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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
10 **SACRAMENTO DIVISION**
11

12 FRANK KENNETH BENSON,) Case No. 2:06-CV-01584-MMS (HC)
13)
14 Petitioner,) ORDER
15 v.)
16 MATT KRAMMER, Warden, et al.,)
17)
18 Respondents.)
19 _____)

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21 Petitioner Frank Benson, an inmate at California State Prison, Solano,
22 seeks a writ of habeas corpus under 28 U.S.C. § 2254 disputing the California state
23 court's denial of habeas relief in his challenge to the April 14, 2005 decision of the
24 California Board of Parole Hearings ("BPH") denying him parole. Petitioner
25 alleges the denial of parole violated his rights under the Fourteenth Amendment of
26 the Constitution. Having considered the arguments of the parties, the Court
27 DENIES the petition for the reasons stated below.

28 **BACKGROUND**

Benson is serving a sentence of fifteen years to life for second degree
murder. In 1981, Benson killed his wife after an argument about their son. Benson
strangled his wife and then, believing her to be dead, weighted her body and threw

1 it off the San Mateo Bridge into the San Francisco Bay. Benson ultimately
2 confessed to the crime.

3 The BPH denied parole in April 2005, in Benson's ninth parole hearing.
4 The BPH decision recited the facts of the murder and found that these facts
5 indicated that Benson acted with a callous disregard for human life, and that
6 Benson had a trivial motive for the murder. The BPH also stated that Benson had a
7 prior conviction for petty theft, a history of substance abuse that indicated an
8 unstable social history, and that the Alameda County District Attorney opposed
9 parole. The Board recognized a number of positive aspects in Benson's record,
10 including the fact that he has been disciplinary free for a long time, had received a
11 positive psychological evaluation, and had been involved in substance abuse
12 programming. The BPH found, however, that the negative aspects in the record
13 outweighed the positive, and thus denied parole. The BPH also provided two
14 recommendations to Benson. First, the Board recommended that he again
15 participate in the Breaking Barriers Program. Second, the Board stated that
16 Benson's record would benefit from further documentation of his study of
17 Buddhism because Benson stated at several points in his hearing that his religious
18 studies would provide him the proper direction to avoid trouble in the outside
19 world.

20 Benson filed a habeas petition in California Superior Court, and the court
21 denied the petition finding that "there was certainly some evidence, including, but
22 not limited to the committing offense," to justify Benson's continued incarceration.
23 Benson sought review in the California Court of Appeal which affirmed without
24 discussion. Justice Parrilli, however, indicated that she would have dissented but
25 for the Supreme Court's decision in *In re Danneberg*, 104 P.3d 783 (Cal. 2005).
26 Justice Pollak dissented. He determined that the BPH erred in focusing on

1 unchanging factors such as the commitment offense and Benson’s history of
2 substance abuse, while ignoring the wealth of information that indicated that
3 Benson no longer posed a threat to society.

4 Benson sought relief in the California Supreme Court. The Supreme Court
5 also denied the petition in a summary disposition. The disposition indicated that
6 Justices Kennard, Werdegarr, and Moreno would have granted Benson’s habeas
7 petition. Benson filed a timely federal habeas petition.

8 **DISCUSSION**

9 Under California law, prisoners serving indeterminate life sentences become
10 eligible for parole after serving a minimum term of confinement. *Dannenberg*, 104
11 P.3d at 785-86. California regulations state that “a life prisoner shall be found
12 unsuitable for and denied parole if in the judgment of the panel the prisoner will
13 pose an unreasonable risk of danger to society if released from prison.” Cal. Code
14 Regs. tit. 15, § 2402(a). In making this suitability determination, the BPH looks to
15 factors such as the nature of the commitment offense, the prisoner’s record of
16 violence, social history, behavior in prison, and any other information relevant to
17 whether the prisoner poses an unreasonable risk to society. *See* Cal. Code Regs.
18 tit. 15 § 2402(b)-(d).

19 If the prisoner files a state habeas petition, the state court reviews the
20 decision of the BPH to determine whether “some evidence” supports the
21 unsuitability determination. *See In re Shaputis*, 190 P.3d 573, 580-81 (Cal. 2008).
22 California has defined “some evidence” to mean that the BPH’s determination
23 “must have some indicia of reliability.” *In re Scott*, 15 Cal. Rptr. 3d 32, 52 (2004)
24 (internal quotation marks omitted). A decision is not supported by “some
25 evidence” if the BPH denies parole solely on the basis of facts of the commitment
26 offense. *See In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008).

1 In *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), the Ninth
2 Circuit explained the standard federal courts are to apply in reviewing the
3 California court's denial of habeas relief to a prisoner challenging the BPH's denial
4 of parole. The court held that a federal court may grant a writ of habeas corpus
5 only if the "decision rejecting parole was an 'unreasonable application' of the
6 California 'some evidence' requirement, or was 'based on an unreasonable
7 determination of the facts in light of the evidence.'" *Id.* at 562-63. The Court here
8 must therefore decide whether the California Superior Court's decision upholding
9 the BPH's denial of parole unreasonably applied California's "some evidence"
10 standard. *Id.*

11 The Superior Court correctly observed that the BPH did not rely exclusively
12 on the nature of the commitment offense, although it was considered relevant. The
13 determination that the murder was conducted in a cruel and dispassionate manner
14 with no significant motive was a reasonable one. Benson strangled his victim for
15 five minutes and threw her body off a bridge believing her to be dead. He killed
16 her after becoming angry in an argument over his son. Additionally, Benson had a
17 history of unstable relationships and substance abuse. These facts provide
18 evidence that Benson still poses a danger to society. The BPH did not foreclose
19 future parole, indicating it would need more information about Benson's religious
20 study.

21 Because the BPH reasonably expected to see convincing evidence that
22 Benson had rid himself of his drug habit and that he would not relapse if released,
23 but Benson failed to do this. Benson testified at his hearing that he did not plan to
24 continue substance abuse programming after release because he believed that he
25 had cured his problem. At his hearing, Benson told the Board that his Buddhist
26 religious studies would enable him to avoid substance abuse problems upon
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1 release, but there is little in the record about this training. In light of this
2 testimony, it was reasonable for the BPH to be concerned that Benson lacked a
3 realistic plan for avoiding drugs if released.

4 Benson failed to carry his burden of showing that he no longer posed a
5 danger to society because of his history of substance abuse. The history, combined
6 with the savage nature of the murder, demonstrate that the California courts did not
7 unreasonably apply the “some evidence” standard. While several appellate judges
8 would have reached a different result, the application of the standard was not
9 unreasonable. Benson’s claim thus fails.

10 CONCLUSION

11 For the above reasons, the petition for a writ of habeas corpus is DENIED.
12 A certificate of appealability is GRANTED as to the issue of whether BPH’s denial
13 of parole violated Benson’s Fourteenth Amendment right to due process because
14 Petitioner has shown his claim is “debatable among reasonable jurists.” *See*
15 *Hayward*, 603 F.3d at 555.

16 DATED: September 8, 2010

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18 /s/ Mary M. Schroeder
19 MARY M. SCHROEDER,
20 United States Circuit Judge
21 Sitting by designation
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