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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GEORGE FRANKLIN BUTZ,

1:10-cv-00435-OWW-SMS (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 1]

JAMES D. HARTLEY,

Respondent.

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

BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation (CDCR) following his conviction of second-degree murder with use of a weapon. Petitioner is serving an indeterminate sentence of sixteen years to life.

In the instant petition, Petitioner does not challenge the validity of his conviction; rather, he challenges the Board of Parole Hearings' (Board) March 4, 2008 decision finding him unsuitable for release.

Petitioner filed a petition for writ of habeas corpus in the Santa Barbara County Superior Court challenging the Board's 2008 decision. The superior court denied the petition in a reasoned decision finding some evidence to support the Board's decision.

1 forth with the knife and ultimately stabbed Cortez in the chest. Another tenant saw him run back
2 to the apartment and leave two or three minutes later. The police responded to several 9-1-1 calls
3 and found Cortez dead face down in a large pool of blood. Petitioner surrendered later that
4 morning. Petitioner said he threw the knife near Mission Street and Highway 101 on-ramp but
5 the police never found the knife.

6 DISCUSSION

7 I. Standard of Review

8 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
9 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its
10 enactment. Lindh v. Murphy, 521 U.S. 320 (1997), *cert. denied*, 522 U.S. 1008 (1997); Jeffries
11 v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997), *quoting* Drinkard v. Johnson, 97 F.3d 751, 769
12 (5th Cir.1996), *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by* Lindh v.
13 Murphy, 521 U.S. 320 (1997) (holding AEDPA only applicable to cases filed after statute's
14 enactment). The instant petition was filed after the enactment of the AEDPA; thus, it is governed
15 by its provisions.

16 Petitioner is in custody of the California Department of Corrections and Rehabilitation
17 pursuant to a state court judgment. Even though Petitioner is not challenging the underlying state
18 court conviction, 28 U.S.C. § 2254 remains the exclusive vehicle for his habeas petition because
19 he meets the threshold requirement of being in custody pursuant to a state court judgment. Sass
20 v. California Board of Prison Terms, 461 F.3d 1123, 1126-1127 (9th Cir.2006), *citing* White v.
21 Lambert, 370 F.3d 1002, 1006 (9th Cir.2004) (“Section 2254 ‘is the exclusive vehicle for a
22 habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the
23 petition is not challenging [her] underlying state court conviction.’”).

24 The instant petition is reviewed under the provisions of the Antiterrorism and Effective
25 Death Penalty Act which became effective on April 24, 1996. Lockyer v. Andrade, 538 U.S. 63,
26 70 (2003). Under the AEDPA, an application for habeas corpus will not be granted unless the
27 adjudication of the claim “resulted in a decision that was contrary to, or involved an
28 unreasonable application of, clearly established Federal law, as determined by the Supreme Court

1 of the United States” or “resulted in a decision that was based on an unreasonable determination
2 of the facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C.
3 § 2254(d); see Lockyer, 538 U.S. at 70-71; Williams, 529 U.S. at 413.

4 “[A] federal court may not issue the writ simply because the court concludes in its
5 independent judgment that the relevant state court decision applied clearly established federal
6 law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411.
7 A federal habeas court making the “unreasonable application” inquiry should ask whether the
8 state court’s application of clearly established federal law was “objectively unreasonable.” Id. at
9 409. Petitioner has the burden of establishing that the decision of the state court is contrary to
10 or involved an unreasonable application of United States Supreme Court precedent. Baylor v.
11 Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the
12 states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a
13 state court decision is objectively unreasonable. See Clark v. Murphy, 331 F.3d 1062, 1069 (9th
14 Cir.2003); Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir.1999).

15 II. Review of Petition

16 There is no independent right to parole under the United States Constitution; rather, the
17 right exists and is created by the substantive state law which defines the parole scheme. Hayward
18 v. Marshall, 603 F.3d 546, 559, 561 (9th Cir. 2010) (en banc) (citing Bd. of Pardons v. Allen,
19 482 U.S. 369, 371 (1987); Pearson v. Muntz, 606 F.3d 606, 609 (9th Cir. 2010) (citing
20 Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005)); Cooke v.
21 Solis, 606 F.3d 1206, 1213 (9th Cir. 2010). “[D]espite the necessarily subjective and predictive
22 nature of the parole-release decision, state statutes may create liberty interests in parole release
23 that are entitled to protection under the Due Process Clause.” Bd. of Pardons v. Allen, 482 U.S.
24 at 371.

