IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KULDIP S. KLER,

Petitioner,

vs.

BOARD OF PRISON TERMS, et al.,

Respondents.

_____/

No. CIV S-06-1919-FCD-CMK-P

ORDER

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the denial of parole in 2005. Pending before the court is petitioner's petition for a writ of habeas corpus (Doc. 1).

I. BACKGROUND

Petitioner is serving an indeterminate sentence of 15 years to life following a 1989 conviction for second degree murder. At the time sentence was imposed on June 11, 1991, petitioner was credited 423 days time served. Petitioner appeared before the Board of Parole Hearings ("Board") for a subsequent parole suitability hearing on June 22, 2005. It is unclear

whether petitioner had more than one prior parole hearing. The Board denied parole for two years, stating that "[t]he most important reason for the denial is the commitment offense which was the murder of Simron Kler, the inmate's 10-month-old daughter. . . ." The Board added:

> . . .[The victim] was just a mere child, an infant. And the crime was carried out in an especially cruel fashion, this child was beaten to death, the various courts indicate over 100 different areas showing bruising, contusions, that she had broken ribs, and unfortunately the injuries that were noted, primarily were new, but the results also show that she had prior abuse. And prior broken ribs. Or ribs that were apparently in the process of healing. The motive for this crime is completely inexplicable, the inmate says that he lost control, that he was angry at the time that she disturbed his sleep. But this young girl lost her life for no reason, other than the fact that the inmate was overly ambitious and obviously self-centered and did not have any care for his daughter. . . .

The Board also cited the following other reasons for denying parole: (1) failure to participate in sufficient self-help programming while in prison; (2) opposition from the Alameda County District Attorney's Office; and (3) lack of suitable parole plans in India.[1] The Board noted that a February 2005 psychological evaluation was "supportive of release" because the doctor opined that petitioner was a "lower than average risk for future violence compared to other men his age." The Board commented that this was "such a statement as . . . once someone has committed a violent crime, they are always going to be a higher risk than the average citizen." The Board also noted that petitioner had been "disciplinary free" since his last parole hearing.

As to self-help in particular, the Board added:

> . . . The panel finds that the inmate needs additional self-help in order to further delve into the causative factors for his participation in the life crime. And until further progress is made, he continues to be unpredictable and potential threat to others. . . . When it [programming] becomes available to you, [we recommend] that you participate in self-help. . . . You have many things to be commended for, there is absolutely no question that you are an exceptionally well programming inmate. That

---

[1] Petitioner states that he is not a citizen, but was a green card holder at the time of his incarceration. Apparently, given his felony conviction, he is subject to removal. The Board noted an "INS hold" and, for this reason, required suitable parole plans in India. The Board did note, however, that petitioner had suitable plans in California because "he can live with his wife in Roseville and has a job offer in nearby Rocklin" and petitioner "also has marketable skill, having completed auto body and fender."

> you have completed auto mechanics, body and fender, prior to incarceration you were a college graduate. You are to be commended that you only have two 115's [disciplinary charges] during the course of your incarceration and that you have been very busy in self-help programs, most recently, bible courses; the FEMA or Emergency Management Institute courses; parenting; conflict resolution; anger management and many others that you have obviously a good wor[k] ethic because you have received laudatory chronos for your work, for your contributions. But these positive aspects of your behavior just do not yet outweigh the factors of unsuitability. . . .

The Board commented that, while petitioner has taken responsibility for his crime and the effect it has had on his family, but stated: "I'm not sure you really take full responsibility for everything you did to this child prior to her death."

Petitioner filed a petition for a writ of habeas corpus in the Alameda County Superior Court challenging the 2005 denial of parole. In denying relief, the state court concluded:

> . . . The Petition fails to state a prima facie case for relief. Even though Petitioner has submitted numerous documents in support of his Petition, review of the transcripts provided and documents pertaining to the June 22, 2005, hearing indicate that there was no abuse of discretion by the Board of Prison Terms. The factual basis of the BPT's decision granting or denying parole is subject to a limited judicial review. A Court may inquire only whether some evidence in the record before the BPT supports the decision to deny parole. The nature of the offense alone can be sufficient to deny parole . (In re Rosenkrantz (2002) 29 Cal.4th 615, 652, 682). The record presented to this Court for review demonstrates that there was certainly some evidence including, but not limited to the committing offense, Petitioner's lack of acceptable parole plans should he be deported to India, and the BPT's finding that Petitioner should participate in additional self-help programming to enhance Petitioner's ability to realistically understand his role and responsibility in abuse of his daughter. There is nothing in the record that indicates that the Board's decision was arbitrary or capricious. . . .

