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

MARCUS JAMES SMITH,

Petitioner,

No. CIV S-05-2601 MCE CHS P

vs.

CLAUDE E. FINN, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

I. INTRODUCTION

Petitioner Marcus Smith is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Smith challenges the August 15, 2003, decision by the Board of Prison Terms (now Board of Parole Hearings and hereinafter Board) finding him unsuitable for parole. Upon careful consideration of the record and the applicable law, the undersigned will recommend that this petition for habeas corpus relief be denied.

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II. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

The facts of Smith’s commitment offense were recounted at the 2003 hearing as follows:

1 PRESIDING COMMISSIONER LAWIN: It states on March 11th,
2 1980, at approximately 10:55 p.m., the Ontario Police Department
3 investigated a shooting incident. According to witness, Ron
4 Anderson and other witnesses, Anderson and the victim, Addie
5 Mae Smith -- That's A-D-D-I-E, capital M-A-E Smith, the
6 estranged wife of the prisoner, had been westbound on Holt, H-O-
7 L-T, in his vehicle on the way to work at General Electric, when
8 the prisoner drove alongside of Anderson's car and fired one shot
9 which hit Anderson in the jaw. Anderson pulled to the curb and
10 got out to seek aid. The prisoner made a u-turn, returned, got out
11 of his vehicle and fired four shots at the victim, who had gotten out
12 of Anderson's car. She died within minutes of gunshot wounds to
13 the brain, according to the coroner's report. There were three
14 bullet wounds to her head and one to her shoulder. The suspect
15 was identified as the victim's husband. On March 13th, 1980,
16 police officers were informed by a subject with whom the prisoner
17 had been staying that he was in possession of the prisoner's
18 vehicle; a 1977 Lincoln. The prisoner told the person that he had
19 to leave town in a hurry, that he would be gone about two months,
20 and left the keys with instructions to use and take care of the car.
21 Officers also learned that the prisoner had made arrangements for
22 his father's continuing care in a convalescent hospital, and that the
23 prisoner called Anderson to explain that he did not mean to shoot
24 him and asked if he needed any money. On July 14, 1982, he was
25 apprehended under the name of Robert Marris, M-AR-R-I-S, and
26 subsequently identified by fingerprints as being the prisoner's
 (sic). He was extradited to California and was booked in the San -
 - at the San Bernardino County Jail on August 22nd, 1982.

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Answer, Exhibit C at 29-30.¹

On March 24, 1983, Smith pled guilty to one count of second degree murder.
Answer, Ex. A at 2. He was sentenced to a term of fifteen years to life. Id. On August, 15,
2003, the Board held Smith's Subsequent Parol Consideration Hearing. Answer, Ex. C at 17. At
the conclusion of that hearing the Board found him unsuitable for parole. Id. at 72.

B. Habeas Review

Smith filed a petition for writ of habeas corpus in the San Bernardino County
Superior Court on July 19, 2004.² Answer, Ex. E at 17. That petition was denied on August 13,

¹ Smith disputed the claim that he called Anderson.

² Smith first filed an Administrative Appeal, which was later denied on January 11, 2005.
Answer, Ex. D at 2.

1 2004, in a two-paragraph opinion that provided no reasoning. Id. at 28. Smith then filed a
2 petition in the California Court of Appeal, Fourth Appellate District on November 10, 2004.
3 Answer, Ex. F at 31. That petition was summarily denied on November 19, 2004. Id. at 30.

4 Smith next filed a petition for review in the California Supreme Court on
5 December 21, 2004. Answer, Ex. G at 46. That petition was summarily denied on November 6,
6 2005. Id. at 45. Finally, Smith filed this federal petition on December 22, 2005.

7 III. APPLICABLE STANDARD OF HABEAS CORPUS REVIEW

8 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
9 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,
10 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.
11 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the
12 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
13 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas
14 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377
15 (1972).

