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

WILLIE E. TATUM,

No. C-08-0814 TEH (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS

BEN CURRY, Warden

Respondent.

_____ /

Pro se Petitioner Willie E. Tatum, a state prisoner incarcerated at the California Training Facility in Soledad, California, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging the California Board of Parole Hearings' ("BPH") September 15, 2005 decision to deny him parole, which, for the reasons that follow, the Court denies.

I

The facts of the crimes, as recited by BPH without objection from Petitioner, are as follows:

United States District Court
For the Northern District of California

1 On May 21, 1982, at about 2:00 A.M., female
2 victim[s] Becker and Simon . . . were forced off
3 the road by [a] van. [Petitioner] and [another
4 man] exited the van and approached the
5 victim[']s car. [Three more men remained in
6 the van.] [Petitioner] was armed with a loaded
7 revolver and forced his way into the passenger
8 side of the victim[']s vehicle. [One of the
9 other men] threatened the victims with a knife
10 and also forced his way into the victim[']s
11 vehicle. The victims screamed. [Both the
12 brother and boyfriend of one of the victims]
13 heard the scream and went out to investigate.
14 [Petitioner] pointed the revolver directly at
15 the m[en] and told them to get back. The two
16 men complied with [Petitioner's] order. The
17 victims were forced to drive away from their
18 location. [Petitioner] ordered Becker to follow
19 the van. They drove a short distance during
20 which [Petitioner] and [a co-perpetrator] robbed
21 the victims of their jewelry. They then ordered
22 the victims out of their car and into the
23 waiting van. Inside the van, [Petitioner]
24 ordered the victims to remove their clothes.
25 [One of the co-perpetrators] attempted to
26 unbutton [] Simon's pants. He stopped when he
27 was told to wait until they got on the freeway.
28 The police had been contacted by the victim's
boyfriend, and the van was identified. The
police spotted the van and a chase ensued. The
chase lasted a short time. The chase culminated
when the van crashed into a tree. The five
defendants then attempted to escape by running
out of the van. [Petitioner] and [one of the co-
perpetrators] were arrested immediately at the
scene. [The] remaining [co-perpetrators] were
arrested later near the scene of the crashed
van.

21 Doc. #4-1 at 43-44.

22 In 1982, Petitioner was sentenced to seven years to life
23 in state prison following his guilty plea to two counts of
24 kidnapping for the purpose robbery and an attached deadly weapon
25 enhancement. Doc. #4-1 at 36; Doc. #4-3 at 2. His minimum eligible
26 parole date was February 28, 1989. Doc. #4-1 at 36.

1 On September 15, 2005, Petitioner appeared before BPH for
2 his twelfth parole suitability hearing. Doc. #1 at 9. Before the
3 hearing concluded, Petitioner, who apparently exhibited disruptive
4 behavior at his prior parole suitability hearings, became
5 "combative" and "argumentative" and was removed. Doc. #4-2 at 26-
6 27. At the conclusion of the hearing, BPH found Petitioner "was not
7 yet suitable for parole and would pose an unreasonable risk of
8 danger to society or a threat to public safety if released from
9 prison." Doc. #4-2 at 40. BPH cited several reasons to support its
10 decision, including: (1) the "very callous" nature of the
11 commitment offense; (2) that there were multiple victims who were
12 subject to Petitioner's "abusive" threats; (3) Petitioner's
13 "unstable" social history, including his history of domestic
14 violence; and (4) his "inability to control his temper, as once
15 again was evidenced today at this hearing." Id. at 40-42, 44.
16 Petitioner's parole was deferred for two years. Id. at 40.

17 Petitioner unsuccessfully challenged BPH's decision in the
18 state superior and appellate courts. Doc. #4-3 at 2-4; Doc. #4-5 at
19 2. On December 12, 2007, the California Supreme Court summarily
20 denied Petitioner's Petition for Review. Doc. #4-7 at 2. This
21 federal Petition for a Writ of Habeas Corpus followed. Doc. #1.

