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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRENNAN R. McNEESE,

1:10-cv-00504-LJO-SMS (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 1]

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.

BACKGROUND¹

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation (CDCR) following his conviction of kidnapping for ransom and robbery. Petitioner is currently serving an indeterminate life sentence with the possibility of parole, plus ten years.

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

Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior

¹ This information is derived from the state court documents attached to Respondent's Answer, which are not subject to dispute.

1 Court challenging the Board's 2008 decision denying him parole. Petitioner claimed the Board's
2 decision violated his due process rights because there was not some evidence to support the
3 finding that he remains an unreasonable risk to public safety. The superior court denied the
4 petition finding some evidence to support the Board's decision.

5 Petitioner then filed petitions for writs of habeas corpus in the California Court of Appeal
6 and California Supreme Court. Both petitions were summarily denied.

7 Petitioner filed the instant federal petition for writ of habeas corpus on March 22, 2010.
8 Respondent filed an answer to the petition on July 29, 2010, and Petitioner filed a traverse on
9 August 19, 2010.

10 STATEMENT OF FACTS²

11 On December 1, 1986, while working for a drug dealer, petitioner and his crime partners
12 forcibly entered the victim's home to collect a \$40,000 drug debt. They kidnapped the victim in
13 order to demand \$50,000 in ransom for his return. They searched the home, but found only \$800
14 worth of jewelry. They handcuffed him and put him in the trunk of their vehicle. However, the
15 victim was able to escape as they entered a freeway ramp. While Petitioner was on bail for this
16 crime, he and three crime partners went to the hotel room of another drug dealer to rob him. One
17 of the men claimed to be the manager of the hotel in order to gain entry to the room. Once
18 inside, they threatened the victim with guns and beat him with fists and a tire iron. He was later
19 found by the police in the back of a van. When police opened the van, they found the victim in
20 his underwear. His chest was drenched in blood and there was a large gash over his eye. He
21 sustained several broken ribs, a fractured jaw and numerous lacerations to the face. After several
22 attempts to flee from officers, Petitioner was eventually arrested.

23 DISCUSSION

24 There is no independent right to parole under the United States Constitution; rather, the
25 right exists and is created by the substantive state law which defines the parole scheme. Hayward
26 v. Marshall, 603 F.3d 546, 559, 561 (9th Cir. 2010) (en banc) (citing Bd. of Pardons v. Allen,

27
28 ² This information is derived from the Los Angeles Superior Court December 19, 2008 decision, attached as
Exhibit 2 to Respondent's Answer.

1 482 U.S. 369, 371 (1987); Pearson v. Muntz, 606 F.3d 606, 609 (9th Cir. 2010) (citing
2 Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005)); Cooke v.
3 Solis, 606 F.3d 1206, 1213 (9th Cir. 2010). “[D]espite the necessarily subjective and predictive
4 nature of the parole-release decision, state statutes may create liberty interests in parole release
5 that are entitled to protection under the Due Process Clause.” Bd. of Pardons v. Allen, 482 U.S.
6 at 371.

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

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

12 (b) Information Considered. All relevant, reliable information available to
13 the panel shall be considered in determining suitability for parole. Such
14 information shall include the circumstances of the prisoner's social history; past
15 and present mental state; past criminal history, including involvement in other
16 criminal misconduct which is reliably documented; the base and other
17 commitment offenses, including behavior before, during and after the crime; past
18 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.

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

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

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

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

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

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

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

28 (2) Previous Record of Violence. The prisoner on previous occasions inflicted or

1 attempted to inflict serious injury on a victim, particularly if the prisoner
2 demonstrated serious assaultive behavior at an early age.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The California parole scheme entitles the prisoner to a parole hearing and various
procedural guarantees and rights before, at, and after the hearing. Cal. Penal Code § 3041.5. If
denied parole, the prisoner is entitled to subsequent hearings at intervals set by statute. Id. In

1 addition, if the Board or Governor find the prisoner unsuitable for release, the prisoner is entitled
2 to a written explanation. Cal. Penal Code §§ 3041.2, 3041.5. The denial of parole must also be
3 supported by “some evidence,” but review of the Board’s or Governor’s decision is extremely
4 deferential. In re Rosenkrantz, 29 Cal.4th 616, 128 Cal.Rptr.3d 104, 59 P.3d 174, 210 (2002).

5
6 Because California’s statutory parole scheme guarantees that prisoners will not be denied
7 parole absent some evidence of present dangerousness, the Ninth Circuit Court of Appeals
8 recently held California law creates a liberty interest in parole that may be enforced under the
9 Due Process Clause. Hayward v. Marshall, 602 F.3d at 561-563; Pearson v. Muntz, 606 F.3d at
10 609. Therefore, under 28 U.S.C. § 2254, this Court’s ultimate determination is whether the state
11 court’s application of the some evidence rule was unreasonable or was based on an unreasonable
12 determination of the facts in light of the evidence. Hayward v. Marshall, 603 F.3d at 563;
13 Pearson v. Muntz, 606 F.3d at 608.

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

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

24 Id. at 1214.

25 In addition, “the circumstances of the commitment offense (or any of the other factors
26 related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to
27 the determination that a prison remains a danger to the public. It is not the existence or
28 nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the

1 significant circumstance is how those factors interrelate to support a conclusion of current
2 dangerousness to the public.” In re Lawrence, 44 Cal.4th at 1212.

3 “In sum, a reviewing court must consider ‘whether the identified facts are *probative* to the
4 central issue of *current* dangerousness when considered in light of the full record before the
5 Board or the Governor.’” Cooke v. Solis, 606 F.3d at 1214 (emphasis in original) (citing
6 Hayward v. Marshall, 603 F.3d at 560).

7 A. Last Reasoned State Court Decision

8 In the last reasoned decision of the Los Angeles Superior Court, the claim was denied
9 based, in pertinent part, on the following:

10 Petitioner went before the Board for a parole consideration hearing on
11 April 23, 2008. Petitioner was denied parole for one year. The Board concluded
12 that although petitioner has made many recent gains in prison, [he] was still
13 unsuitable for parole and would pose an unreasonable risk of danger to society
14 and a threat to public safety. The Board based its decision on several factors,
15 including the commitment offense.

16 The nature of the commitment offense may indicate that a prisoner poses
17 an unreasonable risk to danger of society when the offense is especially heinous,
18 atrocious or cruel. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1); [*In re*]
19 *Rosenkrantz* [(2002) 29 Cal.4th 616,] 682-683. The heinousness of the crime is
20 relevant if it is indicative of the “ultimate conclusion that an inmate continues to
21 pose an unreasonable risk to public safety.” (*In re Shaputis* (2008) 44 Cal.4th
22 1241, 1255.) The Board found petitioner’s commitment offense to indicate an
23 unreasonable degree of danger because multiple victims were attacked in separate
24 incidents. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(A). It does not appear
25 that the kidnapping victim was significantly physically injured during the attack
26 because he was able to escape. However, he was handcuffed and locked in the
27 trunk of a moving vehicle. He was also robbed of \$800 worth of jewelry. The
28 second victim was not as fortunate as he did receive several severe injuries in the
hands of petitioner and his crime partners, including a fractured jaw and broken
ribs. In the case of the second victim, there is some evidence that the crime was
carried out in a manner that demonstrates an exceptionally callous disregard for
human suffering. (Cal. Code. Regs., tit. 15, § 2402, subd. (c)(1)(D).) This
callousness was demonstrated by the brutal beating in which four men attacked a
lone victim with fists and a tire iron. Such a beating is an example of exceptional
callousness because it involves severe trauma. (*In re Scott* (2004) 119
Cal.App.4th 871, 891.) Where an offense includes “multiple wounds inflicted
with a weapon not resulting in immediate death or actions calculated to induce
terror in the victim,” it is some evidence that the perpetrator is exceptionally
callous, and therefore, unreasonably dangerous. (*Id.* at 892.)

When determining whether an inmate currently poses an unreasonable risk
of danger to society, in addition to the commitment offense, the Board must also
consider “the passage of time or the attendant changes in the inmate’s
psychological or mental attitude.” (*Shaputis, supra*, 44 Cal.4th at 1255.) In this
case, petitioner’s serious misconduct in prison is another indicator that petitioner

1 remains unreasonably dangerous. (Cal. Code. Regs., tit. 15, § 2402, subd. (c)(6).)
2 In total, petitioner has received thirteen CDC 115s for serious misconduct. His
3 last was in March, 1999 for physical altercation with the use of force. Because his
4 most recent act of violence was less than ten years ago, it constitutes some
5 evidence that petitioner is not yet suitable for parole. Additionally, there is some
6 evidence that petitioner continues to pose an unreasonable risk of danger to
7 society based on his psychological evaluation in which he was ranked in the
8 moderate range of psychopathology and low to moderate range for future
9 violence. The Board was impressed that petitioner has participated in valuable
10 self-help programming which has allowed him to gain insight into the nature and
11 magnitude of his commitment offense. However, there is some evidence that
12 petitioner must demonstrate that he is able to maintain his gains over a longer
13 period before he is released. [¶] . . .

8
9 (Exhibit 2, to Answer, at 2-3.)

10 B. 2008 Board Hearing

11 As indicated by the superior court, the Board denied parole at the 2008 hearing based on
12 the heinous nature of the commitment offense, institutional misconduct, and psychological
13 evaluation placing in the low to moderate range.

14 Based on the heinous nature of the second commitment offense, there is some evidence to
15 support the finding it was carried out in an especially cruel and callous manner. The first offense
16 took place while Petitioner was using and dealing drugs. In an effort to stimulate his drug
17 dealings, Petitioner and his crime partner, Michael Anderson, robbed another drug dealer (victim
18 James Ransom) at his residence and demanded \$50,000 for ransom. When Mr. Ransom was not
19 able to produce the \$50,000, he was handcuffed and thrown in the trunk of Petitioner's vehicle.
20 Petitioner and his partner searched the residence and took approximately \$800.

21 Although the first kidnapping and robbery victim did not sustain significant physical
22 injury, he was nonetheless handcuffed and thrown in the trunk of a van and abandoned. The
23 second victim was not as fortunate. While Petitioner was out on bail for a prior offense, he along
24 with three other males attacked Mr. Elam at gunpoint in his motel room stating they were going
25 to rob and kidnap him. A struggle ensued which resulted in Mr. Elam being beaten with fists and
26 an tire iron. Mr. Elam was then thrown in the back of the moving van and abandoned in a
27 parking area. When discovered by police, he was wearing only his underwear and his chest area
28 was drenched with blood. He had a gash over his right eye and his face was swollen. As a result

1 of the beating, Mr. Elam suffered a fractured jaw, a broken finger, several broken ribs, and
2 numerous lacerations to his face. Thus, multiple victims were involved in separate incidents, and
3 one of the victims sustained substantial physical injury. In light of these factual circumstances,
4 the second offense was carried out in an especially cruel and callous manner. Cal. Code Regs.
5 tit. 15, § 2402(c)(1)(A), (D).

6 The superior court then considered the fact that Petitioner suffered thirteen serious rules
7 violations (CDC-115s), the last in 1999 for physical altercation with another inmate. Under
8 California law, institutional behavior that evidences “serious misconduct” is probative of an
9 inmate’s present dangerousness. Cal. Code Regs. tit. 15, § 2402(c)(6) (one circumstance tending
10 to show unsuitability for release is if “[t]he prisoner has engaged in serious misconduct in prison
11 or jail.”) The Board was legitimately concerned that Petitioner has not sustained a sufficient
12 period of incarceration free of violence, and he therefore continues to remain an unreasonable
13 risk to public safety if released.

14 In addition, Petitioner’s institutional behavior also included a review of the most recent
15 psychological report which placed Petitioner in the moderate for psychopathy. Petitioner posed a
16 “low to moderate” to likelihood of committing future violence. Such finding was properly
17 considered by the Board and superior court in finding some evidence to support Petitioner’s
18 current dangerousness. See e.g. Hayward, 603 F.3d at 563 (psychologist’s evaluation that
19 prisoner posed a “low to moderate” risk of future violence, coupled with evidence that offense
20 was particularly aggravated, is sufficient evidence to demonstrate future dangerousness to
21 support denial of parole).

22 After considering the factors in support of release on parole, the Board concluded the
23 positive aspects of Petitioner’s behavior did not outweigh the factors in support of unsuitability.
24 The heinous circumstances of the commitment offense, coupled with his institutional misconduct
25 which included a physical altercation and unfavorable psychological evaluation, remain
26 indicative of Petitioner’s present danger to public safety, and the state courts’ determination of
27 this issue was not contrary to, or an unreasonable application of the some evidence standard, nor
28 was it an unreasonable determination of the facts in light of the evidence. 28 U.S.C. § 2254(d).

1 Thus, the petition for writ of habeas corpus must be denied.

2 RECOMMENDATION

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

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

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

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

16
17 IT IS SO ORDERED.

18 **Dated:** September 14, 2010

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE