

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

O

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARTHUR JACOBS,)
)
Plaintiff,)
)
v.)
)
THOMAS CAREY, et al.,)
)
Defendants.)
_____)

Case No. 2:06-CV-01363-VAP

**ORDER DISMISSING PETITION
FOR WRIT OF HABEAS CORPUS
WITH PREJUDICE**

Before the Court is a Petition for Writ of Habeas
Corpus ("Petition") filed by Petitioner Arthur Jacobs
("Petitioner"). The Court finds the matter appropriate
for resolution without a hearing. See Fed. R. Civ. P.
78; L.R. 230(g). After consideration of the papers in
support of, and opposition to the Petition, the Court
DENIES the Petition.

1 I. BACKGROUND

2 A. Statement of Facts

3 1. Underlying Events

4 On the evening of May 15, 1983, J.S. was at her home
5 in Long Beach, California, when she heard her 23-year-old
6 daughter L.S. "yelling for somebody to leave her alone."
7 (Hearing Trans. at 12:3-10; Ans. Ex. D ("Probation
8 Report") at 2.) J.S. began running down the hall to help
9 her daughter, but was stopped near the den by a man J.S.
10 later identified as Petitioner. (Hearing Trans. at
11 12:10-14.) Petitioner grabbed J.S. and said: "[D]on't
12 scream, don't yell, we're not going to hurt her." (Id.
13 at 12:12-14.) J.S. escaped from Petitioner's grasp,
14 entered the den and saw Thomas Owens ("Owens"), who was
15 armed with a shotgun, assaulting the victim. (Id. at
16 12:15-20.) J.S. attempted to intervene but was beaten
17 until she passed out. (Id. at 12:20-22.) When she woke,
18 she discovered her daughter had been fatally shot. (Id.
19 at 12:22-26.) Later investigation revealed that Owens
20 had shot the victim in the head at close range.
21 (Probation Report at 2.) J.S. suffered a cut on her
22 right earlobe, a puncture wound on her right forearm, and
23 other minor injuries. (Hearing Trans. at 12:26-13:6.)

24
25 Petitioner was arrested in connection with the
26 shooting on November 30, 1984, after his then-girlfriend
27 told police Petitioner resembled a composite drawing of
28

1 one of suspects. (Id. at 13:6-15.) At the first trial,
2 Petitioner was identified as the suspect by J.S. and
3 Randall DuBois, a man who was attending a party across
4 the street from the victim's home on May 15, 1983, and
5 pursued the suspects as they were leaving the house after
6 the shooting. (Id. at 14:15-15:1.) During the second
7 trial, Mr. DeBois recanted, saying the second suspect
8 "may or may not" have been Petitioner. (Ans. Ex. E at
9 10.) Other witnesses testified they had frequently seen
10 the victim in the company of Owens and Petitioner.
11 (Hearing Trans. at 14:11-15.) Some speculated that the
12 victim owed Owens money for drugs, and that this was the
13 motive for the shooting. (Pet. at 13; Ans. Ex. C at 2;
14 Hearing Trans. at 80:14-22.)

15
16 Petitioner maintains that, although he was a friend
17 of Owens, he did not know the victim and did not
18 participate in the shooting. (Id. at 15:17-16:3.)
19 According to Petitioner, he drove from Northern
20 California to the Long Beach area on May 14, 1983, the
21 day before the shooting, and stayed overnight with Owens.
22 (Id. at 17:15-18:15.) During the afternoon the following
23 day, Petitioner left Long Beach and drove to Desert Hot
24 Springs, where he was visiting his mother at the time the

25
26
27
28

1 shooting occurred.¹ (Id. at 18:18-26; Pet. Unmarked Ex.,
2 Letter from Theodore Ponticelli, Nov. 15, 2004.)

3

4 **2. Petitioner's Conviction**

5 A jury in Los Angeles County Superior Court convicted
6 Petitioner of second degree murder with a firearm
7 enhancement on August 5, 1985 ("1985 Conviction"). (Ans.
8 Ex. D at 7.) Petitioner appealed the conviction and was
9 granted a new trial. (Pet. at 1.) On October 19, 1992,
10 Petitioner was released on bail. The second trial jury
11 convicted Petitioner of second degree murder with a
12 firearm enhancement and assault with a deadly weapon on
13 May 5, 1993 ("1993 Conviction"). (Ans. Ex. A.)
14 Petitioner was sentenced on May 11, 1993, and judgment
15 was entered on May 18, 1993. (Id.) Petitioner began
16 serving a term of twenty years to life on July 28, 1993.²
17 (Pet. at 1.) On August 11, 2004, the California Court of
18 Appeal affirmed the second conviction. (Ans. Ex. E.)
19 Petitioner did not file any direct appeal or habeas
20 corpus petitions challenging his second conviction.
21 (Pet. at 1.)

