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

JOHN BURNIGHT,

Petitioner,

No. CIV S-06-2398 MCE CHS P

vs.

THOMAS CAREY, Warden, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

I. INTRODUCTION

Petitioner John Burnight is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Burnight challenges the September 15, 2004, decision by the Board of Prison Terms (hereinafter Board) finding him unsuitable for parole.

In the July 28, 2009, Case Reassignment Order, the District Judge assigned to this matter indicated that it may be prudent to await the Ninth Circuit’s decision in Hayward v. Marshall, 512 F.3d 536 (9th Cir. 2008), reh’g en banc granted, 527 F.3d 797 (9th Cir. May 16, 2008). This matter therefore may eventually be stayed pending that decision.

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1 II. CLAIMS

2 Burnight's habeas petition raises three claims as follow, verbatim:

- 3 A. Petitioner is entitled to release on parole because the Board of Parole Hearings  
4 decision to deny parole was not supported by any relevant, reliable evidence in  
5 the record in violation of petitioner's right to due process of law under the Fifth  
6 and Fourteenth Amendments and the California Constitution;
- 7 B. Petitioner is entitled to release on parole because the Board of Parole Hearings  
8 failed to afford him an individualized consideration of all factors relevant to  
9 parole decisions in violation of petitioner's right to due process of law under the  
10 Fifth and Fourteenth Amendments and the California Constitution; and
- 11 C. Petitioner is entitled to release on parole because the Board of Prison Hearings  
12 decision at the September 15, 2004 hearing was invalid because petitioner's term  
13 of imprisonment expired on June 14, 2004 when his presumptive release date  
14 passed without a subsequent parole consideration hearing being conducted.

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16 Upon careful consideration of the record and the applicable law, the undersigned  
17 will recommend that this petition for habeas corpus relief be denied.

18 III. FACTUAL AND PROCEDURAL BACKGROUND

19 A. Facts

20 The Board recited the facts of Burnight's commitment offense as follows:

21 PRESIDING COMMISSIONER RISEN: Okay. I'll go to the  
22 Probation Officer's report. It looks like it's about page three.  
23 Early on the morning of June 30<sup>th</sup>, 1989, the defendant or prisoner  
24 went to the home of his friend, the victim, Steve and I'll spell the  
25 last name, Z-E-E-H-A-N-D-E-L-A-A-R. How do you pronounce  
26 that?

MS. CAMERON: Zeehandelaar.

PRESIDING COMMISSIONER RISEN: Zeehandelaar, thank you.

“The prisoner had with him a shotgun belonging to his  
grandfather. About a month before the incident, the  
prisoner had sawed off the barrel of the shotgun.  
According to information from the prisoner's girlfriend, the  
prisoner's grandmother - -“

Wait.

“According to information from the defendant's girlfriend

1 and defendant's grandmother, the prisoner had gone to the  
2 victim's home to confront the victim with misinformation  
3 that the victim had presented to the girlfriend. The victim  
4 lived about one and a half blocks away from the prisoner,  
5 who walked to the home. The prisoner put the gun in some  
6 bushes in front of the house and then went to the front door,  
7 where the victim answered the door and the prisoner spoke  
8 with him. The victim - - the defendant and the victim  
9 argued. The defendant then backed - - then went back to  
10 the house and picked up the double-barreled shotgun and  
11 returned to the front door. He shot one round directly into  
12 the victim's throat. The shotgun was apparently touching  
13 the victim's neck at the time it was fired. The victim's  
14 brother approached the front door and saw the defendant  
15 standing over the victim's body. The defendant ran to his  
16 girlfriend's house, told her what he had done, drove to  
17 Santa Rita, crashing into a post out - - just outside the  
18 office and told the deputies that he had just shot somebody.  
19 The victim was pronounced dead upon arrival at Eden, E-  
20 D-E-N, Hospital."

21 /////

22 Answer, Exhibit 2 at 12-14.

23 On January 13, 1993, Burnight pled guilty to second degree murder and on March  
24 22, 1993, was sentenced to a term of 15 years to life. Answer, Ex. 1 at 2. On September 15,  
25 2004, the Board held Burnight's Subsequent Parole Consideration Hearing. Answer, Ex. 2 at 2.  
26 At the conclusion of that hearing the Board found him unsuitable for parole. Id. at 63-68.