The California Court of Appeal denied relief without comment or citation, as did the California Supreme Court.

/ / /

/ / /

/ / /

II. STANDARDS OF REVIEW

Because this action was filed after April 26, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are presumptively applicable. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Calderon v. United States Dist. Ct. (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 522 U.S. 1099 (1998). The AEDPA does not, however, apply in all circumstances. When it is clear that a state court has not reached the merits of a petitioner's claim, because it was not raised in state court or because the court denied it on procedural grounds, the AEDPA deference scheme does not apply and a federal habeas court must review the claim de novo. See Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002) (holding that the AEDPA did not apply where Washington Supreme Court refused to reach petitioner's claim under its "re-litigation rule"); see also Killian v. Poole, 282 F.3d 1204, 1208 (9th Cir. 2002) (holding that, where state court denied petitioner an evidentiary hearing on perjury claim, AEDPA did not apply because evidence of the perjury was adduced only at the evidentiary hearing in federal court); Appel v. Horn, 250 F.3d 203, 210 (3d Cir.2001) (reviewing petition de novo where state court had issued a ruling on the merits of a related claim, but not the claim alleged by petitioner). When the state court does not reach the merits of a claim, "concerns about comity and federalism . . . do not exist." Pirtle, 313 F. 3d at 1167.

Where AEDPA is applicable, federal habeas relief under 28 U.S.C. § 2254(d) is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); see also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F. 3d 1223, 1229 (9th Cir. 2001). Thus,

under § 2254(d), federal habeas relief is available only where the state court's decision is "contrary to" or represents an "unreasonable application of" clearly established law. Under both standards, "clearly established law" means those holdings of the United States Supreme Court as of the time of the relevant state court decision. See Carey v. Musladin, 549 U.S. 70, 74 (2006) (citing Williams, 529 U.S. at 412) . "What matters are the holdings of the Supreme Court, not the holdings of lower federal courts." Plumlee v. Masto, 512 F.3d 1204 (9th Cir. 2008) (en banc). Supreme Court precedent is not clearly established law, and therefore federal habeas relief is unavailable, unless it "squarely addresses" an issue. See Moses v. Payne, 555 F.3d 742, 753-54 (9th Cir. 2009) (citing Wright v. Van Patten, 552 U.S. 120, 28 S. Ct. 743, 746 (2008)). For federal law to be clearly established, the Supreme Court must provide a "categorical answer" to the question before the state court. See id.; see also Carey, 549 U.S. at 76-77 (holding that a state court's decision that a defendant was not prejudiced by spectators' conduct at trial was not contrary to, or an unreasonable application of, the Supreme Court's test for determining prejudice created by state conduct at trial because the Court had never applied the test to spectators' conduct). Circuit court precedent may not be used to fill open questions in the Supreme Court's holdings. See Carey, 549 U.S. at 74.

In Williams v. Taylor, 529 U.S. 362 (2000) (O'Connor, J., concurring, garnering a majority of the Court), the United States Supreme Court explained these different standards. A state court decision is "contrary to" Supreme Court precedent if it is opposite to that reached by the Supreme Court on the same question of law, or if the state court decides the case differently than the Supreme Court has on a set of materially indistinguishable facts. See id. at 405. A state court decision is also "contrary to" established law if it applies a rule which contradicts the governing law set forth in Supreme Court cases. See id. In sum, the petitioner must demonstrate that Supreme Court precedent requires a contrary outcome because the state court applied the wrong legal rules. Thus, a state court decision applying the correct legal rule from Supreme Court cases to the facts of a particular case is not reviewed under the "contrary to" standard. See

id. at 406. If a state court decision is "contrary to" clearly established law, it is reviewed to determine first whether it resulted in constitutional error. See Benn v. Lambert, 293 F.3d 1040, 1052 n.6 (9th Cir. 2002). If so, the next question is whether such error was structural, in which case federal habeas relief is warranted. See id. If the error was not structural, the final question is whether the error had a substantial and injurious effect on the verdict, or was harmless. See id.

State court decisions are reviewed under the far more deferential "unreasonable application of" standard where it identifies the correct legal rule from Supreme Court cases, but unreasonably applies the rule to the facts of a particular case. See Wiggins v. Smith, 539 U.S. 510, 520 (2003). While declining to rule on the issue, the Supreme Court in Williams, suggested that federal habeas relief may be available under this standard where the state court either unreasonably extends a legal principle to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply. See Williams, 529 U.S. at 408-09. The Supreme Court has, however, made it clear that a state court decision is not an "unreasonable application of" controlling law simply because it is an erroneous or incorrect application of federal law. See id. at 410; see also Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003). An "unreasonable application of" controlling law cannot necessarily be found even where the federal habeas court concludes that the state court decision is clearly erroneous. See Lockyer, 538 U.S. at 75-76. This is because "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." Id. at 75. As with state court decisions which are "contrary to" established federal law, where a state court decision is an "unreasonable application of" controlling law, federal habeas relief is nonetheless unavailable if the error was non-structural and harmless. See Benn, 283 F.3d at 1052 n.6.

The "unreasonable application of" standard also applies where the state court denies a claim without providing any reasoning whatsoever. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Delgado v. Lewis, 233 F.3d 976, 982 (9th Cir. 2000). Such decisions are considered adjudications on the merits and are, therefore, entitled to deference under the

AEDPA. See Green v. Lambert, 288 F.3d 1081 1089 (9th Cir. 2002); Delgado, 233 F.3d at 982. The federal habeas court assumes that state court applied the correct law and analyzes whether the state court's summary denial was based on an objectively unreasonable application of that law. See Himes, 336 F.3d at 853; Delgado, 233 F.3d at 982.

III. DISCUSSION

Petitioner claims that the Board failed to consider all the suitability factors required under state law. He also argues that the Board's continued reliance on the facts of the commitment offense deprived him of due process. Respondents argue that, in the parole context, due process requires only that the petitioner be given notice and an opportunity to be heard, and a decision stating the reasons for denial of parole. Respondents argue that no clearly established Supreme Court precedent allows this court to apply the "some evidence" standard on habeas review and conclude that, because petitioner was offered the minimum procedural protections, his constitutional claim must fail. Respondents also argue that, even if this court were to apply the "some evidence" test, habeas relief is unavailable because "the state court correctly found that some evidence supports the decision to deny Petitioner parole."

In Sass v. Bd. of Prison Terms, 461 F.3d 1123 (9th Cir. 2006), the Ninth Circuit held that California's parole statute does, in fact, create a federally cognizable liberty interest. See id. at 1127-28. On the merits, the court also rejected the argument that the "some evidence" standard does not apply in the parole context. See id. at 1128-29. Under Superintendent v. Hill, 472 U.S. 445, 455 (1985), due process requires that a prison disciplinary hearing decision be based on "some evidence" in the record as a whole which supports the decision. This standard, which the court has also applied in the parole context, is not particularly stringent and is satisfied where "there is any evidence in the record that could support the conclusion reached." Id. at 455-56. Additionally, this standard requires that the evidence underlying the Board's decision must have some indicia of reliability. See Biggs v. Terhune, 334 F.3d 910, 915 (9th Cir. 2003).

A. Applicable Law

In Sass, the Ninth Circuit also addressed the argument that the requirement of "some evidence" in the parole context has not been clearly established by the Supreme Court. The Ninth Circuit held:

> Hill's some evidence standard is minimal, and assures that "the record is not so devoid of evidence that the findings of the . . . board were without support or otherwise arbitrary." (citation omitted). Hill held that although this standard might be insufficient in other circumstances, "[t]he fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact." (citation omitted). To hold that less than the some evidence standard is required would violate clearly established federal law because it would mean that a state could interfere with a liberty interest – that in parole – without support or in an otherwise arbitrary manner. We therefore reject the state's contention that the some evidence standard is not clearly established in the parole context.
>
> Sass, 461 F.3d at 1129.

Because Sass and Biggs are binding precedent, this court must also conclude the "some evidence" standard is clearly established law for purposes of habeas corpus relief under AEDPA.[2] Therefore, this court will apply the "some evidence" standard on the merits. See id.; see also Irons v. Carey, 505 F.3946, 851 (9th Cir. 2007).

