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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JASON WAYNE CLARK,

Petitioner,

v.

LARRY SMALL, Warden,

Respondent.

Civil No. 09cv0063 LAB (CAB)

**REPORT AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS AND RESPONDENT'S
MOTION TO DISMISS**

I. INTRODUCTION

Jason Wayne Clark, a state prisoner proceeding *pro se*, has filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. Petitioner challenges the September 5, 2007 decision by the California Board of Parole Hearings ("Board"), which denied his release on parole. Petitioner pled guilty to murder in the second degree. He contends the Board violated his rights under the Due Process Clause when it: (1) breached his plea agreement by considering his prior criminal history; (2) breached his plea agreement by considering the facts of the commitment offense; (3) denied him parole without a specific reason; and (4) denied him parole for a total of six years past his minimum eligible parole date.

The Court has considered the Petition, Respondent's Answer, Petitioner's Traverse, and all the supporting documents submitted by the parties. Based on the documents and evidence presented in this case, and for the reasons set forth below, the Court recommends the Petition be **DENIED**. Because the

1 Court finds the Petition should be denied, the Court further recommends Respondent's motion to
2 dismiss Ground One of the Petition be **DENIED as moot**.

3 **II. BACKGROUND**

4 On December 2, 1993, Petitioner pled guilty to murder in the second degree, in violation of
5 California Penal Code section 187. (Petitioner's Exhibit C at 1.) Petitioner stabbed a woman to death
6 over a \$40.00 debt. (Lodgment No. 2 at 62.)¹ As part of the plea agreement, the prosecution agreed to
7 strike the enhancement for use of a knife, under Penal Code section 12022(b), and to strike a prior
8 felony conviction. (Exhibit C at 1.) On February 3, 1994, Petitioner was sentenced to state prison for
9 an indeterminate term of 15 years to life. (Lodgment No. 7.) Pursuant to the plea agreement, Petitioner
10 waived any right to appeal from his conviction and judgment. (Exhibit C at 2.)

11 Petitioner's initial parole consideration hearing took place September 5, 2007. (Exhibit A at 1.)
12 He was found unsuitable for parole and was denied parole for a period of four years. (*Id.* at 5-6.) The
13 decision became final January 3, 2008. (*Id.* at 9.)

14 On January 30, 2008, Petitioner challenged the Board's September 5, 2007 decision in a petition
15 for writ of habeas corpus filed in the San Bernardino County Superior Court. (Lodgment No. 1 at 10-
16 16.) The state petition raised the same four grounds for relief presented in the instant federal petition.
17 On February 7, 2008, the Superior Court denied the petition. (Lodgment No. 2 at 2.) On April 2, 2008,
18 Petitioner filed a state habeas petition in the California Court of Appeal, Fourth Appellate District,
19 Division Two. (Lodgment No. 3.) The petition presented the same four grounds for relief as the earlier
20 petition.² (Lodgment No. 3 at 71-77.) The Court of Appeal summarily denied the petition on April 9,
21 2008. (Lodgment No. 4.) On June 11, 2008, Petitioner filed a state habeas petition in the California
22 Supreme Court, which presented the same four grounds for relief, as well as objections to the Superior
23 Court and Court of Appeal orders. (Lodgment No. 5 at 136, 143-54.) The California Supreme Court
24 summarily denied the petition November 12, 2008. (Lodgment No. 6.)

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26 ¹ Although the lodgments are numbered separately, the pages of the lodgments are numbered
27 consecutively, from Lodgment No. 1 through Lodgment No. 5.

28 ² The petition listed a fifth ground for relief, but this "ground for relief" consisted solely of
Petitioner's objections to the Superior Court's order and did not present any new arguments. (Lodgment
No. 3 at 78-80.)

1 The instant federal petition was filed January 6, 2009. (Doc. No. 1.) Respondent answered on
2 March 30, 2009. (Doc. No. 10.) Petitioner filed a traverse on April 27, 2009. (Doc. No. 13.) On May
3 8, 2009, Respondent filed a motion to dismiss Ground One of the Petition, arguing that the claim is
4 unexhausted and time-barred. (Doc. No. 15.) Respondent did not lodge a copy of the transcript from
5 Petitioner’s plea hearing because the San Bernardino County Superior Court no longer has the reporter’s
6 notes or transcripts from Petitioner’s case. (Lodgment No. 8.)

7 III. DISCUSSION

8 Petitioner contends the Board violated his rights under the Due Process Clause when it: (1)
9 breached his plea agreement by considering his prior criminal history; (2) breached his plea agreement
10 by considering the facts of the commitment offense; (3) denied him parole without a specific reason; and
11 (4) denied him parole for a total of six years past his minimum eligible parole date.³ Respondent did not
12 address these grounds for relief individually, but rather argued generally that the state court’s decision
13 was not objectively unreasonable. Respondent relied almost exclusively upon conclusory statements,
14 such as “this record satisfied the low evidentiary standard of *Hill*,” (Answer at 9), or “[t]he evidence
15 underlying the state court’s ruling goes beyond the ‘meager’ evidence that was constitutionally
16 sufficient in *Hill*,” (Answer at 9), without citing to any part of the record to support the assertion.
17 Respondent is admonished that in the future factual assertions must be supported with citations to the
18 record.

19 A. Standard of Review

20 Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal
21 habeas corpus claims:

22 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an
23 application for a writ of habeas corpus in behalf of a person in custody pursuant to the
24 judgment of a State court only on the ground that he is in custody in violation of the
Constitution or laws or treaties of the United States.

25 28 U.S.C. § 2254(a) (emphasis added).

26
27 ³ Petitioner also claims several times throughout the Petition that the Board’s decision to deny
28 him parole violated the *Ex Post Facto* Clause of the United States Constitution. This Clause is aimed at
laws that “retroactively alter the definition of crimes or increase the punishment for criminal acts.
Collins v. Youngblood, 497 U.S. 499, 43 (1990). Petitioner has failed to point to any legislative act
which retroactively altered the definition of his crime or increased the punishment for his criminal acts.

1 ///

2 The current Petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996
3 (“AEDPA”). See *Lindh v. Murphy*, 521 U.S. 320 (1997). As amended, 28 U.S.C. § 2254(d) reads:

4 (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to
5 the judgment of a State court shall not be granted with respect to any claim that was
6 adjudicated on the merits in State court proceedings unless the adjudication of the claim –

7 (1) resulted in a decision that was contrary to, or involved an unreasonable
8 application of, clearly established Federal law, as determined by the Supreme
9 Court of the United States; or

10 (2) resulted in a decision that was based on an unreasonable determination
11 of the facts in light of the evidence presented in the State court
12 proceeding.

13 28 U.S.C. § 2254(d)(1)-(2) (emphasis added).

14 To obtain federal habeas relief, Petitioner must satisfy either § 2254(d)(1) or § 2254(d)(2). See
15 *Williams v. Taylor*, 529 U.S. 362, 403 (2000). The Supreme Court interprets § 2254(d)(1) as follows:

16 Under the “contrary to” clause, a federal habeas court may grant the writ if the state court
17 arrives at a conclusion opposite to that reached by this Court on a question of law or if
18 the state court decides a case differently than this Court has on a set of materially
19 indistinguishable facts. Under the “unreasonable application” clause, a federal habeas
20 court may grant the writ if the state court identifies the correct governing legal principle
21 from this Court’s decisions but unreasonably applies that principle to the facts of the
22 prisoner’s case.

23 *Williams*, 529 U.S. at 412-13; see also *Lockyer v. Andrade*, 538 U.S. 63, 73-74 (2003).