27 B. State Habeas Review

28 On December 17, 2004, Burnight filed a petition for writ of habeas corpus in the  
29 Alameda County Superior Court. That petition was denied in a short but reasoned opinion on  
30 January 12, 2005. Answer, Ex. 3 at 2. Burnight then filed a petition in the California Court of  
31 Appeal for the First Appellate District, which was summarily denied on March 1, 2005. Answer,  
32 Ex. 4 at 2. Burnight then filed a petition in the California Supreme Court. That petition was  
33 summarily denied on January 25, 2006, with citations to People v. Duvall, 9 Cal. 4th 464 (1995),  
34 In re Miller, 17 Cal. 2d 734 (1941) and In re Rosenkranz, 29 Cal. 4th 616 (2002). Answer, Ex. 5  
35 at 2. Finally, Burnight filed this federal petition on October 31, 2006.

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1 IV. APPLICABLE STANDARD OF HABEAS CORPUS REVIEW

2 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of  
3 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,  
4 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.  
5 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the  
6 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);  
7 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas  
8 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377  
9 (1972).

10 This action is governed by the Antiterrorism and Effective Death Penalty Act of  
11 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d  
12 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting  
13 habeas corpus relief:

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

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

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

21 28 U.S.C. § 2254(d). See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v.  
22 Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). The  
23 court looks to the last reasoned state court decision as the basis for the state court judgment.  
24 Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). Where the state court reaches a  
25 decision on the merits but provides no reasoning to support its conclusion, a federal habeas court  
26 independently reviews the record to determine whether habeas corpus relief is available under

1 section 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Delgado v. Lewis, 223  
2 F.3d 976, 982 (9th Cir. 2000).

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4 V. DISCUSSION OF PETITIONER'S CLAIMS

5 A. Decision Was Not Supported By Evidence

6 1) Description Of Claim

7 Burnight argues that because the circumstances of his commitment offense were  
8 not relevant reliable evidence that he was then currently an unreasonable risk of danger to  
9 society, the Board's decision was not supported by some evidence and violated his liberty  
10 interest in parole. Petition at 18-25.

11 2) State Court Opinion

12 The Alameda County Superior Court rejected this claim finding that, "there was  
13 certainly some evidence, including, but not limited to the committing offense, and Petitioner's  
14 lack of suitable parole plans." Answer, Ex. 4 at 2.

15 3) Applicable Law And Discussion

16 The Due Process Clause of the Fourteenth Amendment prohibits state action that  
17 deprives a person of life, liberty, or property without due process of law. A person alleging due  
18 process violations must first demonstrate that he or she was deprived of a liberty or property  
19 interest protected by the Due Process Clause and then show that the procedures attendant upon  
20 the deprivation were not constitutionally sufficient. Kentucky Dep't of Corrections v.  
21 Thompson, 490 U.S. 454, 459-60 (1989); McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir.  
22 2002).

23 A protected liberty interest may arise from either the Due Process Clause of the  
24 United States Constitution or state laws. Board of Pardons v. Allen, 482 U.S. 369, 373 (1987).  
25 The United States Constitution does not, of its own force, create a protected liberty interest in a  
26 parole date, even one that has been set. Jago v. Van Curen, 454 U.S. 14, 17-21 (1981).

1 However, “a state’s statutory scheme, if it uses mandatory language, ‘creates a presumption that  
2 parole release will be granted’ when or unless certain designated findings are made, and thereby  
3 gives rise to a constitutional liberty interest.” McQuillion, 306 F.3d at 901 (quoting Greenholtz  
4 v. Inmates of Nebraska Penal, 442 U.S. 1, 12 (1979)). In this regard, it is clearly established that  
5 California’s parole scheme provides prisoners sentenced in California to a state prison term that  
6 provides for the possibility of parole with “a constitutionally protected liberty interest in the  
7 receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of  
8 the Due Process Clause.” Irons v. Carey, 505 F.3d 846, 850-51 (9th Cir. 2007) (citing Sass v.  
9 Cal. Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); Biggs v. Terhune, 334 F.3d 910,  
10 914 (9th Cir. 2003); McQuillion, 306 F.3d at 903; and Allen, 482 U.S. at 377-78 (quoting  
11 Greenholtz, 442 U.S. at 12)). Accordingly, this court must examine whether the deprivation of  
12 petitioner’s liberty interest in this case violated due process.

