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United States District Court  
For the Northern District of California

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

TODD FERGUSON,  
  
Petitioner,  
  
vs.  
  
BEN CURRY, Warden,  
  
Respondent.

No. C 09-0020 WHA (PR)  
  
**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

**INTRODUCTION**

This is a habeas corpus case filed by a state prisoner pursuant to 28 U.S.C. 2254. Respondent was ordered to show cause why the writ should not be granted. Respondent has filed an answer, along with a supporting memorandum of points and authorities and exhibits. Petitioner has responded with a traverse. Petitioner’s papers have also been supported by briefs and exhibits. For the reasons set forth below, the petition for a writ of habeas corpus is **DENIED**.

**STATEMENT**

In 1983, petitioner pled to charges of second-degree murder, attempted murder, and conspiracy to commit robbery. He was sentenced to a term of fifteen years to life in state prison for the second-degree murder. He also received sentences of seven years for the attempted murder and three years for the conspiracy to commit robbery convictions, which were both ordered to run concurrently with the sentence for second-degree murder. Petitioner pled guilty to these charges and also agreed to testify against his two co-defendants pursuant to a plea

1 agreement in exchange for reduced charges and a reduced sentence. Petitioner’s co-defendants  
2 were ultimately convicted of first-degree murder for their, and they were sentenced to terms of  
3 life in prison without the possibility of parole.

4 This petition challenges the denial of parole by the California Board of Parole Hearings  
5 (“Board”) in 2006. Petitioner filed habeas petitions challenging this decision in all three levels  
6 of the California courts. The Superior Court of the County of Sonoma granted the petition on  
7 the grounds that the denial of parole was not supported by “some evidence” (Resp. Ex. 2). The  
8 California Court of Appeal reversed the superior court’s decision in a detailed opinion, finding  
9 that the Board’s decision satisfied California’s requirement that there be “some evidence” of  
10 petitioner’s current dangerousness if released from prison (Resp. Exs. 8,9; *People v. Ferguson*,  
11 2008 WL 2445567 (Cal. App. June 18, 2008, *as modified* July 16, 2008)). The California  
12 Supreme Court summarily denied review (Resp. Ex. 11).

### 13 ANALYSIS

#### 14 A. STANDARD OF REVIEW

15 A district court may not grant a petition challenging a state conviction or sentence on the  
16 basis of a claim that was reviewed on the merits in state court unless the state court's  
17 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an  
18 unreasonable application of, clearly established Federal law, as determined by the Supreme  
19 Court of the United States; or (2) resulted in a decision that was based on an unreasonable  
20 determination of the facts in light of the evidence presented in the State court proceeding." 28  
21 U.S.C. 2254(d). The first prong applies both to questions of law and to mixed questions of law  
22 and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong  
23 applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340  
24 (2003).

25 A state court decision is “contrary to” Supreme Court authority, that is, falls under the  
26 first clause of Section 2254(d)(1), only if “the state court arrives at a conclusion opposite to that  
27 reached by [the Supreme] Court on a question of law or if the state court decides a case  
28 differently than [the Supreme] Court has on a set of materially indistinguishable facts.”

1 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an “unreasonable application of”  
2 Supreme Court authority, falls under the second clause of Section 2254(d)(1), if it correctly  
3 identifies the governing legal principle from the Supreme Court’s decisions but “unreasonably  
4 applies that principle to the facts of the prisoner’s case.” *Id.* at 413. The federal court on  
5 habeas review may not issue the writ “simply because that court concludes in its independent  
6 judgment that the relevant state-court decision applied clearly established federal law  
7 erroneously or incorrectly.” *Id.* at 411. Rather, the application must be “objectively  
8 unreasonable” to support granting the writ. *See id.* at 409.

