IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TERRY SHELMIRE,

Petitioner,

vs.

D.K. SISTO, et al.,

Respondents.

_____/

No. CIV S-07-1758-JAM-CMK-P

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the 2006 denial of parole decision. Pending before the court are: Petitioner's petition for writ of habeas corpus (Doc. 1), Respondent's response to the petition (Doc. 7), Petitioner's traverse (Doc. 8), Petitioner's supplemental brief (Doc. 10), and Respondent's supplemental brief (Doc. 11).[1]

[1] The supplemental briefs were filed pursuant to the court's request that each party file a brief discussing the effect, if any, the original Ninth Circuit panel decision in Hayward v. Marshall, 512 F.3d 536 (9th Cir. 2008), would have on this case. The panel decision in Hayward was thereafter vacated, and the case was heard en banc. Therefore, the relevant case, as discussed below is the en banc opinion, 603 F.3d 546 (9th Cir. 2010).

I. BACKGROUND

Petitioner is serving an indeterminate life sentence for a conviction of first-degree murder. Petitioner appeared at a parole suitability hearing in June 2006, at which time he was represented by counsel. In denying parole, the Board of Prison Terms ("Board") noted the following: (1) the facts of the commitment offense; (2) inadequate self-help programming; and (3) a less than supportive psychological evaluation.

As to the commitment offense, the Board stated:

> The offense was carried out in an especially cruel and callous manner. The offense was carried out in a dispassionate and calculated manner. The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. The motive for the crime was inexplicable and incredibly trivial in relation to the offense. These conclusions are drawn from the statement of facts which were read into the record from the probation officer's report at Pages 2 and 3, and I will note that the inmate, after fighting with his wife and being told to leave, followed her three blocks from the apartment, leaving his child, a toddler, at home alone while he followed his wife and shot her in the middle of the street six times.

The Board next noted Petitioner's institutional programing, stating:

> The prisoner has, although you have programmed remarkably since the last Board hearing, this Panel does not believe that you have participated sufficiently in beneficial self-help at this time.

The Board then discussed Petitioner's psychological report as follows:

> Additionally, the psychological report, which is dated March 21st, 2006, authored by John T. Rouse - - Dr. John T. Rouse is not totally supportive of release in that at Page 4, Dr. Rouse states that "indeed he is much more introspective than he appears to have been some five years ago." This shows the Panel that there is still room for growth. Dr. Rouse continues that in his opinion the inmate's risk of dangerousness in the wider community is much less than it was at the time of his life crime and is likely to be average for those inmates who have committed similar offenses and have been successfully paroled. It needs to be lower.

Finally, the Board further addressed Petitioner's self-help programing, stating:

> Mr. Shelmire, the Panel believes that you have started along the path of rehabilitation and have made a very significant start, particularly in [the] last four years between the last Board of Parole hearing and now. You have shown us that you are on the right path with the self-help you have completed. Your work with the Tawheed project in particular is clearly

> helping you work on achieving an understanding of what you've done and what kind of person you want to become. You appear to be grasping empathy and compassion in a step toward insight and remorse. We don't think you're there yet, however. The Panel makes the following findings. The prisoner needs further therapy in order to face, discuss, understand and cope with stress in a non-destructive manner. Until additional progress is made, the prisoner continues to be unpredictable and a threat to others. The prisoner's gains are recent, and he must demonstrate an ability to maintain gains over an extended period of time. Nevertheless, the prisoner should be commended for having absolutely no discipline at all while he has been in prison, completing an abundance of positive programming and showing initiative in development of a relationship workshop for inmates and exceptional work evaluations in PIA optical law. However, these positive aspects of his behavior do not outweigh the factors of unsuitability at this time.

Petitioner challenged the decision with a petition for writ of habeas corpus filed in the Merced County Superior Court. In denying relief, the court stated:

> [T]he Board, in reaching it's decision, specifically found the parolee (petitioner) would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. The Board also found that the offense was carried out in an especially cruel and callous manner and in a calculated manner that demonstrated an exceptionally callous disregard for human suffering.

The Court also denied Petitioner's claims that his crime cannot be considered particularly egregious in the context of a first degree murder. The California Court of Appeals and California Supreme Court both summarily denied relief.

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.

Under § 2254(d)(1), 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, 283 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.

III. DISCUSSION

Petitioner argues that the Board's decision was not based on some evidence of his dangerousness, but rather was arbitrary, and the decision extended his sentence beyond the statutory maximum. Specifically, he argues: (1) the commitment offense is not relevant, reliable evidence that Petitioner is currently a danger to society; (2) the commitment offense was not particularly egregious; and (3) the Board failed to properly consider favorable evidence indicating low public safety threat. Respondents argue: (1) petitioner does not have a federally protected liberty interest in parole; (2) petitioner received all the process he was due because he was provided notice of the hearing and an opportunity to be heard; and (3) even if the "some evidence" standard applies, the factors cited by the state court meet this standard. In addition, they argue Petitioner's sentencing claims are state law matters and are without merit.

In Hayward v. Marshall, the Ninth Circuit sitting en banc held that there is no federal stand-alone substantive due process right to parole. See 603 F.3d 546, 555 (9th Cir. 2010) (en banc). Any substantive due process interest in parole arises solely from state law creating the right. See id. The Ninth Circuit overruled its prior decisions in Biggs v. Terhune,

334 F.3d 910, 915 (9th Cir. 2003), Sass v. Bd. of Prison Terms, 461 F.3d 1123 (9th Cir. 2006), and Irons v. Carey, 505 F.3946, 851 (9th Cir. 2007), "[t]o the extent [they]. . . might be read to imply that there is a federal constitutional right regardless of whether state law entitles the prisoner to release . . . ." Hayward, 603 F.3d at 555.

Turning to whether California's parole scheme creates any substantive due process rights, the Ninth Circuit stated: "Although the due process clause does not, by itself, entitle a prisoner to parole in the absence of some evidence of future dangerousness, state law may supply a predicate for that conclusion." Id. at 561. The court then discussed California law, including the California Supreme Court's decisions in In re Lawrence, 44 Cal.4th 1181 (2008), and In re Shaputis, 44 Cal.4th 1241 (2008), and noted that "as a matter of state law, 'some evidence' of future dangerousness is indeed a state *sine qua non* for denial of parole in California." Id. at 562. The court then provided the following instructions for resolving parole claims in the context of AEDPA:

> Since the "some evidence" requirement applies without regard to whether the United States Constitution requires it, we in this case, and courts in this circuit facing the same issue in the future, need only decide whether the California judicial decision approving the . . . decision rejecting parole was an "unreasonable application" of the California "some evidence" requirement, or was "based on an unreasonable determination of the facts in light of the evidence."
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> Id.

The en banc court concluded that Hayward had properly been denied parole because the nature of the commitment offense combined with an unfavorable psychological evaluation provided "some evidence" under California law of future dangerousness. See id.

Interpreting the en banc decision in Hayward, the Ninth Circuit in Person v. Muntz stated: "By holding that a federal habeas court may review the reasonableness of the state court's application of the 'some evidence' rule, Hayward, necessarily held that compliance with the state requirement is mandated by federal law, specifically the Due Process Clause." 606 F.3d 606, 609 (9th Cir. 2010) (per curiam). The court observed that "[t]he principle that state law

gives rise to liberty interests that may be enforced as a matter of federal law is long-established." Id.

As has been clearly stated by the Ninth Circuit, California law provides the contours of the substantive due process right to parole at issue in this case. Under California law, one year prior to an inmate's minimum eligible parole release date, the Board will set a date for an eligibility hearing. See Cal. Penal Code § 3041(a). A release date shall be set unless release currently poses an unreasonable risk of danger to society. See Cal. Penal Code § 3041(b). The paramount concern in determining parole suitability in California is public safety. See In re Dannenberg, 34 Cal.4th 1061 (2005). This requires an assessment of the inmate's current dangerousness. See In re Lawrence, 44 Cal.4th at 1205. Such an assessment requires more than "rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision – the determination of current dangerousness." Id. at 1210.

California 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). The regulations are designed to guide the Board's assessment regarding whether the inmate poses an "unreasonable risk of danger to society if released from prison," and

thus whether he or she is suitable for parole. In re Lawrence, 44 Cal.4th at 1202. There must be a rational nexus between the facts cited by the Board and the ultimate conclusion on dangerousness. See id. at 1227.

Regarding reliance on the facts of the commitment offense, 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 at 1071. While the Board cannot require an inmate to admit guilt in order to be found suitable for parole, see Cal. Penal Code § 5011(b); 15 Cal Code Regs., tit. 15, § 2236, the Board must consider the inmate's past and present attitude toward the crime and any lack of remorse or understanding of the nature and magnitude of the offense, see 15 Cal. Code Regs., tit. 15, §§ 2402(b), 2402(d)(3). "Lack of insight" is probative of unsuitability only to the extent that it is both demonstrably shown by the record and rationally indicative of the inmate's current dangerousness. See In re Calderon, 184 Cal. App. 4th 670, 690 (2010).

In light of the precedents outlined above the court concludes that petitioner has a protected liberty interest in parole arising from state law. The court also concludes that the contours of the substantive guarantee required to protect that liberty interest are defined by state law and that under California law parole may not be denied unless there is "some evidence" of the inmate's dangerousness at the time of the parole eligibility hearing. Respondents' arguments to the contrary are rejected.

Applying the "some evidence" standard to the facts of this case, the court finds that the state court's decision was neither an unreasonable application of that test nor based on an unreasonable determination of the facts. In making this finding, the court notes that the Board observed that Petitioner's institutional behavior had been good and that his parole plans were good, even going so far as to commend him on his behavior. Aside from the immutable factors concerning the commitment offense, the Board largely relied on Petitioner's recent gains in self-

help programming, noting a majority of Petitioner's programming had been accomplished in the last four years since the prior parole hearing. The Board again commended him on his hard work, but found the advancements had been too recent to demonstrate an ability to maintain over an extended period of time. In addition, the Board relied on the psychological report of Dr. Rouse. While positive overall, as the Board found, the report only rated Petitioner's risk of dangerousness in the community as average. The Board found that risk assessment needs to be lower prior to Petitioner being granted parole. The court finds reliance on Petitioner's recent programming and the marginally supportive psychological report proper. Petitioner has not offered any evidence or argument that the Board's finding that he only recently advanced in programming was inaccurate. There is a reasonable nexus between Petitioner's failure to take advantage of rehabilitative programming prior to that, and a likelihood that petitioner will re-offend if released on parole. In addition, failure to obtain a fully favorable psychological report finding Petitioner's risk assessment to be low, supports the Board's decision that Petitioner poses an unreasonable risk of danger.

Petitioner also argues the Board's decision to deny him a parole date effectively increased his sentence, a decision that requires the facts to be established by a jury and by proof beyond a reasonable doubt. He basis this argument on state parole matrix, and argues his sentence falls withing the middle term which is 28 years. Once his post-conviction credits are applied, his term would be reduced to 21 years, the amount of time he has already served.

Plaintiff was sentenced to an indeterminate term of 25 years to life. To the extent he cites Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), and U.S. v. Booker, 543 U.S. 220, 235 (2005), as support for his sentencing argument, the undersigned finds those cases do not support his argument. Petitioner is not directly challenging his sentence or the jury findings. Instead, he is challenging a parole determination decision. He provides no authority for his position that he has served beyond his maximum sentence of life imprisonment, nor that the failure to set a parole date somehow extends his life sentence beyond the maximum. Even the

state authority Petitioner cites, In re Dannenberg, fails to support his position. See 104 P.3d 783, 791 (Cal. 2005) (noting that noncapital murderers remain subject to indeterminate sentences, and such indeterminate sentences may serve up to life in prison). Indeed, the California Supreme Court, in applying the matrix Petitioner cites to, found that the first step is for the Board to determine if the prisoner is suitable for a parole release date, and only if the Board finds a prisoner so suitable does the matrix apply to determine a specific appropriate release date. See id. Here, the Board determined Petitioner was not suitable for a parole release date at the time of his hearing. Therefore, there was no reason for the Board to continue to the next step and determine a proper release date based on the matrix, and Petitioner's argument to the contrary is unpersuasive.

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 all pending requests/motions be denied as moot.

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 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. 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: September 14, 2010

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE