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

<p>WILBERT PETERSON,</p> <p style="padding-left: 40px;">Petitioner,</p> <p style="text-align: center;">vs.</p> <p>A.P. KANE, Warden,</p> <p style="padding-left: 40px;">Respondent.</p> <hr style="width: 40%; margin-left: 0;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>No. C 05-4458 JSW (PR)</p> <p>ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS</p>
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INTRODUCTION

Petitioner, a prisoner of the State of California, has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging the Board of Prison Terms (“BPT”) denial of parole during parole suitability proceedings in 2004. This Court ordered Respondent to show cause why a writ should not issue. Respondent filed an answer, memorandum and exhibits in support thereof. Petitioner has filed a traverse. For the reasons stated below, the petition is denied on the merits.

BACKGROUND

In 1974, in Contra Costa County Superior Court, Petitioner was convicted of first degree murder with a deadly weapon, first degree robbery causing great bodily injury, selling a controlled substance, receipt of stolen property and possession of a firearm by an ex-felon. The trial court sentenced him to a term of 7 years-to-life plus one to four years in state prison. Petitioner was also convicted of possession of an illegal weapon in 1979 while incarcerated. Petitioner’s minimum parole eligibility date on the life crime was

1 February 22, 1981. In this habeas action, Petitioner does not challenge his conviction or
2 sentence, but instead alleges that his due process rights were violated by the denial of
3 parole by the BPT during a parole suitability hearing in April 2004.

4 The BPT relied, in part, upon the following account of Petitioner's commitment
5 offenses from his prior hearings:

6 On February 8, 1973, sometime between 3:00 p.m. and 5:25 p.m., the
7 prisoner and Crime Partner Breckenridge entered the car lot in Richmond,
8 California, engaged the victim Ruben Wonnenberg, a salesman in the car
9 lot. . .in conversation. The three parties entered the office located on the car
10 lot. Then, while one of the defendants engaged the Victim Wonnenberg in
11 conversation, the other approached from the rear and shot Victim
12 Wonnenberg in the neck. Victim Wonnenberg immediately fell to the floor
13 of the office, but his eyes remained open. One of the defendants repeatedly
14 stabbed the victim in the chest with scissors. The prisoner and crime
15 partner then removed money and other items of value from the victim.

16 Group one, sale of controlled substance, receiving stolen property with no
17 prior felony convictions. Group two, possession of a firearm by an ex-
18 felon with two prior felony convictions, consecutive with group one, and
19 consecutive with prior prison term case number 161810, Contra Costa
20 County. The Richmond Police Department was contacted by a deputy
21 from Contra Costa Sheriff's Office, who indicated that an individual they
22 had in custody for the sale of heroin would be willing to cooperate with
23 local law enforcement agencies by naming him and helping to apprehend
24 his supplier, the prisoner. November 29, 1973, a representative from the
25 Richmond Police Department met with the prisoner who also informed the
26 investigating officers that his wife, Darlene, was involved in the sale and
27 distribution of heroin. The informant contacted the prisoner at his place of
28 residence by telephone and arranged for a sale of a quantity of heroin. The
informant was supplied with 50 dollars. The informant and an undercover
police officer then went to the prisoner's place of residence, observed
informant enter and exit four minutes later. The informant came directly to
the [under]cover officer and gave them a balloon containing a substance
which was believed to be heroin. Officers were left to observe the place of
residence and maintain surveillance. Other officers proceeded to secure a
search warrant. While doing so, the prisoner and his wife left the place of
residence and were followed and covered by law enforcement officials. A
warrant was secured and search of the prisoners' place of residence was
initiated in their absence. Following the securing of the search warrant, the
prisoner and his wife were taken into custody. During the search of the
prisoner, 50 dollars in cash in the marked money used by the informant for
the purchase of heroin was found on his person. During the search of the
prisoner's residence, officers found a substance believed to be marijuana,
one 25 caliber automatic handgun, and one Ruger 22 semi-automatic
handgun, various credit cards and identifications bearing a name other than
those of the prisoner and his wife were found at the place of residence.
Subsequent investigation determined the weapons were found to have been

1 stolen.

2 Possession of an illegal weapon. On July 21, 1979, at approximately 10:00
3 a.m., the prisoner, an inmate at Folsom State Prison was in dining room
4 number one and attempted to search the prisoner, but he ran into the main
5 kitchen area. The officer pursued and blew his whistle for assistance.
6 Another correctional officer stopped the prisoner and found the prisoner to
7 have in his possession a prison made knife 11 inches overall length with a
8 six and 1/4 inch blade sharpened to the point.

9 (Respondent's Exhibit 4 (hereinafter "'Ex. 4 '") at 16.)

10 Petitioner opted not to discuss the circumstances of the crime at the hearing.
11 However, an earlier discussion of the prisoner's version from his counselor's report
12 which was discussed at the hearing stated:

13 Peterson agreed with the commitment offense as it is documented. During
14 the interview, Peterson indicated that he neither shot nor stabbed the
15 victim. He did not go to the car lot with the intent to harm the victim.
16 When the argument between the victim and Breckenridge escalated,
17 Peterson neither attempted to prevent the shooting or stabbing, nor did he
18 report the crime to the police department. Therefore, he stated he must
19 accept responsibility for his actions. Peterson states, quote 'I feel that my
20 commitment offense was a terrible and senseless crime that should not
21 have happened. My actions leading to and following my commitment
22 offense was that of a delinquent with no regard for the suffering of others.
23 However, today I feel the pain and suffering I have caused. . . I am sorry
24 and I regret that it had to take a crime such as this, and, yes, that it took
25 prison to make me a better person. Also, I will continue to grow and
26 mature into responsible person.'

27 Ex. 4 at 17-18.

28 At the hearing, Petitioner also testified about his extensive criminal history, which
included juvenile convictions resulting in a stay at the California Youth Authority, as
well as county jail time for auto theft in 1967, burglary, forgery and credit card theft in
1968, as well as a prior prison term for a 1969 manslaughter conviction, involving the
shooting death of a 17 year old in the head with a 38 caliber revolver, which Petitioner
contends was an accidental killing of a friend. (*Id.* at 18-19.) Petitioner was
subsequently convicted of possession/sale of a controlled substance in 1974. (*Id.* at 19-
20.) Petitioner discussed his extensive history of drug use (*Id.* at 23-24.) The BPT
discussed and considered Petitioner's parole plans (*Id.* at 24-25), including those

1 documented in his counselor's report. (*Id.* at 25-26.) The BPT also considered letters in
2 Petitioner's file from his mother, daughter, sister-in-law and brother, offering significant
3 family support, accommodation and employment upon his release. (*Id.* at 26-29). Since
4 1991, Petitioner's classification score has been zero and his placement score is 19, the
5 lowest it can be based on his conviction. (*Id.* at 32). The Board considered Petitioner's
6 significant work history as a barber (*Id.* at 33-34), positive work reports and other
7 positive programming while incarcerated. (*Id.* at 34.)

8 The Board also considered Petitioner's significant history of disciplinary
9 violations while incarcerated, including 15 serious disciplinary "115s", most recently in
10 April of 1998 for drug trafficking. (*Id.* at 36). The BPT reviewed the psychiatric report
11 prepared in 2001 which noted that he posed a moderate degree of threat to the public if
12 released and that he could benefit by continuing to remain disciplinary free and through
13 additional self-help programs, including anger management. (*Id.* at 37.) The most recent
14 Psychiatrist's report, from 2001, reflects that Petitioner has a very long history of
15 involvement in the drug culture, including use, abuse and dealing (*Id.* at 37.) Petitioner
16 expressed that he discontinued AA and NA when they were phased out in his prison, but
17 that he hasn't "had a need to" continue now that those programs are available again
18 because "due to my illness I have no chance of messing with no more drugs." (*Id.* at 38.)

19 After a recess to consider the evidence before it, the BPT found that Petitioner
20 was not suitable for parole and would pose an unreasonable risk of danger to society or a
21 threat to public safety. (*Id.* at 60.) The presiding Commissioner explained that, in
22 deciding to deny parole, the panel considered all of the information received from the
23 public in denying parole. The Board found that Petitioner's commitment offense was
24 carried out in a cruel manner, in that the employee of the car dealership was shot and
25 then stabbed repeatedly with a pair of scissors. The BPT also found that the motive for
26 the crime was very trivial, apparently robbery of a "little amount of money." (*Id.* at 61.)
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1 Further, the Board found that Petitioner’s lengthy history of prior criminality, including a
2 prior manslaughter conviction, as well as his failed attempts to correct that criminality,
3 were a factor in denying parole. (*Id.* at 60.) They also noted his unstable social history
4 and extensive history of drug abuse and dealing. Further, the BPT found that he had not
5 “sufficiently participated in beneficial self-help programs.” (*Id.*) The Board noted that
6 Petitioner “continued to display negative behavior 24 years into his incarceration,
7 receiving a 115 in April of 1998, the latest, for narcotics trafficking. . .the last of 15
8 115s.”

9 The BPT also relied on the psychiatric evaluation of Petitioner which was “not
10 terribly supportive of release, and it really is inconclusive in that there is no assessment
11 of dangerousness in the report.”(*Id.* at 62.) However, the report also documented the
12 doctor’s perception that contrary to Petitioner’s assertion, he needs ongoing participation
13 and substance abuse prevention. (*Id.*) The Board commended Petitioner on his
14 continued efforts and further noted the doctor’s perception that Petitioner is making
15 strenuous attempts to change his character and lifestyle. However, the Board found that
16 Petitioner needs continued participation in self-help to “develop the skills that will allow
17 him to remain clean and sober, and to remain disciplinary free. Until further progress is
18 made, he continues to be unpredictable and a threat to others.” (*Id.* at 66.) The panel
19 further noted that Petitioner needed to participate in substance abuse prevention because
20 “it’s obvious it has been the root of evil for you for many, many years and you’re going
21 to have to continue to show that you are clean and sober and can remain that way.” (*Id.*)

22 Petitioner challenged the BPT’s decision in the Contra Costa County Superior
23 Court, which issued a reasoned opinion denying Petitioner’s claims. The Court found
24 that there is “no trouble finding that “some evidence” supports the Board’s decision.
25 (Petitioner’s Appendix (hereinafter “App.”) 2 at 3). The court found that the record
26 supported the finding of the BPT based on the fact that the commitment offense was
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1 carried out in an especially cruel manner, that Petitioner had a significant prior record,
2 and that Petitioner's institutional behavior rendered him unsuitable for parole. (App. 2 at
3 3-4.) The California Court of Appeal and the California Supreme Court summarily
4 denied Petitioner's habeas petitions, and thereafter Petitioner filed the instant federal
5 petition for a writ of habeas corpus.

6 DISCUSSION

7 A. Standard of Review

8 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified
9 under 28 U.S.C. § 2254, provides "the exclusive vehicle for a habeas petition by a state
10 prisoner in custody pursuant to a state court judgment, even when the petitioner is not
11 challenging his underlying state court conviction." *White v. Lambert*, 370 F.3d 1002,
12 1009-10 (9th Cir. 2004). Under AEDPA, this court may entertain a petition for habeas
13 relief on behalf of a California state inmate "only on the ground that he is in custody in
14 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
15 2254(a).

16 The writ may not be granted unless the state court's adjudication of any claim on
17 the merits: "(1) resulted in a decision that was contrary to, or involved an unreasonable
18 application of, clearly established Federal law, as determined by the Supreme Court of
19 the United States; or (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
21 proceeding." *Id.* at § 2254(d). Under this deferential standard, federal habeas relief will
22 not be granted "simply because [this] court concludes in its independent judgment that
23 the relevant state-court decision applied clearly established federal law erroneously or
24 incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529
25 U.S. 362, 411 (2000).

26 While circuit law may provide persuasive authority in determining whether the
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1 state court made an unreasonable application of Supreme Court precedent, the only
2 definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the
3 holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court
4 decision. *Id.* at 412; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

5 B. Legal Claims and Analysis

6 Petitioner claims that the BPT’s denial of parole in 2004 violated his right to due
7 process because the decision was not supported by some evidence, and because the
8 decision was made pursuant to the BPT’s “anti-parole” policy.

9 1. The BPT Decision

10 California’s parole scheme provides that the BPT “shall set a release date unless it
11 determines that the gravity of the current convicted offense or offenses, or the timing and
12 gravity of current or past convicted offense or offenses, is such that consideration of the
13 public safety requires a more lengthy period of incarceration for this individual, and that
14 a parole date, therefore, cannot be fixed at this meeting.” Cal. Penal Code § 3041(b). In
15 making this determination, the BPT considers various factors, including the prisoner’s
16 social history, the commitment offense and prior criminal history, and his behavior
17 before, during and after the crime. *See* Cal. Code Regs. tit. 15, § 2402(b) – (d).

18 The record shows, and there is no dispute, that the BPT panel afforded Petitioner
19 and his counsel an opportunity to speak and present their case at the hearing, gave them
20 time to review Petitioner’s central file, allowed them to present relevant documents and
21 provided a reasoned decision denying parole. The panel concluded that Petitioner is not
22 suitable for parole and would pose an unreasonable risk of danger to society or a threat to
23 public safety if released from prison. The panel explained that it found the commitment
24 offense was committed in a cruel manner and found the motive for the crime to be very
25 trivial in comparison with the gravity of the offense. The panel further found that
26 Petitioner had an unstable social history, a significant history of criminality and of using
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1 and selling drugs.

2 The panel further found that Petitioner had not sufficiently participated in self-
3 help programming which Petitioner needed, despite his representation that he did not.
4 The Contra Costa County District Attorney also opposed parole. The Board did
5 commend Petitioner's continued participation in working on improving himself and
6 toward parole.

7 2. The State Court Decisions

8 The state superior court found that the panel's denial of parole was supported by
9 "some evidence" in the record. (Pet. App. 2.) Specifically, the court cited the Board's
10 findings with respect to the circumstances of the murder, Petitioner's history of unstable
11 relationships, his prior record of violence, and his insufficient participation in self-help
12 programs, which it found to be supported by some evidence in the record. (*Id.*) The
13 California Court of Appeal and the California Supreme Court summarily denied
14 Petitioner's habeas petitions.

15 3. The Federal Right to Due Process

16 California's parole scheme "gives rise to a cognizable liberty interest in release on
17 parole" which cannot be denied without adequate procedural due process protections.
18 *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006); *McQuillion*
19 *v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002). The determination does not depend on
20 whether a parole release date has ever been set for the inmate because "[t]he liberty
21 interest is created, not upon the grant of a parole date, but upon the incarceration of the
22 inmate." *Biggs v. Terhune*, 334 F.3d 910, 914-15 (9th Cir. 2003).

23 Due process requires that "some evidence" support the parole board's decision
24 finding him unsuitable for parole. *Sass*, 461 F.3d at 1125 (holding that the "some
25 evidence" standard for disciplinary hearings outlined in *Superintendent v. Hill*, 472 U.S.
26 445, 454-55 (1985), applies to parole decisions in § 2254 habeas petition); *Biggs*, 334
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1 F.3d at 915 (same); *McQuillion*, 306 F.2d at 904 (same). The “some evidence” standard
2 is minimally stringent and ensures that “the record is not so devoid of evidence that the
3 findings of [the BPT] were without support or otherwise arbitrary.” *Hill*, 472 U.S. at 457.
4 Determining whether this requirement is satisfied “does not require examination of the
5 entire record, independent assessment of the credibility of witnesses, or weighing of the
6 evidence.” *Id.* at 455-56 (quoted in *Sass*, 461 F.3d at 1128). Due process also requires
7 that the evidence underlying the parole board’s decision have some indicia of reliability.
8 *Biggs*, 334 F.3d at 915; *McQuillion*, 306 F.3d at 904. In sum, if the parole board’s
9 determination of parole unsuitability is to satisfy due process, there must be some
10 evidence, with some indicia of reliability, to support the decision. *Rosas v. Nielsen*, 428
11 F.3d 1229, 1232 (9th Cir. 2005).

12 When assessing whether a state parole board’s suitability determination was
13 supported by “some evidence,” the court’s analysis is framed by the statutes and
14 regulations governing parole suitability determinations in the relevant state. *Irons v.*
15 *Carey*, 505 F.3d 846, 850 (9th Cir. 2007). Accordingly, in California, the court must
16 look to California law to determine the findings that are necessary to deem a prisoner
17 unsuitable for parole, and then must review the record in order to determine whether the
18 state court decision holding that these findings were supported by “some evidence”
19 constituted an unreasonable application of the “some evidence” principle articulated in
20 *Hill*. *Id.*; *see id.* at 852-53 (finding state court did not unreasonably apply “some
21 evidence” standard to uphold parole suitability denial where there was some evidence at
22 the time of the hearing to support a finding that the prisoner would present a danger to
23 society based on the nature of the commitment offense under the applicable parole
24 regulations).

25 The evidence before the BPT indicated that Petitioner continued to pose an
26 unreasonable risk of danger to society. To begin with, Petitioner’s participation in this
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1 cold-blooded killing was preceded by a lengthy criminal history. The killing was
2 especially cruel in that the victim was repeatedly stabbed with scissors when his eyes
3 remained open after he was shot at close range in the neck. In addition, the motive for
4 the offense, theft, was certainly trivial compared to the gravity of the offense. Moreover,
5 Petitioner had an unstable social history, as he had dropped out of high school, had a
6 substantial history of drug abuse and lack of work history prior to going to prison. The
7 Board considered the lengthy list of his prior convictions, including a prior manslaughter.
8 The psychiatric evaluation found that Petitioner presented a moderate risk to society and
9 that Petitioner needed participation in substance abuse prevention, notwithstanding
10 Petitioner's belief that he did not. Most importantly, the BPT considered Petitioner's
11 participation in drug trafficking in prison as recently as 1998, six years before the
12 hearing after 24 years of incarceration. Petitioner's opinion that he did not need
13 substance abuse prevention after such a recent involvement in drug trafficking reflects a
14 lack of insight. Such evidence amounts to "some evidence" in support of the BPT's
15 determination that Petitioner continued to present a risk of danger if released to the
16 public, and consequently that Petitioner was not suitable for parole.

17 The Ninth Circuit has noted that "over time" the BPT's "continued reliance in the
18 future on an unchanging factor, the circumstance of the offense and conduct prior to
19 imprisonment" would "raise serious questions involving his liberty interest in parole."
20 *Biggs*, 334 F.3d at 916. However, in this case the BPT's denial of parole was not only
21 based upon Petitioner's commitment offense and prior criminal history. Here, there were
22 numerous and substantial other reasons, described above, for their denial of parole as
23 well.

24 Based upon the record in this case, the state courts' determination that there was
25 some reliable evidence to support the BPT's decision, and that Petitioner's right to due
26 process was not violated, was not contrary to or an unreasonable application of federal
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1 law. *See, e.g., Rosas*, 428 F.3d at 1232-33 (upholding denial of parole based on gravity of
2 offense and psychiatric reports); *Biggs*, 334 F.3d at 916 (upholding denial of parole based
3 solely on gravity of offense and conduct prior to imprisonment); *Morales*, 16 F.3d at 1005
4 (upholding denial of parole based on criminal history, cruel nature of offense, and need
5 for further psychiatric treatment). Accordingly, habeas relief is not warranted on this
6 claim.

7 4. “Anti-Parole” Policy


8 Petitioner further argues that the BPT possesses an “Anti-Parole Policy” that is
9 biased and violates his constitutional rights. There is no evidence in the record
10 indicating that this alleged policy affected the BPT’s decision or served as the basis for
11 denying Petitioner parole. To the contrary, the transcript from Petitioner’s 2004 parole
12 hearing demonstrates that he received an individualized assessment of his potential
13 parole suitability. Petitioner’s reliance on the low number of parole grants for life
14 inmates serving sentences for first degree murder provides no proof of the BPT’s alleged
15 bias against parole. *Cf. California Dept. of Corrections v. Morales*, 514 U.S. 499, 510-
16 11 (1995) (citing that 90 percent of all California inmates are found unsuitable for parole
17 as evidence that deferring annual parole suitability hearings was lawful and reasonable).
18 Consequently, Petitioner is not entitled to habeas relief on this claim.

19 **CONCLUSION**

20 For the reasons set forth above, the petition for a writ of habeas corpus is DENIED.
21 The Clerk shall enter judgment in favor of Respondent and close the file.

22 IT IS SO ORDERED.

23 DATED: January 26, 2009

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25 _____
26 JEFFREY S. WHITE
27 United States District Judge
28

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
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5 PETERSON,
6
7 Plaintiff,

Case Number: CV05-04458 JSW

CERTIFICATE OF SERVICE

8 v.

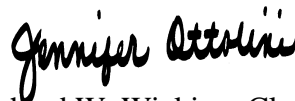
9 CAREY et al,
10 Defendant.
_____ /

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
12 Court, Northern District of California.

13 That on January 26, 2009, I SERVED a true and correct copy(ies) of the attached, by placing
14 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
15 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
16 delivery receptacle located in the Clerk's office.

17 Wilbert Peterson B-22677
18 CSP-Solano
19 P.O. Box 4000
20 Vacaville, CA 95696

21 Dated: January 26, 2009



22 Richard W. Wieking, Clerk
23 By: Jennifer Ottolini, Deputy Clerk
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