25 In California, the Board of Parole Hearings’ determination of whether an inmate is
26 suitable for parole is controlled by the following regulations:

27 (a) General. The panel shall first determine whether the life prisoner is suitable for
28 release on parole. Regardless of the length of time served, a life prisoner shall be found

1 unsuitable for a denied parole if in the judgment of the panel the prisoner will
2 pose an unreasonable risk of danger to society if released from prison.

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

14 Cal. Code Regs. tit. 15, §§ 2402(a) and (b). Section 2402(c) sets forth circumstances tending to
15 demonstrate unsuitability for release. "Circumstances tending to indicate unsuitability include:

16 (1) Commitment Offense. The prisoner committed the offense in an especially heinous,
17 atrocious or cruel manner. The factors to be considered include:

18 (A) Multiple victims were attacked, injured or killed in the same or separate
19 incidents.

20 (B) The offense was carried out in a dispassionate and calculated manner,
21 such as an execution-style murder.

22 (C) The victim was abused, defiled or mutilated during or after the
23 offense.

24 (D) The offense was carried out in a manner which demonstrates an
25 exceptionally callous disregard for human suffering.

26 (E) The motive for the crime is inexplicable or very trivial in relation to
27 the offense.

28 (2) Previous Record of Violence. The prisoner on previous occasions inflicted or
attempted to inflict serious injury on a victim, particularly if the prisoner
demonstrated serious assaultive behavior at an early age.

(3) Unstable Social History. The prisoner has a history of unstable or tumultuous
relationships with others.'

(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted
another in a manner calculated to inflict unusual pain or fear upon the victim.

(5) Psychological Factors. The prisoner has a lengthy history of severe mental
problems related to the offense.

(6) Institutional Behavior. The prisoner has engaged in serious misconduct in
prison or jail.

Cal. Code Regs. tit. 15, § 2402(c)(1)(A)-(E),(2)-(9).

1 Section 2402(d) sets forth the circumstances tending to show suitability which include:

2 (1) No Juvenile Record. The prisoner does not have a record of assaulting others as a
3 juvenile or committing crimes with a potential of personal harm to victims.

4 (2) Stable Social History. The prisoner has experienced reasonably stable relationships
5 with others.

6 (3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of
7 remorse, such as attempting to repair the damage, seeking help for or relieving suffering
8 of the victim, or indicating that he understands the nature and magnitude of the offense.

9 (4) Motivation for Crime. The prisoner committed his crime as a result of significant
10 stress in his life, especially if the stress has built over a long period of time.

11 (5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner
12 suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears
13 the criminal behavior was the result of that victimization.

14 (6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.

15 (7) Age. The prisoner's present age reduces the probability of recidivism.

16 (8) Understanding and Plans for Future. The prisoner has made realistic plans for release
17 or has developed marketable skills that can be put to use upon release.

18 (9) Institutional Behavior. Institutional activities indicate an enhanced ability to function
19 within the law upon release.

20 Cal. Code Regs. tit. 15, § 2402(d)(1)-(9).

21 The California parole scheme entitles the prisoner to a parole hearing and various
22 procedural guarantees and rights before, at, and after the hearing. Cal. Penal Code § 3041.5. If
23 denied parole, the prisoner is entitled to subsequent hearings at intervals set by statute. *Id.* In
24 addition, if the Board or Governor find the prisoner unsuitable for release, the prisoner is entitled
25 to a written explanation. Cal. Penal Code §§ 3041.2, 3041.5. The denial of parole must also be
26 supported by "some evidence," but review of the Board's or Governor's decision is extremely
27 deferential. *In re Rosenkrantz*, 29 Cal.4th 616, 128 Cal.Rptr.3d 104, 59 P.3d 174, 210 (2002).

28 Because California's statutory parole scheme guarantees that prisoners will not be denied
parole absent some evidence of present dangerousness, the Ninth Circuit Court of Appeals
recently held California law creates a liberty interest in parole that may be enforced under the
Due Process Clause. *Hayward v. Marshall*, 602 F.3d at 561-563; *Pearson v. Muntz*, 606 F.3d at
609. Therefore, under 28 U.S.C. § 2254, this Court's ultimate determination is whether the state

1 court's application of the some evidence rule was unreasonable or was based on an unreasonable
2 determination of the facts in light of the evidence. Hayward v. Marshall, 603 F.3d at 563;
3 Pearson v. Muntz, 606 F.3d at 608.

4 The applicable California standard "is whether some evidence supports the *decision* of
5 the Board or the Governor that the inmate constitutes a current threat to public safety, and not
6 merely whether some evidence confirms the existence of certain factual findings." In re
7 Lawrence, 44 Cal.4th 1181, 1212 (2008) (emphasis in original and citations omitted). As to the
8 circumstances of the commitment offense, the Lawrence Court concluded that

9 although the Board and the Governor may rely upon the aggravated circumstances
10 of the commitment offense as a basis for a decision denying parole, the aggravated
11 nature of the crime does not in and of itself provide some evidence of current
12 dangerousness to the public unless the record also establishes that something in
13 the prisoner's pre- or post-incarceration history, or his or her current demeanor
14 and mental state, indicates that the implications regarding the prisoner's
15 dangerousness that derive from his or her commission of the commitment offense
16 remain probative to the statutory determination of a continuing threat to public
17 safety.

18 Id. at 1214.

19 In addition, "the circumstances of the commitment offense (or any of the other factors
20 related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to
21 the determination that a prisoner remains a danger to the public. It is not the existence or
22 nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the
23 significant circumstance is how those factors interrelate to support a conclusion of current
24 dangerousness to the public." In re Lawrence, 44 Cal.4th at 1212.

25 "In sum, a reviewing court must consider 'whether the identified facts are *probative* to the
26 central issue of *current* dangerousness when considered in light of the full record before the
27 Board or the Governor.'" Cooke v. Solis, 606 F.3d at 1214 (emphasis in original) (citing
28 Hayward v. Marshall, 603 F.3d at 560).

29 A. Last Reasoned State Court Decision

30 In the last reasoned state court decision of the Santa Barbara County Superior Court, the
31 court denied the petition, stating in relevant part:

1 The [Board] found that the crime was carried out in a dispassionate
2 manner. Petitioner claims the record does not support this finding. The record
3 reflects that petitioner was very agitated at his landlord and engaged in a heated
4 argument with the landlord and the victim. However, the court of appeals noted
5 that petitioner told a cell mate the “he looked out the window and decided to
6 ‘butcher this toad.’” The witness said “toad” means “a black person” in
7 “penitentiary ling.” [citation] The record also supports the [Board] finding that the
8 motive for the crime is inexplicable and trivial. Legal eviction proceedings and
9 the retrieval of a loaned chair are not strong motivations for violence. Petitioner
10 initiated the provocative racial epithets. From the safety of his upstairs apartment,
11 petitioner “threatened the victim, grabbed his knife, and ran down the stairs
12 intending to “butcher” the “victim.” [citation]

13 15 CCR 2402(b)(2): Petitioner has a long history of arrests, including a
14 previous record of violence, including a prior assault with a deadly weapon and
15 shooting into an inhabited dwelling.

16 15 CCR 2409(b)(6): [Petitioner] apparently had two “115” citations for
17 serious misconduct in prison. He says the incident for fighting is nearly a decade
18 old. IT is unclear in the record whether the fighting incident was in 2001
19 [citation] or 2004 [citation]. In his evaluation report, the correctional counselor’s
20 reported that, on September 16, 2004, petitioner was placed in administrative
21 segregation for mutual combat. However, the “115” was dismissed at a hearing
22 on October 5, 2004. [citation]

23 15 CCR 2402(c)(3): Petitioner claims he has shown signs of remorse.
24 Although he says he deeply regrets what happened to Cortez [citation], he
25 continues to insist that he believes he took Cortez’ life in self defense [citation].
26 He told the commissioners: “And I don’t know if you quite understand the
27 circumstances. Um, nobody has stated that I was being beaten with a club at the
28 time when I stabbed Mr. Cortez.” [citation] There is no evidence that petitioner
“performed acts which tend to indicate the presence of remorse, such as
attempting to repair the damage, seeking help for or relieving suffering of the
victim, or the prisoner has given indications that he understands the nature and
magnitude of the offense.” 15 CCR 2402(c)(3).

Evidence in the record supports the overall conclusion that petitioner
would pose an unreasonable risk of danger to society if released from prison. The
psychologist concluded that petitioner posed a moderate risk of violence if
released based on historical, clinical and future plans analyses. [citation]. The
commissioners concluded that Cortez needs to better understand why he
committed the crime and what he needs to do to achieve personal growth. Before
this court, petitioner minimizes engaging in “mutual combat” both in describing
the crime–“Petitioner’s act of fighting outside with the victim and away from
others as he danced back and forth with the knife and stabbed Mr. Cortez in the
chest as they fought each other with a knife and a stick does not indicate
anything.” [citation]– and the fighting in prison [citation]. He says: “Put in the
psych report note, page 4, that fight have included people underestimating
petitioner?” [citation] He does not explain that thought. There is nothing in the
psychological evaluation suggesting that people underestimate him or any other
mitigating factor for the fight.

