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

OSVALDO ELIAS,

No. C 08-2798 TEH (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS; DENYING
CERTIFICATE OF APPEALABILITY

ROBERT AYERS, Warden,

Respondent.

_____ /

Pro se Petitioner Osvaldo Elias, a state prisoner incarcerated at San Quentin State Prison, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging the California Board of Parole Hearings' ("BPH") August 7, 2007 decision to deny him parole. Doc. #1. On January 9, 2009, the Court issued an Order to Show Cause why the writ should not be granted. Doc. #3. On March 3, 2009, Respondent filed an Answer. Doc. #4. On April 3, 2009, Petitioner filed a Traverse. Doc. #5.

After the matter was submitted, on April 22, 2010, the Ninth Circuit issued its decision in Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc), which addressed important issues

1 relating to federal habeas review of BPH decisions denying parole to
2 California state prisoners. On May 3, 2010, the Court ordered the
3 parties to file supplemental briefing explaining their views of how
4 the Hayward en banc decision applies to the facts presented in
5 Petitioner's challenge to BPH's decision denying him parole. Doc.
6 #6. Respondent filed supplemental briefing on May 25, 2010;
7 Petitioner filed his on June 22, 2010. Doc. ## 7 & 8.

8 Having considered all of the papers filed by the parties,
9 the Court DENIES the Petition.

10
11 I

12 The following summary of the facts of Petitioner's
13 commitment offense is taken from the probation officer's report as
14 read at Petitioner's August 7, 2007 parole suitability hearing:

15 On October 3, 1991, the Oakland Police
16 Department responded to a report of a drive-by
17 shooting at the corner of 94th Avenue and A
18 Street. Officers found a 14-year-old teenager,
19 Adolpho Espinoza on the ground suffering from
20 three gunshot wounds. The victim was
21 transported to the county hospital where he died
22 the next day. It appears that the victim was
23 standing on the corner when a large, dark-
24 colored sedan drove by with the occupants,
25 shooting at the victim. The follow-up
26 investigation points to three young men being
27 involved in this offense, Cesar Estrada is
28 alleged to have been the driver of the car which
29 contained Jose Cervantes and [Petitioner]. It
30 is Cervantes and [Petitioner] who are alleged to
31 have fired their separate guns at the victim who
32 was killed.

33 Doc. #4-1 at 40-41.

34 Petitioner was convicted of second degree murder with an

1 attached firearm enhancement and was sentenced to sixteen years-to-
2 life in state prison. Doc. #4-1 at 30. His life term began on May
3 12, 1997; his minimum eligible parole date was August 4, 2003. Id.

4 On August 7, 2007, Petitioner appeared before BPH for his
5 third parole suitability hearing. Doc. #4-2 at 58. At that
6 hearing, BPH found Petitioner was not yet suitable for parole,
7 expressing concern over the commitment offense, Petitioner's
8 unstable family history, insufficient participation in self-help
9 programs while in prison, lack of sufficient insight into his gang-
10 related activities, his prison disciplinary record that included a
11 recent 128 violation for disrespecting prison staff, and the lack of
12 completely supportive findings by prison doctors with respect to his
13 potential to engage in future violent acts. See Doc. #4-5 at 74.

14 Petitioner unsuccessfully challenged BPH's decision in the
15 state superior and appellate courts. Doc. #4-5 at 74; Doc. #4-6 at
16 2. On April 23, 2008, the California Supreme Court summarily denied
17 Petitioner's petition for review. Doc. #4-8 at 2. This federal
18 Petition for a Writ of Habeas Corpus followed. Doc. #1.

19
20 II

21 In Hayward, the Ninth Circuit explained the law in
22 California as it relates to parole suitability determinations:

23 The California parole statute provides that
24 the Board of Prison Terms "shall set a release
25 date unless it determines that the gravity of
26 the current convicted offense or offenses, or
27 the timing and gravity of current or past
28 convicted offense or offenses, is such that
consideration of the public safety requires a
more lengthy period of incarceration for this

1 individual." The crucial determinant of whether
2 the prisoner gets parole in California is
"consideration of the public safety."

3 In California, when a prisoner receives an
4 indeterminate sentence of fifteen years to life,
5 the "indeterminate sentence is in legal effect a
6 sentence for the maximum term, subject only to
7 the ameliorative power of the [parole authority]
8 to set a lesser term." Under the California
9 parole scheme, the prisoner has a right to a
10 parole hearing and various procedural guarantees
11 and rights before, at, and after the hearing; a
12 right to subsequent hearings at set intervals if
the Board of Prison Terms turns him down for
parole; and a right to a written explanation if
the Governor exercises his authority to overturn
the Board of Prison Terms' recommendation for
parole. Under California law, denial of parole
must be supported by "some evidence," but review
of the [decision to deny parole] is "extremely
deferential."

13 Hayward, 603 F.3d at 561-62 (footnotes and citations omitted).

14 The court further explained that:

15 [s]ubsequent to Hayward's denial of parole, and
16 subsequent to our oral argument in this case,
17 the California Supreme Court established in two
18 decisions, In re Lawrence . . . and In re
19 Shaputis, . . . that as a matter of state law,
20 "some evidence" of future dangerousness is
indeed a state sine qua non for denial of parole
21 in California. We delayed our decision in this
22 case so that we could study those decisions and
the supplemental briefs by counsel addressing
23 them. As a matter of California law, "the
24 paramount consideration for both the Board [of
25 Prison Terms] and the Governor under the
governing statutes is whether the inmate
26 currently poses a threat to public safety."
27 . . . There must be "some evidence" of such a
threat, and an aggravated offense "does not, in
28 every case, provide evidence that the inmate is
a current threat to public safety." . . . The
prisoner's aggravated offense does not establish
current dangerousness "unless the record also
establishes that something in the prisoner's
pre- or post-incarceration history, or his or
her current demeanor and mental state" supports

1 the inference of dangerousness. . . . Thus, in
2 California, the offense of conviction may be
3 considered, but the consideration must address
the determining factor, "a current threat to
public safety."

4 Hayward, 603 F.3d at 562 (footnotes and citations omitted).

5 After providing this background on California law as it
6 applies to parole suitability determinations, the court then
7 explained the role of a federal district court charged with
8 reviewing the decision of either the BPH or the governor in denying
9 a prisoner parole. According to the Ninth Circuit, this Court must
10 decide whether a decision "rejecting parole was an 'unreasonable
11 application' of the California 'some evidence' requirement, or was
12 'based on an unreasonable determination of the facts in light of the
13 evidence.'" Hayward, 603 F.3d at 562-63 (citations omitted); see
14 also Cooke v. Solis, 606 F.3d 1206, 1208, n. 2 & 1213 (9th Cir.
15 2010) (applying Hayward and explicitly rejecting the state's
16 argument that "the constraints imposed by AEDPA preclude federal
17 habeas relief" on petitioner's claim; noting that in Hayward, the
18 court "held that due process challenges to California courts'
19 application of the 'some evidence' requirement are cognizable on
20 federal habeas review under AEDPA").

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22 III

23 When assessing whether California's parole board's
24 suitability determination was supported by "some evidence," this
25 Court's analysis is framed by the state's "regulatory, statutory and
26 constitutional provisions that govern parole decisions in
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1 California." Cooke, 606 F.3d at 1213 (citing In re Rosenkrantz, 29
2 Cal. 4th 616 (2002)); see Hayward, 603 F.3d at 561-62. Under
3 California law, prisoners serving indeterminate life sentences, like
4 Petitioner, become eligible for parole after serving minimum terms
5 of confinement required by statute. In re Dannenberg, 34 Cal. 4th
6 1061, 1069-70 (2005). Regardless of the length of the time served,
7 "a life prisoner shall be found unsuitable for and denied parole if
8 in the judgment of the panel the prisoner will pose an unreasonable
9 risk of danger to society if released from prison." Cal. Code Regs.
10 tit. 15, § 2402(a). In making this determination, BPH must consider
11 various factors, including the prisoner's social history, past and
12 present mental state, past criminal history, the base and other
13 commitment offenses, including behavior before, during and after the
14 crime, past and present attitude toward the crime and any other
15 information that bears on the prisoner's suitability for release.
16 See Cal. Code Regs. tit. 15, § 2402(b)-(d).

17 In considering the commitment offense, BPH must determine
18 whether "the prisoner committed the offense in an especially
19 heinous, atrocious or cruel manner." Cal. Code Regs. tit. 15, §
20 2402(c)(1). The factors to be considered in making that
21 determination include: "(A) Multiple victims were attacked, injured
22 or killed in the same or separate incidents; (B) The offense was
23 carried out in a dispassionate and calculated manner, such as an
24 execution-style murder; (C) The victim was abused, defiled or
25 mutilated during or after the offense; (D) The offense was carried
26 out in a manner which demonstrates an exceptionally callous
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1 disregard for human suffering; (E) The motive for the crime is
2 inexplicable or very trivial in relation to the offense." Id.

3 According to the California Supreme Court, "the core
4 statutory determination entrusted to the Board and the Governor [in
5 determining a prisoner's parole suitability] is whether the inmate
6 poses a current threat to public safety" In re Lawrence, 44
7 Cal. 4th 1181, 1191 (2008). And, "the core determination of 'public
8 safety' under the statute and corresponding regulations involves an
9 assessment of an inmate's current dangerousness." Id. at 1205
10 (emphasis in original) (citing Rosenkrantz, 29 Cal. 4th 616 &
11 Dannenberg, 34 Cal. 4th 1061). The court further explained that:

12 a parole release decision authorizes the Board
13 (and the Governor) to identify and weigh only
14 the factors relevant to predicting "whether the
15 inmate will be able to live in society without
16 committing additional antisocial acts." . . .
17 These factors are designed to guide an
18 assessment of the inmate's threat to society, if
19 released, and hence could not logically relate
20 to anything but the threat currently posed by
21 the inmate.

22 Lawrence, 44 Cal. 4th at 1205-06 (citations omitted). The relevant
23 inquiry, therefore, is:

24 whether the circumstances of the commitment
25 offense, when considered in light of other facts
26 in the record, are such that they continue to be
27 predictive of current dangerousness many years
28 after commission of the offense. This inquiry
is, by necessity and by statutory mandate, an
individualized one, and cannot be undertaken
simply by examining the circumstances of the
crime in isolation, without consideration of the
passage of time or the attendant changes in the
inmate's psychological or mental attitude.

In re Shaputis, 44 Cal. 4th 1241, 1254-55 (2008).

1 demonstrates that there was certainly some
2 evidence, including, but not limited to the
3 committing offense, Petitioner's unstable family
4 history, Petitioner's insufficient participating
5 in self help programs, Petitioner's lack of
6 sufficient insight into his gang related
7 activities, Petitioner's prison disciplinary
8 record including a recent 128 violation for
9 disrespecting prison staff, and the lack of
10 completely supportive findings by Doctors
11 Kornberg and Starrett. There is nothing in the
12 record indicating that the Board's decision was
13 arbitrary or capricious, nor that Petitioner's
14 . . . due process rights were violated. Thus,
15 Petitioner has failed to meet his burden of
16 sufficiently proving or supporting the
17 allegations that serve as the basis for habeas
18 relief.

11 Doc. #4-5 at 74. After careful review of the law and the evidence,
12 and as set forth below, this Court cannot say that the state court's
13 approval of BPH's decision to deny Petitioner parole was an
14 unreasonable application of the California "some evidence" standard,
15 nor that it was based on an unreasonable determination of the facts
16 in light of the evidence. See Hayward, 603 F.3d at 563.

17 As an initial matter, the record shows that, at
18 Petitioner's August 7, 2007 parole suitability hearing, BPH afforded
19 Petitioner and his counsel an opportunity to speak and present
20 Petitioner's case, gave them time to review documents relevant to
21 Petitioner's case and provided them with a reasoned decision in
22 denying parole. Doc. #4-1 at 35-40; Doc. #4-2 at 58-71. The record
23 also shows that BPH relied on several circumstances tending to show
24 unsuitability for parole and that these circumstances formed the
25 basis for its conclusion that Petitioner was not yet suitable for
26 parole and would pose a current unreasonable risk of danger to
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1 society or threat to public safety if released from prison. Doc.
2 #4-2 at 60-70; see Lawrence, 44 Cal. 4th at 1191, 1205; Cal. Code
3 Regs. tit. 15, § 2402(a) (stating that a prisoner determined to be
4 an unreasonable risk to society shall be denied parole).

5 In its decision denying Petitioner parole, BPH
6 acknowledged Petitioner's "very strong and somewhat widespread
7 family support," but also noted that his parole plans "lack[ed]
8 specificity, particularly with [respect to] employment." Doc. #4-2
9 at 62-63; see id. at 27-29. BPH observed that Petitioner had an
10 "unstable social history," specifically noting his "gang affiliation
11 since he was 13 years of age." Id. at 63; see Doc. #4-1 at 48-49.
12 BPH further stated that Petitioner

13 was a drop out in school and living at home at
14 this time. And wasn't working, was getting
15 more involved in the gang, had gotten his young
16 girlfriend pregnant when she was approximately
17 15, so was basically a father when he was around
18 16 years of age when this life crime occurred.
19 And basically, he was living with his girlfriend
20 and his baby with no viable means of support.

21 Doc. #4-2 at 63. With respect to Petitioner's institutional
22 behavior, BPH stated that Petitioner "has not sufficiently
23 participated in beneficial self-help and that his misconduct
24 includes one 128 counseling chrono that he incurred in April of 2006
25 for disrespect towards staff." Id. BPH also noted that both
26 Petitioner's April 2005 and April 2007 psychological evaluations
27 were "not totally supportive of release" and stated that the
28 psychologist who evaluated Petitioner in April 2007 observed that
Petitioner had only just "begun to program beginning in the early

1 2000's [sic] and [that he needed] to continue along this path." Id.
2 at 63-64; see id. at 9-16. BPH also quoted from Petitioner's April
3 2005 evaluation, in which the doctor observed, "[t]he lack of a
4 relationship between [Petitioner] and the victim suggests a random
5 nature to his violent act which may . . . increase [the] risk of
6 dangerousness." Id. at 64; see id. at 16.

7 Regarding the commitment offense, BPH stated that
8 Petitioner:

9 did commit the offense in a very cruel manner,
10 specifically, he made the choice to arm himself
11 with a loaded weapon, get in that car, and go
12 ahead and along with the driver and his other
13 crime partner. He also made the choice to shoot
14 that weapon, ended up taking [the] life of a 14-
15 year-old kid and then took off, and then
16 basically, I believe he was at large for close
17 to a year. [The crime] was carried out in a
18 very calculated manner, when, again, these three
19 . . . affiliated gang members decided to go into
20 that area where these rival gang people lived
21 and specifically wanted to hurt somebody all to
22 get even. It was a gang retribution on a lot of
23 different levels, so it really shows a total
24 disregard for human life or human suffering.
25 They didn't think in terms that somebody could
26 actually lose their life. They were just going
27 to hurt somebody.

19 Doc. #4-2 at 66-67.

20 BPH concluded the hearing by recommending that Petitioner
21 remain disciplinary free, continue to participate actively in self-
22 help programming, including being able to tell BPH at subsequent
23 hearings how the programming has benefitted Petitioner, and
24 cooperate with clinicians in completing an upgraded psychological
25 evaluation. Doc. #4-2 at 71.

26 Based on the entire body of evidence presented at
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1 Petitioner's August 7, 2007 parole suitability hearing, the Court
2 cannot say that the state court's approval of BPH's decision to deny
3 Petitioner parole was an unreasonable application of the California
4 "some evidence" standard, nor that it was based on an unreasonable
5 determination of the facts in light of the evidence. See Hayward,
6 603 F.3d at 563. Petitioner therefore is not entitled to federal
7 habeas relief.

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10 For the foregoing reasons, the Petition for a Writ of
11 Habeas Corpus is DENIED. Further, a certificate of appealability is
12 DENIED. See Hayward, 603 F.3d at 554-55. Petitioner has failed to
13 make "a substantial showing of the denial of a constitutional
14 right." Id. (citing 28 U.S.C. § 2253(c)(2)). Nor has Petitioner
15 demonstrated that his claim is "debatable among reasonable jurists."
16 See Hayward, 603 F.3d at 555.

17 The Clerk of Court shall terminate all pending motions as
18 moot, enter judgment in accordance with this Order and close the
19 file.

20
21 IT IS SO ORDERED.

22
23 DATED 08/12/10



THELTON E. HENDERSON
United States District Judge

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