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

18           “The ‘some evidence’ standard is minimally stringent,” and a decision will be  
19 upheld if there is any evidence in the record that could support the conclusion reached by the  
20 fact-finder. Powell v. Gomez, 33 F.3d 39, 40 (9th Cir. 1994) (citing Cato v. Rushen, 824 F.2d  
21 703, 705 (9th Cir. 1987)); Toussaint v. McCarthy, 801 F.2d 1080, 1105 (9th Cir. 1986).  
22 However, “the evidence underlying the [ ] decision must have some indicia of reliability.”  
23 Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987). See also Perveler v.  
24 Estelle, 974 F.2d 1132, 1134 (9th Cir. 1992). Determining whether the “some evidence”  
25 standard is satisfied does not require examination of the entire record, independent assessment of  
26 the credibility of witnesses, or the weighing of evidence. Toussaint, 801 F.2d at 1105. The

1 question is whether there is any reliable evidence in the record that could support the conclusion  
2 reached. Id.

3 In finding Burnight unsuitable for parole, the Board relied upon: a) the  
4 circumstances of the commitment offense and b) Burnight's lack of adequate parole plans.

5 a. Circumstances Of The Commitment Offense

6 The circumstances of the commitment offense are one of fifteen factors relating to  
7 an inmate's unsuitability or suitability for parole under California law. Cal. Code Regs., tit. 15 §  
8 2402(c)(1)-(d). When denial is based on these circumstances the California courts have stated  
9 that:

10 A prisoner's commitment offense may constitute a circumstance  
11 tending to show that a prisoner is presently too dangerous to be  
12 found suitable for parole, but the denial of parole may be  
13 predicated on a prisoner's commitment offense only where the  
14 Board can "point to factors beyond the minimum elements of the  
15 crime for which the inmate was committed" that demonstrate the  
16 inmate will, at the time of the suitability hearing, present a danger  
17 to society if released. [In re] Dannenberg, 34 Cal.4th [1061] at  
18 1071, 23 Cal.Rptr.3d 417, 104 P.3d 783 (Cal.2005). Factors  
beyond the minimum elements of the crime include, inter alia, that  
"[t]he offense was carried out in a dispassionate and calculated  
manner," that "[t]he offense was carried out in a manner which  
demonstrates an exceptionally callous disregard for human  
suffering," and that "[t]he motive for the crime is inexplicable or  
very trivial in relation to the offense." Cal.Code Regs., tit. 15  
§ 2402(c)(1)(B), (D)-(E)."

18 ////

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

24 Such circumstances may include "rehearsing the murder, executing of a sleeping  
25 victim, stalking," id., or evidence that the defendant "acted with cold, calculated, dispassion, or  
26 that he tormented, terrorized or injured [the victim] before deciding to shoot her; or that he

1 gratuitously increased or unnecessarily prolonged her pain and suffering.” In re Smith, 114 Cal.  
2 App.4th at 367.

3 With respect to triviality, all murder is trivial to some degree. Therefore for  
4 purposes of comparison and to fit the statutory definition the motive must be materially less  
5 significant (or more “trivial”) than those which typically drive people to commit murder and  
6 therefore is more indicative of a risk of danger to society if the prisoner is released than is  
7 ordinarily presented. In re Scott, 119 Cal. App.4th 871, 891 (2004).

8 The ultimate inquiry however “is not merely whether an inmate’s crime was  
9 especially callous, or shockingly vicious or lethal, but whether the identified facts are probative  
10 to the central issue of current dangerousness when considered in light of the full record before  
11 the Board or the Governor.” In re Lawrence, 44 Cal.4th 1181, 1221 (Cal. 2008); In re  
12 Dannenberg, 34 Cal.4th 1061, 1070-71 (Cal. 2005).

13 With respect to the circumstances of the commitment offense, the Board stated:

14 The offense was carried out in an especially cruel and callous  
15 manner. These conclusions are drawn from the statement of facts,  
16 wherein the prisoner was angry with the victim because the victim  
17 had allegedly given some misinformation to the prisoner’s  
18 girlfriend. The prisoner, late at night, obtained a shotgun from the  
19 trunk of his car. He had previously sawed the barrel off. He  
20 walked over to the victim’s house that was approximately a block  
21 and a half away. He hid the shotgun in the bushes. He then made  
22 contact with the victim at the front door. The prisoner and the  
23 victim had an argument over the alleged misinformation. The  
24 prisoner then stepped back from the porch, went over to where the  
25 shotgun was, took it out it was a double-barreled shotgun, and  
26 walked up to the prisoner [sic] and placed it on his chest. A few  
moments later, the gun was raised up to the victim’s throat and two  
- - a shot was fired, killing the victim instantly. The prisoner then  
fled the scene and went to a sheriff’s department or the police  
department, where he gave himself up later that day.

23 Answer, Ex. 2 at 63-64.

24 Thus, because of “misinformation” Burnight obtained a shotgun, which he had  
25 previously sawed-off, and in the dead of night walked to the home of his friend. Burnight then  
26 concealed the shotgun and confronted his friend. At some point Burnight retrieved the shotgun,

1 placed the barrel against his friend's throat, and shot him.

2 Arriving at the home of one's friend in the middle of the night and concealing a  
3 weapon which you later use to shoot that friend in the throat could be properly characterized as  
4 acting "with cold, calculated, dispassion." Further, the motive for the murder, a dispute over  
5 "misinformation," could properly be characterized as a trivial motive for murder. More  
6 importantly, the identified facts of Burnight's commitment offense were probative to the central  
7 issue of his then current dangerousness when considered in light of the full record before the  
8 Board. That record included Burnight's lack of appropriate parole plans. Burnight however  
9 objects to the Board's use of the circumstances of his commitment offense, arguing that "reliance  
10 on these unchanging factors violates due process and runs contrary to the public interest  
11 purposes of rehabilitation and deterrence." Petition at 25 (quoting Biggs, 334 F.3d at 916-17).

12 While it is true that the continued reliance over time on unchanging factors such  
13 as the circumstances of the commitment offense may result in a due process violation, a parole  
14 denial based solely on unchanging factors can initially satisfy due process requirements. Biggs,  
15 334 F.3d at 916. In Irons, the Ninth Circuit explained that Biggs represents the law of the circuit  
16 that continued reliance on a prisoner's commitment offense or conduct prior to imprisonment  
17 could result in a due process violation over time. Irons, 505 F.3d at 853. Nevertheless, the court  
18 held that, given the egregiousness of the commitment offense, due process was not violated  
19 when the Board deemed a prisoner unsuitable for parole prior to expiration of his minimum term.  
20 Id. at 846.

21 Burnight pled guilty on January 13, 1993, and was sentenced to a term of 15 years  
22 to life on March 22, 1993. Thus at the time of his September 15, 2004 hearing Burnight had  
23 only served eleven years of his 15 year minimum term.<sup>1</sup> Furthermore, his commitment offense

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24  
25 <sup>1</sup> Burnight's "minimum term" is not to be confused with his "minimum eligible parole  
26 date." A minimum term is the minimum number of years imposed by a prisoner's sentence, in  
this case 15 years. A "Minimum Eligible Parole Date," or "MEPD," is the "earliest date on  
which an Indeterminate Sentence Law or life prisoner may be legally released on parole"

1 could properly be characterized as being “egregious” as Burnight shot his friend in the neck over  
2 an extremely trivial dispute. The Board therefore would not have violated due process if it had  
3 deemed Burnight unsuitable for parole based solely on the circumstances of his commitment  
4 offense. The Board however also took issue with Burnight’s parole plans.

5 b. Parole Plans

6 Upon his release, Burnight planned to live with his mother in Hayward,  
7 California. Answer, Ex. 2 at 36. At the 2004 hearing the victim’s sister argued against  
8 Burnight’s parole and requested that if the Board were to grant Burnight parole that he not be  
9 allowed to live in the city of Hayward because the victim’s entire family still lived in that city.  
10 Id. at 59. The victim’s sister noted that her family previously had “run-ins” with Burnight’s  
11 family since the time of the commitment offense. Id.

