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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JASON W. CLARK,

vs.

LARRY SMALL, Warden,

Petitioner,

Respondent.

CASE NO. 09cv0063-LAB (CAB)

**ORDER OVERRULING
PETITIONER'S OBJECTIONS
AND ADOPTING REPORT AND
RECOMMENDATION**

I. Introduction

Jason Wayne Clark, a prisoner in state custody, filed a petition for writ of habeas corpus (the "Petition") in this Court on January 6, 2009. Pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.1(c) and (d), the Petition was referred to Magistrate Judge Cathy Ann Bencivengo for a report and recommendation.

Respondent answered the Petition on March 30, 2009, and Clark filed a traverse on April 27, 2009. Then, on May 8, 2009, Respondent moved to dismiss the Petition. Clark did not file an opposition, and on July 6, 2009 Judge Bencivengo issued her report and recommendation (the "R&R"), which recommended that the Petition be denied and Respondent's motion to dismiss be denied as moot. Clark did file a timely objection to the R&R.

1 **II. Factual Background**

2 The R&R does a thorough job of reciting the facts of this case, but some of them are
3 worth repeating here. Clark stabbed a woman to death over a \$40.00 debt, and on
4 December 2, 1993 he pled guilty to second degree murder. As part of his plea agreement,
5 the prosecution agreed to strike enhancements for Clark's use of a knife and his having a
6 prior felony conviction. On February 3, 1994, Clark was sentenced to state prison for an
7 indeterminate term of 15 years to life. He began to serve his sentence on February 14,
8 1994. His minimum eligible parole date was January 2, 2006.

9 In 2007, well over a decade after Clark was sentenced, he was eligible for parole for
10 the first time. His initial parole hearing took place on September 5, 2007, and he was found
11 unsuitable for parole for a period of four years. This decision became final on January 3,
12 2008, and it is this decision that Clark challenges in his Petition.

13 **III. Legal Standards**

14 A district court has jurisdiction to review a Magistrate Judge's report and
15 recommendation concerning a dispositive pretrial motion. Fed. R. Civ. P. 72(b). "The district
16 judge must determine de novo any part of the magistrate judge's disposition that has been
17 properly objected to. The district court may accept, reject, or modify the recommended
18 disposition; receive further evidence; or return the matter to the magistrate judge with
19 instructions. Fed. R. Civ. P. 72(b)(3). In other words, "the district judge must review the
20 magistrate judge's findings and recommendations de novo *if objection is made*, but not
21 otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

22 Because Clark is proceeding *pro se*, the Court construes his pleadings liberally and
23 affords him the benefit of any doubt. See *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621,
24 623 (9th Cir. 1988). That said, "[p]ro se litigants must follow the same rules of procedure
25 that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

26 **IV. Discussion**

27 The essence of Clark's Petition is that his due process rights were violated by the
28 parole board because, in denying him parole, it considered certain factors that his plea

1 agreement, for sentencing purposes, took off the table. For example, the parole board
2 looked at Clark's criminal history, even though his plea agreement struck an enhancement
3 based upon a prior felony conviction. Clark also believes, as a more general matter, that
4 the parole board's decision to deny him parole for a period of 4 years was categorically
5 unreasonable.

6 Although Clark filed an objection to the R&R, and although his individual objections
7 ostensibly address the R&R head-on, Clark mostly reiterates in a conclusory fashion the
8 same four grounds for relief alleged in his Petition. The Court will consider each one in turn
9 nonetheless.

10 **1. Clark's Prior Convictions**

11 Clark's first due process claim challenges the parole board's consideration of his
12 criminal history in deeming him unsuitable for parole. Because he pled guilty pursuant to a
13 plea agreement that struck a sentencing enhancement based upon his past convictions,
14 Clark has the expectation that the parole board could not and would not take those
15 convictions into account. Instead, the parole board took notice of Clark's record and found
16 "an escalating pattern of criminal conduct and a failure to profit from society's previous
17 attempts to correct his criminality, specifically juvenile probation, juvenile camp, adult
18 probation and county jail." (Pet., Ex. A.)

19 The R&R is right: plea agreements are contracts, construed using the ordinary rules
20 of contract interpretation, and Clark "has not demonstrated that the [Parole] Board violated
21 the plea agreement by considering his prior criminal history . . . in finding him unsuitable for
22 parole." (R&R at 5.) Indeed, nothing in the record suggests that Clark's plea agreement was
23 intended to bind the parole board when the time came to make a suitability determination.
24 To the contrary, as the R&R points out, Clark was aware, in his own words, that "the plea did
25 not specifically mention the parole board or limitations on said board." It isn't plausible that
26 Clark's prosecutor would bargain away the rights and duties of a parole board with a plea
27 agreement that is entered into years before a suitability determination will be made. Nor
28 would that square with the understanding that "there is no constitutional limit on what

1 evidence a parole board may consider, only a requirement that its decision be supported by
2 some reliable evidence.” *Sanders v. Kane*, No. C 04-2886, 2008 WL 4680070 at *5 (N.D.
3 Cal. 2008) (citing *Rosas v. Nielsen*, 428 F.3d 1229, 1232 (9th Cir. 2005)).

4 Thus, Clark’s argument in his objection to the R&R that “the parole board used
5 allegations that were not presented as evidence in a state court” is fundamentally misguided.
6 That is what parole boards often do. Not only is there no constitutional limit to what a parole
7 board may consider in reaching its decisions, provided those decisions are based upon
8 reliable evidence, California parole law explicitly provides, at least for those guilty of murder,
9 that “[a]ll relevant, reliable information available to the panel shall be considered in
10 determining suitability for parole.” See Cal. Code Regs. tit. 15, § 2402. Moreover:

11 Such information shall include the circumstances of the
12 prisoner’s social history; past and present mental state; *past*
13 *criminal history*, including involvement in other criminal
14 misconduct which is reliably documented; the base and other
15 commitment offenses, including behavior before, during and
16 after the crime; past and present attitude toward the crime; any
17 conditions of treatment or control, including the use of special
18 conditions under which the prisoner may safely be released to
19 the community; and any other information which bears on the
20 prisoner’s suitability for release. Circumstances which taken
21 alone may not firmly establish unsuitability for parole may
22 contribute to a pattern which results in a finding of unsuitability.

23 *Id.* (emphasis added). California law is relevant to Clark’s federal habeas claim because the
24 Supreme Court has recognized a federally-protected liberty interest in the expectation of
25 release on parole arising from state parole statutes. See *Greenholtz v. Inmates of Nebraska*
26 *Penal and Corr. Complex*, 442 U.S. 1, 12 (1979).

27 In the final analysis, habeas relief cannot be granted unless the state court’s decision
28 to reject Clark’s due process claims was contrary to, or an unreasonable application of
existing federal law, or unless it was based on an unreasonable determination of the facts
in this case. 28 U.S.C. 2254(a). Existing federal law requires that Clark be provided an
opportunity to be heard and a statement of reasons for the parole board’s decision,
Greenholtz, 442 U.S. at 16, and that the decision be supported by “some evidence” in the

1 record, *Sass v. California Board of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006).¹

2 These standards were met, and Clark’s objection is therefore **OVERRULED**.

3 **2. The Facts of Clark’s Crime**

4 Clark makes the exact same argument with respect to the facts of his commitment
5 offense as he does with his criminal history. The plea agreement under which he was
6 sentenced dropped an enhancement for Clark’s use of a knife to murder his victim, but the
7 parole board considered the fact that he “chose to settle a reported drug debt with the victim,
8 who was not a threat to Petitioner, by stabbing her in the neck, not seeking aid for her, and
9 ultimately allowing her to die.” (R&R at 7.)

10 The above analysis applies. The plea agreement did not bind the parole board, and
11 the parole board, in turn, did not violate Clark’s due process rights by taking the nature of his
12 underlying crime into account. Clark’s objection is therefore **OVERRULED**.

13 **3. Evidence for Parole Board’s Decision**

14 Clark’s third due process claim attacks the parole board’s decision more generally,
15 arguing it was arbitrary because the parole board *always* finds that a commitment offense
16 was “carried out in an especially cruel and callous manner.” (R&R at 6.) In his objection
17 to the R&R, Clark makes the argument in a slightly different way: “However it is obvious that
18 when the parole boards [sic] only recommendation is ‘to continue’ and only rely [sic] on a
19 sixteen year old commitment offense their decision is arbitrary” (Obj. at 4.)

20 There is no doubt that Clark is vested with “a constitutionally protected liberty interest
21 in the receipt of a parole release date, a liberty interest that is protected by the procedural
22 safeguards of the Due Process Clause.” *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007).
23 *See also Greenholtz, supra*. In *Irons*, the Ninth Circuit further held that “the Supreme Court
24 [has] clearly established that a parole board’s decision deprives a prisoner of due process

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26 ¹ To be fair, the applicability of the “some evidence” standard is uncertain. The Ninth
27 Circuit held in *Sass* that the “some evidence” standard was clearly established federal law,
28 applicable to state parole proceedings for AEDPA purposes, but the standard has not been
applied to parole hearings by the Supreme Court. *Hayward v. Marshall*, 527 F.3d 797 (9th
Cir. 2008), now pending before the Ninth Circuit following a rehearing en banc, will address
this question.

1 with respect to this interest if the board's decision is not supported by 'some evidence in the
2 record.'" *Id.* at 851 (citing *Sass v. California Board of Prison Terms*, 461 F.3d 1123, 1128-29
3 (9th Cir. 2006)).

4 The R&R cites four reasons, unique to Clark's case, that he was found unsuitable for
5 parole. (R&R at 7.) Two of those have already been discussed here: his escalating criminal
6 history and the nature of his commitment offense. The others were his behavior in custody
7 (fifteen disciplinary reports) and his psychological profile. Under California law, particularly
8 § 2402 quoted at length above, these were all proper considerations for the parole board.
9 The parole board's decision was, in fact, supported by "some evidence" specific to the
10 circumstances of Clark's offense and confinement, and for this reason the state court's
11 decision was not contrary to, or an unreasonable application of, clearly established Supreme
12 Court law. Clark's objection is **OVERRULED**.

13 **4. Length of Clark's Parole Denial**

14 Clark's fourth due process claim is a variant on his third: He takes issue with the
15 parole board's finding that "it is not reasonable to expect that parole would be granted during
16 the next four years" on the grounds that this means he will have been denied parole for six
17 years beyond his minimum eligible parole date.²

18 Contrary to what Clark argues in his objection to the R&R, the "nature of the 'some
19 evidence' standard," as Clark puts it, is not arbitrary. Clark was given an indeterminate
20 sentence of 15 years to life, and his release on parole is therefore contingent on a decision
21 of the parole board that he is suitable for parole. The transcript of the parole board's hearing
22 that Clark has attached to his Petition makes very clear what its reasons were for finding him
23 unsuitable, and each of those four reasons is valid. The parole board's decision to deny
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25 ² To repeat the relevant dates, Clark's minimum eligible parole date was January 2nd,
26 2006. The parole board found on September 5th, 2007 that Clark should not be paroled for
27 another four years, taking his current eligible parole date to September 5th, 2011. So, six
28 years is not exactly right; Clark has now been denied parole for 5 years, 8 months, and 3
days beyond his minimum eligible parole date. Clark also alleges in his petition that there
was a "previous postponement of two years," but the Court does not know what to make of
that given that the record suggests the parole decision at issue came out of Clark's "initial
parole consideration hearing."

1 Clark parole was based on “some evidence,” *see Irons*, 505 F.3d at 850-851 and therefore
2 afforded Clark the process he was due. His objection is **OVERRULED**.

3 **V. Conclusion**

4 While Clark’s Petition is misguided, it is not frivolous. The Court well understands
5 where he is coming from. It is unclear what Clark’s sentencing exposure would have been
6 had the prosecutor not dropped a criminal history and a weapon enhancement against him,
7 but there is no doubt that the parole board’s decision has the potential to effectuate that very
8 enhancement, or some fraction of it, resulting in a longer sentence than Clark believes he
9 bargained for.

10 The fact remains, however, that the plea agreement Clark entered into made no
11 mention of what a parole board may consider years down the road, and the parole board
12 decision Clark’s Petition puts at issue respected his due process rights – namely the right
13 to have a parole decision be based on “some evidence.” There is simply nothing here that
14 is “contrary to, or an unreasonable application of, clearly established Federal law, as
15 determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d). The Court
16 **OVERRULES** Clark’s objections and **ADOPTS** the R&R.

17 **VI. Clark’s Request to Amend the Petition**

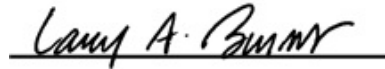
18 In his objection to the R&R, Clark asks for leave to amend his Petition to incorporate
19 two new claims – first, that he did not knowingly enter into his plea agreement, and second,
20 that his guilty plea was the result of ineffective assistance of his counsel. Habeas petitions
21 may be amended as provided in Fed. R. Civ. P. 15, *see* 28 U.S.C. § 2242, and Rule 15
22 encourages the Court to give leave to amend “when justice so requires.” The Court can’t
23 ignore this request merely because these claims appear, for the first time, in an objection to
24 a report and recommendation. *See Brown v. Roe*, 279 F.3d 742 (9th Cir. 2002).

25 Leave to amend should be freely given in the absence of a good reason not to allow
26 amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). With respect to Clark’s new
27 claims, however, there are likely exhaustion and statute of limitations barriers to the Court
28 considering the claims he wishes to add to his Petition. Those claims were not raised in his

1 state habeas petition, and it appears that well over one year has passed – even taking
2 statutory tolling into account – since the parole board’s decision became final and Clark was
3 aware that he could raise the habeas claims that he now seeks to raise at this late juncture.
4 Clark was appraised of these issues in a “NOTICE REGARDING POSSIBLE FAILURE TO
5 EXHAUST AND ONE-YEAR STATUTE OF LIMITATIONS” that was sent to him on January
6 22, 2009. (Dkt. No. 8.) Clark is therefore **ORDERED** to show cause why leave to amend
7 his Petition should be granted in this case. He must do so within 30 days of the date he
8 receives this Order in the mail. The government may file a response within 14 days of the
9 date Clark’s pleading is filed.

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11 **IT IS SO ORDERED.**

12 DATED: November 18, 2009

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14 **HONORABLE LARRY ALAN BURNS**
15 United States District Judge
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