24 Where there is no reasoned decision from the state’s highest court, the Court “looks through” to
25 the underlying appellate court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991). If the
26 dispositive state court order does not “furnish a basis for its reasoning,” federal habeas courts must
27 conduct an independent review of the record to determine whether the state court’s decision is contrary
28 to, or an unreasonable application of, clearly established Supreme Court law. See *Delgado v. Lewis*, 223
F.3d 976, 982 (9th Cir. 2000) (overruled on other grounds by *Lockyer*, 538 U.S. at 75-76); accord
Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). A state court, however, need not cite Supreme
Court precedent when resolving a habeas corpus claim. *Early v. Packer*, 537 U.S. 3, 8 (2002). “[S]o
long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court
precedent],” the state court decision will not be “contrary to” clearly established federal law. *Id.*

29 B. Grounds One and Two

30 Petitioner’s first two grounds for relief contend the Board violated his plea agreement when it

1 considered his prior felony convictions and the facts of the commitment offense in finding him
2 unsuitable for parole. Plea agreements are contractual in nature and are construed using the ordinary
3 rules of contract interpretation. *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006);
4 *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003). Courts will enforce the literal terms of the plea
5 agreement but must construe any ambiguities against the government. *United States v. Franco-Lopez*,
6 312 F.3d 984, 989 (9th Cir. 2002). “[W]hen a plea rests in any significant degree on a promise or
7 agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such
8 promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262 (1971). The essence of any such
9 promise must in some way be made known on the record. *See id.* at 262-63. In construing a plea
10 agreement, this Court must determine what Petitioner reasonably believed its terms were at the time of
11 the plea. *Franco-Lopez*, 312 F.3d at 989.

12 Petitioner has not demonstrated that the Board violated his plea agreement by considering his
13 prior criminal history and the facts of the commitment offense in finding him unsuitable for parole. It
14 appears Petitioner believed that because the sentencing enhancements for a prior strike and for the use of
15 a knife during the commission of the murder were dismissed pursuant to the plea, that the Board would
16 not consider Petitioner’s criminal history or the facts of the commitment offense in determining his
17 suitability for parole. There is nothing in the record, however, indicating the prosecutor made a promise
18 that the Board would be somehow limited in determining Petitioner’s suitability for parole as a result of
19 his plea agreement. Petitioner himself acknowledges “the plea did not specifically mention the parole
20 board or limitations on said board,” and “the District Attorney never mentioned the parole board in the
21 pleading [sic].” (Traverse at 4-5.) Rather, he claims the prosecutor “knowingly allowed the illusion of
22 relief” because the prosecutor was aware that parole boards consider a prisoner’s criminal history and
23 the facts of the commitment offense in determining suitability for parole. (Petition, Grounds One and
24 Two.)

25 This Court may not grant habeas relief based upon Petitioner’s unsupported belief that the
26 dismissal of sentencing enhancements would result in the Board not considering his criminal history and
27 the nature of the commitment offense in determining his suitability for parole. Petitioner, who was
28 represented by counsel, bargained for the dismissal of two sentencing enhancements in exchange for

1 pleading guilty on the sole count of murder in the second degree with a maximum possible sentence of
2 fifteen years to life. (Exhibit C at 1-2.) Pursuant to the plea agreement, the sentencing enhancements
3 were dismissed and Petitioner was sentenced to fifteen years to life. (Lodgment No. 7.) Petitioner,
4 therefore, received the benefit of his bargain. The state court's decision to reject Petitioner's claim in
5 this regard is not contrary to, or an unreasonable application of federal law, nor is it based on an
6 unreasonable determination of the facts in this case. Accordingly, this Court recommends Grounds One
7 and Two of the Petition be **DENIED**.⁴

8 **C. Ground Three**

9 Petitioner argues the Board violated his right to Due Process when it denied his request for
10 parole in part because the commitment offense was "carried out in an especially cruel and callous
11 manner," which he claims is a finding the Board makes in every murder. Liberally construed, it appears
12 Petitioner contends the Board's decision was not supported by "some evidence."

13 As a matter of federal due process, California inmates do possess a liberty interest in parole.
14 *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007). In California, the setting of a parole date is
15 conditioned on the Board determining a prisoner is suitable for parole. Cal. Penal Code § 3041; Cal.
16 Code Regs. tit. 15, §§ 2401, 2402. The Ninth Circuit has held that "the Supreme Court [has] clearly
17 established that a parole board's decision deprives a prisoner of due process with respect to this interest
18 if the board's decision is not supported by 'some evidence in the record.'"⁵ *Id.* at 851. "Some
19 evidence" is "any evidence in the record" that supports the Board's decision. *Sass v. Cal. Bd. of Prison*
20 *Terms*, 461 F.3d 1123, 1128-29 (9th Cir. 2006). The "some evidence" standard is deferential, but it
21 ensures that "the record is not so devoid of evidence that the findings of [the board] were without

22
23 ⁴ To the extent it can be construed that Petitioner contends his plea agreement was breached
24 because it was induced by illusory promises, such a claim also fails. "[W]hen a plea rests in any
25 significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the
26 inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262. The essence
of any such promise, however, must in some way be made known on the record. *See id.* at 262-63. As
discussed above, on the basis of this record, there is no indication any promises were made to somehow
limit the discretion of the parole board.

27 ⁵ Respondent argues this Court is not bound by that determination because the Supreme Court
28 itself has not concluded the "some evidence" standard applies to parole board hearings. Respondent's
argument is unavailing. This Court will not substitute its judgment for that of the Ninth Circuit with
respect to whether the "some evidence" standard is clearly established federal law for purposes of parole
board hearings.

1 support or otherwise arbitrary.” *Superintendent v. Hill*, 472 U.S. 445, 457 (1985). Determining whether
2 the “some evidence” requirement is satisfied “does not require examination of the entire record,
3 independent assessment of the credibility of witnesses, or weighing of the evidence.” *Id.* What
4 constitutes “some evidence” is determined according to state law. *Irons*, 505 F.3d at 851.

5 Here, the Board found Petitioner was unsuitable for parole in light of the following
6 circumstances: (1) the nature of Petitioner’s commitment offense, in which Petitioner chose to settle a
7 reported drug debt with the victim, who was not a threat to Petitioner, by stabbing her in the neck, not
8 seeking aid for her, and ultimately allowing her to die; (2) his escalating criminal history—progressing
9 from juvenile probation, to juvenile camp, county jail, and then to adult probation; (3) his institutional
10 behavior, which included fifteen serious disciplinary reports and six counseling chronos; and (4)
11 Petitioner’s psychological profile. (Exhibit A at 6-7.) Under California law, these were all proper
12 considerations for the Board to take into account in determining whether Petitioner was suitable for
13 parole. *See* Cal. Code Regs. tit. 15, §§ 2402(b)(c). Because the Board’s decision was supported by
14 “some evidence,” the state court’s decision was not contrary to, or an unreasonable application of,
15 clearly established Supreme Court law. Accordingly, this Court recommends Ground Three of the
16 Petition be **DENIED**.

17 **D. Ground Four**

18 Petitioner contends his Due Process rights have been violated because the Board has denied him
19 parole six years beyond his minimum eligible parole date. The mere fact Petitioner was denied parole,
20 however, does not constitute a Due Process violation. Petitioner was sentenced to an indeterminate
21 sentence of fifteen years to life. Petitioner is therefore eligible for release at the discretion of the parole
22 board. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 9-10
23 (1979). While Petitioner does possess a liberty interest in parole, Due Process is satisfied so long as the
24 Board’s decision to deny Petitioner parole was supported by “some evidence.” *Irons*, 505 F.3d at 850-
25 51. As discussed above, Petitioner’s denial of parole was supported by “some evidence.” Accordingly,
26 this Court recommends Ground Four of the Petition be **DENIED**.

27 **IV. CONCLUSION**

28 The Court submits this Report and Recommendation to United States District Judge Larry A.

1 Burns under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the
2 Southern District of California. For the reasons outlined above, **IT IS HEREBY RECOMMENDED**
3 that the Court issue an Order: (1) approving and adopting this Report and Recommendation, and (2)
4 directing that Judgment be entered **DENYING** the Petition in its entirety.

5 **IT IS ORDERED** that no later than August 3, 2009, any party to this action may file written
6 objections with the Court and serve a copy on all parties. The document should be captioned
7 “Objections to Report and Recommendation.”

8 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court and
9 served on all parties no later than 10 days after being served with the objections. The parties are
10 advised that failure to file objections within the specified time may waive the right to raise those
11 objections on appeal of the Court’s order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998);
12 *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

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14 DATED: July 2, 2009

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17 **CATHY ANN BENCIVENGO**
18 United States Magistrate Judge
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