12 The Board found Burnight’s parole plans insufficient because Burnight would  
13 have been living in close proximity to the victim’s family. Id. at 64. The Board stated:

14 His parole plans, the prisoner has parole plans to parole to  
15 Hayward. I believe that’s in the county where the crime occurred  
16 and the victim’s next of kin apparently still live in that area and  
17 they are afraid today, I guess, and opposed to him being released to  
18 that area. And I believe the parole rules are that he cannot be  
19 within at least 35 miles of the family of the victim, so he’s going to  
20 have to come up with some other parole plans for a residence.

21 Id. at 65. After the Board rendered its decision, Burnight noted that at his previous hearing he  
22 had been informed that if paroled he must reside in Alameda County, which includes the city of  
23 Hayward. Id. at 67. The Board acknowledged that there was a recent change to the law that  
24 allowed the Board to parole Burnight to any county in California. Id. Given the new flexibility,  
25 Presiding Commissioner Risen did not think it was “a reasonable idea” to parole Burnight to the  
26 county where the victim’s family still lived. Id. at 68.

24 ////

25 \_\_\_\_\_  
26 pursuant to California regulations. See Cal. Code Regs., titl. 15, § 3000; see also Cal. Code  
Regs., tit. 15, § 2000(b)(67). As of the 2004 hearing, Burnight’s MEPD was April 23, 1999.

1 Under California law, the Board is authorized to consider “any other information  
2 which bears on the prisoner’s suitability for release.” Cal. Code Regs., tit. 15, § 2402(b). While  
3 it appears the lack of adequate parole plans was not because of Burnight’s failure, but instead a  
4 change in the law, the Board nevertheless was within it’s right to consider this factor,  
5 particularly given the nature of Burnight’s crime. Had this been the sole factor relied upon by  
6 the Board, it would likely be insufficient to justify a denial. But that was not the case.

7 4) Conclusion

8 The facts of Burnight’s commitment offense were probative to his current  
9 dangerousness when considered in light of the full record before the Board. Burnight murdered  
10 his friend in a gruesome manner for an inexplicable reason. While that may one day be  
11 insufficient to find him unsuitable for parole, it was sufficient at the time of his 2004 hearing as  
12 Burnight had not yet served his minimum term. Moreover, Burnight’s parole plans included  
13 returning to the city of his commitment offense, where the victim’s family still resided, and  
14 which the Board found to be unreasonable.

15 Based on this record there was evidence to support the Board’s conclusion that at  
16 the time of the hearing Burnight was unsuitable for parole. The state court’s rejection of this  
17 claim was neither contrary to, nor an unreasonable application of, clearly established  
18 constitutional law and Burnight is not entitled to relief on this claim.

19 B. Individualized Consideration

20 1) Description Of Claim

21 Burnight argues that the Board’s decision violated his right to due process  
22 because the Board failed to given him an individualized consideration of all factors relevant to  
23 parole decisions. Petition at 29. Burnight also argues that the Board failed to consider special  
24 conditions of parole under which Burnight could have been safely paroled and failed to consider  
25 his minimum term in relation to the Board’s “matrix of base terms.” Id. at 29-37.

26 ////

1                   2)     Applicable Law And Discussion

2                   With respect to Burnight’s claim that he was not afforded an individualized  
3 consideration by the Board, the entirety of this claim consists of one paragraph of boilerplate law  
4 without any factual allegations or argument. It would be a strain to characterize this paragraph  
5 as even conclusory allegations, however, even conclusory allegations, without more, cannot  
6 provide a basis for habeas relief. See Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995)  
7 (stating that conclusory allegations are not sufficient to support habeas relief).

8                   Burnight however does allege the Board failed to consider specific factors of  
9 suitability in later portions of his petition, specifically his lack of a juvenile record, his age, and  
10 his exemplary behavior while incarcerated. Petition at 34-35. Assuming Burnight intended this  
11 argument to buttress his claim that he was not given an individualized consideration, the record  
12 belies this claim.

13                   The record shows that Burnight’s hearing consisted of a lengthy individualized  
14 examination of the relevant factors of parole suitability and unsuitability as they applied to him.  
15 See Answer, Ex. 2 at 2-68. While the Board may not have mentioned every factor, or Burnight  
16 may not agree with the Board’s conclusions, there is no evidence the Board did not afford him an  
17 “individualized consideration” of all relevant factors.

18                   With respect to Burnight’s claim that the Board failed to consider special  
19 conditions of parole, Burnight argues that the Board’s decision violated his right to due process  
20 because the Board “failed to fulfill its legislative mandate under the parole statutes and its own  
21 regulations by denying his release on parole without considering a legitimate alternative[] to  
22 ensure ‘the prisoner may safely be released to the community.’ ” Petition at 33 (quoting Cal.  
23 Code Regs., tit. 15, § 2402(b)). Therefore, Burnight argues, the Board’s determination that he  
24 was unsuitable for parole was “arbitrary and capricious.” Id.

25                   Section 2402 of the California Code of Regulations provides that:

26                   (a) General. *The panel shall first determine whether the life*

1 *prisoner is suitable for release on parole.* Regardless of the length  
2 of time served, a life prisoner shall be found unsuitable for and  
3 denied parole if in the judgment of the panel the prisoner will pose  
4 an unreasonable risk of danger to society if released from prison.

5 (b) Information Considered. *All relevant, reliable information*  
6 *available to the panel shall be considered* in determining  
7 suitability for parole. Such information shall include the  
8 circumstances of the prisoner's social history; past and present  
9 mental state; past criminal history, including involvement in other  
10 criminal misconduct which is reliably documented; the base and  
11 other commitment offenses, including behavior before, during and  
12 after the crime; past and present attitude toward the crime; any  
13 conditions of treatment or control, *including the use of special*  
14 *conditions* under which the prisoner may safely be released to the  
15 community; and any other information which bears on the  
16 prisoner's suitability for release. Circumstances which taken alone  
17 may not firmly establish unsuitability for parole may contribute to  
18 a pattern which results in a finding of unsuitability.

19 Cal. Code Regs., tit. 15, § 2402(a)-(b) (emphasis added). Thus, while it is true that the Board  
20 must consider special conditions of release, when the subsections are read together and in their  
21 entirety, it is clear that "special conditions" are merely one type of "relevant, reliable  
22 information" that the Board may consider in determining whether Burnight was "suitable for  
23 release on parole."

24 Here the Board thoroughly examined "all relevant, reliable information" and  
25 determined that Burnight's release on parole would pose an unreasonable risk of danger to  
26 society. Burnight has failed to show any violation of the applicable regulations, let alone his  
right to due process.

With respect to Burnight's argument that the Board failed to consider his  
minimum term in relation to the Board's matrix of base terms, while it is true that California  
regulations contain a matrix of suggested base terms that prisoners with indeterminate sentences  
should serve before they are released on parole, the matrix is not referenced until the prisoner  
has been found suitable for parole. See Cal. Code Regs., tit. 15, § 2403 (a)-(b). The Board  
found Burnight unsuitable for parole and therefore was not required to reference the matrix.

////

1 For all these reasons, Burnight has failed to present any evidence of a  
2 constitutional violation and this claim should therefore be denied.

3 C. Presumptive Release Date

4 1) Description of Claim

5 Burnight argues that at his June 14, 2002, parole consideration hearing he was  
6 denied parole for a period of two years. Petition at 41. He argues that this decision “created a  
7 new presumptive release date . . . of June 14, 2004) and that when “this date passed without the  
8 Board conducting a parole suitability hearing . . . his term of confinement was completed and  
9 any action by the Board under Penal Code section 3041(b) was invalid.” Id. at 41-42.

10 2) Applicable Law And Discussion

11 To the extent Burnight is alleging a state law violation, such a claim is not  
12 cognizable in federal habeas. A writ of habeas corpus is available under 28 U.S.C. § 2254(a)  
13 only on the basis of some transgression of federal law binding on the state courts. Middleton,  
14 768 F.2d at 1085; Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). It is unavailable for  
15 alleged error in the interpretation or application of state law. Middleton, 768 F.2d at 1085; see  
16 also Lincoln v. Sunn, 807 F.2d 805, 814 (9th Cir. 1987); Givens v. Housewright, 786 F.2d 1378,  
17 1381 (9th Cir. 1986). Habeas corpus cannot be utilized to try state issues de novo. Milton, 407  
18 U.S. at 377.

19 The Supreme Court has reiterated the standards of review for a federal habeas  
20 court. Estelle v. McGuire, 502 U.S. 62 (1991). In Estelle, the Supreme Court reversed the  
21 decision of the Court of Appeals for the Ninth Circuit, which had granted federal habeas relief.  
22 The Court held that the Ninth Circuit erred in concluding that the evidence was incorrectly  
23 admitted under state law since, “it is not the province of a federal habeas court to reexamine state  
24 court determinations on state law questions.” Id. at 67-68. The Court re-emphasized that  
25 “federal habeas corpus relief does not lie for error in state law.” Id. at 67, citing Lewis v. Jeffers,  
26 497 U.S. 764 (1990), and Pulley v. Harris, 465 U.S. 37, 41 (1984) (federal courts may not grant

1 habeas relief where the sole ground presented involves a perceived error of state law, unless said  
2 error is so egregious as to amount to a violation of the Due Process or Equal Protection clauses  
3 of the Fourteenth Amendment).

4 To the extent Burnight is arguing the alleged delay violated constitutional law, in  
5 order to establish a constitutional violation, Burnight must prove that any delay was both  
6 unreasonable and prejudicial. See United States v. Santana, 526 F.3d 1257, 1260 (9th Cir.  
7 2008); Meador v. Knowles, 990 F.2d 503, 506 (9th Cir. 1993); Camacho v. White, 918 F.2d 74,  
8 79 (9th Cir. 1990); Hopper v. United States Parole Comm'n, 702 F.2d 842, 845 (9th Cir. 1983);  
9 Biggs v. California, 2006 WL 2621057, at \*3-4 (E.D. Cal. Sept. 12, 2006); William v. Board of  
10 Prison Terms, 2006 WL 463128, at \*10 (E.D. Cal. Feb. 24, 2006), adopted, 2006 WL 845594  
11 (E.D. Cal. Mar. 30, 2006). Here there is no need to determine whether the alleged delay was  
12 unreasonable, because Burnight has failed to allege any prejudice.

13 Moreover, even if Burnight had established a claim worthy of relief, and he has  
14 not, his argument that the “only appropriate remedy” would be his “immediate release on parole”  
15 is incorrect. Petition at 42. When habeas relief is warranted the district court has considerable  
16 discretion in fashioning a remedy “tailored to the injury suffered from the constitutional  
17 violation . . .” United States v. Morrison, 449 U.S. 361, 364 (1981). The Supreme Court has  
18 stated that “[f]ederal habeas corpus practice, as reflected by the decisions of this Court, indicates  
19 that a court has broad discretion in conditioning a judgment granting habeas relief. Federal  
20 courts are authorized, under 28 U.S.C. § 2243, to dispose of habeas corpus matters ‘as law and  
21 justice require.’ ” Hilton v. Braunskill, 481 U.S. 770, 775 (1987) (internal quotation marks  
22 omitted).

23 Contrary to Burnight’s argument, when a suitability hearing has been delayed the  
24 “only remedy” required by law and justice would not be immediate release. An order for an  
25 immediate hearing would be a more appropriate remedy. Burnight however has already received  
26 the delayed hearing at issue.

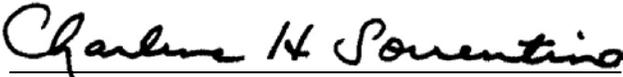
1 For all these reasons, Burnight is not entitled to relief on this claim.

2 VI. CONCLUSION

3 Accordingly, IT IS RECOMMENDED that petitioner's petition for a writ of  
4 habeas corpus be denied.

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

13 DATED: April 5, 2010

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15 CHARLENE H. SORRENTINO  
16 UNITED STATES MAGISTRATE JUDGE  
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