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6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8

9 MELCHOR BARAJAS,

No. C 08-4911 SI (pr)

10 Petitioner,

**ORDER DENYING HABEAS
PETITION**

11 v.

12 BEN CURRY, warden,

13 Respondent.
14 _____/

15 **INTRODUCTION**

16 Melchor Barajas, an inmate at the Correctional Training Facility in Soledad, filed this pro
17 se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. This matter is now before the
18 court for consideration of the merits of the pro se habeas petition and respondent's motion to
19 dismiss the petition as moot. For the reasons discussed below, the petition and the motion to
20 dismiss will be denied.

21 **BACKGROUND**

22 Barajas was convicted in Los Angeles County Superior Court of attempted murder in
23 1990 with enhancements for use of a firearm and for discharging a firearm from a vehicle. He
24 was sentenced to life in prison with the possibility of parole, plus a total of seven years for the
25 enhancements. His habeas petition does not challenge his conviction but instead challenges an
26 October 24, 2006 decision by the Board of Parole Hearings ("BPH") that found him not suitable
27 for parole.

28 The BPH identified the circumstances of the commitment offense, the need for additional

1 programming, and a concern about the psychological report as the reasons for finding him
2 unsuitable.

3 Barajas sought relief in the California courts. The Los Angeles County Superior Court
4 denied his petition for writ of habeas corpus in two reasoned decisions. The California Court
5 of Appeal and California Supreme Court summarily denied his petitions for writ of habeas
6 corpus.

7 Barajas then filed his federal petition for writ of habeas corpus. The court found
8 cognizable his claim that 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. Respondent filed
10 an answer and Barajas filed a traverse.

11 12 **JURISDICTION AND VENUE**

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

17 18 **EXHAUSTION**

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

25 26 **STANDARD OF REVIEW**

27 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
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1 custody pursuant to the judgment of a State court only on the ground that he is in custody in
2 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The
3 petition may not be granted with respect to any claim that was adjudicated on the merits in state
4 court unless the state court's adjudication of the claim: "(1) resulted in a decision that was
5 contrary to, or involved an unreasonable application of, clearly established Federal law, as
6 determined by the Supreme Court of the United States; or (2) resulted in a decision that was
7 based on an unreasonable determination of the facts in light of the evidence presented in the
8 State court proceeding." 28 U.S.C. § 2254(d); see Williams (Terry) v. Taylor, 529 U.S. 362,
9 409-13 (2000). Section 2254(d) applies to a habeas petition from a state prisoner challenging
10 the denial of parole. See Hayward v. Marshall, 603 F.3d 546, 563 (9th Cir. 2010) (en banc);
11 Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126-27 (9th Cir. 2006).

12 13 **DISCUSSION**

14 A. State Law Standards For Parole Those Convicted Of Attempted Murder

15 California uses indeterminate sentences for most non-capital murders and attempted
16 murders. For attempted first degree murders, the term is life imprisonment with the possibility
17 of parole. Cal. Penal Code §§ 190, 664; see generally In re Dannenberg, 34 Cal. 4th 1061, 1078
18 (Cal. 2005).

19 A BPH panel meets with an inmate one year before the prisoner's minimum eligible
20 release date "and shall normally set a parole release date. . . . The release date shall be set in a
21 manner that will provide uniform terms for offenses of similar gravity and magnitude in respect
22 to their threat to the public, and that will comply with the sentencing rules that the Judicial
23 Council may issue and any sentencing information relevant to the setting of parole release
24 dates." Cal. Penal Code § 3041(a). Significantly, that statute also provides that the panel "shall
25 set a release date unless it determines that the gravity of the current convicted offense or
26 offenses, or the timing and gravity of current or past convicted offense or offenses, is such that
27 consideration of the public safety requires a more lengthy period of incarceration for this
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1 individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code
2 § 3041(b). The statutory scheme places individual suitability for parole above a prisoner's
3 expectancy in early setting of a fixed date designed to ensure term uniformity. Dannenberg, 34
4 Cal. 4th at 1070-71.

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 offenses
9 of similar gravity and magnitude with respect to the threat to the public."¹ The regulation also
10 provides that "[t]he panel shall first determine whether the life prisoner is suitable for release on
11 parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and
12 denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of
13 danger to society if released from prison." 15 Cal. Code Regs. § 2402(a). The panel may
14 consider all relevant and reliable information available to it. 15 Cal. Code Regs. § 2402(b).
15 These regulations cover both murders and attempted murders as to which the perpetrator has
16 been sentenced to life imprisonment pursuant to California Penal Code § 664. See 15 Cal. Code
17 Regs. § 2400.