(Ex. 2, to Answer, Decision, at 3-5.)

1 B. 2008 Board Hearing

2 At Petitioner’s initial Board hearing in 2008, the Board found Petitioner unsuitable for
3 release based on the circumstances of the commitment offense, prior criminal history,
4 institutional misconduct, unfavorable psychological report, questionable parole plans, and lack of
5 sufficient self-help programming.

6 The unfortunate victim was not the original subject of the argument, but was the ultimate
7 victim of Petitioner’s anger that evening. After arguing with the victim, Petitioner left the safety
8 of his apartment armed with a knife and confronted the victim to a physical challenge. Petitioner
9 danced back and forth with the knife and then stabbed Mr. Cortez in the chest. Petitioner fled the
10 scene while Cortez was laying face down on the ground in a pool of blood. There was evidence
11 before the state appellate court that Petitioner told a cell mate that when Petitioner looked out the
12 window he decided to “butcher this toad [the victim].” The cell mate explained that “toad”
13 referred to “a black person” in “penitentiary lingo.” The motive was certainly trivial as Petitioner
14 became enraged because of his landlord’s retrieval of loaned patio furniture. The Board found
15 the commitment offense was carried out in an especially cruel manner.

16 Petitioner has an extensive amount of arrests dating back to 1977 and continuing
17 intermittently up to the commitment offense. Of particular relevance is the fact that Petitioner
18 suffered convictions for assault with a deadly weapon and shooting at an inhabited dwelling-both
19 demonstrating a prior propensity toward violence. Cal. Code Regs. tit. 15, § 2402(c)(2).

20 The most recent psychological report by Dr. Catherine Tooley, was not favorable of
21 Petitioner’s release. Dr. Tooley assessed Petitioner to be in the “moderate” range for future
22 violence if released. Such finding was properly considered by the Board and superior court as a
23 factor in determining whether Petitioner remains a current risk to public safety. See e.g.
24 Hayward, 603 F.3d at 563 (psychologist’s evaluation that prisoner posed a “low to moderate”
25 risk of future violence, coupled with evidence that offense was particularly aggravated, is
26 sufficient evidence to demonstrate future dangerousness to support denial of parole.)

27 Petitioner has suffered two serious rules 115 violations, the most recent in 2001 for
28 failure to comply and the prior for mutual combat. Cal. Code Regs. tit. 15, § 2402(6). The

1 Board considered this evidence but did not weigh it very heavily.

2 The Board had serious concerns regarding Petitioner's desire to reside with a prior inmate
3 upon his release. The Board expressed the potential problems that may arise if Petitioner is
4 housed with a parolee or former parolee. Petitioner was advised to find a alternative living
5 arrangement upon release in California.

6 The Board further noted that although Petitioner had participated in Alcoholics
7 Anonymous (AA), it was too recent and further work was required in order for Petitioner to
8 thoroughly understand and articulate the Twelve Step program.

9 After considering the factors in support of suitability, the Board concluded that the
10 positive factors did not outweigh the factors in support of unsuitability, and the superior court's
11 determination that the circumstances of the commitment offense, prior criminal history,
12 institutional misconduct, unfavorable psychological, insufficient self-help programming, and
13 questionable parole plans demonstrate Petitioner continues to remain an unreasonable risk to
14 public safety is not an unreasonable application of the some evidence standard, nor an
15 unreasonable determination of the facts in light of the evidence. 28 U.S.C. § 2254(d).

16 RECOMMENDATION

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

- 18 1. The instant petition for writ of habeas corpus be DENIED; and
- 19 2. The Clerk of Court be directed to enter judgment in favor of Respondent.

20 This Findings and Recommendation is submitted to the assigned United States District
21 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
22 Local Rules of Practice for the United States District Court, Eastern District of California.

23 Within thirty (30) days after being served with a copy, any party may file written objections with
24 the court and serve a copy on all parties. Such a document should be captioned "Objections to
25 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served
26 and filed within fourteen (14) days after service of the objections. The Court will then review the
27 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
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1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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9 IT IS SO ORDERED.

10 **Dated:** November 3, 2010

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE