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E-Filed 10/15/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DAVID THAYNE SMITH,

No. C 08-4620 RS (PR)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

v.

BEN CURRY, Warden,

Respondent.

INTRODUCTION

This is a federal habeas corpus action filed by a *pro se* state prisoner pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is DENIED.

BACKGROUND

In 1994, a Los Angeles Superior Court jury convicted petitioner of second degree murder. The trial court sentenced petitioner to fifteen years-to-life, plus one year, in state prison. In 2006, the Board of Parole Hearings (“Board”) found petitioner unsuitable for parole on grounds that he “would pose an unreasonable risk of danger to society or a threat to public safety if released from prison.” (Pet., Ex. A at 99.) In response to the Board’s decision, petitioner sought, though was denied, relief on state collateral review. (Pet. at 4–5.)

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ORDER DENYING PETITION

1 This federal habeas petition followed.

2 In reaching its decision, the Board considered the facts of the commitment offense. In
3 October 1992, petitioner and his friend Dan Miller shot and killed Drake Hanson in what the
4 Board described as an “execution style murder,” each naming the other as the actual shooter.
5 Hanson, petitioner’s employer and friend, was shot five times with his back to the shooter,
6 and was wounded in his head, back, and upper torso. (*Id.* at 16–22, 24, 25). Hanson’s
7 wallet, keys, identification cards, and address book were taken from the body, and later
8 found in petitioner’s storage unit, as was the victim’s computer equipment. (*Id.* at 21 & 38.)
9 The three men had been committing burglaries together in the months before the shooting,
10 and drove to a remote area of Los Angeles one night in search of a construction site to rob.
11 (*Id.* at 22–24, 34–35.) The three allegedly got lost, and exited the vehicle for a time, during
12 which Hanson was shot. (*Id.* at 24.) Petitioner admits that he was near the crime scene, but
13 asserts that he had no part in the plan to kill Hanson, and that he was 75 yards from the scene
14 urinating when the shooting occurred. (*Id.* at 24 & 30.)

15 The Board felt that petitioner’s expressions of remorse “sounded very canned.” As
16 the presiding commissioner observed: “I didn’t really get any sincerity from you whatsoever
17 and the fact is, you knew this person. You knew him. I mean he was a friend. You testified
18 to that.” (*Id.* at 107.) The Board was also troubled by the fact that the crime looked
19 “extremely well-planned” in that the victim was shot in a remote area in Los Angeles
20 County. (*Id.*)

21 In addition to the circumstances of the commitment offense, the Board cited his
22 institutional and parole plans as factors in its decision. Although petitioner had no prior
23 criminal history, *id.* at 40, has committed no disciplinary infractions while in prison, *id.* at 56,
24 and, according to 2002 psychological report, presents a low risk of future violence, *id.* at
25 71–72, the Board was troubled by petitioner’s lack of adequate parole plans, particularly his
26 lack of firm job offers, a great concern because petitioner had participated in the commitment
27 offense because he needed money. Though his mother, who lives in Oklahoma and has been
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1 too unwell to travel to California to visit her son, had offered him a place to stay after
2 release, *id.* at 42–43, the Board and petitioner regarded such arrangement as a temporary
3 solution, *id.* at 104–05. Petitioner’s sister, who resides in California, did offer petitioner a
4 place to live, though it appears that petitioner has not secured any job offers in the area in
5 which she lives. (*Id.* at 47–48.) In fact, petitioner had not received any job offers in
6 California,¹ the state where he would be paroled, but rather thought he would be able to
7 develop job offers through the marketing of his office and cabinet mill work. (*Id.* at 106.)
8 These vague plans concerned the Board a great deal:

9 [P]rior to your incarceration, it appeared that you were — you know, you were
10 taking acting classes. You weren’t really employed. You got employed but
11 into a situation, which was completely illegal. So the likelihood for that
occurring again if you didn’t have support on the outside is what we’re
concerned about.

12 (*Id.* at 106.) In light of all these factors, the Board concluded that petitioner posed an
13 unreasonable threat to public safety and denied him parole. (*Id.* at 99.) As grounds for
14 federal habeas relief, petitioner alleges that there was no evidence that petitioner poses a
15 current risk to public safety if released on parole.

16 STANDARD OF REVIEW

17 This court may entertain a petition for writ of habeas corpus “in behalf of a person in
18 custody pursuant to the judgment of a State court only on the ground that he is in custody in
19 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).
20 The petition may not be granted with respect to any claim that was adjudicated on the merits
21 in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that
22 was contrary to, or involved an unreasonable application of, clearly established Federal law,
23 as determined by the Supreme Court of the United States; or (2) resulted in a decision that
24 was based on an unreasonable determination of the facts in light of the evidence presented in
25 the State court proceeding.” 28 U.S.C. § 2254(d).

26
27 ¹ Petitioner, who has experience in carpentry and once had a contractor’s license, was
28 offered a job in woodworking in Oklahoma. (*Id.* at 45, 46.)

1 dangerousness “unless the record also establishes that something in the prisoner’s pre- or
2 post-incarceration history, or his or her current demeanor and mental state” supports an
3 inference of dangerousness. *Id.* (citing *In re Lawrence*, 44 Cal. 4th 1181, 1214 (Cal. 2008).)

4 Here, the record shows that there was “some evidence” to support the state court’s
5 approval of the Board’s parole denial. First, the circumstances surrounding the commitment
6 offense suggest that petitioner is capable of coolly committing acts of planned violence for
7 trivial reasons. Petitioner and Miller drove Hanson to a remote area of Los Angeles in
8 conjunction with a plan to steal from a construction site, and shot him execution-style in the
9 back of the head and chest. Second, the record establishes that petitioner’s post-conviction
10 history supports an inference of current dangerousness — in particular his lack of remorse
11 for the death of his friend, which may indicate a lack of insight into his offense, and, more
12 importantly, his rather vague parole plans. The insubstantiality of his parole plans raises a
13 particular concern in that it was petitioner’s lack of lawful employment that drove him to
14 commit crimes. It is reasonable to infer from this record of past violence and failure to plan
15 adequately for his future that, if released, petitioner currently poses an unreasonable risk of
16 danger to society, or a threat to public safety. In sum, the state court’s approval of the
17 Board’s decision, therefore, was not an “unreasonable application” of the California “some
18 evidence” requirement, nor was it “based on an unreasonable determination of the facts in
19 light of the evidence.”

20 CONCLUSION

21 The state court’s denial of petitioner’s claims did not result in a decision that was
22 contrary to, or involved an unreasonable application of, clearly established federal law, nor
23 did it result in a decision that was based on an unreasonable determination of the facts in
24 light of the evidence presented in the state court proceeding. Accordingly, the petition is
25 DENIED.

26 A certificate of appealability will not issue. Petitioner has not shown “that jurists of
27 reason would find it debatable whether the petition states a valid claim of the denial of a
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1 constitutional right and that jurists of reason would find it debatable whether the district court
2 was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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

4 **IT IS SO ORDERED.**

5 DATED: October 14, 2010


6 RICHARD SEEBORG
United States District Judge

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