In assessing whether the "some evidence" standard has been met, the analysis is framed by the state's statutes and regulations governing parole suitability. See Biggs, 334 F.3d at 915. Thus, this court looks to California law to determine the findings that are necessary to deem a prisoner unsuitable for parole and then reviews the record to determine whether there is "some

---

[2] The court is aware of the Ninth Circuit's holding in Hayward v. Marshall, 512 F.3d 536 (9th Cir. 2008), rehearing en banc granted, 527 F.3d 797 (9th Cir. 2008), where the court applied the "some evidence" standard as clearly established law and concluded that habeas relief was granted because the continued reliance on immutable factors violated due process. However, that case is not binding precedent pending issuance of the mandate. See Hayward, 527 F.3d 797 ("The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit"). Among the issues being considered on rehearing is whether there is any clearly established law in the parole context. If the Ninth Circuit ultimately concludes that there is no clearly established law, habeas relief would be unavailable. See Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (citing Wright v. Van Patten, 552 U.S. 120, 128 S.Ct. 743, 746 (2008)).

evidence" supporting the decision to deny parole. Under California Penal Code § 3041(b) and California Code of Regulations, Title 15, § 2402(a), once the inmate has served the minimum term required, a release date shall be set unless release currently poses an unreasonable risk of danger to society.[3] It follows from this that, even though there may be some evidence that a particular unsuitability factor exists, this does not necessarily mean that there is some evidence of a current unreasonable risk of danger to the community if the inmate is released.[4]

In addition to concluding that due process requires "some evidence" in the parole context based on Hill, the Ninth Circuit has addressed whether the continued reliance on immutable factors satisfies this standard and whether continued reliance solely on such factors ignores the goal of rehabilitation and violates due process. In Biggs, where the petitioner was challenging the first denial of parole based solely on the facts of the commitment offense, the Ninth Circuit concluded that the denial was based on some evidence – the facts of the commitment offense – even though other findings made by the Board in Biggs' case lacked evidentiary support. In dicta, however, the court acknowledged that, sometime in the future, the continued reliance on immutable factors could violate due process. See Biggs, 334 F.3d at 917. From this, it is clear that the Board may rely solely on immutable factors for the first denial of

---

[3] The regulations set forth various circumstances which tend to show suitability and others which tend to show unsuitability. See Cal. Code Regs., tit 15 § 2402(c)-(d). Under § 2402(c), circumstances tending to show unsuitability include: (1) the facts of the commitment offense, where the offense was committed in an especially heinous, atrocious, or cruel manner; (2) the prisoner's previous record of violence; (3) a history of unstable relationships with others; (4) commission of sadistic sexual offenses; (5) a lengthy history of severe mental problems related to the offense; and (6) serious misconduct while in prison. Circumstances tending to show suitability include: (1) lack of a juvenile record; (2) reasonably stable relationships with others; (3) the prisoner has shown remorse; (4) lack of significant history of violent crimes; (5) realistic plans for release; and (6) participation in institutional activities indicating an enhanced ability to function within the law upon release. See Cal. Code Regs., tit. 15 § 2402(d).

[4] The California Supreme Court has held that, under the regulations, the denial of parole may be predicated on the commitment offense only where the Board can point to factors beyond the minimum elements of the crime that demonstrate that, at the time of the suitability hearing, the inmate will present an unreasonable risk of danger to society if released. See In re Dannenberg, 34 Cal.4th 1061, 1071 (2005).

parole given the minimal passage of time between the commitment offense and parole decision.

As to subsequent denials of parole and the continued reliance on immutable factors, the Ninth Circuit has not drawn any bright line. In Sass, where the petitioner was challenging the third denial of parole, the Ninth Circuit affirmed the denial of the habeas petition. See Sass, 461 F.3d at 1129. The court did not conclude that reliance on immutable factors (the facts of the commitment offense and the petitioner's prior criminal history) – even for a third time – violated due process. See id. The court held:

> In making a judgment call based on evidence of pre-conviction recidivism and the nature of the conviction offense, the Board cannot be categorized as acting arbitrarily. Here, the Board based its finding that Sass was unsuitable for parole on the gravity of his convicted offenses in combination with his prior offenses. These elements amount to some evidence. . . . Consequently, the state court decisions upholding the denials were neither contrary to, nor did they involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.
>
> Id.

In Irons v. Carey, 505 F.3d 846 (9th Cir. 2007), rehearing en banc denied, 505 F.3d 951 (9th Cir. 2007), the Ninth Circuit reversed the district court's grant of a habeas petition challenging the eighth denial of parole, concluding that the facts of the petitioner's commitment offense alone constituted some evidence of unsuitability under California law. The court in Irons noted that none of the Ninth Circuit's cases regarding reliance solely on immutable factors to deny parole involved inmates who had served the minimum terms of their sentences. Specifically, the court observed:

> We note that in all the cases in which we have held that a parole board's decision to deem a prisoner unsuitable for parole solely on the basis of his commitment offense comports with due process, the decision was made before the inmate had served the minimum number of years required by his sentence. Specifically, in Biggs, Sass, and here, the petitioners had not served the minimum number of years to which they had been sentenced at the time of the challenged parole denial by the Board. Biggs, 334 F.3d at 912; Sass, 461 F.3d at 1125. All we held in those cases and all we hold today, therefore, is that, given the particular circumstances of the offenses in these cases, due process was not violated when these prisoners were deemed unsuitable for parole prior to the expiration of their

minimum terms.