22

23 ¹ Petitioner and Petitioner's mother assert that
24 polygraph tests confirmed that they were both in Desert
25 Hot Springs at the time of the shooting, but it is
26 unclear whether this evidence was presented at either
27 trial. (Pet. Unmarked Ex., Letter from Theodore
28 Ponticelli, Nov. 15, 2004.)

26 ² Petitioner's term includes fifteen years for second
27 degree murder, plus an additional year for the firearm
28 enhancement and four years for the assault conviction.
(Ans. Ex. A.)

1 **B. Procedural History**

2 Since Petitioner's 1993 Conviction, Petitioner has
3 appeared before the Board of Prison Terms ("BPT") on two
4 occasions. When Petitioner first appeared before the BPT
5 on March 4, 1999, the BPT denied parole for five years.
6 (Pet. at 2.) At a second hearing on June 16, 2005 ("the
7 hearing"), the BPT denied Petitioner parole, and
8 recommended that he remain discipline-free in prison and
9 participate in self-help and substance abuse
10 programs. (Pet. at 2; Ans. at 2; Ans. Ex. B at 85:13-
11 86:7.) The allegations in this Petition concern the
12 BPT's denial of parole at the June 16, 2005, hearing.
13

14 At the hearing, Petitioner introduced and the BPT
15 considered several letters in support of parole.
16 Specifically, Joyce and Milo Hunt wrote Petitioner a
17 letter of support indicating they believed Petitioner was
18 not involved in the commitment offense. They stated they
19 have known Petitioner since he was nineteen, they think
20 of Petitioner as one of their own children and Petitioner
21 will "always have a home and total support from them."
22 (Id. at 48:20-49:3 (letter paraphrased by BPT
23 Commissioner Fisher).) Steve Hunt also sent a letter of
24 support, indicating he would give Petitioner a job and a
25 place to live whenever he needed it. (Id. at 50:3-21.)
26 Petitioner also received letters of support from long-
27 time friends Maggie Philoctete (Id. at 47:11-48:2.),
28

1 Karen Aanderud (Id. 48:3-10.), Kevin Crawford (Id. at
2 48:10-18.), Donnelle Mulinschmidt (Id. at 49:21-50:1.)
3 and R.L. Armstrong (Id. at 50:21-51:2.).
4

5 In opposition, the BPT received a letter from the
6 Long Beach Police Department, which investigated the
7 commitment offense, opposing Petitioner's release on
8 parole due to the nature of the offense and Petitioner's
9 lack of remorse. (Ans. Ex. C.) A representative from
10 the Los Angeles District Attorney's Office, which
11 prosecuted the commitment offense, opposed parole via
12 video-conference. (Hearing Trans. 83:6-10.) At the
13 hearing, the victim's brother and sister, M.S. and J.C.,
14 also asked the BPT to deny parole. (Hearing Trans. 75:7-
15 78:12.) Both emphasized the devastating effect of the
16 commitment offense on their family in general and on
17 J.S., the victim's mother, in particular. (Id.) J.C.
18 also said she believed Petitioner would be more likely to
19 re-offend due to his minimal involvement in Alcoholics
20 Anonymous. (Id. at 77:25-78:3.)
21

22 **1. BPT's Decision and Reasoning**

23 The BPT concluded Petitioner was "not yet suitable
24 for parole and would pose an unreasonable risk of danger
25 to society or threat of public safety if released from
26 prison." (Hearing Trans. at 79:9-15.) The BPT based its
27
28

1 decision primarily on the nature of the commitment
2 offense. (Id. at 79:15-81:8; 84:11-85:2.)

3
4 The BPT cited three additional reasons for finding
5 Petitioner's unsuitable for parole: (1) Petitioner's past
6 arrests for drug or alcohol offenses and interfering with
7 a police officer constitute an "escalating pattern of
8 criminal conduct," and is evidence of an unstable social
9 history (Id. at 81:9-11, 85:2-6.); (2) the staff
10 psychologist recommended Petitioner participate in more
11 self-help programs and develop better coping mechanisms
12 for dealing with obsessive thoughts related to
13 Petitioner's asserted innocence (Id. at 82:13-25, 85:6-
14 13, 81:24-82:1) and (3) Petitioner has not participated
15 in substance abuse programs since about 1999 (Id. at
16 82:4-13, 85:16-86:9.).

17
18 **2. Petitioner's Writ of Habeas Corpus in State**
19 **Court**

20 Petitioner challenged the BPT's denial of parole by
21 filing a petition for writ of habeas corpus in Los
22 Angeles County Superior Court ("Superior Court") on
23 October 31, 2005. (Ans. Ex. F, Final Order, "Sup. Court
24 Decision.")

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

a. Superior Court Decision

On December 16, 2005, the Superior Court denied the petition, finding there was "some evidence" to support the BPT's denial of parole. (Id. at 1:19-24.)

The Superior Court relied primarily on the BPT's determination that the brutal nature of the commitment offense and the triviality of the motivation for the offense constitute "some evidence." (Id. at 2:15-25.) The Court also agreed with the BPT's conclusion that denial of parole was supported by Petitioner's need to resume participation in substance abuse programs and other self-help programs to help him cope with what the psychologist described as "obsessive thoughts" related to Petitioner's asserted innocence. (Id. at 3:12-21.)

The Superior Court, however, rejected the BPT's conclusions that Petitioner was unsuitable due to a record of violence or unstable social history. (Id. 3:1-11.) The court concluded there is no evidence that Petitioner has a history of violence, since he has only been arrested for non-violent offenses (Id. at 3:1-6.), and no evidence that Petitioner has an unstable social history, since he has had three stable long-term relationships and many close friendships. (Id. at 7-11.)

1 The Superior Court also rejected Petitioner's claims
2 that the BPT improperly considered Petitioner's refusal
3 to admit guilt, that the BPT improperly considered
4 evidence from the victim's family, and that Petitioner's
5 term has become grossly disproportionate to his
6 commitment offense (collectively, "Petitioner's secondary
7 claims"). (Id.)

8
9 **b. Appellate Decisions**

10 On February 14, 2006, Petitioner filed a petition
11 with the California Court of Appeal, which summarily
12 denied the petition on March 10, 2006. (Ans. Ex. G.)
13 The Court of Appeal stated: "The record submitted
14 reflects some evidence to support the challenged decision
15 of the Board of Prison Terms. (In re Dannenberg (2005) 34
16 Cal.4th 1061, 1071, 1080; In re Rosenkrantz (2002) 29
17 Cal.4th 616 664-665.)" (Id.) The Court of Appeals also
18 summarily rejected Petitioner's secondary claims. (See
19 id.) On March 20, 2006, Petitioner brought a third
20 petition to the California Supreme Court, which denied
21 review on May 24, 2006. (Ans. ¶ 5, Ex. G.)

22
23 **3. Petitioner's Federal Claims**

24 Petitioner filed this petition on June 20, 2006, and
25 asserts the following grounds for federal habeas corpus
26 relief:

- 1 1. The BPT violated Petitioner's state and federal
2 constitutional rights to due process by denying
3 him parole without "some evidence" to support
4 its decision;
- 5 2. The BPT improperly considered Petitioner's
6 refusal to admit guilt as a factor weighing in
7 favor of unsuitability for parole, in violation
8 of Cal. Penal Code § 5011 and Cal. Code of
9 Regs., tit. 15, § 2236.
- 10 3. The BPT improperly considered testimony from
11 victim's family as a factor weighing in favor of
12 unsuitability for parole;
- 13 4. Petitioner's prison term has become grossly
14 disproportionate with his commitment offense, in
15 violation of the California Constitution.

16 17 **II. STANDARD OF REVIEW**

18 Under the Antiterrorism and Effective Death Penalty
19 Act of 1996, a federal court may not grant habeas relief
20 on a claim adjudicated on its merits in state court
21 unless that adjudication "resulted in a decision that was
22 contrary to, or involved an unreasonable application of,
23 clearly established Federal law, as determined by the
24 Supreme Court of the United States," or "resulted in a
25 decision that was based on an unreasonable determination
26 of the facts in light of the evidence presented in the
27 State court proceeding." 28 U.S.C. § 2254(d).

1 Because "[t]here is no right under the Federal
2 Constitution to be conditionally released
3 before the expiration of a valid sentence, and
4 the States are under no duty to offer parole
5 to their prisoners,' [federal courts] may
6 review only whether the California-created
7 liberty interest in parole satisfies the
8 'minimal' procedural requirements of the Due
9 Process Clause. [citation] In other words,
10 "[b]ecause the only federal right at issue is
11 procedural, the relevant inquiry is what
12 process [the petitioner] received, not whether
13 the state court decided the case correctly."

8 Smiley v. Hernandez, No. 06-55727, 2011 WL 343951, *1
9 (9th Cir. Jan. 28, 2011) (citing Swarthout v. Cooke, 562
10 U.S. ___, 2011 WL 197627, at *2 (2011) (per curiam)).
11

12 Thus, when reviewing cases challenging parole
13 suitability determinations, a federal court's decision
14 regarding whether inmates denied parole received due
15 process is a limited inquiry: whether "[t]hey were
16 allowed to speak at their parole hearings and to contest
17 the evidence against them, were afforded access to their
18 records in advance, and were notified as to the reasons
19 why parole was denied." Swarthout v. Cooke, 562 U.S.
20 ___, 2011 WL 197627 (2011), *2-3 ("When, however, a State
21 creates a liberty interest, the Due Process Clause
22 requires fair procedures for its vindication-and federal
23 courts will review the application of those
24 constitutionally required procedures. In the context of
25 parole, . . . the procedures required are minimal
26 The Constitution . . . does not require more."). "It is
27 no federal concern . . . whether California's 'some
28

1 evidence' rule of judicial review (a procedure beyond
2 what the Constitution demands) was correctly applied."
3 Id.

4 5 **III. DISCUSSION**

6 **A. Scope of Review**

7 As a preliminary matter, under 28 U.S.C. § 2254(a), a
8 federal court may only entertain a habeas petition on the
9 ground that a petitioner "is in custody in violation of
10 the Constitution or laws or treaties of the United
11 States." Therefore, insofar as they allege deprivations
12 of his rights under the California Constitution,
13 Petitioner's claims are not cognizable on federal habeas
14 review. See Sperling v. Clay, No. EDCV 08-944-ODW (RNB),
15 2009 WL 62433, at *5 n.4 (C.D. Cal. Jan. 9, 2009) (citing
16 Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)).

17 Similarly, the Court only examines Petitioner's
18 allegations that the BPT violated Cal. Penal Code § 5011
19 and Cal. Code Regs. 15 § 2236, insofar as this conduct
20 violated Petitioner's federal constitutional rights.

21 22 **B. BPT Hearing**

23 Here, as in Swarthout, Petitioner received adequate
24 process. Petitioner attended the June 16, 2005, hearing
25 and was represented by counsel, Ben Ramos. (Hearing Tr.
26 1:20-2:14) At the hearing, Mr. Ramos offered evidence
27 supporting Petitioner's parole, and contested the
28

1 evidence against Petitioner. (See, e.g., Hearing Tr.
2 64:16-67:4, 70:13-17.) Moreover, although Petitioner did
3 not have an opportunity to review all of the documents,
4 Petitioner was afforded access to his records before the
5 hearing, and he believed he had adequate information for
6 the hearing to proceed. (Hearing Tr. 5:14-6:12.)
7 Finally, the BPT issued a decision on the record at the
8 hearing articulating the reasons it denied Petitioner's
9 parole. (Hearing Tr. 79:3-86:12.)

10

11 Accordingly, as Petitioner was permitted to speak at
12 his hearing and to contest the evidence against him, was
13 afforded access to his records in advance of the hearing,
14 and was notified why parole was denied, under Swarthout,
15 the parole hearing did not violate Jacobs's procedural
16 due process rights. Swarthout, 2011 U.S. 197627 at *2-3;
17 Smiley, 2011 WL 343951 at *1. The Court therefore
18 DISMISSES Jacobs's Petition.

19

20

IV. CONCLUSION

21

22

23

For the foregoing reasons, the Court DISMISSES Arthur
Jacobs's Petition for Writ of Habeas Corpus WITH
PREJUDICE.

24

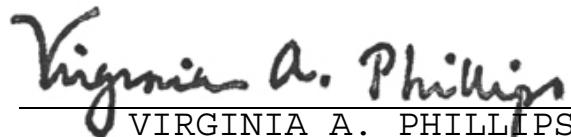
25

Dated: February 15, 2011

26

27

28


VIRGINIA A. PHILLIPS
United States District Judge