9 “Factual determinations by state courts are presumed correct absent clear and  
10 convincing evidence to the contrary.” *Miller-El*, 537 U.S. at 340. This presumption is not  
11 altered by the fact that the finding was made by a state court of appeals, rather than by a state  
12 trial court. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Bragg v. Galaza*, 242 F.3d 1082,  
13 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001). A petitioner must present clear and  
14 convincing evidence to overcome Section 2254(e)(1)’s presumption of correctness; conclusory  
15 assertions will not do. *Ibid.*

16 Under Section 2254(d)(2), a state court decision “based on a factual determination will  
17 not be overturned on factual grounds unless objectively unreasonable in light of the evidence  
18 presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340; *see also Torres v. Prunty*,  
19 223 F.3d 1103, 1107 (9th Cir. 2000).

20 When there is no reasoned opinion from the highest state court to consider the  
21 petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*, 501  
22 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir.2000). In  
23 this case, the last reasoned opinion is that of California Court of Appeal denying petitioner’s  
24 habeas petition. *See People v. Ferguson*, 2008 WL 2445567 (Cal. Ct. App. June 18, 2008).

25 **B. ISSUES PRESENTED**

26 As grounds for relief, petitioner claims the denial of parole violated his right to due  
27 process because it was not supported by at least “some evidence” of his current dangerousness.  
28 A second claim for relief, that the appellate court’s reasoned opinion was contrary to, or an

1 unreasonable application of, clearly-established United States Supreme Court authority, states  
2 the standard of review that will be applied under Section 2254 but does not set forth an  
3 independent grounds for relief.

4 The Due Process Clause does not, by itself, entitle prisoners to release on parole in the  
5 absence of some evidence of their current dangerousness. *Hayward v. Marshall*, 603 F.3d 546,  
6 555, 561 (9th Cir. 2010) (en banc). Under California law, however, “some evidence” of current  
7 dangerousness is required in order to deny parole. *Id.* at 562 (citing *In re Lawrence*, 44 Cal.4th  
8 1181, 1205-06 (2008) and *In re Shaputis*, 44 Cal.4th 1241 (2008)). This requirement gives  
9 California prisoners a liberty interest protected by the federal constitutional guarantee of due  
10 process in release on parole in the absence of “some evidence” of their current dangerousness.  
11 *Cooke v. Solis*, 606 F.3d 1206, 1213-14 (9th Cir. 2010) (citing *Hayward*, 603 F.3d at 561-64);  
12 *Pearson v. Muntz*, 606 F.3d 606, 610-11 (9th Cir. 2010) (citing *Hayward*, 603 F.3d at 561-64).

13 When a federal habeas court in this circuit is faced with a claim by a California prisoner  
14 that their right to due process was violated because the denial of parole was not supported by  
15 “some evidence,” the court “need only decide whether the California judicial decision  
16 approving” the denial of parole “was an ‘unreasonable application’[] of the California ‘some  
17 evidence’ requirement, or was ‘based on an unreasonable determination of the facts in light of  
18 the evidence.’” *Hayward*, 603 F.3d at 562-63 (quoting 28 U.S.C. 2254(d)(1)-(2)). California’s  
19 “some evidence” requirement was summarized in *Hayward* as follows:

20 As a matter of California law, ‘the paramount consideration for both the Board  
21 and the Governor under the governing statutes is whether the inmate currently  
22 poses a threat to public safety.’ There must be ‘some evidence’ of such a threat,  
23 and an aggravated offense ‘does not, in every case, provide evidence that the  
24 inmate is a current threat to public safety.’ The prisoner’s aggravated offense  
25 does not establish current dangerousness ‘unless the record also establishes that  
26 something in the prisoner’s pre- or post- incarceration history, or his or her  
27 current demeanor and mental state’ supports the inference of dangerousness.  
28 Thus, in California, the offense of conviction may be considered, but the  
consideration must address the determining factor, ‘a current threat to public  
safety.’

26 *Hayward*, 603 F.3d at 562 (quoting *Lawrence*, 44 Cal.4th. at 1191, 1209-15); *see also Cooke*,  
27 606 F.3d at 1213-14 (describing California’s “some evidence” requirement).

28 Here, the commitment offenses certainly evinced dangerousness. Petitioner drove the

1 getaway car and provided his two accomplices with rifles, ammunition, masks, and “insider  
2 information” for how to rob the liquor store where petitioner had previously worked. *Ferguson*,  
3 2008 WL 2445567 at 1-2. The two accomplices herded the two clerks, approximately ages 50  
4 and 30, into a cold storage room, took their wallets, ordered them to put their coats over their  
5 heads, and shot them “execution-style,” i.e. multiple times at close range. *Id.* at 2. They killed  
6 one clerk and seriously wounded the other. *Ibid.* When the wounded man groaned, one shooter  
7 returned and shot him in the face, but he still survived. *Ibid.* Petitioner drove the accomplices  
8 away, and petitioner remained at large for one year. *Ibid.* The plan that petitioner made for the  
9 robbery did not call for them to kill the clerks, but petitioner did know that one of the shooters  
10 had a history of boasting of his past violence. *Id.* at 1-2. In addition to committing these  
11 crimes, the three of them had attempted to rob the same store several weeks earlier. *Id.* at 1.

12         Petitioner also had a prior history of violence, including a juvenile adjudication of  
13 assault with a deadly weapon upon a police officer involving a 17-mile car chase in which  
14 petitioner traveled up 100 miles per hour and crashed into a police car. *Id.* at 3. This incident  
15 took place in the same year that he carried out the commitment offenses with his accomplices.  
16 *Ibid.* Petitioner also admitted to committing approximately six recent robberies when he was  
17 arrested for the commitment offenses. *Ibid.*

18         The California Court of Appeal’s decision, like the Board’s, also rested on petitioner’s  
19 “failure to demonstrate evidence of positive change” at the Board hearing:

20         We restate the ruling of Presiding Commissioner Lee:

21         “[Ferguson] needs therapy, self-help and programming in order to face, discuss,  
22 understand and cope with stress in a non-destructive manner as well as get  
23 further insight into this offense. It has been said by previous boards, by Mr. Kirk,  
24 by the District Attorney and many other people that [Ferguson] seems to come  
25 across as though he minimizes his activity like I don't deserve the time that I'm  
26 doing that this is too long and this is unfair.... [T]his was a legitimate felony  
murder and if it wasn't for the fact that he did cooperate with the police [he could  
27 have faced the death penalty or a sentence of a life without parole, which] would  
28 mean that you wouldn't be in front of [the Board] at this point. So until progress  
is made [Ferguson] continues to be unpredictable and a threat to others.”

...

Here the Board expressed its view, and the view of others who have interacted  
with Ferguson, that Ferguson continues to minimize his role in the commitment

1 offense. (Although it is less than clear, it appears that Presiding Commissioner  
2 Lee referred to, by paraphrase, past statements of Ferguson at prior parole  
3 hearings in which he appeared to minimize his role in the offense and said his  
4 continued incarceration was unfair.) We note that he refused to answer questions  
5 at the parole hearing about why he did not think a shooting might occur when he  
6 armed hardened criminals, made their weapons more concealable, and gave them  
7 the layout of the liquor store. The Board listened to the only expression of  
8 remorse at the parole hearing from a man obviously intelligent and with  
9 considerable verbal skills, who read a declaration into the record-not a sincere,  
10 extemporaneous statement of remorse. We also note that an inmate's attitude  
11 toward the offense is assessed by the Board panel, who observe firsthand the  
12 inmate's demeanor and assess his credibility and sincerity.

13 Ferguson's past statements and his observable demeanor constitute information  
14 about his attitude toward the offense, speak directly to the level of his  
15 remorse-which involves his "understand[ing] of the nature and magnitude of the  
16 offense" (Cal.Code Regs., tit. 15, § 2402, subd. (d)(3)), and by logical extension,  
17 the degree to which he facilitated the crime and was legally responsible for it  
18 under the felony murder rule. In an informal administrative parole hearing, these  
19 factors are "some evidence" that he has not fully understood his role in the  
20 offense, a murder and a serious wounding which happened in no small part  
21 because of his conduct. Had he not armed [his accomplices] Bilyeu and  
22 Quinnell, and given them masks and the layout of the liquor store, Richard  
23 Philbert would not have been brutally murdered and Clark not wounded. This is  
24 some evidence that Ferguson still has not gained sufficient insight into his  
25 behavior, and thus would pose an unreasonable risk of danger to society if  
26 released.

27 *Id.* at 10-11 (footnotes omitted).

28 There are a number of factors to be considered here. One of great importance is that  
petitioner had been in prison for twenty-three years at the time of the Board's decision, and he  
was eighteen years old at the time of the commitment offenses. Another is that it is not  
disputed – even by the Board – that petitioner's conduct in prison has been exemplary. *Id.* at 3-  
4. Among other things, at the time of the decision he had not received a disciplinary violation  
charge nine years, had completed numerous self-help, vocational and educational programs. *Id.*  
at 3. His psychological reports were favorable, he gave clear statements of remorse, and he had  
family support and realistic parole plans. *Id.* at 3-4.

The evidence supporting the denial was, first of all, the facts of the crime. Regardless of  
whether petitioner intended there to be violence, he gave loaded guns and masks to individuals  
with a history of violence, he was instrumental in planning the robbery and helped the shooters  
escape capture. By doing so, petitioner facilitated the brutal execution-style murder of one man  
and serious wounding of another man. Petitioner's prior crimes of violence and subsequently

1 committing additional robberies before his arrest further point to his dangerousness. In  
2 addition, the state court’s factual finding that petitioner failed to demonstrate sufficient insight  
3 and continued to minimize his role in the crimes at the Board hearing is entitled to deference  
4 under Section 2254(d)(2) because it was a reasonable factual determination in light of the  
5 evidence that petitioner read a prepared statement of remorse instead of making one  
6 extemporaneously and he refused to answer questions at the parole hearing about why he did  
7 not think a shooting might occur when he armed his accomplices with loaded weapons. *See*  
8 *Hayward*, 603 F.3d at 562-63 (citing 28 U.S.C. 2254(d)(2)). In making this finding, the state  
9 appellate court correctly observed that the Board was in the best position to assess petitioner’s  
10 demeanor and the sincerity of prepared statement of remorse. The Board and state court could  
11 reasonably view petitioner’s minimizing his responsibility for the crimes, despite the fact that  
12 he could have been held as responsible as the shooters under the felony murder rule, as  
13 evidence of his continuing dangerousness.

14         The issue for this court is whether the state courts’ rejection of petitioner’s claim was an  
15 unreasonable application of California’s “some evidence” standard. *See id.* This was not a case  
16 that the state courts took lightly. The superior court granted the petition, and the California  
17 Court of Appeal’s lengthy and detailed opinion demonstrates that it reversed only because  
18 California’s “some evidence” standard is “extremely deferential” to the Board’s findings.  
19 *Ferguson*, 2008 WL 2445567 at 12. Whether the Board’s decision was supported by “some  
20 evidence” of petitioner’s current dangerousness may be a close call, but it is not a close call  
21 when the additional layer of deference to the state court that this court must give under the  
22 “unreasonable application” standard of Section 2254(d)(1). Indeed, when the constitutionality  
23 of the underlying decision is a close question, it is almost a foregone conclusion that it was  
24 reasonable for the state courts to hold that it was not unconstitutional. That is the case here.  
25 The state courts’ rejection of the this claim was not an unreasonable application of California’s  
26 “some evidence” requirement, nor was it based upon an unreasonable determination of the facts  
27 in light of the evidence presented. Accordingly, the state courts’ denial of petitioner’s claim  
28 was neither contrary to nor an unreasonable application of petitioner’s federal constitutional

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guarantee of due process, and petitioner is not entitled to federal habeas relief on his claim.

**CONCLUSION**

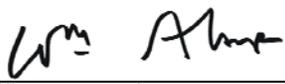
The petition for a writ of habeas corpus is **DENIED**.

Rule 11(a) of the Rules Governing Section 2254 Cases now requires a district court to rule on whether a petitioner is entitled to a certificate of appealability in the same order in which the petition is denied. Petitioner has failed to make a substantial showing that his claims amounted to a denial of his constitutional rights or demonstrate that a reasonable jurist would find the denial of his claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no certificate of appealability is warranted in this case.

The clerk shall enter judgment and close the file.

**IT IS SO ORDERED.**

Dated: September 30, 2010.

  
\_\_\_\_\_  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE