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

GORDON BROOKS,

Petitioner,

No. CIV S-08-862 MCE CHS P

vs.

D.K. SISTO, Warden, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

_____ /

I. INTRODUCTION

Petitioner Brooks is a state prisoner proceeding pro se with an amended petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner is currently serving a sentence of 15 years to life following his 1992 second degree murder conviction in the Calaveras County Superior Court. In the pending petition, petitioner presents a single claim challenging the execution of his sentence, and specifically, the January 2, 2007 decision by the Board of Parole Hearings that he was not suitable for parole. Based on a thorough review of the record and applicable law, it is recommended that the petition be denied.

II. BACKGROUND

On June 30, 1990, petitioner smoked marijuana and used methamphetamine at the home of his friend Terry, a drug dealer. At some point, Pini, the victim, arrived at Terry's home.

1 According to Frombaugh, who testified at petitioner's trial in exchange for sentencing
2 considerations for his part in the crime, petitioner thought Pini had stolen \$10,000 from Terry
3 and petitioner beat Pini with a crowbar in attempt to get him to confess. Petitioner beat Pini
4 severely enough to leave a large puddle of blood about ten inches in radius on the garage floor.
5 At petitioner's direction, Frombaugh tied Pini's hands with a rope and put tape over his mouth.
6 Terry fashioned a weighted chain out of wrenches, a large steel plate, and a metal chain.
7 Frombaugh and petitioner drove Pini to Lake Tulloch, took him out on a boat, attached the
8 weighted chain to him, and threw him overboard. There was evidence that Pini was still alive
9 and conscious at the time he was thrown overboard.

10 Pini's body was found was found floating in the lake on July 18, 1990. Petitioner
11 was arrested, found guilty by jury of second degree murder, and sentenced to a term of 15 years
12 to life in state prison.

13 Petitioner was received in prison on July 8, 1992. His minimum eligible parole
14 date passed on August 28, 2001. On January 2, 2007, the Board of Parole Hearings ("Board")
15 conducted a second subsequent (third overall) hearing to determine whether petitioner was
16 suitable to be released on parole. A panel of the Board concluded that petitioner still posed an
17 unreasonable risk of danger to the public, and thus that he was not suitable for parole.

18 Petitioner challenged the Board's denial of parole as a violation of due process in
19 a petition for writ of habeas corpus to the Calaveras County Superior Court; the claim was denied
20 in a brief reasoned decision dated June 21, 2007. The California Court of Appeal, Third District,
21 and the California Supreme Court likewise denied relief, but without written opinions.

22 III. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

23 An application for writ of habeas corpus by a person in custody under judgment of
24 a state court can be granted only for violations of the Constitution or laws of the United States.
25 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
26 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (*citing Engle v. Isaac*, 456 U.S. 107, 119 (1982)).

1 Additionally, this petition for writ of habeas corpus was filed after the effective date of, and thus
2 is subject to, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Lindh v.*
3 *Murphy*, 521 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999).
4 Under AEDPA, federal habeas corpus relief is not available for any claim decided on the merits
5 in state court proceedings unless the state court’s adjudication of the claim:

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

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

10 28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*
11 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).
12 This court looks to the last reasoned state court decision in determining whether the law applied
13 to a particular claim by the state courts was contrary to the law set forth in the cases of the United
14 States Supreme Court or whether an unreasonable application of such law has occurred. *Avila v.*
15 *Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 919 (2003).

16 IV. DISCUSSION

17 Petitioner presents a single claim for relief: that the Board’s decision to deny
18 parole following the January 2, 2007 suitability hearing violated his right to due process of law.
19 The Due Process Clause of the Fourteenth Amendment prohibits state action that deprives a
20 person of life, liberty, or property without due process of law. A person alleging a due process
21 violation must first demonstrate that he or she was deprived of a protected liberty or property
22 interest, and then show that the procedures attendant upon the deprivation were not
23 constitutionally sufficient. *Kentucky Dep’t. of Corrections v. Thompson*, 490 U.S. 454, 459-60
24 (1989); *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002).

25 A protected liberty interest may arise from either the Due Process Clause itself or
26 from state laws. *Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987). The United States

1 Constitution does not, in and of itself, create for prisoners a protected liberty interest in receipt of
2 a parole date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). If a state’s statutory parole scheme
3 uses mandatory language, however, it creates “a presumption that parole release will be granted,”
4 thereby giving rise to a constitutional liberty interest. *McQuillion*, 306 F.3d at 901 (*quoting*
5 *Greenholtz v. Inmates of Nebraska Penal*, 442 U.S. 1, 12 (1979)). California’s statutory scheme
6 for determining parole for life-sentenced prisoners provides, generally, that parole shall be
7 granted “unless consideration of the public safety requires a more lengthy period of
8 incarceration.” Cal. Penal Code §3041. This statute gives California state prisoners whose
9 sentences carry the possibility of parole a clearly established, constitutionally protected liberty
10 interest in receipt of a parole release date. *Irons v. Carey*, 505 F.3d 846, 850-51 (9th Cir. 2007)
11 (*citing Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006)); *Biggs v. Terhune*,
12 334 F.3d 910, 914 (9th Cir. 2003); *McQuillion*, 306 F.3d at 903; *Allen*, 482 U.S. at 377-78
13 (*quoting Greenholtz*, 442 U.S. at 12)).

14 Despite existence of this liberty interest, the full panoply of rights afforded a
15 defendant in a criminal proceeding is not constitutionally mandated in the context of a parole
16 proceeding. *See Pedro v. Or. Parole Bd.*, 825 F.2d 1396, 1398-99 (9th Cir. 1987). The Supreme
17 Court has held that a parole board’s procedures are constitutionally adequate if the inmate is
18 given an opportunity to be heard and a decision informing him of the reasons he did not qualify
19 for parole. *Greenholtz*, 442 U.S. at 16.

20 Additionally, as a matter of California state law, denial of parole to state inmates
21 must be supported by at least “some evidence” demonstrating future dangerousness. *Hayward v.*
22 *Marshall*, 603 F.3d 546, 562-63 (9th Cir. 2010) (en banc) (*citing In re Rosenkrantz*, 29 Cal.4th
23 616 (2002), *In re Lawrence*, 44 Cal.4th 1181 (2008), and *In re Shaputis*, 44 Cal.4th 1241
24 (2008)). California’s “some evidence” requirement is a component of the liberty interest created
25 by the state’s parole system.” *Cooke v. Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010). The federal
26 Due Process Clause requires that California comply with its own “some evidence” requirement.

1 *Pearson v. Muntz*, 606 F.3d 606, 609 (9th Cir. 2010) (per curiam). Accordingly, the United
2 States Court of Appeals for the Ninth Circuit has held that a reviewing court such as this one
3 must “decide whether the California judicial decision approving the... decision rejecting parole
4 was an “unreasonable application” of the California ‘some evidence’ requirement, or was “based
5 on an unreasonable determination of the facts in light of the evidence.” *Hayward*, 603 F.3d at
6 562-63. This analysis is framed by California’s own statutes and regulations governing parole
7 suitability determinations for its prisoners. *See Irons*, 505 F.3d at 851.

8 Title 15, Section 2402 of the California Code of Regulations sets forth various
9 factors to be considered by the Board in its parole suitability findings for murderers. The Board
10 is directed to consider all relevant, reliable information available regarding

11 the circumstances of the prisoner’s social history; past and present
12 mental state; past criminal history, including involvement in other
13 criminal misconduct which is reliably documented; the base and
14 other commitment offenses, including behavior before, during and
15 after the crime; past and present attitude toward the crime; any
conditions of treatment or control, including the use of special
conditions under which the prisoner may safely be released to the
community; and any other information which bears on the
prisoner’s suitability for release.

16 15 Cal. Code Regs. §2402(b). The regulation also sets forth specific circumstances which tend to
17 show unsuitability or suitability for parole:

18 (c) Circumstances Tending to Show Unsuitability. The following
19 circumstances each tend to indicate unsuitability for release. These
20 circumstances are set forth as general guidelines; the importance
21 attached to any circumstance or combination of circumstances in a
particular case is left to the judgment of the panel. Circumstances
tending to indicate unsuitability include:

22 (1) Commitment Offense. The prisoner committed the
offense in an especially heinous, atrocious or cruel manner....

23 (2) Previous Record of Violence. The prisoner on previous
24 occasions inflicted or attempted to inflict serious injury on
25 a victim, particularly if the prisoner demonstrated serious
assaultive behavior at an early age.

26 (3) Unstable social history. The prisoner has a history of
unstable or tumultuous relationships with others.

1 (4) Sadistic Sexual Offenses. The prisoner has previously
2 sexually assaulted another in a manner calculated to inflict
unusual pain or fear upon the victim.