18 The "Penal Code and corresponding regulations establish that the fundamental
19 consideration in parole decisions is public safety . . . [T]he core determination of 'public safety'
20 under the statute and corresponding regulations involves an assessment of an inmate's current
21 dangerousness." In re Lawrence, 44 Cal. 4th 1181, 1205 (Cal. 2008)(emphasis in source).

22
23 ¹The listed circumstances tending to show unsuitability for parole are the nature of the
24 commitment offense, i.e., whether the prisoner committed the offense in "an especially heinous,
25 atrocious or cruel manner;" the prisoner has a previous record of violence; the prisoner has an
26 unstable social history, the prisoner previously engaged in a sadistic sexual offense, the prisoner
27 has a lengthy history of severe mental problems related to the offense; and negative institutional
28 behavior. 15 Cal. Code Regs. § 2402(c). The listed circumstances tending to show suitability
for parole are the absence of a juvenile record, stable social history, signs of remorse, a stressful
motivation for the crime, whether the prisoner suffered from battered woman's syndrome, lack
of criminal history, the present age reduces the probability of recidivism, the prisoner has made
realistic plans for release or developed marketable skills, and positive institutional behavior. 15
Cal. Code Regs. § 2402(d).

1 Where "evidence of the inmate's rehabilitation and suitability for parole under the governing
2 statutes and regulations is overwhelming, the only evidence related to unsuitability is the gravity
3 of the commitment offense, and that offense is both temporally remote and mitigated by
4 circumstances indicating the conduct is unlikely to recur, the immutable circumstance that the
5 commitment offense involved aggravated conduct does not provide 'some evidence'
6 inevitably supporting the ultimate decision that the inmate remains a threat to public safety."
7 Id. at 1191 (emphasis in source).

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9 B. Federal Habeas Relief On Parole Denial Claims

10 The U. S. Constitution's Due Process Clause does not itself provide state prisoners with
11 a federal right to release on parole. Hayward v. Marshall, 603 F.3d 546, 562 (9th Cir. 2010) (en
12 banc). The substantive law of a state might create a right to release on parole, however. See id.
13 at 555, 559. Although Hayward purported not to reach the question whether a California's
14 substantive law created a federally protected liberty interest, see id. at 562, later cases from the
15 Ninth Circuit have said or assumed it does. See Pearson v. Muntz, 606 F.3d 606, 609 (9th Cir.
16 2010) ("state-created rights may give rise to liberty interests that may be enforced as a matter
17 of federal law. . . . By holding that a federal habeas court may review the reasonableness of the
18 state court's application of the California 'some evidence' rule, Hayward necessarily held that
19 compliance with the state requirement is mandated by federal law, specifically the Due Process
20 Clause."); Cooke v. Solis, 606 F.3d 1206, 1213 (9th Cir. 2010) ("In Hayward, we held that due
21 process challenges to California courts' application of the 'some evidence' requirement are
22 cognizable on federal habeas review under AEDPA"); id. ("we must examine the nature and
23 scope of the federally enforceable liberty interest created by California's 'some evidence'
24 requirement"); see also Pirtle v. California Board of Prison Terms, 611 F.3d 1015, 1020 (9th Cir.
25 2010) ("California's parole scheme gives rise to a cognizable liberty interest in release on
26 parole." McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir 2002). That liberty interest
27 encompasses the state-created requirement that a parole decision must be supported by 'some
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1 evidence' of current dangerousness. Hayward [603 F.3d at 562-63.]") Hayward's application
2 and these later cases make it clear that in the Ninth Circuit there is federal habeas relief available
3 under § 2254 for California prisoners denied parole without sufficient evidence, although it now
4 appears that the emphasis has shifted from § 2254(d)(1) to § 2254(d)(2).

5 A federal district court reviewing a California parole decision "must determine 'whether
6 the California judicial decision approving the governor's [or the Board's] decision rejecting
7 parole was an 'unreasonable application' of the California 'some evidence' requirement, or was
8 'based on an unreasonable determination of the facts in light of the evidence.'" Hayward, 603
9 F.3d at 562-63 (quoting 28 U.S.C. § 2254(d)(1)-(2)). That requirement was summarized in
10 Hayward as follows:

11 As a matter of California law, "the paramount consideration for both the Board and the
12 Governor under the governing statutes is whether the inmate currently poses a threat to
13 public safety." There must be "some evidence" of such a threat, and an aggravated
14 offense "does not, in every case, provide evidence that the inmate is a current threat to
15 public safety." The prisoner's aggravated offense does not establish current
16 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
the inference of dangerousness. [¶] Thus, in California, the offense of conviction may
be considered, but the consideration must address the determining factor, "a current threat
to public safety."