16 This action is governed by the Antiterrorism and Effective Death Penalty Act of
17 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d
18 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting
19 habeas corpus relief:

20 An application for a writ of habeas corpus on behalf of a
21 person in custody pursuant to the judgment of a State court shall
22 not be granted with respect to any claim that was adjudicated on
the merits in State court proceedings unless the adjudication of the
claim -

23 (1) resulted in a decision that was contrary to, or involved
24 an unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

25 (2) resulted in a decision that was based on an unreasonable
26 determination of the facts in light of the evidence presented in the
State court proceeding.

1 28 U.S.C. § 2254(d). See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v.
2 Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). The
3 court looks to the last reasoned state court decision as the basis for the state court judgment.
4 Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). Where the state court reaches a
5 decision on the merits but provides no reasoning to support its conclusion, a federal habeas court
6 independently reviews the record to determine whether habeas corpus relief is available under
7 section 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Delgado v. Lewis, 223
8 F.3d 976, 982 (9th Cir. 2000).

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10 IV. DISCUSSION OF PETITIONER'S CLAIM

11 All of the arguments in Smith's petition rely on a claim of the denial of
12 Constitutional due process.³

13 1) Description of Claim

14 Smith argues that the Board's decision violated his right to due process because it
15 was based solely on "unchanging factors" such as the circumstances of the commitment offense.
16 Petition at 4. He argues that by relying on these factors the Board violated his liberty interest in
17 parole. Id.

18 2) Applicable Law

19 The Due Process Clause of the Fourteenth Amendment prohibits state action that
20 deprives a person of life, liberty, or property without due process of law. A person alleging due
21 process violations must first demonstrate that he or she was deprived of a liberty or property
22 interest protected by the Due Process Clause and then show that the procedures attendant upon
23 the deprivation were not constitutionally sufficient. Kentucky Dep't of Corrections v.

25 ³ In his traverse, Smith raises for the first time a claim concerning an error with his plea
26 colloquy. See Traverse at 3. This challenge to his 1983 conviction is time barred under AEDPA
and will not be reviewed.

1 Thompson, 490 U.S. 454, 459-60 (1989); McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir.
2 2002).

3 A protected liberty interest may arise from either the Due Process Clause of the
4 United States Constitution or state laws. Board of Pardons v. Allen, 482 U.S. 369, 373 (1987).
5 The United States Constitution does not, of its own force, create a protected liberty interest in a
6 parole date, even one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981).
7 However, “a state’s statutory scheme, if it uses mandatory language, ‘creates a presumption that
8 parole release will be granted’ when or unless certain designated findings are made, and thereby
9 gives rise to a constitutional liberty interest.” McQuillion, 306 F.3d at 901 (quoting Greenholtz
10 v. Inmates of Nebraska Penal, 442 U.S. 1, 12 (1979)). In this regard, it is clearly established that
11 California’s parole scheme provides prisoners sentenced in California to a state prison term that
12 provides for the possibility of parole with “a constitutionally protected liberty interest in the
13 receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of
14 the Due Process Clause.” Irons v. Carey, 505 F.3d 846, 850-51 (9th Cir. 2007) (citing Sass v.
15 Cal. Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); Biggs v. Terhune, 334 F.3d 910,
16 914 (9th Cir. 2003); McQuillion, 306 F.3d at 903; and Allen, 482 U.S. at 377-78 (quoting
17 Greenholtz, 442 U.S. at 12)). Accordingly, the court must examine whether the deprivation of
18 petitioner’s liberty interest in this case violated due process.

19 It has been clearly established by the United States Supreme Court “that a parole
20 board’s decision deprives a prisoner of due process with respect to this interest if the board’s
21 decision is not supported by ‘some evidence in the record,’ Sass, 461 F.3d at 1128-29 (citing
22 Superintendent v. Hill, 472 U.S. 445, 457 (1985)); see also Biggs, 334 F.3d at 915 (citing
23 McQuillion, 306 F.3d at 904), or is “otherwise arbitrary,” Hill, 472 U.S. at 457.