3 (5) Psychological Factors. The prisoner has a lengthy
4 history of severe mental problems related to the offense.

5 (6) Institutional Behavior. The prisoner has engaged in
serious misconduct in prison or jail.

6 (d) Circumstances Tending to Show Suitability. The following
7 circumstances each tend to show that the prisoner is suitable for
8 release. The circumstances are set forth as general guidelines; the
9 importance attached to any circumstance or combination of
circumstances in a particular case is left to the judgment of the
panel. Circumstances tending to indicate suitability include:

10 (1) No Juvenile Record. The prisoner does not have a
11 record of assaulting others as a juvenile or committing
12 crimes with a potential of personal harm to victims.

13 (2) Stable Social History. The prisoner has experienced
14 reasonably stable relationships with others.

15 (3) Signs of Remorse. The prisoner performed acts which
16 tend to indicate the presence of remorse, such as attempting
17 to repair the damage, seeking help for or relieving suffering
18 of the victim, or indicating that he understands the nature
19 and magnitude of the offense.

20 (4) Motivation for Crime. The prisoner committed his
21 crime as the result of significant stress in his life, especially
22 if the stress has built over a long period of time.

23 (5) Battered Woman Syndrome. At the time of the
24 commission of the crime, the prisoner suffered from
25 Battered Woman Syndrome, as defined in section 2000(b),
26 and it appears the criminal behavior was the result of that
victimization.

(6) Lack of Criminal History. The prisoner lacks any
significant history of violent crime.

(7) Age. The prisoner's present age reduces the probability
of recidivism.

(8) Understanding and Plans for Future. The prisoner has
made realistic plans for release or has developed
marketable skills that can be put to use upon release.

(9) Institutional Behavior. Institutional activities indicate an

1 enhanced ability to function within the law upon release.

2 15 Cal. Code Regs. § 2402(c)-(d).

3 The overriding concern is public safety and the proper focus is on the inmate's
4 *current* dangerousness. *In re Lawrence*, 44 Cal. 4th at 1205. Thus, the applicable standard of
5 review is not whether some evidence supports the reasons cited for denying parole, but whether
6 some evidence indicates that the inmate's release would unreasonably endanger public safety. *In*
7 *re Shaputis*, 44 Cal.4th 1241, 1254 (2008). In other words, there must be a rational nexus
8 between the facts relied upon and the ultimate conclusion that the prisoner continues to be a
9 threat to public safety. *In re Lawrence*, 44 Cal. 4th at 1227.

10 In this case, although many applicable regulatory criteria tend to show that
11 petitioner is suitable for parole, the Board's decision to deny parole did not violate his right to
12 due process because it is supported by some evidence in the record.

13 Petitioner was born in 1970. He grew up Antioch, California and dropped out of
14 school after completing the 11th grade. Petitioner reports working "odd jobs" including one as a
15 machinist in his grandfather's machine shop. Petitioner has no juvenile record. As an adult, he
16 incurred one felony conviction for possession of a controlled substance for sale. Petitioner
17 admits previous use of marijuana and methamphetamine.

18 After entering prison, petitioner obtained his GED in 1992. He began attending
19 NA in 1995 and has participated in both AA and NA since that time. While in prison, petitioner
20 availed himself of available, relevant self-help programming and maintained a record free of any
21 discipline. Petitioner achieved several skill certifications and completed one or more vocations
22 while in prison. At the time of the January 2, 2007 suitability hearing, petitioner held the
23 position of Lead Man Journeyman Tool and Dye Maker for the Prison Industry Authority Metal
24 Fab. He had received a positive evaluation from his supervisor. Several individuals, including
25 two correctional officers, submitted letters of support on his behalf. Petitioner produced
26 evidence of realistic parole plans including multiple job opportunities. The most recent

1 psychological evaluator opined that petitioner’s estimated future dangerousness in the
2 community was “low.”

