

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHNNY RAMOS,

No. C 06-1014 MHP (pr)

Petitioner,

**ORDER DENYING HABEAS
PETITION**

v.

A. P. KANE, warden,

Respondent.

INTRODUCTION

Johnny Ramos, an inmate formerly at the Correctional Training Facility in Soledad, filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. This matter is now before the court for consideration of the merits of the pro se habeas petition. For the reasons discussed below, the petition will be denied.

BACKGROUND

Ramos was convicted in Santa Barbara County Superior Court of second degree murder and was found to have used a firearm in the offense. On May 23, 1989, he was sentenced to 17 years to life in prison. His habeas petition does not challenge his conviction but instead challenges an August 17, 2004 decision of the Board of Prison Terms, now known as the Board of Parole Hearings ("BPH"), that found him not suitable for parole. This was his second parole hearing, and was conducted at a time when he was 16 years into his 17-to-life sentence.

The BPH identified the circumstances of the commitment offense, Ramos' unstable social history, and Ramos' need for more self-help programming as the reasons for its decision that his release would pose an unreasonable risk of danger to society or threat to

1 public safety. The BPH also relied on the opposition to parole by the victim's next of kin and
2 the district attorney's office.

3 Ramos sought relief in the California courts. The Santa Barbara County Superior
4 Court denied his petition for writ of habeas corpus in a short, but reasoned, decision. The
5 California Court of Appeal summarily denied his petition for writ of habeas corpus and the
6 California Supreme Court summarily denied his petition for review.

7 Ramos then filed his federal petition for a writ of habeas corpus. The court found
8 cognizable his claims that (1) his right to due process was violated because the evidence was
9 insufficient to support the BPH's decision that he was unsuitable for parole and (2) the BPH's
10 decision violated his plea agreement. Ramos later dismissed his unexhausted claim that the
11 BPH's decision violated his plea agreement. Respondent filed an answer on the remaining
12 claim and Ramos filed a traverse.

13 The court earlier indicated that it intended to wait for guidance from the anticipated en
14 banc decision in Hayward v. Marshall, 512 F.3d 536 (9th Cir.), reh'g en banc granted, 527
15 F.3d 797 (9th Cir. 2008). Although much time has passed, Hayward remains pending in the
16 appellate court and it is unknown to this court when the decision will be released. The court
17 will proceed to decide the merits of the petition without the benefit of the Hayward decision.

18 **JURISDICTION AND VENUE**

19 This court has subject matter jurisdiction over this habeas action for relief under 28
20 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged
21 action concerns the execution of the sentence of a prisoner housed at a prison in Monterey
22 County, within this judicial district. 28 U.S.C. §§ 84, 2241(d).

23 **EXHAUSTION**

24 Prisoners in state custody who wish to challenge collaterally in federal habeas
25 proceedings either the fact or length of their confinement are required first to exhaust state
26 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the
27 highest state court available with a fair opportunity to rule on the merits of each and every
28 claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties do not

1 dispute that state court remedies were exhausted for the claims asserted in the petition.

2 STANDARD OF REVIEW

3 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
4 custody pursuant to the judgment of a State court only on the ground that he is in custody in
5 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).
6 The petition may not be granted with respect to any claim that was adjudicated on the merits
7 in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that
8 was contrary to, or involved an unreasonable application of, clearly established Federal law,
9 as determined by the Supreme Court of the United States; or (2) resulted in a decision that
10 was based on an unreasonable determination of the facts in light of the evidence presented in
11 the State court proceeding." 28 U.S.C. § 2254(d); see Williams (Terry) v. Taylor, 529 U.S.
12 362, 409-13 (2000). Section 2254(d) applies to a habeas petition from a state prisoner
13 challenging the denial of parole. See Sass v. California Board of Prison Terms, 461 F.3d
14 1123, 1126-27 (9th Cir. 2006).

15 DISCUSSION

16 A. Due Process Requires That Some Evidence Support a Parole Denial

17 A California prisoner with a sentence of a term of years to life with the possibility of
18 parole has a protected liberty interest in release on parole and therefore a right to due process
19 in the parole suitability proceedings. See Sass, 461 F.3d at 1127-28; Board of Pardons v.
20 Allen, 482 U.S. 369 (1987); Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442
21 U.S. 1 (1979); Cal. Penal Code § 3041(b).

22 A parole board's decision satisfies the requirements of due process if "some evidence"
23 supports the decision. Sass, 461 F.3d at 1128-29 (adopting some evidence standard for
24 disciplinary hearings outlined in Superintendent v. Hill, 472 U.S. 445, 454-55 (1985)). "To
25 determine whether the some evidence standard is met 'does not require examination of the
26 entire record, independent assessment of the credibility of witnesses, or weighing of the
27 evidence. Instead, the relevant question is whether there is any evidence in the record that
28 could support the conclusion reached'" by the BPH. Sass, 461 F.3d at 1128 (quoting

1 Superintendent v. Hill, 472 U.S. at 455-56). The "some evidence standard is minimal, and
2 assures that 'the record is not so devoid of evidence that the findings of the . . . board were
3 without support or otherwise arbitrary.'" Id. at 1129 (quoting Superintendent v. Hill, 472
4 U.S. at 457). The some evidence standard of Superintendent v. Hill is clearly established law
5 in the parole context for purposes of § 2254(d). Sass, 461 F.3d at 1129. As a matter of state
6 law, the parole authority's decision must also satisfy the "some evidence" standard of review.
7 See In re Lawrence, 44 Cal. 4th 1181, 1191 (Cal. 2008) (state court "standard of review
8 properly is characterized as whether 'some evidence' supports the conclusion that the inmate
9 is unsuitable for parole because he or she currently is dangerous").

10 Having determined that there is a due process right, and that some evidence is the
11 evidentiary standard for judicial review, the next step is to look to state law because that sets
12 the criteria to which the some evidence standard applies. One must look to state law to
13 answer the question, "'some evidence' of what?"

14 B. State Law Standards For Parole For Murderers In California

15 California uses indeterminate sentences for most non-capital murderers, with the term
16 being life imprisonment and parole eligibility after a certain minimum number of years. A
17 first degree murder conviction yields a minimum term of 25 years to life and a second degree
18 murder conviction yields a minimum term of 15 years to life imprisonment. See In re
19 Dannenber, 34 Cal. 4th 1061, 1078 (Cal. 2005); Cal. Penal Code § 190. The upshot of
20 California's parole scheme described below is that a release date normally must be set unless
21 various factors exist, but the "unless" qualifier is substantial.

22 A BPH panel meets with an inmate one year before the prisoner's minimum eligible
23 release date "and shall normally set a parole release date. . . . The release date shall be set in a
24 manner that will provide uniform terms for offenses of similar gravity and magnitude in
25 respect to their threat to the public, and that will comply with the sentencing rules that the
26 Judicial Council may issue and any sentencing information relevant to the setting of parole
27 release dates." Cal. Penal Code § 3041(a). Significantly, that statute also provides that the
28 panel "shall set a release date unless it determines that the gravity of the current convicted

1 offense or offenses, or the timing and gravity of current or past convicted offense or offenses,
2 is such that consideration of the public safety requires a more lengthy period of incarceration
3 for this individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal.
4 Penal Code § 3041(b).

5 One of the implementing regulations, 15 Cal. Code Regs. § 2401, provides: "A parole
6 date shall be denied if the prisoner is found unsuitable for parole under Section 2402(c). A
7 parole date shall be set if the prisoner is found suitable for parole under Section 2402(d). A
8 parole date set under this article shall be set in a manner that provides uniform terms for
9 offenses of similar gravity and magnitude with respect to the threat to the public."¹ The
10 regulation also provides that "[t]he panel shall first determine whether the life prisoner is
11 suitable for release on parole. Regardless of the length of time served, a life prisoner shall be
12 found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose
13 an unreasonable risk of danger to society if released from prison." 15 Cal. Code Regs. §
14 2402(a). The panel may consider all relevant and reliable information available to it. 15 Cal.
15 Code Regs. § 2402(b).

16 The regulations contain a matrix of suggested base terms for several categories of
17 crimes. See 15 Cal. Code Regs. § 2403. For example, for second degree murders, the matrix
18 of base terms ranges from the low of 15, 16, or 17 years to a high of 19, 20, or 21 years,
19 depending on some of the facts of the crime. The statutory scheme places individual
20 suitability for parole above a prisoner's expectancy in early setting of a fixed date designed to
21 ensure term uniformity. Dannenber, 34 Cal. 4th at 1070-71. Under state law, the matrix is
22 not reached unless and until the prisoner is found suitable for parole. Id. at 1070-71; 15 Cal.
23 Code Regs. § 2403(a).

24 The "Penal Code and corresponding regulations establish that the fundamental
25 consideration in parole decisions is public safety . . . [T]he core determination of 'public
26 safety' under the statute and corresponding regulations involves an assessment of an inmate's
27 current dangerousness." Lawrence, 44 Cal. 4th at 1205 (emphasis in source).²

28 A critical issue in parole denial cases concerns the parole authority's use of evidence

1 about the murder that led to the conviction. Three Ninth Circuit cases provide the guideposts
2 for applying the Superintendent v. Hill some evidence standard on this point: Biggs v.
3 Terhune, 334 F.3d 910 (9th Cir. 2003), Sass, 461 F.3d 1123, and Irons v. Carey, 505 F.3d
4 846 (9th Cir. 2007).³ Biggs explained that the value of the criminal offense fades over time
5 as a predictor of parole suitability: “The Parole Board’s decision is one of ‘equity’ and
6 requires a careful balancing and assessment of the factors considered. . . . A continued
7 reliance in the future on an unchanging factor, the circumstance of the offense and conduct
8 prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system
9 and could result in a due process violation.” Biggs, 334 F.3d at 916-17. Biggs upheld the
10 initial denial of a parole release date based solely on the nature of the crime and the
11 prisoner’s conduct before incarceration, but cautioned that “[o]ver time . . . , should Biggs
12 continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a
13 parole date simply because of the nature of Biggs’ offense and prior conduct would raise
14 serious questions involving his liberty interest in parole.” Id. at 916. Next came Sass, which
15 criticized the Biggs statements as improper and beyond the scope of the dispute before the
16 court: "Under AEDPA it is not our function to speculate about how future parole hearings
17 could proceed." Sass, 461 F.3d at 1129. Sass determined that the parole board is not
18 precluded from relying on unchanging factors such as the circumstances of the commitment
19 offense or the petitioner's pre-offense behavior in determining parole suitability. See id.
20 (commitment offenses in combination with prior offenses provided some evidence to support
21 denial of parole at subsequent parole consideration hearing). Sass also put to rest any idea
22 from Biggs that the commitment crime and pre-offense behavior only support the initial
23 denial of parole. Irons determined that due process was not violated by the use of the
24 commitment offense and pre-offense criminality to deny parole for a prisoner 16 years into
25 his 17-to-life sentence. Irons emphasized that all three cases (Irons, Sass and Biggs) in
26 which the court had "held that a parole board's decision to deem a prisoner unsuitable for
27 parole solely on the basis of his commitment offense comports with due process, the decision
28 was made before the inmate had served the minimum number of years required by his

1 sentence." Irons, 505 F.3d at 853. Interpreting this statement from Irons to suggest that the
2 offense can only be relied on until the minimum number of years has been reached would
3 suffer the same problem that Sass identified in Biggs: it is not the holding of the case. The
4 dicta in Biggs and Irons are speculative and do not determine when a denial of parole based
5 solely upon the commitment offense or pre-offense behavior violates due process. Neither
6 logic nor Irons compel a decision that such reliance must cease when the prisoner reaches the
7 minimum number of years in his sentence, such as the fifteenth year of a 15-to-life sentence.

8 The upshot of these three cases is that the BPH can look at immutable events, such as
9 the nature of the conviction offense and pre-conviction criminality, to predict that the
10 prisoner is not currently suitable for parole even after the initial denial (Sass), but the weight
11 to be attributed to those immutable events should decrease over time as a predictor of future
12 dangerousness as the years pass and the prisoner demonstrates favorable behavior (Biggs and
13 Irons). Sass did not dispute the principle that, other things being equal, a murder committed
14 50 years ago is less probative of a prisoner's current dangerousness than one committed 10
15 years ago. Not only does the passage of time in prison count for something, exemplary
16 behavior and rehabilitation in prison count for something according to Biggs and Irons.
17 Superintendent v. Hill's standard might be quite low, but it does require that the decision not
18 be arbitrary, and reliance on only the facts of the crime might eventually make for an
19 arbitrary decision.⁴

20 C. Some Evidence Supports The BPH's Decision In Ramos' Case

21 1. BPH Decision

22 The BPH identified the circumstances of the commitment offense, Ramos' unstable
23 social history, and Ramos' need for more self-help programming as the reasons for its
24 decision that his release would pose an unreasonable risk of danger to society or threat to
25 public safety. The BPH also relied on the opposition to parole by the victim's next of kin and
26 the district attorney's office. In its decision, the BPH observed that Ramos had numerous
27 positive attributes. He had no disciplinary write-ups while in prison. He had marketable
28 skills to use if paroled, albeit no job. He had vocational training in upholstery and appliance

1 repair. He had a high school diploma. Nonetheless, the positive aspects of his behavior did
2 not outweigh the factors of unsuitability, in the BPH's view.

3 a. Commitment Offense

4 In finding Ramos unsuitable, the BPH stated that the commitment offense "is certainly
5 the primary reason for the denial, and the manner in which it was carried out." RT 42. "The
6 viciousness of this crime is one that certainly is of grave concern to the Panel." RT 43. The
7 motive was trivial or inexplicable, regardless of whether the killing was due to jealousy or
8 anger. RT 43.

9 Ramos shot and killed his wife on September 17, 1988, ending a marital argument that
10 followed a night of heavy drinking by Ramos. See Resp. Exh. B, reporter's transcript of
11 August 17, 2004 hearing ("RT"), at 10-13. Earlier in the evening, Ramos and his wife had
12 been dancing and consuming alcohol at La Cantina Bar in Santa Maria, California. Ramos
13 drank about a six-pack of beer and at least a dozen mixed drinks. Resp. Exh. C, p. 8. His
14 wife drove him home and he passed out in the truck. When he awoke, he was alone in the
15 truck parked outside his house. He became angry because his wife had taken the truck and
16 house keys. He found another key, drove to a convenience store, and called a local restaurant
17 in an unsuccessful search for his wife. He returned home and, while in the backyard
18 vomiting, heard the phone ring so he broke into the house to answer it. The caller was his
19 wife, and he told her to "'Get her butt home.'" RT 11. His wife was at a restaurant with
20 friends and told them, "'If you hear an ambulance it will be coming for me.'" RT 13. When
21 Ramos' wife came home, they began arguing – first in the bedroom and then in the living
22 room. He eventually shot her in the head with his 9 millimeter pistol. Ramos then called his
23 brother and told him he loved him and his parents. When Ramos' parents called back, Ramos
24 told them his wife was dead. RT 11-12. Ramos confessed to police that he killed his wife.
25 Resp. Exh. C, pp. 7-8. The cause of death was five gunshot wounds to the victim's head. Id.
26 at 5. She also had a contusion on her right clavicle area and a slight swelling to the left side
27 of her abdomen. Id.

1 b. Unstable Social History

2 The BPH stated that it also relied on Ramos' unstable social history in denying him
3 parole. RT 43. The BPH noted that, while some parts of his life reflected stability, such as
4 his graduation from high school and long-term employment, other parts reflected instability.
5 RT 43-44. He had drug use as a juvenile, continued alcohol use as an adult, and anger
6 management problems that resulted in domestic violence against both his first wife and his
7 second wife (i.e., the murder victim).

8 There was evidentiary support for the BPH's reliance on this factor, even if there was
9 mixed evidence on it. On the positive side, Ramos had no convictions as an adult and had
10 been employed at the same place for about eight years. On the negative side, he had used
11 marijuana, cocaine, LSD, and methamphetamine mostly as a juvenile. In adulthood, he used
12 only alcohol, and only once or twice a month, according to Ramos, RT 17, although he had
13 consumed a very large quantity of alcohol on the night of the murder. He had engaged in
14 domestic violence against both his first and second wives. See RT 28, 38-39. He admitted
15 he had an anger management problem.

16 c. Need For More Self-Help

17 The BPH made a finding that Ramos need to continue "participation in self-help to
18 further delve into the causative factors for his participation in this life crime, as well as to
19 continue to develop the skills that will allow him to remain clean and sober and to deal with
20 the issues of anger that he has expressed he's had, and until further progress is made in these
21 areas he continues to be unpredictable and a threat to others." RT 44-45; see also RT 48.

22 There was evidentiary support for this finding. Although Ramos had participated in
23 various groups and workshops, he had participated in Alcoholics Anonymous for only four
24 years and not since 1999. Ramos stated that he stopped going to AA when his yard was on
25 lockdown, and since then had been reading a book about alcohol and drug addiction. RT 24.
26 His psychological assessment from 1999 had been positive overall, but did note that "alcohol
27 abuse presents a significant risk factor, which may be a precursor to violence for inmate
28 Ramos and mandatory attendance at AA should be a contingency upon granting parole." RT

1 26. Ramos stated that he had been "clean and sober" since 1989. RT 27. He believed he
2 could find an AA meeting if paroled, but had not yet made any efforts to do so. RT 29. He
3 stated that he disagreed with AA, and had sought out other means to deal with his alcohol
4 abuse, but would go to AA if paroled. See RT 37.

5 The BPH also noted that several of the victim's relatives and the district attorney
6 opposed parole. See RT 20-21, 38-41. They are allowed to speak and the BPH is allowed by
7 state law to consider their input in making its decision. The fact that relatives or the district
8 attorney oppose parole is not inherently probative of Ramos' current danger. However, their
9 input sometimes does contain information that may be of value in the parole consideration.
10 Here, for example, one of the relative's statements showed that Ramos' proposed residence
11 was quite near the residence of the victim's next of kin, which apparently is not permitted by
12 the parole authority. Like many other things, the statements of the victim's relatives and the
13 district attorney are but part of the overall picture that the BPH must evaluate. The
14 information from the victim's relatives led the BPH to recommend that Ramos make alternate
15 parole plans. RT 46. Specifically, the BPH did not think his plan to live with his mother
16 would be acceptable because he would be too close to the victim's next of kin, who
17 apparently were within walking distance of his mother's house; the law reportedly required
18 there to be a sufficient distance between the parolee and the victim's next of kin. RT 40, 46.

19 2. State Court Decision

20 The Santa Barbara County Superior Court rejected Ramos' habeas petition in a short,
21 but reasoned, decision. Resp. Exh. E. The superior court stated:

22 [T]he BPH acted principally on the basis that the gravity of the offense weighed
23 against a finding of suitability. This weighing process is an exercise of judgment
24 within its discretion, although given the length of time, especially with applicable
25 credits, that he has served on a second degree murder conviction, other factors must
26 be considered. It appears that the Board gave additional weight to concern about
27 petitioner's unstable social history as reflected in a history of domestic violence and
28 uncertainty about the extent to which Mr. Ramos appreciated its causes, the existence
of a significant history with alcohol that has been addressed since 1999 only by
reading on his own, and plans for parole that would place him in close proximity with
the family of his victim over their expressed objections. While, on the other hand,
petitioner's discipline-free conduct and anger management course work, his job skills
and his overall psychological assessment are strong positive factors favoring parole,
the decision of the Board of Prison Terms, after weighing all of the factors, is not an
abuse of its discretion. There is some evidence to support its decisions.

1 Resp. Exh. E, pp. 1-2.

2 3. Analysis Of Federal Claim

3 This court applies § 2254(d) to the Santa Barbara County Superior Court's decision
4 because it is the last reasoned decision from a state court on Ramos' claim. See Ylst v.
5 Nunnemaker, 501 U.S. 797, 803-04 (1991); Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th
6 Cir. 2005). The superior court correctly identified the "some evidence" standard as the
7 applicable standard for judicial review, as evidenced by its citation to In re Rosenkrantz, 29
8 Cal. 4th 616 (Cal. 2002), which had cited and adopted the Superintendent v. Hill some
9 evidence standard as the proper standard for judicial review of evidentiary sufficiency for
10 administrative cases. See Rosenkrantz, 29 Cal. 4th at 665-67.

11 The superior court did not unreasonably apply Superintendent v. Hill in determining
12 that there were "strong positive factors favoring parole," Resp. Exh. E, p. 2, but they were
13 outweighed by negative factors. Notwithstanding all the positive factors for Ramos, the
14 BPH had determined that, 16 years into his 17-to-life sentence, Ramos posed an
15 unreasonable risk of danger to society if released from prison because of the murder plus his
16 history of domestic violence, plus uncertainty about his appreciation of the cause of his
17 violence, plus the concerns about his limited work on his alcohol problem that required
18 further self-help. There is a rational connection between the evidence relied on and the
19 decision that he is a current threat. Shooting one's spouse in the head five times is cruel and
20 callous. Although the murder was obviously a very large factor in its decision, the BPH did
21 not rely solely on the murder and instead relied on the murder plus a combination of several
22 other factors. Ramos had a history of domestic violence and a history of alcohol abuse
23 before incarceration, which reasonably would prompt concern about a return to either if
24 paroled. Added to this was the uncertainty caused by Ramos' cessation of participation in the
25 Alcoholics Anonymous program five years before the hearing and replacement of that
26 program with only reading a book, plus his inconsistent statements that he didn't believe in
27 AA, but would attend meetings if paroled. The alcohol and anger management concerns that
28 the BPH identified were important – even Ramos admits that the murder he committed was

1 the result of the "lethal combination of anger and alcohol." Traverse, p. 10. Bearing in
2 mind that the court's chore is to consider not whether some evidence supports the reasons,
3 but whether some evidence supports the conclusion that Ramos' release unreasonably
4 endangers public safety, this court concludes that the Santa Barbara County Superior Court's
5 rejection of his insufficient evidence claim was not contrary to or an unreasonable
6 application of the Superintendent v. Hill some evidence standard. Ramos is not entitled to
7 the writ.

8 **CONCLUSION**

9 For the foregoing reasons, the petition is denied on the merits. The clerk shall close
10 the file.

11 IT IS SO ORDERED.

12 DATED: March 16, 2010



Marilyn Hall Patel
United States District Judge

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

