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

PEDRO FELICIANO,

No. C 07-4713 CW (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS; DENYING
CERTIFICATE OF APPEALABILITY

BEN CURRY, Warden,

Respondent.

_____ /

INTRODUCTION

Pro se Petitioner Pedro Feliciano, a state prisoner incarcerated at the Correctional Training Facility in Soledad, California, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging the August 31, 2005 decision of the California Board of Parole Hearings (BPH) to deny him parole at his fourth parole suitability hearing. Doc. No. 1 at 10.

On February 7, 2008, the Court issued an Order to Show Cause why the writ should not be granted. Doc. No. 3. On April 30, 2008, Respondent filed a motion to dismiss the Petition on the ground that it was untimely, which the Court denied on March 11, 2009.

1 Doc. Nos. 7 & 11. On June 8, 2009, Respondent filed an Answer.
2 Doc. No. 12. On June 18, 2009, Petitioner filed a Traverse. Doc.
3 No. 13.

4 After the matter was submitted, on April 22, 2010, the Ninth
5 Circuit issued its decision in Hayward v. Marshall, 603 F.3d 546
6 (9th Cir. 2010) (en banc), which addressed important issues relating
7 to federal habeas review of BPH decisions denying parole to
8 California state prisoners. On May 6, 2010, the Court ordered the
9 parties to file Supplemental Briefing explaining their views of how
10 the Hayward en banc decision applies to the facts presented in
11 Petitioner's challenge to the BPH's decision denying him parole.
12 Doc. No. 14. Respondent filed Supplemental Briefing on May 28,
13 2010; Petitioner filed his on June 14, 2010. Doc. Nos. 15 & 16.

14 Having considered all of the papers filed by the parties, the
15 Court DENIES the Petition.

16 BACKGROUND

17 At Petitioner's August 31, 2005 parole suitability hearing, the
18 BPH read two factual summaries of Petitioner's commitment offense.
19 Doc. No. 12-1 at 36-39. The first derives from Petitioner's 2004
20 parole suitability hearing and is set forth below.

21 On June 15, 1[9]82 at approximately 8:18
22 p.m. officers from the Colton Police Department
23 responded to East Congress Street in Colton to
24 [a] call [of] shots fired. Subsequent
25 investigation revealed that [Petitioner's]
26 estranged common-law wife Lazarra . . .
27 Hernandez, victim, went to his residents [sic]
28 in order to see her three children. She was
driven to the house by her boyfriend of two
months, Pedro Rodriguez. While still in the
vehicle, they were approached by [Petitioner],
who advise[d] Rodriguez to . . . "take out the

1 rifle" . . . because he was going to obtain one.
2 Mr. [Rodriguez] then informed [Petitioner] that
3 [he] did not have a rifle. [Petitioner] obtained
4 a 22 caliber automatic rifle from his . . .
5 house, stood in the . . . area of the doorway
6 and fired two to four shots in the direction of
7 the vehicle striking Rodriguez in the neck and
8 Ms. Hernandez in the head. Rodriguez was able
9 to drive the vehicle away from the area and made
10 contact with police. Both victims received
11 emergency medical care and shortly there after
12 [sic] Ms. Hernandez was pronounced dead at Loma
13 Linda Medical Center. [Petitioner] was arrested
14 at his residents [sic] at approximately 8:33
15 p.m.

9 Doc. No. 12-1 at 36-38.

10 Below is Petitioner's version of the commitment offense that
11 originally was set forth in a statement made in 1998, which
12 Petitioner maintained as true at his 2005 parole suitability
13 hearing.

14 [Petitioner] stated that he never told Rodriguez
15 to take out the rifle. He stated that when
16 Rodriguez pulled up in his car, he parked right
17 in front of [Petitioner's] apartment.
18 [Rodriguez] told . . . [Petitioner] that . . .
19 Ms. Hernandez wanted her children back.
20 [Petitioner] told him that he would not give up
21 the children and told Rodriguez to move his car
22 from in front of his apartment. . . .
23 [Petitioner] claimed . . . that he told
24 Rodriguez that [Ms.] Hernandez could go to the
25 end of the apartment to see her children. Then
26 he said that Rodriguez refused to move his car
27 so [Petitioner] went to his apartment, got a 22.
28 [sic] [c]aliber rifle. It [sic] says that he
stood in his doorway. He saw Rodriguez reach
down. He thought Rodriguez was reaching for a
relationship [sic], so he claims he fired two
rounds not knowing his common-law wife was still
in the car. He did not believe at first that he
had killed - I'll back up. He claims that even
when he was arrested, he did not believe at fist
[sic] that he had killed Hernandez. He said he
felt badly and was concerned because he knew he
was going to jail and that . . . [there] would
be nobody to take care of his children. He said

1 he didn't have any problems with his ex-common
2 law wife and never intended to kill her.