3 Thus, it is undisputed that petitioner has no juvenile record (15 Cal. Code Regs.
4 §2402(d)(1)), no record of previous violence (15 Cal. Code Regs. §2402(c)(2)), and no history of
5 sadistic sexual offenses (15 Cal. Code Regs. §2402(c)(4)). There is no evidence that petitioner
6 has suffered from severe mental problems or that he has psychological problems that would bear
7 on his suitability (15 Cal. Code Regs. §2402(c)(5)). There is no evidence of previous unstable or
8 tumultuous relationships with others (15 Cal. Code Regs. §2402(c)(3)); rather, it appears that
9 petitioner has maintained contact during incarceration with many family members including his
10 mother, grandmother, sister, and a cousin. Petitioner’s prison record is free of serious
11 misconduct (15 Cal. Code Regs. §2402(c)(6)), as he has never received a single “115”
12 disciplinary report or even one of the less serious “128” write-ups during his entire
13 incarceration.¹ The psychological evaluator opined that petitioner has shown remorse (15 Cal.
14 Code Regs. §2402(d)(d)). Petitioner has participated in activities in prison that indicate an
15 enhanced ability to function within the law upon release (15 Cal. Code Regs. §2402(d)(9)); it is
16 also undisputed that he has also developed marketable skills and made realistic plans for his
17 release (15 Cal. Code Regs. §2402(d)(8)).

18 Nevertheless, the Board found that the positive factors demonstrating petitioner’s
19 suitability for parole did not outweigh the negative factors demonstrating his unsuitability. In
20 finding that petitioner was not suitable to be released on parole, the Board relied heavily on the
21 circumstances of his commitment offense. Additionally, the Board cited petitioner’s conduct
22 prior to incarceration. Before he committed his life crime, petitioner incurred a possession for
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24 ¹ A 115 “Rules Violation Report” is a report documenting misconduct that is “believed to
25 be a violation of law or is not minor in nature .” By contrast, a 128 is issued for minor
26 misconduct that recurs after verbal counseling or where documentation of minor misconduct is
needed. 15 Cal. Code Regs. §3312(a)(3).

1 sale felony drug conviction. He also failed to successfully complete his term of probation for
2 that offense as the record indicates he had ceased reporting to his probation officer. On this
3 basis, the Board found that petitioner had “failed to profit from society’s previous attempts to
4 correct [his] criminality.” The Board concluded that petitioner was not suitable for parole.

5 On state habeas corpus review of the Board’s decision, the Calaveras County
6 Superior Court held:

7 In the petition before the court there is some evidence before the
8 Board supporting the decision to deny parole. The petitioner was
9 convicted of 2nd degree murder. The facts before the board
10 included that the petitioner hitting the victim [*sic*], knocking him
11 down, telling a potential rescuer of the conduct to leave in a
12 threatening manner, kicking the victim in the face while he was
13 kneeling with a 20 inch pool of the victims blood and ordering the
14 victim to write a confession. The petitioner told another person to
15 help gather items including duct tape, rope and tools. Another
16 person prepared weights of metal tools and a metal plate. The
17 petitioner armed himself and took the victim who had flex cuffs on
18 his wrists. They went to a boat in the lake with the victim. They
19 went to the deepest part of the lake. Petitioner ordered the other
20 person who was helping him to tie the victim and attach weights to
21 the victim and help lift him over the side. The victim’s eyes
22 opened just before he went into the water. The cause of death was
23 drowning... Petitioner was previously convicted of felony
24 possession of a controlled substance for sale, on December 12,
25 1990 in Cont[r]a Costa County... These facts are “some evidence”
26 that the offense was carried out in a manner that demons[tr]ates an
exceptionally callous disregard for human suffering... the crime
went far beyond the minimum elements. There is “some evidence”
that the Board found the petitioner had failed to profit from
probation in his prior conviction... [¶] THE PETITION FOR
[WRIT] OF HABEAS CORPUS IS DENIED.

20 (*In re Gordon Brooks*, Case No. C12828, slip op. at 1-3 (Calaveras County Sup. Ct. June 21,
21 2007). It must now be determined whether this decision is an unreasonable application of
22 California’s “some evidence” standard or based on an unreasonable determination of the facts in
23 light of the evidence. *See Hayward*, 603 F.3d at 562-63.

24 Under some circumstances, a prisoner’s commitment offense can by itself
25 constitute a valid basis for denying parole. *In re Rosenkrantz*, 29 Cal.4th at 682. In order for the
26 circumstances of a commitment offense to support the denial of parole, there must be “something

1 in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental
2 state," that indicates "the implications regarding the prisoner's dangerousness that derive from
3 his or her commission of the commitment offense remain probative to the statutory
4 determination" of the prisoner's current or future dangerousness. *See Cooke*, 606 F.3d at 1216
5 (quoting *In re Lawrence*, 44 Cal. 4th 3d at 1214).

6 Under the applicable state regulations, factors relating to a commitment offense
7 tend to show unsuitability for parole where (A) multiple victims were attacked, injured or killed;
8 (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-
9 style murder; (C) the victim was abused, defiled or mutilated; (D) the offense was carried out in a
10 manner which demonstrates an exceptionally callous disregard for human suffering; or (E) the
11 motive for the crime is inexplicable or very trivial in relation to the offense." 15 Cal. Code Regs.
12 §2402 (c)(1)(A)-(E).

13 In this case, the Board noted that three of the above factors had support in the
14 record, while the state superior court explicitly found one of the above factors to be supported in
15 the record. To begin, the Board described the motive for petitioner's offense as "inexplicable."
16 In order to fit the applicable regulatory description for an inexplicable or very trivial offense, a
17 prisoner's motive must have been *more* trivial than those which conventionally drive people to
18 commit the offense in question. *See In re Scott*, 119 Cal.App.4th 871, 893 (1st Dist. 2004) (*Scott*
19 *D*) (reasoning that all motives for murder could reasonably be deemed "trivial"). The reasoning
20 behind this factor is that one whose motive is unintelligible or cannot be explained may be
21 unusually unpredictable and dangerous. *Id.* Here, there was evidence in the record that the
22 victim was believed to have stolen \$10,000 from Terry and that petitioner essentially tortured the
23 victim in an unsuccessful effort to make him confess to the theft. Such retaliation for the theft of
24 another's money is a trivial reason to brutally torture and kill someone. Under the circumstances
25 of this case, where petitioner's conduct during the offense was so heinous, a conclusion that he
26 may be unusually unpredictable and dangerousness due to his trivial motive is not unreasonable.

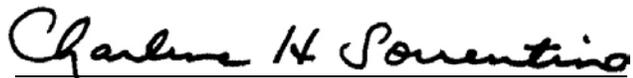
1 The Board additionally found that the offense was carried out in a dispassionate
2 and calculated manner in that it appeared to have been well planned, with “extreme steps of
3 movement of the victim, including taking the victim to the deepest part of the lake.” Both the
4 Board and the state superior court found the offense was carried out with an exceptionally callous
5 disregard for human suffering, because the record indicated the offense lasted for an extended
6 period of time during which the victim was severely beaten, tied, and then tossed into the lake
7 while he was still alive. Indeed, petitioner’s conduct in torturing the victim prior to the murder
8 can fairly be characterized as *especially* heinous compared to the typical conduct of a person who
9 commits second degree murder.

10 The Board further cited, as support to deny parole, the fact that petitioner had a
11 prior felony conviction and the related fact that he failed to successfully complete his term of
12 probation for that offense. Petitioner’s prior felony conviction and certain elements of his life
13 crime both appear to be related to drugs. His criminal history is fairly characterized as
14 demonstrating escalating criminal conduct in this regard. *But see Pirtle v. California Bd. of*
15 *Prison Terms*, 611 F.3d 1015, 1022-23 (9th Cir. 2010) (fact that the prisoner had previously
16 served two brief jail terms for non-violent, alcohol related offenses was not some evidence that
17 he could not be counted on to avoid future criminality).

18 While the circumstances relied upon by the Board and the state superior court in
19 this case to deny petitioner parole are indeed immutable factors that he is forever unable to
20 change, this is not a case in which the continued reliance on such factors rises to the level of a
21 due process violation. *See generally Biggs*, 334 F.3d at 916 (cautioning that “[o]ver time...
22 should [a prisoner] continue to demonstrate exemplary behavior and evidence of rehabilitation,
23 denying him a parole date simply because of the nature of [his] offense and prior conduct would
24 raise serious questions involving his liberty interest in parole”) (overruled on other grounds in
25 *Hayward*, 603 F.3d at 555, 563). The parole suitability hearing at issue took place approximately
26 17 years after petitioner committed his life crime and just under 15 years after he entered state

1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
3 one days after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Such a document should be captioned
5 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
6 shall be served and filed within seven days after service of the objections. Failure to file
7 objections within the specified time may waive the right to appeal the District Court’s order.
8 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.
9 1991). In any objections he elects to file Kelsaw may address whether a certificate of
10 appealability should issue in the event he elects to file an appeal from the judgment in this case.
11 *See* Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a
12 certificate of appealability when it enters a final order adverse to the applicant).

13 DATED: September 21, 2010

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15 CHARLENE H. SORRENTINO
16 UNITED STATES MAGISTRATE JUDGE
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