reasons for the Board's decision. Accordingly, Petitioner's
13 claim to the contrary is without merit.

14 In light of the above, it cannot be said that the state court resolution of Petitioner's claims
15 "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
16 established Federal law, as determined by the Supreme Court of the United States" or "resulted in
17 a decision that was based on an unreasonable determination of the facts in light of the evidence
18 presented in the State Court proceeding." 28 U.S.C. § 2254(d).

19 RECOMMENDATION

20 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 21 1. The petition for writ of habeas corpus be DENIED; and
- 22 2. Judgment be entered in favor of Respondent.

23 This Findings and Recommendations is submitted to the assigned United States District
24 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of
25 the Local Rules of Practice for the United States District Court, Eastern District of California.
26 Within thirty (30) days after being served with a copy, any party may file written objections with
27 the court and serve a copy on all parties. Such a document should be captioned "Objections to
28 Magistrate Judge's Findings and Recommendations." Replies to the objections shall be served

1 and filed within fourteen (14) days after service of the objections. The Court will then review the
2 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
3 failure to file objections within the specified time may waive the right to appeal the District
4 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5
6 IT IS SO ORDERED.

7 **Dated: March 1, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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