22 Per order filed on July 2, 2008, the Court found
23 Petitioner's claim that BPH violated his due process rights, when
24 liberally construed, colorable under § 2254, and ordered Respondent
25 to show cause why a writ of habeas corpus should not be granted.
26 Doc. #3. Respondent has filed an Answer and Petitioner has filed a
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1 Traverse. Doc. ## 4 & 5.

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3 II

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

14 The writ may not be granted unless the state court's
15 adjudication of any claim on the merits: "(1) resulted in a
16 decision that was contrary to, or involved an unreasonable
17 application of, clearly established Federal law, as determined by
18 the Supreme Court of the United States; or (2) resulted in a
19 decision that was based on an unreasonable determination of the
20 facts in light of the evidence presented in the State court
21 proceeding." 28 U.S.C. § 2254(d). Under this deferential standard,
22 federal habeas relief will not be granted "simply because [this]
23 court concludes in its independent judgment that the relevant
24 state-court decision applied clearly established federal law
25 erroneously or incorrectly. Rather, that application must also be
26 unreasonable." Williams v. Taylor, 529 U.S. 362, 411 (2000).

1 federal court must ask whether the state court applied them
2 unreasonably to the facts. See Lockhart, 250 F.3d at 1232.

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4 III

5 Petitioner seeks federal habeas corpus relief from BPH's
6 September 15, 2005 decision finding him unsuitable for parole and
7 denying him a subsequent hearing for two years on the ground that
8 the decision does not comport with due process. Specifically,
9 Petitioner claims BPH's decision was not supported by "some
10 evidence." Doc. #1 at 10-11.

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12 A

13 Under California law, prisoners like Petitioner who are
14 serving indeterminate life sentences become eligible for parole
15 after serving minimum terms of confinement required by statute. In
16 re Dannenberg, 34 Cal.4th 1061, 1077-78 (2005). At that point,
17 California's parole scheme provides that BPH "shall set a release
18 date unless it determines that the gravity of the current convicted
19 offense or offenses, or the timing and gravity of current or past
20 convicted offense or offenses, is such that consideration of the
21 public safety requires a more lengthy period of incarceration."
22 Cal. Penal Code § 3041(b). Regardless of the length of the time
23 served, "a life prisoner shall be found unsuitable for and denied
24 parole if in the judgment of the panel the prisoner will pose an
25 unreasonable risk of danger to society if released from prison."
26 Cal. Code Regs. tit. 15, § 2402(a). In making this determination,

1 BPH must consider various factors, including the prisoner's social
2 history, past criminal history, and base and other commitment
3 offense, including behavior before, during and after the crime. See
4 Id. § 2402(b)-(d).

5 California's parole scheme "gives rise to a cognizable
6 liberty interest in release on parole" that cannot be denied without
7 adequate procedural due process protections. Sass v. California Bd.
8 of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); McQuillion v.
9 Duncan, 306 F.3d 895, 902 (9th Cir. 2002). It matters not that a
10 parole release date has not been set for the inmate because "[t]he
11 liberty interest is created, not upon the grant of a parole date,
12 but upon the incarceration of the inmate." Biggs v. Terhune, 334,
13 F.3d 910, 915 (9th Cir. 2003).

14 Petitioner's due process rights require that "some
15 evidence" support BPH's decision finding him unsuitable for parole.
16 Sass, 461 F.3d at 1125. This "some evidence" standard is
17 deferential, but ensures that "the record is not so devoid of
18 evidence that the findings of [the board] were without support or
19 otherwise arbitrary." Superintendent v. Hill, 472 U.S. 445, 457
20 (1985). Determining whether this requirement is satisfied "does not
21 require examination of the entire record, independent assessment of
22 the credibility of witnesses, or weighing of the evidence." Id. at
23 455. Rather, "the relevant question is whether there is any
24 evidence in the record that could support the conclusion reached by
25 the disciplinary board." Id. at 455-56.

26 Due process also requires that the evidence underlying
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1 BPH's decision have some indicium of reliability. Biggs, 334 F.3d
2 at 915; McQuillion, 306 F.3d at 904. Relevant to this inquiry is
3 whether the prisoner was afforded an opportunity to appear before,
4 and present evidence to, BPH. See Pedro v. Oregon Parole Bd., 825
5 F.2d 1396, 1399 (9th Cir. 1987). If BPH's determination of parole
6 unsuitability is to satisfy due process, there must be some reliable
7 evidence to support the decision. Rosas v. Nielsen, 428 F.3d 1229,
8 1232 (9th Cir. 2005).

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10 B

11 Petitioner claims BPH's finding that he was unsuitable for
12 parole violated his due process rights because it is not supported
13 by "some evidence." Doc. #1 at 10-11. Petitioner is mistaken.

14 As an initial matter, the Court notes the record shows
15 BPH afforded Petitioner and his counsel an opportunity to speak and
16 present Petitioner's case at the hearing, gave them time to review
17 documents relevant to Petitioner's case and provided them with a
18 reasoned decision in denying parole. Doc. #4-1 at 38-43; Doc. #4-2
19 at 40-46.

20 The record also shows BPH relied on several circumstances
21 tending to show unsuitability for parole and that these
22 circumstances formed the basis for its conclusion that Petitioner
23 was "not suitable for parole and would pose an unreasonable risk of
24 danger to society or a threat to public safety if released from
25 prison." Doc. #4-2 at 40; see Cal. Code Regs. tit. 15, § 2402(a)
26 (stating that a prisoner determined to be an unreasonable risk to
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1 society shall be denied parole).

2 First, regarding the commitment offense, BPH noted:

3 the offense was carried out in a very callous
4 manner. [] [T]here were multiple victims, and
5 the victims were abused during this offense
6 because they were robbed, and then they were
7 forced into a van with apparently four men,
8 [Petitioner] being one of them. And
9 [Petitioner], according to the victims and
10 corroborated by one of his crime partners, told
11 them to take off their clothes because he was
12 going to fuck them. Whether or not a hand was
13 laid on them, that was abusive. Those women
14 were terrified. There's no doubt about it.
15 This was a horrible crime. It was a crime where
16 these young women had absolutely no ability to
17 protect themselves. They were outnumbered, and
18 they were quite clearly going to be sexually
19 abused had not the police already been called
20 and proceeded on their behalf before they were
21 raped.

22 Doc. #4-2 at 41; see Cal. Code Regs. tit. 15, § 2402(c)(1)(A) & (C)
23 (listing that "multiple victims were attacked, injured or killed in
24 the same or separate incidents" and "the victim[s] [were] abused,
25 defiled or mutilated during or after the offense" as factors tending
26 to show the commitment offense demonstrates an unsuitability for
27 parole).

28 Second, BPH noted Petitioner's previous "history of law
enforcement contact related to domestic violence issues in
particular. . . . [Petitioner] indicated . . . today that there were
fights with the wife and he indicated to the probation officer in
discussing this arrest that he had hit her. Also, notably she
stabbed him." Doc. #4-2 at 41-42; see Cal. Code Regs. tit. 15, §
2402(c)(3) (listing "unstable social history" defined as "a history
of unstable or tumultuous relationships with others" as factors

1 tending to show unsuitability for parole).

2 Third, BPH noted Petitioner's inability to control his
3 anger and his resulting need for continued participation in self-
4 help so that he could "understand and cope with stress in a non-
5 destructive manner." Doc. #4-2 at 44.

6 BPH also considered other factors tending to support
7 suitability for parole including that Petitioner: (1) completed his
8 General Educational Development while incarcerated; (2) had a
9 marketable skill; (3) had been involved in substance abuse
10 programming since about 1989; and (4) planned on residing with his
11 mother and stepfather should he be paroled. Doc. #4-2 at 42-43.

12 The state superior court affirmed the decision of BPH to
13 deny Petitioner parole, finding that it was supported by "some
14 evidence." Doc. #4-3 at 2-4. The court noted:

15 there is some evidence to support the Board's
16 finding that multiple victims were attacked in
17 the same incident [Citation]. The Board also
18 found that the offense was carried out in 'a
19 very callous manner[.]' [Citation]. There is
20 some evidence to support the finding that the
21 offense was carried out in manner [sic] that
22 demonstrates an exceptionally callous disregard
23 for human suffering[.] [Citation]. An
24 'exceptionally callous disregard for human
25 suffering' means the offense in question must
26 have been committed in a more aggravated or
27 violent manner than that ordinarily shown in the
28 commission of that offense. [Citation]. Here,
the two female victims were outnumbered by five
male attackers. The victims were ordered to
take off their clothes and threatened with
sexual assault.

The record reflects that the Board relied
on additional factors in denying parole, and
there is some evidence to support that decision.
There is some evidence that petitioner is
unsuitable for parole due to his 'history of

1 unstable or tumultuous relationships with
2 others[.]' [Citation]. The record reflects
3 that the petitioner 'has a history of law
4 enforcement contact related to domestic violence
5 issues[.]' [Citation]. In determining
6 suitability, the Board may consider 'all
7 relevant, reliable information available[.]'
8 [Citation]. The record shows that petitioner's
9 behavior at the parole suitability hearing was
10 uncooperative and combative[.] [Citation].
11 There is some evidence to support the Board's
12 finding that Petitioner could benefit from
13 continuing to participate in self-help to
14 'address his anger issues and his inability to
15 control his temper' [citation] based on his
16 conduct at the parole suitability hearing.
17 Although the Board commended petitioner for the
18 positive aspects of his behavior, [it] found
19 that this positive behavior did not outweigh the
20 factors of unsuitability.

21 Doc. #4-3 at 3-4.

22 The state appellate court also affirmed the decision of
23 BPH to deny Petitioner parole, in an order that stated, in its
24 entirety:

25 The petition for writ of habeas corpus has
26 been read and considered.

27 The petition is denied. Denial of parole
28 may be based solely or in part upon the
particular circumstances of the inmate's
commitment offense. The record shows that the
particular circumstances of petitioner's
kidnapping-for-purpose-of-robbery offense
"exceed the minimum elements necessary to
sustain a conviction" of that offense in
numerous respects. (In re Dannenberg (2005) 34
Cal.4th 1061, 1070-1071, 1094-1095.) The record
also amply satisfies the applicable "some
evidence" standard with regard to the other
factors identified by the Board in determining
petitioner unsuitable for parole in 2005.

29 Doc. #4-5 at 2; see also Doc. #4-6 at 32. The state supreme court
30 summarily denied Petitioner's Petition for Review. Doc. #4-7 at 2.

1 him. Doc. #4-2 at 41-42. Based on these considerations, especially
2 when viewed in conjunction with the nature of the commitment
3 offense, which involved Petitioner and four other men kidnapping and
4 robbing two women and threatening them with sexual assault, this
5 Court cannot say that BPH's finding that Petitioner was unsuitable
6 for parole was "without support or otherwise arbitrary." See Hill,
7 472 U.S. at 457.

8 Given the evidence before the Court, BPH reasonably
9 concluded that Petitioner was not yet suitable for parole. See,
10 e.g., Rosas, 428 F.3d at 1232-33 (upholding denial of parole based
11 on gravity of offense and the petitioner's psychiatric reports
12 documenting his failure to complete programming while in prison);
13 Biggs, 334 F.3d at 916 (upholding denial of parole based on gravity
14 of offense and the petitioner's conduct prior to imprisonment);
15 Morales v. California Dep't. of Corrections, 16 F.3d 1001, 1005 (9th
16 Cir. 1994), rev'd on other grounds, 514 U.S. 499 (1995) (upholding
17 denial of parole based on the cruel nature of offense, the
18 petitioner's unstable and criminal history, and his need for further
19 psychiatric treatment). It is not up to this Court to "reweigh the
20 evidence." Powell v. Gomez, 33 F.3d 39, 42 (9th Cir. 1994).

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IV

For the reasons set forth above, the Petition for a Writ of Habeas Corpus is DENIED.

The Clerk shall terminate any pending motions as moot, enter judgment in favor of Respondent and close the file.

IT IS SO ORDERED.

DATED 07/30/09



THELTON E. HENDERSON
United States District Judge