24 “The ‘some evidence’ standard is minimally stringent,” and a decision will be
25 upheld if there is any evidence in the record that could support the conclusion reached by the
26 fact-finder. Powell v. Gomez, 33 F.3d 39, 40 (9th Cir. 1994) (citing Cato v. Rushen, 824 F.2d

1 703, 705 (9th Cir. 1987)); Toussaint v. McCarthy, 801 F.2d 1080, 1105 (9th Cir. 1986).
2 However, “the evidence underlying the [] decision must have some indicia of reliability.”
3 Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987). See also Perveler v.
4 Estelle, 974 F.2d 1132, 1134 (9th Cir. 1992). Determining whether the “some evidence”
5 standard is satisfied does not require examination of the entire record, independent assessment of
6 the credibility of witnesses, or the weighing of evidence. Toussaint, 801 F.2d at 1105. The
7 question is whether there is any reliable evidence in the record that could support the conclusion
8 reached. Id.

9 3) Discussion

10 In finding Smith unsuitable for parole, the Board relied upon: a) the
11 circumstances of the commitment offense, b) the need for continued participation in self-help
12 therapy, and c) his lack of adequate parole plans.

13 a) Circumstances of The Commitment Offense

14 With respect to the circumstances of the commitment offense the Board stated:

15 The first -- the first and foremost reason would be the commitment
16 offense and the manner in which it was carried out. It clearly
17 showed a lack of regard for the life and suffering of others. And it
18 was in a very cruel fashion that the inmate fired a gun at his wife’s
19 companion, striking him in the jaw. He left and went for
20 assistance. The inmate made a u-turn, came back, and fired and hit
21 his wife, striking her four times in the head and neck, shoulder
22 area, causing her death.

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20 Answer, Ex. C at 72.

21 The circumstances of the commitment offense are one of fifteen factors relating to
22 an inmate’s unsuitability or suitability for parole under California law. Cal. Code. Regs., tit. 15,
23 § 2402(c)(1)-(d). When denial is based on these circumstances the California courts have stated
24 that:

25 A prisoner’s commitment offense may constitute a circumstance
26 tending to show that a prisoner is presently too dangerous to be
found suitable for parole, but the denial of parole may be

1 predicated on a prisoner's commitment offense only where the
2 Board can "point to factors beyond the minimum elements of the
3 crime for which the inmate was committed" that demonstrate the
4 inmate will, at the time of the suitability hearing, present a danger
5 to society if released. In re Dannenberg, 34 Cal.4th [1061] at
6 1071, 23 Cal.Rptr.3d 417, 104 P.3d 783 (Cal.2005). Factors
7 beyond the minimum elements of the crime include, inter alia, that
8 "[t]he offense was carried out in a dispassionate and calculated
9 manner," that "[t]he offense was carried out in a manner which
10 demonstrates an exceptionally callous disregard for human
11 suffering," and that "[t]he motive for the crime is inexplicable or
12 very trivial in relation to the offense." Cal. Code. Regs., tit. 15
13 § 2402(c)(1)(B), (D)-(E)."

14 Irons, 505 F.3d at 852-53; see also In re Weider, 145 Cal.App.4th 570, 588 (2006) (to support
15 denial of parole, the "factors beyond the minimum elements of the crime" "must be predicated
16 on "some evidence that the particular circumstances of [the prisoner's] crime-circumstances
17 beyond the minimum elements of his conviction-indicated exceptional callousness and cruelty
18 with trivial provocation, and thus suggested he remains a danger to public safety.")

19 Such circumstances may include "rehearsing the murder, executing of a sleeping
20 victim, stalking," id., or evidence that the defendant "acted with cold, calculated, dispassion, or
21 that he tormented, terrorized or injured [the victim] before deciding to shoot her; or that he
22 gratuitously increased or unnecessarily prolonged her pain and suffering." In re Smith, 114
23 Cal.App.4th at 367.

24 The relevant inquiry however "is not merely whether an inmate's crime was
25 especially callous, or shockingly vicious or lethal, but whether the identified facts are probative
26 to the central issue of current dangerousness when considered in light of the full record before
the Board or the Governor." In re Lawrence, 44 Cal.4th 1181, 1221 (Cal. 2008); In re
Dannenberg, 34 Cal. 4th at 1070-71.

Smith shot Anderson in the jaw because Smith saw his estranged wife, Addie
Mae Smith ("Addie Mae"), riding in Anderson's car. Anderson and Addie Mae were coworkers.
It is unclear if Smith meant to shoot Anderson or Addie Mae with his first shot. It would have
been obvious however that Addie Mae was not alone in the moving vehicle because she was the

1 passenger. By firing into the car Smith disregarded the lives of both Anderson and Addie Mae.
2 It is only by chance that Smith did not also kill Anderson.

3 There is no question however that Smith intended to shoot and kill Addie Mae.
4 After shooting Anderson, Smith turned his car around, got out, and fired four more shots into
5 Addie Mae's head and shoulder, as she stood outside Anderson's vehicle. Smith never sought
6 aid for Anderson or Addie Mae. Instead he fled town and evaded capture for some time.

7 The circumstances of Smith's commitment offense could properly be described as
8 dispassionate and calculated, and as being carried out in a manner which demonstrated an
9 exceptionally callous disregard for human suffering. The Board's conclusions regarding the
10 circumstances of the commitment offense are therefore supported by evidence. More
11 importantly, the identified facts were probative to the central issue of Smith's then current
12 dangerousness when considered in light of the full record before the Board. That record
13 included Smith's need for continued participation in self-help therapy and his lack of an
14 adequate parole plan.

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16 b) Need For Self-Help Therapy

17 The Board stated that Smith had not "sufficiently participated in beneficial self-
18 help programs." Answer, Ex. C at 73. The Board determined that Smith needed further therapy
19 because he repeatedly explained previous incidents of violence by claiming that the other people
20 involved were lying. Id. At 75. The Board stated:

21 And really what we saw here today that was most disconcerting
22 was the fact that everybody else is a liar but you. I mean we've
23 got all these incidents that are documented by police reports and
24 telephone conversations, and yet everybody else is wrong. The
25 probation officer's report is wrong. So that's a little troubling that
26 -- And it could indicate a number of things. One, that truly they
were. I mean truly they made these things up or it could mean that
you are just not accepting what happened as something that
happened and then move on or something in between. But it is
troubling to us when we have not just one person, but a number of
people saying that these other circumstances existed and yet you

1 say that they did not.

2 Answer, Ex. C at 75-76.

3 According to the 1983 Probation Officer's Report, Ontario Police Department
4 records indicated that on March 18, 1979, Smith got in an argument with Addie Mae. Answer,
5 Ex. A at 11. When she threatened to call the police, Smith ripped the phone cord out of the wall
6 and struck her with a revolver. Id. Addie Mae refused to prosecute. Id. Smith told the Board
7 that those events did not happen. Answer, Ex. C at 63.

8 On October 6, 1979, Smith and Addie Mae again got into an argument. Answer,
9 Ex. A at 11. Smith again struck Addie Mae with a handgun, causing her to fall to the ground,
10 knocking out some of her teeth, and pushing some of her teeth through her lip. Id. Smith also
11 threatened to kill her. Id.

12 Officers made several phone calls to Smith. Id. When they eventually reached
13 Smith he stated that Addie Mae was lying and that he had not touched her. Id. During another
14 phone call Smith threatened to "have somebody waste her." Id. Addie Mae later canceled an
15 interview with police officers. Id. Smith again told the Board that none of those events
16 happened. Answer, Ex. C at 64.

17 On February 11, 1980, Addie Mae and her sister reported that the home in which
18 they were staying with their children had been struck by bullets. Answer, Ex. A at 11. Addie
19 Mae stated that Smith "possibly indicated" his responsibility for the shooting in a recorded
20 conversation. Id. On February 15, 1980, Addie Mae reported that she had three more recorded
21 telephone conversations in which Smith threatened to kill her if she called the police again. Id.
22 at 12. Smith again told the Board those events did not happen. Answer, Ex. C at 65.

23 On March 6, 1980, Addie Mae's stepfather informed the police about a telephone
24 conversation with Smith during which Smith referred to a recent beating Addie Mae had suffered
25 at the hands of two male coworkers. Answer, Ex. A at 12. Smith allegedly told the stepfather
26 that the "police could do nothing" and threatened that if he did not get his furniture by 6 p.m. she

1 “was a dead woman” and that “the contract is out.” Id. Smith told the Board he did not have any
2 conversation with the stepfather. Answer, Ex. C at 67.

3 Under California law, the Board is authorized to consider “any other information
4 which bears on the prisoner's suitability for release.” Cal. Code. Regs., tit. 15, § 2402(b).
5 Smith’s inability to acknowledge his prior violence bears upon his suitability for release and the
6 issue of his current dangerousness. If Smith was not able to acknowledge his prior violence he
7 would not have been able to address that violence in therapy. If Smith were released, those
8 unresolved issues could trigger a violent response to the numerous stressors parolees face outside
9 of prison.

10 The Board’s conclusion regarding Smith’s need for additional self-help therapy is
11 supported by evidence.

12 c) Lack of Adequate Parol Plan

13 Upon being paroled Smith planned to live with his mother in Arkansas. Answer,
14 Ex. C at 47. Smith however did not ask his mother to write a letter to the Board confirming that
15 Smith could live with her. Id. When informed that the Board must place Smith somewhere in
16 California, Smith stated that he did not have any place to live in California because he had no
17 family or friends living in the state. Id. at 47-48. The Board found Smith’s parole plan
18 inadequate because he had no letters of support and “essentially no place to live.” Id. at 74.

19 Under California law, the Board is authorized to consider “any other information
20 which bears on the prisoner's suitability for release.” Cal. Code. Regs., tit. 15, § 2402(b). At the
21 time of the 2003 hearing Smith had spent nearly twenty years in prison. In addition to the stress
22 of transitioning from life in prison to life in the outside world, Smith had no place to live and no
23 family in California to help him. Further Smith murdered the last person he resided with outside
24 of prison, making the Board’s consideration of his plan for residency even more important.

25 Granting Smith parole without a plan for residence would have been improper for
26 the Board and harmful to Smith. A supportive residence is vital to Smith’s successful parole.

1 Without an identified residence, or even a plan for one, it is very likely that Smith would fail
2 parole and return to prison. The Board's concern that Smith did not have an identifiable
3 residence in California was appropriate.

4 The Board's finding that Smith's parole plan was inadequate is supported by the
5 record.

6 4) Conclusion

7 The circumstances of Smith's commitment offense were probative to his current
8 dangerousness when considered in light of the full record before the Board. That record
9 included Smith's need to participate in additional self-help therapy and his lack of an adequate
10 parole plan.

11 V. CONCLUSION

12 Smith had a violent and abusive relationship with his late wife, Addie Mae Smith.
13 That violence escalated and he eventually executed her. In doing so Smith nearly killed another
14 person. His commitment offense was a brutal and vicious attack that showed a total disregard
15 for the lives and suffering of his victims. Smith never sought medical attention for his victims or
16 took responsibility for his actions.

17 While Smith undoubtedly and understandably focused on his accomplishments
18 while incarcerated, he continued to avoid acknowledging his violent history. Further his parole
19 plan was totally inadequate as he lacked even a basic identifiable residence. The Board could
20 not grant parole without knowing where Smith was going to live, particularly in light of his
21 commitment offense.

22 Independent review of this record reveals evidence to support the Board's
23 conclusion that at the time of the hearing Smith was unsuitable for parole because he was
24 currently dangerous. He is therefore not entitled to relief on this claim.

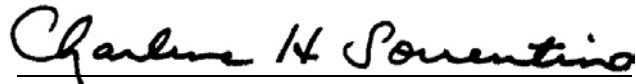
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1 Accordingly, IT IS RECOMMENDED that petitioner’s petition for a writ of
2 habeas corpus be denied.

3 These findings and recommendations are submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
5 days after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
8 shall be served and filed within ten days after service of the objections. The parties are advised
9 that failure to file objections within the specified time may waive the right to appeal the District
10 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 DATED: October 23, 2009


CHARLENE H. SORRENTINO
UNITED STATES MAGISTRATE JUDGE