17 Hayward, 603 F.3d at 562 (footnotes omitted) (quoting Lawrence, 44 Cal. 4th. at 1210, 1213-
18 14); see also Cooke, 606 F.3d at 1216 (describing California's "some evidence" requirement).

19 When a federal court considers a habeas case directed to a parole decision, the
20 "necessary subsidiary findings" and the "ultimate 'some evidence' findings" by the state courts
21 are factual findings – and thus are reviewed by the federal court under 28 U.S.C. § 2254(d)(2)
22 for whether the decision was "based on an unreasonable determination of the facts in light of the
23 evidence." Cooke, 606 F.3d at 1214 (citing Hayward, 603 F.3d at 563).

24 C. Barajas' Case

25 1. His Circumstances

26 Commitment offense: One of the BPH commissioners read an excerpt from the probation
27 officer's report that described the shooting that led to Barajas' conviction:
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1 The inmate [was] seated in the rear of a vehicle [and] the crime partner [was] the driver
2 of the vehicle. They passed 10844 Wygand where victims 1 and 2 were standing and the
3 inmate fired six shots at the victim striking both victims. A police vehicle heard the shots
4 and observed the vehicle speeding away from the location. Prior to the officer stopping
5 the vehicle the gun was thrown from the car to the ground next to the vehicle. The
6 inmate admits to the officers that he did the shooting because they were shot at earlier by
7 rival gang members from the Colonial Watts. Victim 1 sustained a gunshot wound to his
8 back. . . . Victim 2 sustained a gunshot wound to his left hip and left side.

9 October 24, 2006 BPH hearing reporter's transcript ("RT") at 10-11. One of the victims was
10 paralyzed as a result of being shot. RT 38, 46. There were a few other people standing with the
11 two victims in the group at which Barajas fired the gun. RT 39.

12 Barajas denied that he was in a gang, although the people he was with were gang
13 members. RT 11. Barajas claimed that the gang members were talking to his neighbor, and then
14 his neighbor told him they were going to get some beer, so Barajas went with them. RT 12. On
15 the way, he found out the gang members were going to go looking for someone with whom they
16 had a problem. When they arrived at that location, they were shot at by rival gang members.
17 Barajas said his group then retrieved a gun to shoot back at them. RT 12. The persons he shot
18 at were not armed at the time and he was "not sure" whether they were the men that shot at his
19 acquaintances. RT 36. Barajas said he originally wasn't supposed to be the shooter, but the
20 weapon was handed to him and he fired the shots. RT 12-13. (Elsewhere he said he "made the
21 decision to grab" the gun. RT 41.) When asked how he felt about shooting the victims, Barajas
22 said he felt "embarrassed" and "pretty bad for these men." RT 13. When asked why he fired the
23 shots, Barajas said: "I don't know." RT 37. The District Attorney and at least one commissioner
24 found it inexplicable why Barajas would have done the shooting under the circumstances he had
25 described of being a non-gang member tag-along with gang members who were retaliating
26 against rival gang members. RT 45.

27 Pre-Offense History: At the time of the shooting, Barajas had only been living in the
28 United States 4-6 months, having come illegally from Mexico. RT 13-14. Some of his family
lived in Mexico and some lived in the United States. He apparently had no criminal history.
See 12/18/03 psychological evaluation, p. 4. There was an immigration hold on him (meaning
that deportation was likely if released from prison). RT 27.

1 Barajas said he used to drink alcohol. He started when he was 13-14 years old. RT 15.
2 He also used marijuana, and started doing that at about the same time. RT 15. His drug use
3 escalated to include cocaine, and he used that for a couple of years. RT 16.

4 Prison Disciplinary History: Barajas had received two CDC-115s: one for fighting in
5 1992 and one for fighting in 1991. The commissioner commended him for staying out of trouble
6 since then. RT 26. Barajas also had a couple of CDC-128 counseling memoranda for refusing
7 orders in 1995 and 1997. RT 47.

8 In-Custody Activities: Barajas had engaged in some educational activities, had
9 participated in NA and AA since 1996, and had records of having participated in various
10 programs recently. RT 18-19, 23. He said also had taken some correspondence courses and
11 other self-improvement courses in the last couple of years. RT 18-20. He also participated in
12 recreational sports. RT 20-21. Other than AA and NA, he appeared to have done little self-help
13 programming before the two years preceding the hearing. See Resp. Exh. 3 at Exhs. C-D.

14 He had held various jobs, such as being a teacher's aide, a porter, working on the yard
15 crew, working in the machine shop and working in the culinary division. He always had "pretty
16 good work reports." RT 21. He had completed a vocational program in 2005 in offset print.
17 RT 21-22. He earned his GED in 2000. RT 22.

18 Psychological Reports: The 2006 psychological evaluation was favorable. The
19 psychologist noted that Barajas expressed regret and remorse for the crime, that he was
20 responsible for what occurred that day and had said that "no one put a gun in my hands."
21 Resp. Exh. 3 at 8/15/2006 Psychological Evaluation, p. 3. This showed "a slight, yet significant,
22 change in his presentation and would indicate taking more personal responsibility for his actions
23 that day." Id. The psychologist noted that Barajas denied being in a gang, although his central
24 file had information that he was in a gang. The psychologist opined that if released to the
25 community, Barajas' "violence potential is about the same as the average citizen." Id. This was
26 an improvement from the 2003 evaluation, in which a psychologist had opined that, "if released
27 to the community his violence potential is estimated to be no more than slightly higher than the
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1 average citizen in the community." RT 31.

2 Parole plans: Barajas had parole plans. He had a job offer from a relative in Mexico. RT
3 33-34. And his father offered to house him in Tijuana. RT 34. He also had a letter from a
4 facility to address substance abuse treatment in Mexico. RT 35.

6 2. BPH's Decision And State Court Review

7 The BPH determined that Barajas was "not suitable for parole" because he would "pose
8 an unreasonable risk of danger to society or a threat to public safety if released at this time." RT
9 52. The BPH relied primarily on the commitment offense. The offense was carried out in an
10 especially cruel manner, multiple victims were injured in the shooting, the offense was carried
11 out in an dispassionate and calculated manner and a manner that demonstrated an exceptionally
12 callous disregard for human suffering. RT 52. The motive was "incredibly trivial and
13 inexplicable." RT 52. The second factor the BPH relied on was that Barajas "has programmed
14 in a limited manner while incarcerated until 2004 and has not sufficiently participated in
15 beneficial self-help and/or therapy programs." RT 53. The third factor relied on was that the
16 2006 psychological report "is not totally supportive of release" in that the psychologist noted that
17 there had been a "slight yet significant change in the presentation" which, when combined with
18 the earlier report in 2003 that noted some insight by the prisoner, led the BPH panel to conclude
19 that "there has been improvement but that more is needed." RT 54. The BPH panel believed
20 that Barajas was "on the right track" and was "making good progress," but that the change had
21 been since 2004 and that the progress needed to be maintained over a longer period of time. RT
22 55. This was a prisoner whose "gains are recent and he must demonstrate an ability to maintain
23 gains over an extended period of time if paroled." RT 55. The second commissioner explained
24 that Barajas needed to maintain his gains to convince a later panel and the Governor that he was
25 suitable for parole because "a lot of years went by" before he started programming. RT 57.

26 The Los Angeles County Superior Court upheld the BPH's decision in a reasoned
27 decision. See Petition Exh. A. As the last reasoned decision from a state court, the decision
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1 from the superior court is the decision to which § 2254(d) applies. See Ylst v. Nunnemaker, 501
2 U.S. 797, 803-04 (1991); Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th Cir. 2005). The
3 superior court found that some evidence did support the BPH's conclusion that Barajas' release
4 would pose an unreasonable risk of danger to society if released and was unsuitable for parole.
5 Petition Exh. A at 1. The superior court found "no evidence to support the Board's finding that
6 the offense was committed in a manner which demonstrates a callous disregard for human
7 suffering" and saw it as an average attempted murder. Id at 3. That court did find some
8 evidence to support the BPH's remaining findings regarding the commitment offense and those
9 together constituted some evidence that it was committed in an especially heinous, atrocious or
10 cruel manner. Id That is, there was some evidence of multiple victims, that the crime was
11 committed in a calculated and dispassionate manner, and that the motive was very trivial. Id. at
12 4-5. The court further explained that in addition to the commitment offense, the BPH
13 "considered and weighed several other factors, noting that Petitioner's involvement in self-help
14 programs in 2004 and 2005, while positive, were relatively recent." Id. at 4. The court also
15 found that there was some evidence to support the BPH's finding that Barajas' insight into why
16 he committed the crime was not fully developed, as he said he didn't know why he committed
17 the offense.

18 19 3. Analysis Of Habeas Claim

20 There was sufficient evidence for the state superior court to uphold the BPH's decision.
21 The commitment offense was an aggravated one, as Barajas had committed a drive-by shooting
22 and fired shots into a group of people, hitting two of them. The shooting was done in a
23 calculated and dispassionate manner as, after allegedly being shot at, Barajas and his
24 acquaintances went to retrieve a gun and returned to shoot at a group of people. Barajas didn't
25 know if the people he shot at were the people who did the earlier alleged shooting. None of the
26 people he shot at were armed. The motive, a gang retaliatory shooting, was trivial. The
27 evidence was sufficient to show that most of his prison self-help programming was relatively
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1 recent and that he needed more time to explore his responsibility for the crime. His insight was
2 a work in progress, according to the psychologist. Although the shooting looked very gang-like,
3 Barajas denied that he was in a gang. His statement that he did not know why he took the gun
4 and shot at the group of people showed that he could benefit from additional programming. The
5 reasons were supported by sufficient evidence, and so was the reasoning: the identified factors
6 were relevant to and provided reliable evidence in support of the ultimate determination that he
7 was currently dangerous.

8 The information relied upon by the BPH and state court supported a determination "that
9 the implications regarding the prisoner's dangerousness that derive from his . . . commission of
10 the commitment offense remain probative to the statutory determination of a continuing threat
11 to public safety." Lawrence, 44 Cal. 4th at 1214. Barajas' generally positive behavior in prison
12 counts in his favor, but it cannot be said that at this point it makes a finding that he is not suitable
13 for parole unsupported by evidence. Cf. Shaputis, 44 Cal. 4th at 1259-60 (upholding
14 unsuitability determination for prisoner who, despite favorable programming and prison
15 behavior, still had not gained insight into his domestic violence and murder of his wife). The
16 state court's rejection of Barajas' petition was not an unreasonable application of California's
17 "some evidence" requirement and was not based on an unreasonable determination of the facts
18 in light of the evidence. Barajas therefore is not entitled to federal habeas relief.

19
20 D. Respondent's Motion To Dismiss

21 Respondent has moved to dismiss the petition as moot. Respondent argues that the
22 petition is moot because another parole consideration hearing was held in 2010, and Barajas was
23 found suitable at that hearing; therefore, in respondent's view, Barajas has received the best
24 result he could receive if he prevailed in his challenge to the 2007 hearing decision. Not true.
25 The remedy available to a successful parole habeas applicant is not limited to another hearing
26 and instead may include an order for his release from custody. See Pirtle v. California Board
27 of Prison Terms, 611 F.3d 1015, 1025 (9th Cir. 2010) (rejecting argument that the appropriate
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1 remedy would be to remand the case to the parole board for another hearing). "Ordering the
2 release of a prisoner is well within the range of remedies available to federal habeas courts." Id.
3 Had a constitutional violation been found with regard to the 2007 parole hearing, this court
4 would not be limited to ordering a new parole hearing. The motion to dismiss the petition as
5 moot therefore is DENIED. (Docket # 6.) There might be a more compelling argument for
6 mootness if the petitioner was no longer in prison, but that is not the situation here.

7 Respondent also filed a contingent motion for an additional amount of time to file a
8 supplemental brief regarding the Hayward case if his motion to dismiss was denied. The
9 motion for an extension of time to file a supplemental brief is DENIED. (Docket # 7, # 10.)
10 There was no need for respondent to wait for the ruling on the motion to dismiss to brief the
11 Hayward question.

12
13 E. Certificate Of Appealability


14 A certificate of appealability is GRANTED as to the due process claim. See 28 U.S.C.
15 § 2253(c). Reasonable jurists could find the district court's assessment of the claim debatable.
16 See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner is cautioned that the court's ruling
17 on the certificate of appealability does not relieve him of the obligation to file a timely notice
18 of appeal if he wishes to appeal.

19
20 **CONCLUSION**

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

23 IT IS SO ORDERED.

24 DATED: October 4, 2010



SUSAN ILLSTON
United States District Judge