

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DENNIS W. PRATT,

Petitioner,

No. C 05-3503 PJH (PR)

vs.

**ORDER DENYING  
HABEAS PETITION**

WARDEN ORNOSKI,

Respondent.

This is a habeas corpus case filed by a state prisoner pursuant to 28 U.S.C. § 2254. The petition is directed to a denial of parole.

The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has responded with a traverse. For the reasons set forth below, the petition will be denied.

**BACKGROUND**

Petitioner pled guilty in Sonoma County Superior Court to one count of second degree murder. In 1981 he was sentenced to fifteen years to life in prison. On December 3, 2004, after a hearing before the Board of Prison Terms ("Board"), during which petitioner was represented and was given an opportunity to be heard, the Board found petitioner unsuitable for parole. Exh. 2 at 83.<sup>1</sup> The Board based its decision upon the commitment offense; the fact that the motive for the crime was very trivial in relation to the offense;

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<sup>1</sup>Citations in format "Exh. \_\_\_" refer to exhibits attached to the Attorney General's Answer to Petition for Writ of Habeas Corpus.

1 petitioner's unstable social history; an escalating pattern of criminal conduct, including  
2 misconduct while in prison; and his lack of insight into how his crime and his actions  
3 affected others. *Id.* at 83-87.

## 4 DISCUSSION

### 5 I. Standard of Review

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

16 A state court decision is "contrary to" Supreme Court authority, that is, falls under the  
17 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that  
18 reached by [the Supreme] Court on a question of law or if the state court decides a case  
19 differently than [the Supreme] Court has on a set of materially indistinguishable facts."  
20 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision that is an "unreasonable  
21 application of" Supreme Court authority, falls under the second clause of § 2254(d)(1), if it  
22 correctly identifies the governing legal principle from the Supreme Court's decisions but  
23 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The  
24 federal court on habeas review may not issue the writ "simply because that court concludes  
25 in its independent judgment that the relevant state-court decision applied clearly  
26 established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must  
27 be "objectively unreasonable" to support granting the writ. *Id.* at 409.

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1 “Factual determinations by state courts are presumed correct absent clear and  
2 convincing evidence to the contrary.” *Miller-El*, 537 U.S. at 340. This presumption is not  
3 altered by the fact that the finding was made by a state court of appeals, rather than by a  
4 state trial court. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Bragg v. Galaza*, 242 F.3d  
5 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001). A petitioner must present  
6 clear and convincing evidence to overcome § 2254(e)(1)'s presumption of correctness;  
7 conclusory assertions will not do. *Id.*

8 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual  
9 determination will not be overturned on factual grounds unless objectively unreasonable in  
10 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340;  
11 *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

12 When there is no reasoned opinion from the highest state court to consider the  
13 petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*,  
14 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th  
15 Cir.2000).

16 **II. Issues Presented**

17 **A. Respondent’s Contentions**

18 Among other things, respondent contends that California prisoners have no liberty  
19 interest in parole and that if they do, the only due process protections available are a right  
20 to be heard and a right to be informed of the basis for the denial – that is, respondent  
21 contends there is no due process right to have the result supported by sufficient evidence.  
22 Because these contentions go to whether petitioner has any due process rights at all in  
23 connection with parole, and if he does, what those rights are, they will be addressed first.

24 **1. Liberty Interest**

25 Respondent contends that there is no clearly established Supreme Court authority  
26 holding that California law creates a liberty interest in parole. Respondent argues that  
27 although the Ninth Circuit has held that California inmates do have a liberty interest in  
28 parole, its decision is not clearly established federal law for purposes of the Antiterrorism

1 and Effective Death Penalty Act (AEDPA). *Id.*

2       The Fourteenth Amendment provides that no state may “deprive any person of life,  
3 liberty, or property, without due process of law.” U.S. Const., amend. XIV, § 1. In  
4 *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1  
5 (1979), the Supreme Court found that the inmates had a liberty interest in discretionary  
6 parole that was protected by the Due Process Clause. The right was created by the  
7 “expectancy of release provided in [the Nebraska parole statute.]” That statute provided  
8 that the parole board “shall order” release of eligible inmates unless that release would  
9 have certain negative impacts. *Id.* at 11–12. The Supreme Court returned to the issue in  
10 *Board of Pardons v. Allen*, 482 U.S. 369 (1987). There it held that a similar liberty interest  
11 was created even though the parole board had great discretion. *Id.* at 381. For parole  
12 decisions, this mode of analysis survived the Supreme Court’s later rejection of it for prison  
13 disciplinary decisions in *Sandin v. Conner*, 515 U.S. 472 (1995). *Biggs v. Terhune*, 334  
14 F.3d 910, 914 (9th Cir. 2003) (*Sandin* “does not affect the creation of liberty interests in  
15 parole under *Greenholtz* and *Allen*.”).

16       While there is “no constitutional or inherent right of a convicted person to be  
17 conditionally released before the expiration of a valid sentence,” *Greenholtz*, 442 U.S. at 7,  
18 a state’s statutory parole scheme, if it uses mandatory language, may create a presumption  
19 that parole release will be granted when or unless certain designated findings are made,  
20 and thereby give rise to a constitutionally protected liberty interest, *Allen*, 482 U.S. at 376-  
21 78 (Montana parole statute providing that board “shall” release prisoner, subject to certain  
22 restrictions, creates due process liberty interest in release on parole); *Greenholtz*, 442 U.S.  
23 at 11-12 (Nebraska parole statute providing that board “shall” release prisoner, subject to  
24 certain restrictions, creates due process liberty interest in release on parole). In such a  
25 case, a prisoner has a liberty interest in parole that cannot be denied without adequate  
26 procedural due process protections. *Allen*, 482 U.S. at 373-81; *Greenholtz*, 442 U.S. at 11-  
27 16.

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1 Respondent contends that California law does not create a liberty interest in parole.  
2 But California's parole scheme uses mandatory language and is similar to the schemes in  
3 *Allen* and *Greenholtz* which the Supreme Court held gave rise to a protected liberty interest  
4 in release on parole. In California, the panel or board "shall set a release date unless it  
5 determines that the gravity of the current convicted offense or offenses, or the timing and  
6 gravity of current or past convicted offense or offenses, is such that consideration of the  
7 public safety requires a more lengthy period of incarceration for this individual, and that a  
8 parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code § 3041(b). Under  
9 the clearly established framework of *Allen* and *Greenholtz*, "California's parole scheme  
10 gives rise to a cognizable liberty interest in release on parole." *McQuillion v. Duncan*, 306  
11 F.3d 895, 902 (9th Cir. 2002). The scheme requires that parole release be granted unless  
12 the statutorily defined determination (that considerations of public safety forbid it) is made.  
13 *Id.*; *Biggs v. Terhune*, 334 F.3d 910, 915-16 (9th Cir. 2003) (finding initial refusal to set  
14 parole date for prisoner with fifteen-to-life sentence implicated prisoner's liberty interest). In  
15 sum, the structure of California's parole scheme – with its mandatory language and  
16 substantive predicates – gives rise to a federally protected liberty interest in parole such  
17 that an inmate has a federal right to due process in parole proceedings.

18 Respondent's argument as to liberty interest is without merit.

## 19 **2. Due Process Protections**

20 Respondent contends that even if California prisoners do have a liberty interest in  
21 parole, the due process protections to which they are entitled by clearly-established  
22 Supreme Court authority are limited to notice, an opportunity to be heard, and a statement  
23 of reasons for denial. That is, respondent contends there is no due process right to have  
24 the decision supported by "some evidence." This position, however, has been rejected by  
25 the Ninth Circuit, which has held that the Supreme Court has clearly established that a  
26 parole board's decision deprives a prisoner of due process if the board's decision is not  
27 supported by "some evidence in the record", or is "otherwise arbitrary." *Irons v. Carey*, 479  
28 F.3d 658, 662 (9th Cir. 2007) (applying "some evidence" standard used for disciplinary

1 hearings as outlined in *Superintendent v. Hill*, 472 U.S. 445-455 (1985)); *McQuillion*, 306  
2 F.3d at 904 (same). The evidence underlying the Board's decision must also have "some  
3 indicia of reliability." *McQuillion*, 306 F.3d at 904; *Biggs*, 334 F.3d at 915. The some  
4 evidence standard identified in *Hill* is clearly established federal law in the parole context for  
5 purposes of § 2254(d). See *Sass*, 461 F.3d at 1128-1129.

6 **B. Petitioner's Claims**

7 Petitioner contends that: (1) his due process rights were violated by the Board's  
8 denial of parole based on the circumstances of his crime; (2) the Board's decision was pro  
9 forma, arbitrary, capricious, and not supported by the evidence; and (3) use of the "some  
10 evidence" standard for denying parole violated his due process rights.

11 According to the transcript of the December 3, 2004, parole hearing, petitioner  
12 confirmed as true the Board's statement of the facts and circumstances of petitioner's  
13 offense. Exh. 2 at 12. Petitioner admitted to stabbing the victim – a friend of his –  
14 seventeen times during a confrontation that occurred while petitioner attempted to  
15 burglarize the victim's motor home. *Id.* at 11-12, 65-69. The Board stated that the "[crime]  
16 was clearly carried out in a way that demonstrate[d] an exceptionally callous disregard for  
17 human suffering" in light of the motive for the crime and the victim's older age in  
18 comparison to petitioner's. *Id.* at 84. The Board was also influenced by petitioner's  
19 decision to write a letter to the victim's daughter seven years prior to the hearing and  
20 seventeen years after the crime was committed. *Id.* While the contents of the letter were  
21 not evident from the transcript, the daughter's submission of a videotape expressing her  
22 fear after reading the letter contributed to the Board's determination of petitioner's  
23 "tremendous lack of insight" into his crime and actions. *Id.* at 81. Petitioner's only serious  
24 disciplinary action occurred in 1988 and while the Board recognized his positive conduct  
25 and letters of support since then, it emphasized that these gains were recent and must be  
26 demonstrated over an extended period of time. *Id.* at 85-86; Exh. 3 at 6.<sup>2</sup>

27 \_\_\_\_\_  
28 <sup>2</sup> At the hearing, the Board twice referred to the year of the disciplinary violation and  
accompanying criminal conviction as 1998. The date is accompanied by [sic] in the transcript,  
without explanation. Exh. 2 at 24, 85. The Board agreed that the correct date was 1988 when

1                   **1. “Biggs Claim”**

2                   In a line of relatively recent cases the Ninth Circuit has discussed the  
3                   constitutionality of denying parole when the only basis for denial is the circumstances of the  
4                   offense. *See Hayward v. Marshall*, 512 F.3d 536, (9th cir. 2008); *Irons v. Carey*, 505 F.3d  
5                   846, 852-54 (9th Cir. 2007); *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1129  
6                   (9th Cir. 2006); *Biggs v. Terhune*, 334 F.3d 910, 915-17 (9th Cir. 2003).

7                   In *Biggs* the court said that it might violate due process if the Board were to continue  
8                   to deny parole to a prisoner because of the facts of his or her offense and in the face of  
9                   evidence of rehabilitation. 334 F.3d at 916-17. No legal rationale for this statement was  
10                  provided, and it was unclear whether the court was suggesting that the continued denial of  
11                  parole would be a new sort of due process violation or whether it was simply expressing the  
12                  thought that with the passage of time the nature of the offense could cease to be “some  
13                  evidence” that the prisoner would be a danger if paroled.<sup>3</sup> This ambiguity was helpfully  
14                  cleared up in *Irons*, where the court clearly treated a “some evidence” claim as different  
15                  from a “*Biggs* claim.” *Irons*, 505 F.3d at 853-54. It appears, putting together the brief  
16                  discussions in *Biggs* and *Irons*, that the court meant that at some point denial of parole  
17                  based on long-ago and unchangeable factors, when overwhelmed with positive evidence of  
18                  rehabilitation, would be fundamentally unfair and violate due process. As the dissenters  
19                  from denial of rehearing en banc in *Irons* point out, in the Ninth Circuit what otherwise might  
20                  be dictum is controlling authority if the issue was presented and decided, even if not strictly  
21                  “necessary” to the decision. *Irons v. Carey*, 506 F.3d 951, — (9th Cir. Nov. 6, 2007)  
22                  (dissent from denial of rehearing en banc) (citing and discussing *Barapind v. Enomoto*, 400  
23                  F.3d 744, 751 n. 8 (9th Cir.2005)).

24                  \_\_\_\_\_

25                  petitioner pointed out the error. Exh. 2 at 25-26.

26                  <sup>3</sup> The Supreme Court has clearly established that a parole board’s decision deprives  
27                  a prisoner of due process if the board’s decision is not supported by “some evidence in the  
28                  record,” or is “otherwise arbitrary.” *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123,  
1129 (9th Cir. 2006) (adopting “some evidence” standard for disciplinary hearings outlined in  
*Superintendent v. Hill*, 472 U.S. 445, 454-55 (1985).

1            Depending on whether the discussion of dictum in the dissent from denial of  
2 rehearing en banc in *Irons* is correct, it thus may be that the Ninth Circuit has recognized  
3 that due process right, which for convenience will be referred to in this opinion as a “*Biggs*  
4 claim.” Here, petitioner’s first issue is a “*Biggs* claim,” in that he contends that simply using  
5 the circumstances of his offense as grounds for denial violates due process, separate from  
6 his “some evidence” claim, which is issue two, below.

7            Petitioner has failed to establish the predicate for his *Biggs* claim. First, petitioner’s  
8 parole was not denied solely because of the circumstances of his offense, but also because  
9 of petitioner's lack of insight into the crime and his actions – demonstrated by the fact that  
10 he had his wife locate the victim's daughter's address in order to write her a letter – seven  
11 years prior to the hearing. Exh. 2 at 83-85. Further, the Board also relied on petitioner's  
12 unstable social history and escalating criminal conduct that continued while he was  
13 incarcerated, which it concluded outweighed any recent positive rehabilitative behavior. *Id.*  
14 at 83-88. In 1988, petitioner was subject to serious disciplinary action and a criminal  
15 conviction for attempting to smuggle drugs into the prison, and he received five other minor  
16 disciplinary reports since then. *Id.* at 39. And finally, assuming for purposes of this  
17 discussion that *Biggs* and *Irons* recognized an abstract due process right not to have parole  
18 repeatedly denied on the basis of the facts of one’s crime and in the face of extensive  
19 evidence of rehabilitation, and also assuming arguendo that the right was violated in  
20 petitioner’s case, petitioner still cannot obtain relief on this theory, because as there is no  
21 clearly-established United States Supreme Court authority recognizing a “*Biggs* claim.”  
22 The state courts’ rulings therefore could not be contrary to, or an unreasonable application  
23 of, clearly-established Supreme Court authority.

24            **2. “Some Evidence” Claim**

25            Petitioner contends that denial of parole was not supported by “some evidence” and  
26 thus was a violation of his due process rights.

27            Ascertaining whether the some evidence standard is met "does not require  
28 examination of the entire record, independent assessment of the credibility of witnesses, or

1 weighing of the evidence. Instead, the relevant question is whether there is any evidence  
2 in the record that could support the conclusion reached by the disciplinary board." *Hill*, 472  
3 U.S. at 455; *Sass*, 461 F.3d at 1128. The some evidence standard is minimal, and assures  
4 that "the record is not so devoid of evidence that the findings of the disciplinary board were  
5 without support or otherwise arbitrary." *Sass*, 461 F.3d at 1129 (quoting *Hill*, 472 U.S. at  
6 457).

7 Here, the Board's decision was supported by evidence of the callous nature of  
8 petitioner's crime, Exh. 2 at 64-65; petitioner's disciplinary report and criminal conviction in  
9 1988 for possession of a controlled substance after he attempted to smuggle  
10 methamphetamine into the prison, *id.* at 25-26; his past history with substance abuse, *id.* at  
11 24-26; and his deliberate decision to contact the victim's daughter which indicated a lack of  
12 insight into his crime, *id.* at 59-60. The Board did not ignore petitioner's recent positive  
13 rehabilitative activities and supportive psychiatric evaluations but determined that they have  
14 not been maintained for a sufficient period of time. *Id.* at 41-59.

15 Because there was no constitutional violation, the state courts' denial of this claim  
16 was not contrary to, or an unreasonable application of, clearly established Supreme Court  
17 authority.

### 18 3. Breach of Plea Bargain

19 Petitioner contends that by denying him parole the Board has breached his plea  
20 bargain, because it in effect treated him as if he had been convicted of first-degree murder.  
21 The plea bargain called for a sentence of fifteen years to life, and that is what petitioner  
22 received. See Exh. 1. Although petitioner contends he is being punished as if he had  
23 pleaded to first-degree murder, he in fact is receiving the parole consideration that his  
24 fifteen-to-life sentence entitles him.

25 Also, the factual premise of this claim is false. Because first-degree murder is  
26 punishable by death, life without parole, or a term of twenty-five years to life, Cal. Penal  
27 Code § 190(a), if petitioner had been convicted of first-degree murder he would not have  
28 served the twenty-five year minimum sentence at the time of the 2004 parole hearing at

1 issue here.

2 This claim is without merit. The state courts' rejection of petitioner's argument was  
3 not contrary to, or an unreasonable application of, clearly established Supreme Court  
4 authority.

5 **4. Standard of Decision**

6 Petitioner appears to believe that the Board used the "some evidence" standard at  
7 the initial decision-making level, when its proper place is as a review standard. There is no  
8 evidence of this – the Board never said what standard it was applying -- so the claim fails.

9 Petitioner contends that the proper standard for the Board to apply would be  
10 "substantive-evidence' (defined as enough to convince a reasonable person)." Pet. at 8c.  
11 His confusion here, which is perfectly understandable, is between the standard that the  
12 Board uses in the first instance and the standard that this court uses in determining  
13 whether a due process violation has occurred (it is also the standard that state law requires  
14 for appellate review of sufficiency of the evidence claims). See *Sass*, 461 F.3d at 1128-29  
15 (federal); *In re Rosenkrantz*, 29 Cal. 4th 616, 652 (2002) (state-law standard). Because  
16 there is no clearly-established United States Supreme Court authority saying that a parole  
17 board is constitutionally required to use any particular standard in making its decision in the  
18 first instance, this claim is legally without merit, as well as factually.

19 The state courts' rejection of this claim was not contrary to, or an unreasonable  
20 application of, clearly-established Supreme Court authority.

21 **CONCLUSION**

22 The petition for a writ of habeas corpus is **DENIED**. The clerk shall close the file.

23 **IT IS SO ORDERED.**

24 Dated: September 29, 2008.



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PHYLLIS J. HAMILTON  
United States District Judge