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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARK PISZCZEK,

Petitioner,

No. C 07-3724 PJH (PR)

vs.

**ORDER DENYING
HABEAS PETITION**

B. CURRY, Warden,

Respondents.

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 filed a traverse in response. For the reasons set forth below, the petition will be denied.

BACKGROUND

Petitioner was convicted of second degree murder in the Superior Court of San Bernardino County in 1986. He was sentenced to a term of fifteen years to life in state prison. On June 29, 2006, after a hearing before the Board of Parole Hearings ("Board"), during which petitioner was represented and was given an opportunity to be heard, the Board found petitioner unsuitable for parole. Resp. Ex. D at 60-66. The Board based its decision upon characteristics of the offense, petitioner's escalating pattern of criminality, his disciplinary record in prison, and his failure to complete self-help drug and alcohol programs while in prison. *Id.*

Following the parole hearing, petitioner filed a petition for writ of habeas corpus in

1 the Superior Court of San Bernardino County, which denied the petition. Resp. Ex. F.
2 Petitioner subsequently filed habeas petitions for relief in the state court of appeal and the
3 state supreme court, both of which were summarily denied. Resp. Exs. G, H. Thereafter,
4 petitioner filed this federal petition for a writ of habeas corpus.

5 DISCUSSION

6 I. Standard of Review

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

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

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 **II. Issues Presented**

13 Petitioner contends that: (1) the Board violated his due process rights by denying
14 parole based on the circumstances of his crime; (2) there was not “some evidence” to
15 support the denial of parole, in violation of due process; (3) the Board violated his due
16 process rights by not giving his case individualized consideration; and (4) the Board has a
17 “no parole” policy.

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 **A. Respondent’s Contentions**

25 **1. Liberty Interest**

26 Respondent contends that California law does not create a liberty interest in parole.
27 However, the Ninth Circuit has held that it does. *See Sass v. California Bd. of Prison*
28 *Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006). Respondent’s argument as to liberty

1 interest is without merit.

2 **2. Due Process Protections**

3 Respondent contends that even if California prisoners do have a liberty interest in
4 parole, the due process protections to which they are entitled by clearly-established
5 Supreme Court authority are limited to notice, an opportunity to be heard, and a statement
6 of reasons for denial. That is, respondent contends there is no due process right to have
7 the decision supported by “some evidence.” This position, however, has been rejected by
8 the Ninth Circuit, which has held that the Supreme Court has clearly established that a
9 parole board’s decision deprives a prisoner of due process if the board’s decision is not
10 supported by "some evidence in the record", or is "otherwise arbitrary." *Irons v. Carey*, 479
11 F.3d 658, 662 (9th Cir. 2007) (applying "some evidence" standard used for disciplinary
12 hearings as outlined in *Superintendent v. Hill*, 472 U.S. 445-455 (1985)); *McQuillion*, 306
13 F.3d 895, 904 (9th Cir. 2002) (same). The evidence underlying the Board’s decision must
14 also have "some indicia of reliability." *McQuillion*, 306 F.3d at 904; *Biggs*, 334 F.3d at 915.
15 The some evidence standard identified in *Hill* is clearly established federal law in the parole
16 context for purposes of § 2254(d). See *Sass*, 461 F.3d at 1128-1129.

17 **B. Petitioner’s Claims**

18 **1. “Biggs Claim”**

19 In a line of relatively recent cases, the Ninth Circuit has discussed the
20 constitutionality of denying parole when the only basis for denial is the circumstances of the
21 offense. See *Hayward v. Marshall*, 512 F.3d 536, (9th cir. 2008); *Irons v. Carey*, 505 F.3d
22 846, 852-54 (9th Cir. 2007); *Sass*, 461 F.3d at 1129; *Biggs v. Terhune*, 334 F.3d 910, 915-
23 17 (9th Cir. 2003).

24 In *Biggs* the court said that it might violate due process if the Board were to continue
25 to deny parole to a prisoner because of the facts of his or her offense and in the face of
26 evidence of rehabilitation. 334 F.3d at 916-17. No legal rationale for this statement was
27 provided, and it was unclear whether the court was suggesting that the continued denial of
28 parole would be a new sort of due process violation or whether it was simply expressing the

1 thought that with the passage of time the nature of the offense could cease to be “some
2 evidence” that the prisoner would be a danger if paroled. This ambiguity was helpfully
3 cleared up in *Irons*, where the court clearly treated a “some evidence” claim as different
4 from a “*Biggs* claim.” *Irons*, 505 F.3d at 853-54. It appears, putting together the brief
5 discussions in *Biggs* and *Irons*, that the court meant that at some point denial of parole
6 based on long-ago and unchangeable factors, when overwhelmed with positive evidence of
7 rehabilitation, would be fundamentally unfair and violate due process. As the dissenters
8 from denial of rehearing en banc in *Irons* point out, in the Ninth Circuit what otherwise might
9 be dictum is controlling authority if the issue was presented and decided, even if not strictly
10 “necessary” to the decision. *Irons v. Carey*, 506 F.3d 951, 956 (9th Cir. Nov. 6, 2007)
11 (dissent from denial of rehearing en banc) (citing and discussing *Barapind v. Enomoto*, 400
12 F.3d 744, 751 n. 8 (9th Cir.2005)). Depending on whether the discussion of dictum in the
13 dissent from denial of rehearing en banc in *Irons* is correct, it thus may be that the Ninth
14 Circuit has recognized that due process right, which for convenience will be referred to in
15 this opinion as a “*Biggs* claim.” Here, petitioner’s first issue raises such a “*Biggs* claim,”
16 insofar as he contends that simply using the circumstances of his offense and prior criminal
17 records as grounds for denial violates due process.

18 Petitioner’s *Biggs* claim is not supported by the record. In addition to petitioner’s
19 commitment offense the Board provided other reasons for denying petitioner parole. Resp.
20 Ex. D at 60-66. The Board found that petitioner had not “sufficiently participated in
21 beneficial self-help programs” while in prison, especially Alcoholics Anonymous and
22 Narcotics Anonymous. *Id.* at 63. The Board also suggested that petitioner take more
23 advantage of the educational opportunities in prison. *Id.* at 66. Petitioner’s record also
24 contained evidence of unsuitable behavior while incarcerated, ranging from violations for
25 smoking to more serious problems like a failure to report and embezzlement. *Id.* at 39-41,
26 63. Moreover, assuming for purposes of this discussion that *Biggs* and *Irons* recognized an
27 abstract due process right not to have parole repeatedly denied on the basis of the facts of
28 one’s crime and in the face of extensive evidence of rehabilitation, and also assuming

1 arguendo that the right was violated in petitioner’s case, petitioner still cannot obtain relief
2 on this theory, because there is no clearly-established United States Supreme Court
3 authority recognizing a “*Biggs* claim.” The state courts’ rulings therefore could not be
4 contrary to, or an unreasonable application of, clearly-established Supreme Court authority.

5 **2. “Some Evidence” Claim**

6 The Board’s decision to deny petitioner parole was supported by “some evidence.”
7 The Board described the circumstances of the crime, based upon a “Life Prisoner
8 Evaluation Report” prepared for the hearing. Resp. Ex. D at 12; Ex. C. The “Life Prisoner
9 Evaluation Report” set forth the following summary of the crime:

10 On November 29, 1986, at approximately 0421 hrs, Rialto
11 Police Officers responded to a call regarding a stabbing at the trailer
12 park at 350 South Willow Avenue, Space 84, in Rialto, CA. Upon
13 arrival, Corporal R. Bitonti observed the victim, later identified by
14 witnesses as Michael Eric Hartman, lying in a fetal position on the
15 laundry room floor. He was observed to have blood covering his face
16 and upper torso lying in a pool of thick blood. Rialto Fire Department
17 paramedics arrived and immediately began cardiopulmonary
18 resuscitation on the victim. Victim Hartman’s shirt was removed,
19 exposing his front torso area and having at least three (3) large stab
20 wounds to the chest area. He was transported to Kaiser Hospital in
21 Fontana where he was pronounced dead at 0506 hours. He was
22 later found to have approximately fifteen (15) stab wounds, several
23 located in the chest area. Rialto Police Corporal Bitonti interviewed
24 the resident of the trailer, Cathy [sic] Davidson, girlfriend of the
25 suspect, and Robert Judge, Davidson’s son, regarding the incident.
26 Ms. Davidson related that she had received a telephone call from
27 suspect Piszczek at approximately 0300 hours, asking her if he could
28 come over. Ms. Davidson told him that he could not because it was
too late. Ms. Davidson indicated that Piszczek became very upset
and hung up on her. Approximately thirty minutes later, Ms.
Davidson was in bed when she heard a noise outside. Upon
investigating, she saw Piszczek with a large hard tool smash out the
window of the trailer. She saw him then run into the living room in a
rage and jump on top of victim Hartman who was asleep on the
couch. Ms. Davidson initially thought Piszczek was punching the
victim, then saw blood everywhere. Realizing then that Piszczek was
stabbing the victim, Ms. Davidson ran to a neighbor’s home and
called police. Witness Robert Judge was also interviewed by police.
Judge stated that he was awakened by yelling coming from outside,
recognizing the voice as Piszczek. He heard a crash, then saw
Piszczek rush toward victim Hartman, asleep on the couch. Judge
stated that he observed Piszczek jumped [sic] on top of the victim,
and begin to stab him with a large knife. Judge described the attack
as unprovoked.

Both witnesses saw Piszczek flee from the trailer on foot. He was

1 later apprehended in a field near the trailer park.

2 Detective Woods interviewed Piszczek at which time he admitted to
3 breaking into the trailer and stabbing the victim with a kitchen knife. He
4 stated that he “knew that she was up to no good and I couldn’t handle it.”
Piszczek was booked into the San Bernardino County jail and charged with
Murder with the Use of a Dangerous Weapon (knife) and Burglary.
[. . .]

5 Inmate Piszczk stated that the Probation Officer’s Report does not
6 reflect an accurate account of what actually occurred. He advised that
Kathy Davidson and he had been involved for approximately two (2) years.
7 It was a regular occurrence for him to go to her trailer following his delivery
of newspapers in the early morning. Piszczek stated that he called her that
8 morning from a 7-11 convenience store approximately on [sic] block from
Ms. Davidson’s trailer. She told him not come over, then began arguing
9 with Piszczek. He felt that this was “kinky”, so he went to her trailer.
Piszczek stated that they began arguing again at Ms. Davidson’s window.
10 He then heard a male voice say, “Tell the mother fucker to get out of here.”
Piszczek stated that he “hit the ceiling, grabbed a cutting tool, and broke the
11 door down.” He observed Ms. Davidson standing in the nude in the
doorway, telling him, “It’s not what you think.” He pushed her, turned and
12 saw a tall blond male rushing at him with something in his hand. Piszczek
does not recall the actual act of stabbing the victim but stated, “it’s clear to
13 me what came out at the trial.” Piszczek stated that Ms. Davidson’s
statement that the victim was asleep at the time of the attack conflicts with
14 her son’s statement that the victim was sitting on the edge of the sofa.
Piszczek also pointed out that he sustained a cut to his thigh requiring five
15 sutures. He claimed that the victim cut him with broken glass mug and [sic]
which was later photographed and confiscated with blood on the edge of the
16 glass and then supposedly destroyed. He also felt it was important to know
that his defense took issue with the fact that the blanket that covered the
17 victim while he was sleeping had no blood or cuts through the blanket.

18 Resp. Ex. C at 1-2.

19 Petitioner admitted that he had been “lodged in juvenile hall 10 times between 1961
20 and 1966” because of his abusive father. Resp. Ex. C at 3. He was arrested for Grand
Theft Auto in 1966, but was released after a short detention. *Id.* As an adult, petitioner
21 was arrested for assault and ended up serving thirty days in jail for disturbing the peace.
22 Resp. Ex. D at 19. Petitioner also had various convictions for transporting to sell
23 dangerous drugs and driving under the influence. *Id.* at 20-21. At the parole hearing,
24 petitioner admitted to using drugs since he was 17 and that he had used “cocaine,
25 marijuana, heroin, LSD, amphetamines, barbituates [and] anything [he] could get [his]
26 hands on.” *Id.* at 42. Petitioner participated in a prisoner-run self-help program called
27 BRAG (Balance, Re-entry, Association and Group) but never took the opportunity to
28

1 participate in Alcoholics Anonymous or Narcotics Anonymous. *Id.* at 43-45. The Board
2 noted that it could not find any evidence that petitioner had obtained a GED. *Id.* at 36-37.
3 Petitioner had two serious rule violations while in prison, one for failing to report and the
4 other for embezzlement. *Id.* at 39-41. There were also five other violations of prison rules,
5 including smoking, being absent from assignment and being out-of-bounds. *Id.* at 41.
6 Finally, a district attorney from San Bernardino County opposed granting petitioner parole.
7 *Id.* at 53-54.

8 A parole board's decision satisfies the requirements of due process if “some
9 evidence” supports the decision. *Sass*, 461 F.3d at 1128-29 (adopting some evidence
10 standard for disciplinary hearings outlined in *Superintendent v. Hill*, 472 U.S. 445, 454-55
11 (1985)). “To determine whether the some evidence standard is met ‘does not require
12 examination of the entire record, independent assessment of the credibility of witnesses, or
13 weighing of the evidence. Instead, the relevant question is whether there is any evidence
14 in the record that could support the conclusion reached’” by the parole board. *Id.* at 1128
15 (quoting *Hill*, 472 U.S. at 455-56). The “some evidence standard is minimal, and assures
16 that ‘the record is not so devoid of evidence that the findings of the . . . board were without
17 support or otherwise arbitrary.’” *Id.* at 1129 (quoting *Hill*, 472 U.S. at 457).

18 In assessing whether the Board’s denial of parole was supported by some evidence,
19 the court’s “analysis is framed by the statutes and regulations governing parole suitability
20 determinations in the relevant state.” *Irons*, 505 F.3d at 851 (citing *Biggs*, 334 F.3d at 915).
21 “Accordingly, here we must look to California law to determine the findings that are
22 necessary to deem a prisoner unsuitable for parole, and then must review the record in
23 order to determine whether the state court decision holding that these findings were
24 supported by ‘some evidence’ in [petitioner’s] case constituted an unreasonable application
25 of the ‘some evidence’ principle articulated in *Hill*, 472 U.S. at 454.” *Id.*

26 Under California law, “[t]he Board must determine whether a prisoner is presently
27 too dangerous to be deemed suitable for parole based on the ‘circumstances tending to
28 show unsuitability’ and the ‘circumstances tending to show suitability’ set forth in 15 Cal.

1 Code. Regs. § 2402(c)-(d).” *Id.* The circumstances tending to show that a prisoner is
2 unsuitable include the following: (1) the commitment offense, where the offense was
3 committed in “an especially heinous, atrocious or cruel manner;” (2) the prisoner’s previous
4 record of violence; (3) “a history of unstable or tumultuous relationships with others;” (4)
5 commission of “sadistic sexual offenses;” (5) “a lengthy history of severe mental problems
6 related to the offense;” and (6) “serious misconduct in prison or jail.” 15 Cal. Code. Regs. §
7 2402(c). The circumstances tending to show that a prisoner is suitable for parole include
8 the following: (1) the prisoner has no juvenile record; (2) the prisoner has experienced
9 reasonably stable relationships with others; (3) the prisoner has shown remorse; (4) the
10 prisoner committed his crime as the result of significant stress in his life; (5) the prisoner
11 suffered from Battered Woman Syndrome at the time of committing the crime; (6) the
12 prisoner lacks any significant history of violent crime; (7) the prisoner’s present age reduces
13 the risk of recidivism; (8) the prisoner “has made realistic plans for release or has
14 developed marketable skills that can be put to use upon release;” and (9) institutional
15 activities “indicate an enhanced ability to function within the law upon release.” 15 Cal.
16 Code. Regs. § 2402(d).

17 In rejecting petitioner’s request for parole, the Board cited evidence of the “especially
18 cruel and callous manner” in which petitioner committed the commitment offense. Resp.
19 Ex. D at 60. This court notes that petitioner’s commitment offense occurred 17 years
20 before the 2006 parole hearing, slightly longer than the minimum 15-year term of his
21 sentence. However, the very brutal nature of the crime in which petitioner stabbed the
22 victim 15 times, it was reasonable for the Board to continue to cite the commitment offense
23 as evidence of petitioner’s current danger to society. *Id.* at 60-61; Resp. Ex. B at 6. Also,
24 petitioner’s commitment offense came as the climax to “an escalating pattern of criminal
25 conduct . . . including H & S violations, DUI violations and driving under the influence,”
26 which could also reasonably indicate to the Board a risk that petitioner had become a
27 serious and violent offender who should not be released. Resp. Ex. D at 63. The Board
28 found further evidence of petitioner’s unsuitability for parole in his unwillingness to

1 participate in prison-sponsored drug and alcohol rehabilitation programs and lack of any
2 post-probation relapse prevention plan. Given petitioner’s extensive use of drugs prior to
3 entering prison, petitioner’s lack of drug treatment in prison reasonably indicated a
4 significant risk that if released petitioner would relapse into drug abuse and the concomitant
5 criminal and violent behavior he had engaged in previously. Petitioner’s misconduct in
6 prison, which included two serious offenses and several minor violations, also provided
7 evidence that petitioner remained a danger to society. *Id.* at 63-64.

8 Considering the “exceptionally callous disregard for human suffering” involved in
9 petitioner’s commitment offense, petitioner’s misconduct while incarcerated, and his refusal
10 to engage in drug treatment, it was reasonable for the Board to find that petitioner
11 continued to present a danger to society and deny him parole. *Id.* at 61. Consequently, the
12 denial of parole did not violate petitioner’s right to due process, and the state courts’ denial
13 of this claim was not contrary to, or an unreasonable application of, clearly established
14 Supreme Court authority.

15 **3. “Individualized Consideration” Claim**

16 Petitioner also claims that the Board failed to provide individualized consideration of
17 his suitability for parole, and incorrectly used the “some evidence” standard of judicial
18 review to deny him parole. A review of the record establishes that this was not the case.
19 At petitioner’s hearing, the Board engaged petitioner in a thorough discussion of his early
20 life, including the abuse he suffered at the hands of his father. *Resp. Ex. D* at 18-26. The
21 Board also read letters in support of petitioner’s parole, as well as examined petitioner’s
22 educational history, work history in prison and psychiatric report. *Id.* at 27-52. Petitioner’s
23 attorney also spoke at the hearing. *Id.* at 54-59. Upon giving its decision, the Board cited
24 specific factors, such as the commitment offense and petitioner’s lack of self-help, as
25 reasons why petitioner was not suitable for parole. *Id.* at 60-64. Petitioner received
26 individualized consideration and is not entitled to habeas relief on this claim.

27 **4. “No Parole Policy” Claim**

28 The instant petition also makes a reference to an alleged Board “policy” to deny

1 parole to all life inmates. It is not clear whether petitioner means to raise this as a separate
2 claim. To the extent he does, such a claim was not presented to the California Supreme
3 Court and therefore has not been exhausted. Resp. Ex. H. Nevertheless, even considered
4 on its merits, the claim fails because, as discussed above, parole was denied because of
5 petitioner's commitment offense, his behavior while incarcerated and his lack of
6 participation in self-help programs. As such, the record demonstrates that the denial of
7 parole in his case was done based on petitioner's individual circumstances of petitioner's
8 case, and not based on any blanket policy. Therefore, habeas relief is not warranted on
9 this claim.

10 **CONCLUSION**

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

12 **IT IS SO ORDERED.**

13 Dated: March 27, 2009



14 _____
15 PHYLLIS J. HAMILTON
16 United States District Judge

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