Id. at 853-54.

As to the continued reliance solely on immutable factors, the court noted in dicta:

> Furthermore, we note that in Sass and in the case before us there was substantial evidence in the record demonstrating rehabilitation. In both cases, the California Board of Prison Terms appeared to give little or no weight to this evidence in reaching its conclusion that Sass and Irons presently constituted a danger to society and thus were unsuitable for parole. We hope that the Board will come to recognize that in some cases, indefinite detention based solely on an inmate's commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process, given the liberty interest in parole that flows from the relevant California statutes.
>
> Id. at 854.

From Biggs, Sass, and Irons the court can conclude that, where the challenged parole denial occurs before the petitioner has served the minimum term of his sentence, the continued reliance solely on immutable factors to deny parole for up to eight times does not violate due process. It may be that, so long as the inmate has not served his minimum sentence, the Board may deny parole any number of times based solely on immutable factors.[5] Where the inmate has served the minimum term, the following rules apply: (1) California law creates a liberty interest in parole for prisoners who have served the minimum sentence, see Sass, 461 F.3d at 1127-28; Irons, 505 F.3d at 853-54; (2) the Board's decision to deny parole must be supported by "some evidence" that the prisoner's release would have posed an unreasonable risk of danger to the community at the time, see Sass, 461 F.3d at 1128-29; and (3) the evidence relied upon by the Board must have some indicia of reliability, see Biggs, 334 F.3d at 915. In some cases where the minimum term has been served, the continued reliance on immutable factors to deny parole may violate due process. See id. at 917; see also Irons, 505 F.3d at 854.

---

[5] Such a reading of the cases would be consistent with California law, which does not require that a parole release date even be considered until the inmate has served the minimum term of his sentence. See Cal. Penal Code § 3041(b) and Cal. Code of Regs., Title 15, § 2402(a).

B. Analysis

In this case, petitioner was convicted in 1991 and sentenced to serve a minimum of 15 years in prison. Given that the denial challenge in this case occurred in 2005, it is not clear that petitioner had served his minimum term, in which case the state court could not have erred in affirming the Board's denial of parole.

Assuming for the moment, however, that petitioner had served his minimum term by virtue of application of 423 days time served at the time of sentencing, the court finds that habeas relief is still unavailable. Initially, the court notes that it must apply the "some evidence" standard in analyzing the state court's decision to affirm the Board's denial of parole. Notwithstanding respondents' compelling argument that no clearly established United States Supreme Court authority exists applying this standard in the parole context, this court is bound to follow the existing Ninth Circuit precedent, namely Biggs, Sass, and Irons, all of which applied the "some evidence" standard in parole cases.

Applying the "some evidence" standard to the facts of this case, the court finds that some evidence, which was reliable and relevant to the issue of petitioner's danger to the community if released in 2005, supports the Board's decision to deny parole. In particular, as the Board noted, petitioner had not participated in self-help programming to the point where he accepted responsibility for the abuse of his daughter. While the court accepts the Board's finding that petitioner has accepted responsibility for his crime, this is not the same as accepting responsibility for the child abuse which preceded and no doubt played a part in the crime itself. Neither the Board nor the state court erred in concluding that this constituted some evidence of a risk of danger to society.

In addition, the court notes petitioner's lack of suitable plans for release upon removal to India. While petitioner will no doubt argue that he had adequate plans for release in California, the court finds nothing in the applicable regulations which limits the Board's consideration to the risk of danger to the local community. In other words, the Board was free

(and by all rights had a duty) to consider the danger petitioner's release would pose to the community in which he would likely live given the INS hold – India. It is undisputed that petitioner had no living arrangements or offers of employment in India. This alone also constitutes some evidence to support the Board's denial of parole.

IV. CONCLUSION

Based on the foregoing, the undersigned recommends that petitioner's petition for a writ of habeas corpus (Doc. 1) be denied and that respondents' request to stay these proceedings pending issuance of the mandate in Hayward be denied as unnecessary.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within 20 days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 20, 2009

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE