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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DIEGO RAMIREZ,)	No. C 06-6621 MMC (PR)
)	
Petitioner,)	ORDER DENYING
vs.)	PETITION FOR WRIT OF
BEN CURRY, Warden,)	HABEAS CORPUS
)	
Respondent.)	

INTRODUCTION

On August 7, 2006, petitioner Diego Ramirez, a California state prisoner proceeding pro se, filed, pursuant to 28 U.S.C. § 2254, the above-titled petition for a writ of habeas corpus.¹ For the reasons stated herein, the petition is hereby DENIED.

BACKGROUND

In 1987, petitioner shot and killed the victim, Juan Cruz (“Cruz”), outside a bar in Long Beach, California. (Ans. Ex. 7 at 1.) A jury convicted petitioner of second degree murder, and found true an allegation that petitioner personally used a firearm in the commission of the murder. The trial court sentenced petitioner to seventeen years to life in prison, and he was received at the California Department of Corrections on April 5,

¹ The action was filed initially in the Central District; it subsequently was transferred to the Northern District, and was received herein on October 24, 2006.

1 1988. (Id. Ex. 3 at 1.) In December 2003, the Board found petitioner unsuitable for
2 parole, on grounds that he “would pose an unreasonable risk of danger to society or a
3 threat to public safety if released from prison at [that] time.” (Id. Ex. 3 at 53.)

4 In reaching its decision, the Board accepted the following facts taken from the
5 state appellate court’s decision on petitioner’s direct appeal:

6 [Petitioner], while armed with a handgun which he carried in his waistband,
7 visited a bar in Long Beach. Later, upon leaving, he was followed by the
8 victim. As [petitioner] reached the door, he suddenly turned and fired two
9 shots at the victim killing him. When the victim’s brother, who was in the
10 bar, started toward where the victim was lying, [petitioner] stated: “Don’t
11 get involved or I’ll kill you too.”

12 [Petitioner], at trial, essentially claimed to have acted in self defense. He
13 testified that the victim menaced him with a six-inch long knife and
14 demanded money. According to [petitioner] he produced the gun in
15 response to an attack upon him with the knife although he claimed that he
16 did not intend to fire the gun. Apparently, no one else saw the victim
17 menace [petitioner] in any way.

18 (People v. Ramirez, 264 Cal. Rptr. 161, 162–63 (Cal. Ct. App. 1989).²

19 At the parole hearing, the Board reviewed petitioner’s record, including the
20 circumstances of his commitment offense and his behavior in prison.³ With respect to the
21 commitment offense, the Board found the offense was carried out in a manner that was
22 “especially [] vicious and brutal,” “dispassionate,” and “which demonstrates [an]
23 exceptionally insensitive disregard for human sufferings.” (Ans. Ex. 3 at 53, 54.) The
24 Board described to petitioner the facts on which this determination was based:

25 [Y]ou had been drinking for most of the day and as noted you were
26 intoxicated and this happened around 10:30 in the evening. You were at a
27 bar together with Mr. Cruz. You were exiting the bar, you pulled a gun
28 from your waistband and for no real provocation that we can find you shot
29 this man twice, shot him twice, causing his demise . . . You confronted the
30 victim’s brother, telling him that you would shoot him as well.

31 (Id. at 53–54.) The Board further found that the “[m]otivation for the crime was

32 ² In lieu of reciting these facts directly into the record, the presiding commissioner
33 incorporated the above-quoted statement of facts by reference. (Ans. Ex. 3 at 7; Ex. 6 at
34 2.)

35 ³ Petitioner has no record of criminal activity prior to the commitment offense.
36 (Ans. Ex. 3 at 55.)

1 court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or
2 involved an unreasonable application of, clearly established Federal law, as determined
3 by the Supreme Court of the United States; or (2) resulted in a decision that was based on
4 an unreasonable determination of the facts in light of the evidence presented in the State
5 court proceeding.” 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412–13
6 (2000). A federal court must presume the correctness of the state court’s factual findings.
7 28 U.S.C. § 2254 (e)(1). Habeas relief is warranted only if the constitutional error at
8 issue had a “substantial and injurious effect or influence in determining the jury’s
9 verdict.” Penry v. Johnson, 532 U.S. 782, 795 (2001) (internal quotation and citation
10 omitted).

11 The state court decision implicated by 2254(d) is the “last reasoned decision” of
12 the state court. See Ylst v. Nunnemaker, 501 U.S. 797, 803–04 (1991); Barker v.
13 Fleming, 423 F.3d 1085, 1091–92 (9th Cir. 2005). Where there is no reasoned opinion
14 from the highest state court to have considered the petitioner’s claims, the district court
15 looks to the last reasoned state court opinion, which, in this instance, is the second
16 opinion of the Los Angeles Superior Court. (Ans. Ex. 18);⁴ see Nunnemaker, 501 U.S. at
17 801–06; Shackleford v. Hubbard, 234 F.3d 1072, 1079 n. 2 (9th Cir. 2000).

18 **B. Petitioner’s Claim**

19 Petitioner claims the Board’s continued reliance on the circumstances of the
20 commitment offense violates his right to due process. (Pet. at 5.) The superior court

22 ⁴ The record includes two opinions by the state superior court addressing
23 petitioner’s claims arising from the Board’s December 2003 decision. In the first of said
24 opinions, the superior court found the Board’s decision void because it relied entirely on
25 the circumstances of the commitment offense “without regard to the public safety
26 implications of [p]etitioner’s offense as it compares with other similar offenses and in
27 light of the terms prescribed by the legislature for such offenses.” (Ans. Ex. 17 at 2.) The
28 state court stayed execution of its order, however, pending the California Supreme
Court’s decision in In re Dannenberg, 125 Cal.Rptr. 2d 458 (Cal. Ct. App. 2002). After
the California Supreme Court issued its decision in that action, the superior court denied
the petition, concluding that the Board is not required to use the sentencing matrix until it
has concluded that an inmate is suitable for parole. (Ans. Ex. 18.)

1 rejected the claim, finding that the seriousness of petitioner’s crime creates a “bar [that] is
2 seemingly very high for petitioner in terms of when his sentence will become ‘grossly
3 disproportionate.’” (Ans. Ex. 18 at 2.)

4 A denial of parole complies with due process provided there is “some evidence” to
5 support the parole board’s decision. A parole board’s decision deprives a prisoner of due
6 process if such decision is not supported by “some evidence in the record,” or is
7 otherwise “arbitrary.” See Superintendent v. Hill, 472 U.S. 445, 454–55 (1985); Sass v.
8 California Bd. of Prison Terms, 461 F.3d 1123, 1129 (9th Cir. 2006). Additionally, the
9 evidence underlying the parole board’s decision must have “some indicia of reliability.”
10 See McQuillion v. Duncan, 306 F.3d 895, 904 (9th Cir. 2002). Accordingly, if a parole
11 board’s determination with respect to parole suitability is to satisfy due process, such
12 determination must be supported by some evidence having some indicia of reliability.
13 Rosas v. Nielsen, 428 F.3d 1229, 1232 (9th Cir. 2005).

14 Additionally, in assessing whether there is “some evidence” to support the Board’s
15 denial of parole, this Court must consider the regulations that guide the Board in making
16 its parole suitability determinations. Pursuant to such regulations, “[t]he panel shall first
17 determine whether the life prisoner is suitable for release on parole[;] [r]egardless of the
18 length of time served, a life prisoner shall be found unsuitable for and denied parole if in
19 the judgment of the panel the prisoner will pose an unreasonable risk of danger to society
20 if released from prison.” 15 Cal. Code Regs. § 2402(a). The regulations enumerate
21 various circumstances tending to indicate whether or not an inmate is suitable for parole.
22 Id., § 2402(c)–(d).⁵ One circumstance tending to show an inmate’s unsuitability is that

24 ⁵ The circumstances tending to show an inmate’s unsuitability are: (1) the
25 commitment offense was committed in an “especially heinous, atrocious or cruel
26 manner;” (2) previous record of violence; (3) unstable social history; (4) sadistic sexual
27 offenses; (5) psychological factors such as a “lengthy history of severe mental problems
28 related to the offense;” and (6) prison misconduct. 15 Cal. Code Regs. § 2402(c). The
circumstances tending to show suitability are: (1) no juvenile record; (2) stable social
history; (3) signs of remorse; (4) commitment offense was committed as a result of stress
which built up over time; (5) Battered Woman Syndrome; (6) lack of criminal history;

1 the crime was committed in an “especially heinous, atrocious or cruel manner.” Id.,
2 § 2402(c). Two factors that the parole authority may consider in determining whether
3 such a circumstance exists are whether “[t]he offense was carried out in a manner that
4 demonstrates an exceptionally callous disregard for human suffering,” and whether “[t]he
5 motive for the crime is inexplicable or very trivial in relation to the offense.” Id.,
6 § 2402(c)(1)(D) & (E). In addition to these factors, the Board is to consider “all relevant,
7 reliable information available.” Id., § 2402(b).

8 It is now established under California law that the task of the Board is to determine
9 whether the prisoner would be a danger to society if he or she were paroled. See In re
10 Lawrence, 44 Cal. 4th 1181 (2008). Consequently, the constitutional “some evidence”
11 requirement is that there exists some evidence that the prisoner constitutes such a danger,
12 not simply that there exists some evidence of one or more of the factors listed in the
13 regulations as considerations appropriate to the parole determination. Id. at 1205–06.

14 In that regard, however, a parole authority’s continued reliance on the
15 circumstances of the commitment offense as the sole basis for denying parole can, over
16 time, raise due process concerns. See Biggs v. Terhune, 334 F.3d 910, 916 (9th Cir.
17 2003). “[I]n some cases, indefinite detention based solely on an inmate’s commitment
18 offense, regardless of the extent of his rehabilitation, will at some point violate due
19 process, given the liberty interest in parole that flows from the relevant California
20 statutes.” Irons v. Carey, 505 F.3d 846, 854 (9th Cir. 2007).

21 Here, the Court cannot find that the state court was unreasonable in concluding
22 there is some evidence to support the Board’s decision that petitioner would pose a
23 danger to society if released. The record contains some evidence to support the Board’s
24 finding, including the circumstances of the commitment offense, and petitioner’s behavior
25 in prison.

26 _____
27 (7) age is such that it reduces the possibility of recidivism; (8) plans for future including
28 development of marketable skills; and (9) institutional activities that indicate ability to
function within the law. Id. § 2402(d).

1 First, evidence exists to support the Board’s determination that the circumstances
2 of the commitment offense indicated petitioner presented a risk of danger to society if
3 released. The record contains evidence that the commitment offense was committed in an
4 “especially heinous, atrocious or cruel manner,” a circumstance tending to show parole
5 unsuitability, see 15 Cal. Code Regs. § 2402(c), in that, as the Board found, the offense
6 was carried out in a manner that was “especially [] vicious and brutal,” “dispassionate,”
7 and “which demonstrates [an] exceptionally insensitive disregard for human suffering[].”
8 (Ans. Ex. 3 at 53, 54.) Specifically, petitioner, while inebriated and without apparent
9 provocation, shot and killed the victim at close range and threatened the victim’s brother
10 when he endeavored to come to the victim’s aid as he lay dying on the floor. Under these
11 circumstances, the Board’s description of the offense as “dispassionate” and “especially
12 [] vicious and brutal” is not unreasonable. While at some point, the circumstances of the
13 commitment offense may cease to have probative value, they constitute, for purposes of
14 the Board’s determination in December 2003, some evidence of petitioner’s
15 dangerousness.

16 Additionally, petitioner’s institutional behavior supplied further evidence of
17 petitioner’s unsuitability for parole. While in prison, petitioner had committed at least
18 eight disciplinary infractions. (Ans. Ex. 7.) Also, the record supports the Board’s
19 determination that petitioner had not adequately participated in self-help programming.
20 Because the Board relied on this evidence in addition to the circumstances of the
21 commitment offense, petitioner’s claim that the Board’s decision violated his right to due
22 process by relying solely on the unchanging facts of the commitment offense is without
23 merit.

24 CONCLUSION

25 Because the record contains, at a minimum, some evidence to support the Board’s
26 determination that petitioner would present an unreasonable risk of danger to society if
27 released, the Court finds the state court’s determination was neither contrary to nor an
28 unreasonable application of clearly established Supreme Court precedent, nor can the

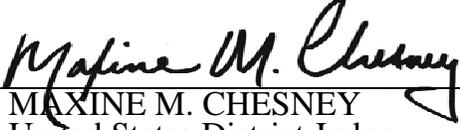
1 Court say it was based on an unreasonable determination of the facts.

2 Accordingly, the petition for a writ of habeas corpus is hereby DENIED.

3 The Clerk shall enter judgment in favor of respondent and close the file.

4 **IT IS SO ORDERED.**

5 DATED: February 11, 2010


MAXINE M. CHESNEY
United States District Judge

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