3 Doc. No. 12-1 at 38-39.

4 On January 27, 1983, Petitioner was convicted in San Bernardino
5 County Superior Court of one count of first degree murder and one
6 count of attempted first degree murder with firearm enhancements
7 attached to both counts. Doc. No. 1 at 2. He was sentenced to a
8 term of twenty-seven years to life in state prison. Id. His
9 minimum eligible parole date was June 16, 2000. Doc. No. 12-1 at
10 27.

11 On August 31, 2005, Petitioner appeared before the BPH for his
12 fourth parole suitability hearing, having served over twenty two
13 years on his twenty seven to life sentence. Doc. No. 12-1 at 27;
14 Doc. No. 1 at 10. At the hearing, the BPH found Petitioner was not
15 yet suitable for parole and that he would pose an unreasonable risk
16 of danger to society or threat to public safety if released from
17 prison, citing the circumstances of the commitment offense and
18 expressing concern over Petitioner's absence of realistic parole
19 plans, including his lack of "firm job offers at this time." Doc.
20 No. 12-1 at 45 & 64-65.

21 Petitioner unsuccessfully challenged the BPH's decision in the
22 state superior and appellate courts. Doc. No. 12-3 at 22-24. On
23 August 8, 2007, the California Supreme Court summarily denied
24 Petitioner habeas relief. Doc. No. 1 at 23. This federal Petition
25 for a Writ of Habeas Corpus followed. Doc. No. 1.

26 LEGAL STANDARD

27 In Hayward, the Ninth Circuit explained the law in California

1 as it relates to parole suitability determinations:

2 The California parole statute provides that the
3 Board of Prison Terms "shall set a release date unless
4 it determines that the gravity of the current convicted
5 offense or offenses, or the timing and gravity of
6 current or past convicted offense or offenses, is such
7 that consideration of the public safety requires a more
8 lengthy period of incarceration for this individual."
9 The crucial determinant of whether the prisoner gets
10 parole in California is "consideration of the public
11 safety."

12 In California, when a prisoner receives an
13 indeterminate sentence of fifteen years to life, the
14 "indeterminate sentence is in legal effect a sentence
15 for the maximum term, subject only to the ameliorative
16 power of the [parole authority] to set a lesser term."
17 Under the California parole scheme, the prisoner has a
18 right to a parole hearing and various procedural
19 guarantees and rights before, at, and after the
20 hearing; a right to subsequent hearings at set
21 intervals if the Board of Prison Terms turns him down
22 for parole; and a right to a written explanation if the
23 Governor exercises his authority to overturn the Board
24 of Prison Terms' recommendation for parole. Under
25 California law, denial of parole must be supported by
26 "some evidence," but review of the [decision to deny
27 parole] is "extremely deferential."

28 Hayward, 603 F.3d at 561-62 (footnotes and citations omitted).

The court further explained that:

 [s]ubsequent to Hayward's denial of parole, and
subsequent to our oral argument in this case, the
California Supreme Court established in two decisions, In
re Lawrence [190 P.3d 535, 549 (Cal. 2008)] and In re
Shaputis, [190 P.3d 573, 582 (Cal. 2008)] that as a matter
of state law, "some evidence" of future dangerousness is
indeed a state sine qua non for denial of parole in
California. We delayed our decision in this case so that
we could study those decisions and the supplemental briefs
by counsel addressing them. As a matter of California
law, "the paramount consideration for both the Board [of
Prison Terms] and the Governor under the governing
statutes is whether the inmate currently poses a threat to
public safety." [Lawrence, 190 P.3d at 552.] There must
be "some evidence" of such a threat, and an aggravated
offense "does not, in every case, provide evidence that
the inmate is a current threat to public safety." [Id. at
554.] The prisoner's aggravated offense does not

1 establish current dangerousness "unless the record also
2 establishes that something in the prisoner's pre- or
3 post-incarceration history, or his or her current demeanor
4 and mental state" supports the inference of dangerousness.
5 [Id. at 555.] Thus, in California, the offense of
6 conviction may be considered, but the consideration must
7 address the determining factor, "a current threat to
8 public safety." [Id. at 539.]

9 Hayward, 603 F.3d at 562 (footnotes and citations omitted).

10 After providing this background on California law as it applies
11 to parole suitability determinations, the court then explained the
12 role of a federal district court charged with reviewing the decision
13 of either the BPH or the governor in denying a prisoner parole.

14 According to the Ninth Circuit, this Court must decide whether a
15 decision "rejecting parole was an 'unreasonable application' of the
16 California 'some evidence' requirement, or was 'based on an
17 unreasonable determination of the facts in light of the evidence.'"¹

18 Hayward, 603 F.3d at 562-63 (citations omitted); see also Cooke v.
19 Solis, 606 F.3d 1206, 1208, n.2 & 1213 (9th Cir. 2010) (applying
20 Hayward and explicitly rejecting the state's argument that "the
21 constraints imposed by AEDPA preclude federal habeas relief" on
22 petitioner's claim; noting that in Hayward, the court "held that due
23 process challenges to California courts' application of the 'some
24 evidence' requirement are cognizable on federal habeas review under

25 ¹ Applying this standard to the facts presented in Hayward, the
26 court concluded that the state court's decision finding there was
27 "'some evidence' of Hayward's future dangerousness because of 'the
28 nature of the commitment offense' and 'the somewhat unfavorable
psychological and counsel reports,'" one of which noted that Hayward
"would pose a 'low' to 'moderate' risk of danger if released, as
opposed to 'no' or merely 'low' risk," was not unreasonable and
therefore did not warrant federal habeas relief. Hayward, 603 F.3d
at 563.

1 AEDPA").

2
3 DISCUSSION

4 I. California Law Regarding Parole Suitability Determinations

5 When assessing whether California's parole board's suitability
6 determination was supported by "some evidence," this Court's
7 analysis is framed by California's "regulatory, statutory and
8 constitutional provisions that govern parole decisions in
9 California." Cooke, 606 F.3d at 1213 (citing In re Rosenkrantz, 29
10 Cal. 4th 616 (2002)); see Hayward, 603 F.3d at 561-62. Under
11 California law, prisoners serving indeterminate life sentences, like
12 Petitioner, become eligible for parole after serving minimum terms
13 of confinement required by statute. In re Dannenberg, 34 Cal. 4th
14 1061, 1069-70 (2005). Regardless of the length of the time served,
15 "a life prisoner shall be found unsuitable for and denied parole if
16 in the judgment of the panel the prisoner will pose an unreasonable
17 risk of danger to society if released from prison." Cal. Code Regs.
18 tit. 15, § 2402(a). In making this determination, the BPH must
19 consider various factors, including the prisoner's social history,
20 past and present mental state, past criminal history, the base and
21 other commitment offenses, including behavior before, during and
22 after the crime, past and present attitude toward the crime and any
23 other information that bears on the prisoner's suitability for
24 release. See Cal. Code Regs. tit. 15, § 2402(b)-(d).

25 In considering the commitment offense, the BPH must determine
26 whether "the prisoner committed the offense in an especially
27

1 heinous, atrocious or cruel manner." Cal. Code Regs. tit. 15,
2 § 2402(c)(1). The factors to be considered in making that
3 determination include: "(A) Multiple victims were attacked, injured
4 or killed in the same or separate incidents; (B) The offense was
5 carried out in a dispassionate and calculated manner, such as an
6 execution-style murder; © The victim was abused, defiled or
7 mutilated during or after the offense; (D) The offense was carried
8 out in a manner which demonstrates an exceptionally callous
9 disregard for human suffering; (E) The motive for the crime is
10 inexplicable or very trivial in relation to the offense." Id.

11 According to the California Supreme Court, "the core statutory
12 determination entrusted to the Board and the Governor [in
13 determining a prisoner's parole suitability] is whether the inmate
14 poses a current threat to public safety" In re Lawrence, 44
15 Cal. 4th 1181, 1191 (2008). And, "the core determination of 'public
16 safety' under the statute and corresponding regulations involves an
17 assessment of an inmate's current dangerousness." Id. at 1205
18 (emphasis in original) (citing Rosenkrantz, 29 Cal. 4th 616 and
19 Dannenberg, 34 Cal. 4th 1061). The court further explained that:

20 a parole release decision authorizes the Board (and the
21 Governor) to identify and weigh only the factors
22 relevant to predicting "whether the inmate will be able
23 to live in society without committing additional
24 antisocial acts." . . . These factors are designed to
guide an assessment of the inmate's threat to society,
if released, and hence could not logically relate to
anything but the threat currently posed by the inmate.

25 Lawrence, 44 Cal. 4th at 1205-06 (citations omitted). The relevant
26 inquiry, therefore, is:

27 whether the circumstances of the commitment offense,

1 when considered in light of other facts in the record,
2 are such that they continue to be predictive of current
3 dangerousness many years after commission of the
4 offense. This inquiry is, by necessity and by
5 statutory mandate, an individualized one, and cannot be
6 undertaken simply by examining the circumstances of the
7 crime in isolation, without consideration of the
8 passage of time or the attendant changes in the
9 inmate's psychological or mental attitude.

6 In re Shaputis, 44 Cal. 4th 1241, 1254-55 (2008).

7 The evidence of current dangerousness "must have some indicia
8 of reliability." In re Scott, 119 Cal. App. 4th 871, 899 (2004)
9 (Scott I). Indeed, "the 'some evidence' test may be understood as
10 meaning that suitability determinations must have some rational
11 basis in fact." In re Scott, 133 Cal. App. 4th 573, 590, n. 6
12 (2005) (Scott II); see also Cooke, 606 F.3d at 1216 (holding that
13 the state court decision upholding the denial of parole was "'based
14 on an unreasonable determination of the facts in light of the
15 evidence[],'" Hayward, 603 F.3d at 563 (quoting 28 U.S.C. §
16 2254(d)(2)), and therefore finding petitioner entitled to habeas
17 relief because "[n]othing in the record supports the state court's
18 finding that there was 'some evidence' in addition to the
19 circumstances of the commitment offense to support the Board's
20 denial of petitioner's parole").

21 II. Analysis of Petitioner's Claim

22 Petitioner initially sought federal habeas corpus relief from
23 the BPH's August 31, 2005 decision finding him unsuitable for parole
24 and denying him a subsequent hearing for two years, on the ground
25 that the decision did not comport with due process. Doc. No. 1.
26 Specifically, Petitioner argued that at his 2005 parole suitability
27

1 hearing, the BPH "fail[ed] to address the exact nature of
2 Petitioner's CURRENT character." Id. at 11 (emphasis in original).
3 Petitioner further argues that "a multi-year denial can only be
4 applicable when valid grounds exist to find Petitioner unsuitable
5 for parole." Id. at 17.

6 Respondent, in both the Answer and post-Hayward Supplemental
7 Briefing, argues that Petitioner is not entitled to relief because
8 he has not demonstrated that the state court decision was contrary
9 to, or an unreasonable application of, the California "some
10 evidence" standard, or that it was based on an unreasonable
11 determination of the facts in light of the evidence. Doc. Nos. 12 &
12 15.

13 After reviewing the petition filed in superior court
14 challenging Petitioner's 2005 parole denial, that court concluded:
15 "A review of the record supports a finding that there was 'some
16 evidence' which led the Board to its finding of unsuitability of the
17 Petitioner for parole, for as the [California Supreme Court]
18 described such evidence, it need be only a 'modicum' of evidence."
19 Doc. No. 12-3 at 24. As explained below, after careful review of
20 the record, the Court finds that the state court's approval of the
21 BPH's decision to deny Petitioner parole was not an unreasonable
22 application of the California "some evidence" standard, nor was it
23 based on an unreasonable determination of the facts in light of the
24 evidence. See Hayward, 603 F.3d at 562-63.

25 The record shows that, at Petitioner's August 31, 2005 parole
26 suitability hearing, the BPH afforded Petitioner and his counsel an
27

1 opportunity to speak and present Petitioner's case, gave them time
2 to review documents relevant to Petitioner's case and provided them
3 with a reasoned decision in denying parole. Doc. No. 12-1 at 31-36
4 & 64-71. The record also shows that the BPH relied on several
5 circumstances tending to show unsuitability for parole and that
6 these circumstances formed the basis for its conclusion that
7 Petitioner was not yet suitable for parole and would pose an
8 unreasonable risk of danger to society or threat to public safety if
9 released from prison. Doc. No. 12-1 at 64; see Cal. Code Regs. tit.
10 15, § 2402(a) (stating that a prisoner determined to be an
11 unreasonable risk to society shall be denied parole).

12 At the hearing, the BPH commended Petitioner for his lack of
13 prior criminal history, for being free since 1995 of counseling
14 chronos and since 1984 of serious rules violations, and for
15 receiving several laudatory chronos. Doc. No. 12-1 at 65. The BPH
16 expressed concern, however, that Petitioner's "[v]ocational [and]
17 educational participation . . . has been nonexistent for about a
18 decade." Id. at 67. Further, the BPH was "troubled" by
19 Petitioner's parole plans. Id. at 65. The BPH acknowledged that
20 Petitioner had an offer of employment in construction, but also
21 noted that during the evidentiary portion of the hearing Petitioner
22 explained he had various physical limitations which precluded him
23 from working while in prison. Id. at 52-53 & 65. Thus, the BPH did
24 not consider Petitioner's construction job offer to be viable. And,
25 although Petitioner had a place to live with his wife in Hanford,
26 she was unable to work because of an injury sustained in a car
27

1 accident. Id. at 46-47 & 65-66. It therefore was not clear how
2 Petitioner planned to support himself (and his wife) and establish a
3 degree of self-sufficiency.

4 The BPH also relied on the circumstances of Petitioner's
5 commitment offense in deciding to deny Petitioner parole, noting the
6 crime was "particularly callous and was clearly carried out in a
7 dispassionate calculated manner." Doc. No. 12-1 at 64. The BPH
8 concluded the hearing by recommending that Petitioner remain
9 disciplinary-free, learn a trade if possible, earn positive chronos
10 and participate in self-help programs. Doc. No. 12-1 at 70.
11 Based on the entire body of evidence presented at Petitioner's
12 August 31, 2005 parole suitability hearing, this Court cannot say
13 that the state court's approval of the BPH's decision to deny
14 Petitioner parole was an unreasonable application of the California
15 "some evidence" standard, nor that it was based on an unreasonable
16 determination of the facts in light of the evidence.² See Hayward,
17 603 F.3d at 563.

18 CONCLUSION

19 For the foregoing reasons, the Petition for a Writ of Habeas
20 Corpus is DENIED. Petitioner is advised to file timely any state
21 court habeas petitions after any future parole denials, and attach
22 thereto any documents required by the state court.

23 Further, a certificate of appealability is DENIED. See
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25
26 ² In light of this conclusion, Petitioner's argument that "a
27 multi-year denial can only be applicable when valid grounds exist to
28 find Petitioner unsuitable for parole," Doc. No. 1 at 17, necessarily
fails as well.

1 Hayward, 603 F.3d at 554-55. Petitioner has failed to make "a
2 substantial showing of the denial of a constitutional right." Id.
3 (citing 28 U.S.C. § 2253(c)(2)). Nor has Petitioner demonstrated
4 that his claim is "debatable among reasonable jurists." See
5 Hayward, 603 F.3d at 555.

6 The Clerk of Court shall terminate all pending motions as
7 moot, enter judgment in accordance with this order and close the
8 file.

9 IT IS SO ORDERED.
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12 Dated: 7/29/2010



13 CLAUDIA WILKEN
14 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 PEDRO FELICIANO,

5 Plaintiff,

6 v.

7 BEN CURRY et al,

8 Defendant.

Case Number: CV07-04713 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
10 Northern District of California.

11 That on July 29, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in
13 the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's
14 office.

15 Pedro Feliciano C-59854
16 P.O. Box 689, ZW-321L
17 Soledad, CA 93960-0689

18 Dated: July 29, 2010

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk