UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KARL D. DREW,

Petitioner - Appellant,

v.

STEPHEN SMITH and JAMES ROBERTSON,

Respondents - Appellees.

No. 24-68

D.C. No. 4:22-cv-05694-YGR
Northern District of California, Oakland

ORDER

Before: OWENS and COLLINS, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Hayward v. Marshall*, 603 F.3d 546, 552-54 (9th Cir. 2010) (en banc) (habeas challenge to parole decision requires a certificate of appealability when underlying conviction and sentence issued from a state court), *overruled on other grounds by Swarthout v. Cooke*, 562 U.S. 216 (2011).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KARL D. DREW,

Petitioner,

v.

STEPHEN SMITH, Acting Warden,[1]

Respondent.

Case No. 22-cv-05694-YGR (PR)

ORDER GRANTING MOTION TO DISMISS PETITION; AND DENYING CERTIFICATE OF APPEALABILITY

I. INTRODUCTION

Before the Court is petitioner's federal habeas petition, which has been deemed filed on August 22, 2022, in which he claims that his constitutional rights were violated in connection with a decision by the Board of Parole Hearings in denying him parole in 2020. *See* Dkts. 1, 12 at 1-2.

Also before the Court is respondent's motion to dismiss the petition on various grounds, including that it does not state a claim under federal law, and also that it is procedurally barred, unexhausted, insufficiently pleaded, and untimely. Dkt. 11. Petitioner filed an opposition, and respondent filed a reply. Dkts. 12, 13.

For the reasons stated herein, respondent's motion is GRANTED, and the petition is DISMISSED.

II. DISCUSSION

Petitioner filed a state habeas petition raising this issue in the California Supreme Court. Resp't Ex. 1. His petition was denied with a citation to *People v. Duvall*, 9 Cal. 4th 464 (1995). Resp't Ex. 2. *Duvall* stands for the proposition that a state habeas petition must "include copies of reasonably available documentary evidence . . . ." *Duvall*, 9 Cal. 4th at 474. Respondent contends that the procedural default bars this petition. Dkt. 11 at 6 fn. 5.

In all cases in which a state prisoner has defaulted his federal claims in state court

[1] Stephen Smith, the current acting warden of the prison where petitioner is incarcerated, has been substituted as respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner's claims are procedurally defaulted only if the Supreme Court of California's bar was an independent and adequate state procedural ground barring federal review. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995); *Siripongs v. Calderon*, 35 F.3d 1308, 1316-18 (9th Cir. 1994).

Here, petitioner does not contend that the bar was not independent, and indeed the record shows that it was—the only reason given for rejecting the state habeas petition was due to the failure to include "reasonably available documentary evidence." *See* Resp't Ex. 2. The ruling was not on the merits, or intertwined with a decision on the merits. Respondent argues as follows:

> Drew failed to attach evidence supporting his claims sufficient for judicial review. (Ex. 2.) And under California law, the longstanding bar to judicial review of a habeas petition for failure to plead and/or prove one's claims is well-established and regularly applied. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474 (holding petition "should both (i) state fully and with particularity the facts on which relief is sought . . . as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations") (internal citations omitted); *In re Harris*, 5 Cal. 4th 813, 827 (1993), *as modified* (Sept. 30, 1993), ***reh'g denied and opinion modified*** (Sept. 30, 1993) (recognizing factual allegations should be supported by "[reasonably available] documentary evidence and/or affidavits") (citing *In re Clark*, 5 Cal. 4th 750, 781, n.16 (1993)); *see also In re Reno*, 55 Cal. 4th 428, 500 (2012), ***as modified on denial of reh'g*** (Oct. 31, 2012) ("We repeat that conclusory allegations are inadequate to satisfy [one's] pleading burden"); *Ex parte Swain*, 34 Cal. 2d 300, 303-04 (1949) ("[O]ur determination that the vague, conclusionary allegations of the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise[.]"

Dkt. 11 at 5. As to adequacy, the State has pleaded the existence of the bar, thereby shifting the burden to petitioner to come forward with specific factual allegations and citations to authority to demonstrate that the rule is not consistently enforced. *See Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir.), *cert. denied*, 540 U.S. 938 (2003). This he has not done.

It thus appears that the bar is both adequate and independent. In his opposition, petitioner fails to address respondent's arguments relating to the procedural bar. The California Supreme

Court's decision that his state habeas petition was procedurally barred under state law is binding on this Court. Petitioner does not attempt to show cause and prejudice or a miscarriage of justice, the exceptions to the procedural bar rule. *See Coleman*, 501 U.S. at 750 (exceptions).

Therefore, this petition is procedurally barred, and respondent's motion to dismiss is GRANTED on this ground. Dkt. 11.

Alternatively, respondent contends that petitioner's claim is not exhausted. Dkt. 11 at 4-6. Because petitioner's claim was presented to the California Supreme Court in a manner which made it unlikely that the claim would be considered on the merits, it was not "fairly presented." *See Harris v. Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc) ("If the denial of the habeas corpus petition includes a citation of an authority which indicates that the petition was procedurally deficient . . . then the available state remedies have not been exhausted") (citations omitted). The claim therefore is not exhausted, and respondent's motion is GRANTED on this alternative ground.[2]

III. CONCLUSION

For the reasons outlined above, respondent's motion to dismiss is GRANTED. Dkt. 11. The claim is procedurally defaulted and unexhausted. Consequently, the petition is DISMISSED.

Because reasonable jurists would not find the result here debatable, a certificate of appealability ("COA") is DENIED. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000) (standard for COA).

The Clerk of the Court shall close the file. Stephen Smith has been substituted as respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

This Order terminates Docket No. 11.

IT IS SO ORDERED.

Dated: December 22, 2023

JUDGE YVONNE GONZALEZ ROGERS
United States District Judge

[2] Because the Court has granted respondent's motion on the grounds that the petition is procedurally barred and unexhausted, it need not address respondent's remaining alternative arguments.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KARL D. DREW,

Petitioner - Appellant,

v.

STEPHEN SMITH and JAMES ROBERTSON,

Respondents - Appellees.

No. 24-68

D.C. No. 4:22-cv-05694-YGR
Northern District of California, Oakland

ORDER

Before: BADE and VANDYKE, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

7 Murder. Penalty—Initiative Statute

Official Title and Summary Prepared by the Attorney General

MURDER. PENALTY. INITIATIVE STATUTE. Changes and expands categories of first degree murder for which penalties of death or confinement without possibility of parole may be imposed. Changes minimum sentence for first degree murder from life to 25 years to life. Increases penalty for second degree murder. Prohibits parole of convicted murderers before service of 25 or 15 year terms, subject to good-time credit. During punishment stage of cases in which death penalty is authorized: permits consideration of all felony convictions of defendant; requires court to impanel new jury if first jury is unable to reach a unanimous verdict on punishment. Financial impact: Indeterminable future increase in state costs.

Analysis by Legislative Analyst

Background:

Under existing law, a person convicted of *first degree murder* can be punished in one of three ways: (1) by death, (2) by a sentence of life in prison without the possibility of parole, or (3) by a life sentence with the possibility of parole, in which case the individual would become eligible for parole after serving seven years. A person convicted of *second degree murder* can be sentenced to 5, 6, or 7 years in prison. Up to one-third of a prison sentence may be reduced through good behavior. Thus, a person sentenced to 6 years in prison may be eligible for parole after serving 4 years.

Generally speaking, the law requires a sentence of death *or* life without the possibility of parole when an individual is convicted of first degree murder under one or more of the following special circumstances: (1) the murderer was hired to commit the murder; (2) the murder was committed with explosive devices; (3) the murder involved the killing of a specified peace officer or witness; (4) the murder was committed during the commission or attempted commission of a robbery, kidnapping, forceable rape, a lewd or lascivious act with a child, or first degree burglary; (5) the murder involved the torture of the victim; or (6) the murderer has been convicted of more than one offense of murder in the first or second degree. If any of these special circumstances is found to exist, the judge or jury must "take into account and be guided by" aggravating or mitigating factors in sentencing the convicted person to either death or life in prison without the possibility of parole. "Aggravating" factors which might warrant a death sentence include brutal treatment of the murder victim. "Mitigating" factors, which might warrant life imprisonment, include extreme mental or emotional disturbance when the murder occurred.

Proposal:

This proposition would: (1) increase the penalties for first and second degree murder, (2) expand the list of special circumstances requiring a sentence of either death or life imprisonment without the possibility of parole, and (3) revise existing law relating to mitigating or aggravating circumstances.

The measure provides that individuals convicted of first degree murder and sentenced to life imprisonment shall serve a minimum of 25 years, less whatever credit for good behavior they have earned, before they can be eligible for parole. Accordingly, anyone sentenced to life imprisonment would have to serve at least 16 years and eight months. The penalty for second degree murder would be increased to 15 years to life imprisonment. A person sentenced to 15 years would have to serve at least 10 years before becoming eligible for parole.

The proposition would also expand and modify the list of special circumstances which require either the death penalty or life without the possibility of parole. As revised by the measure, the list of special circumstances would, generally speaking, include the following: (1) murder for any financial gain; (2) murder involving concealed explosives or explosives that are mailed or delivered; (3) murder committed for purposes of preventing arrest or aiding escape from custody; (4) murder of any peace officer, federal law enforcement officer, fireman, witness, prosecutor, judge, or elected or appointed official with respect to the performance of such person's duties; (5) murder involving particularly heinous, atrocious, or cruel actions; (6) killing a victim while lying in wait; (7) murder committed during or while fleeing from the commission or attempted commission of robbery, kidnapping, specified sex crimes (including those sex crimes that now represent "special circumstances"), burglary, arson, and trainwrecking; (8) murder in which the victim is tortured or poisoned; (9) murder based on the victim's race, religion, nationality, or country of origin; or (10) the murderer has been convicted of more than one offense of murder in the first or second degree.

Also, this proposition would specifically make persons involved in the crime other than the actual murderer subject to the death penalty or life imprisonment without possibility of parole under specified circumstances.

Finally, the proposition would make the death sentence *mandatory* if the judge or jury determines that the aggravating circumstances surrounding the crime *outweigh* the mitigating circumstances. If aggravating circumstances are found *not* to outweigh mitigating circumstances, the proposition would require a life sentence without the possibility of parole. Prior to weighing the aggravating and mitigating factors, the jury

would have to be informed that life without the possibility of parole might at a later date be subject to commutation or modification, thereby allowing parole.

Fiscal Effect:

We estimate that, over time, this measure would increase the number of persons in California prisons, and thereby increase the cost to the state of operating the prison system.

The increase in the prison population would result from:

- the longer prison sentences required for first degree murder (a minimum period of imprisonment equal to 16 years, eight months, rather than seven years);
- the longer prison sentences required for second degree murder (a minimum of ten years, rather than four years); and
- an increase in the number of persons sentenced to life without the possibility of parole.

There could also be an increase in the number of executions as a result of this proposition, offsetting part of the increase in the prison population. However, the number of persons executed as a result of this measure would be significantly less than the number required to serve longer terms.

The Department of Corrections states that a small number of inmates can be added to the prison system at a cost of $2,575 per inmate per year. The additional costs resulting from this measure would not begin until 1983. This is because the longer terms would only apply to crimes committed after the proposition became effective, and it would be four years before any person served the minimum period of imprisonment required of second degree murderers under existing law.

Text of Proposed Law

This initiative measure proposes to repeal and add sections of the Penal Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

Section 1. Section 190 of the Penal Code is repealed.

~~190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.~~

Sec. 2. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

Sec. 3. Section 190.1 of the Penal Code is repealed.

~~190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:~~

~~(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.~~

~~(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.~~

~~(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.~~

Sec. 4. Section 190.1 is added to the Penal Code, to read:

190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is

Continued on page 41

(9) THIS

2014 15 CCR 2282

2014 California Administrative Code Archive

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS > TITLE 15. CRIME PREVENTION AND CORRECTIONS > DIVISION 2. BOARD OF PAROLE HEARINGS > CHAPTER 3. PAROLE RELEASE > ARTICLE 5. PAROLE CONSIDERATION CRITERIA AND GUIDELINES FOR LIFE PRISONERS

§ 2282. Base Term

(a) General. The panel shall set a base term for each life prisoner who is found suitable for parole. The base term shall be established solely on the gravity of the base offense, taking into account all of the circumstances of that crime. The base offense is the most serious of all life offenses for which the prisoner has been committed to prison.

The base term shall be established by utilizing the appropriate matrix of base terms provided in this section for the base offense of which the prisoner was convicted. The panel shall determine the category most closely related to the circumstances of the crime. The panel shall impose the middle base term reflected in the matrix unless the panel finds circumstances in aggravation or mitigation.

If the panel finds circumstances in aggravation or in mitigation as provided in § 2283 or 2284, the panel may impose the upper or lower base term provided in the matrix, stating the specific reason for imposing such a term. A base term other than the upper, middle or lower base term provided in the matrix may be imposed by the panel if justified by the particular facts of the individual case.

(b) Matrix of Base Terms for First Degree Murder.

[See Illustration In Original]

(c) Matrix for Kidnapping for Robbery or Ransom.

[See Illustration In Original]

(d) Matrix for Other Life Crimes.

In considering crimes for which no matrix is provided, the panel shall impose a base term by comparison to offenses of similar gravity and magnitude in respect to the threat to the public, and shall consider any relevant Judicial Council rules and sentencing information as well as any circumstances in aggravation or mitigation of the crime.

Statutory Authority

AUTHORITY:

Note: Authority cited: Section 5076.2, Penal Code. Reference: Section 3041, Penal Code.

History

HISTORY:

1. Amendment of subsection (b), Categories II and IV, filed 5-1-80; effective thirtieth day thereafter (Register 80, No. 18).

Cal Pen Code § 3041

§ 3041. Consultation with inmate to review activities and conduct pertinent to parole eligibility and postconviction credit; Setting of parole release date; Report of backlog of cases

(a)

(1)In the case of any inmate sentenced pursuant to any law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Parole Hearings shall meet with each inmate during the sixth year before the inmate's minimum eligible parole date for the purposes of reviewing and documenting the inmate's activities and conduct pertinent to parole eligibility. During this consultation, the board shall provide the inmate information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior. Within 30 days following the consultation, the board shall issue its positive and negative findings and recommendations to the inmate in writing.

(2)One year before the inmate's minimum eligible parole date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally grant parole as provided in Section 3041.5. No more than one member of the panel shall be a deputy commissioner.

(3)In the event of a tie vote, the matter shall be referred for an en banc review of the record that was before the panel that rendered the tie vote. Upon en banc review, the board shall vote to either grant or deny parole and render a statement of decision. The en banc review shall be conducted pursuant to subdivision (e).

(4)Upon a grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date or elderly parole eligible date.

(5)At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. Any person on the hearing panel may request review of any decision regarding parole for an en banc hearing by the board. In case of a review, a majority vote in favor of parole by the board members participating in an en banc review is required to grant parole to any inmate.

(b)

(1)The panel or the board, sitting en banc, shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.

(2)After July 30, 2001, any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing.

(3)A decision of a panel shall not be disapproved and referred for rehearing except by a majority vote of the board, sitting en banc, following a public meeting.

(c)For the purpose of reviewing the suitability for parole of those inmates eligible for parole under prior law at a date earlier than that calculated under Section 1170.2, the board shall appoint panels of at least two persons to meet annually with each inmate until the time the person is released pursuant to proceedings or reaches the expiration of his or her term as calculated under Section 1170.2.

(d)It is the intent of the Legislature that, during times when there is no backlog of inmates awaiting parole hearings, life parole consideration hearings, or life rescission hearings, hearings will be conducted by a panel of three or more members, the majority of whom shall be commissioners. The board shall report monthly on the number of cases where an inmate has not received a completed initial or subsequent parole consideration hearing within 30 days of the hearing date required by subdivision (a) of Section 3041.5 or paragraph (2) of subdivision (b) of Section 3041.5, unless the inmate has waived the right to those timeframes. That report shall be considered the backlog of cases for purposes of this section, and shall include information on the progress toward eliminating the backlog, and on the number of inmates who have waived their right to the above timeframes. The report shall be made public at a regularly scheduled meeting of the board and a written report shall be made available to the public and transmitted to the Legislature quarterly.

(e)For purposes of this section, an en banc review by the board means a review conducted by a majority of commissioners holding office on the date the matter is heard by the board. An en banc review shall be conducted in compliance with the following:

(1)The commissioners conducting the review shall consider the entire record of the hearing that resulted in the tie vote.

(2)The review shall be limited to the record of the hearing. The record shall consist of the transcript or audiotape of the hearing, written or electronically recorded statements actually considered by the panel that produced the tie vote, and any other material actually considered by the panel. New evidence or comments shall not be considered in the en banc proceeding.

(3)The board shall separately state reasons for its decision to grant or deny parole.

(4)A commissioner who was involved in the tie vote shall be recused from consideration of the matter in the en banc review.

History

Added Stats 1941 ch 106 § 15. Amended Stats 1953 ch 721 § 1; Stats 1957 ch 2256 § 58; Stats 1963 ch 1702 § 2; Stats 1971 ch 1732 § 3; Stats 1976 ch 1139 § 281, operative July 1, 1977; Stats 1977 ch 165 § 45, effective June 30, 1977, operative July 1, 1977; Stats 1978 ch 329 § 3, effective June 30, 1978; Stats 1979 ch 255 § 19; Stats 1984 ch 1432 § 6; Stats 1986 ch 1446 § 3; Stats 2001 ch 131 § 2 (SB 778), effective July 31, 2001; Stats 2004 ch 1 § 2 (AB 2), effective January 21, 2004; Amended by Governor's Reorganization Plan No. 1 of 2005 § 28, effective May 5, 2005, operative July 1, 2005; Stats 2005 ch 10 § 29 (SB 737), effective May 10, 2005, operative July 1, 2005; Stats 2009 ch 276 § 1 (AB 1166), effective January 1, 2010; Stats 2013 ch 312 § 2 (SB 260), effective January 1, 2014; Stats 2015 ch 470 § 1 (SB 230), effective January 1, 2016; Stats 2017 ch 676 § 1 (AB 1448), effective January 1, 2018.

California Penal Code Section 3041.5

CA Penal Code § 3041.5 (2017)

(a) At all hearings for the purpose of reviewing an inmate's parole suitability, or the setting, postponing, or rescinding of parole, with the exception of en banc review of tie votes, the following shall apply:

(1) At least 10 days before any hearing by the Board of Parole Hearings, the inmate shall be permitted to review the file which will be examined by the board and shall have the opportunity to enter a written response to any material contained in the file.

(2) The inmate shall be permitted to be present, to ask and answer questions, and to speak on his or her own behalf. Neither the inmate nor the attorney for the inmate shall be entitled to ask questions of any person appearing at the hearing pursuant to subdivision (b) of Section 3043.

(3) Unless legal counsel is required by some other law, a person designated by the Department of Corrections and Rehabilitation shall be present to ensure that all facts relevant to the decision be presented, including, if necessary, contradictory assertions as to matters of fact that have not been resolved by departmental or other procedures.

(4) The inmate and any person described in subdivision (b) of Section 3043 shall be permitted to request and receive a stenographic record of all proceedings.

(5) If the hearing is for the purpose of postponing or rescinding parole, the inmate shall have the rights set forth in paragraphs (3) and (4) of subdivision (c) of Section 2932.

(6) The board shall set a date to reconsider whether an inmate should be released on parole that ensures a meaningful consideration of whether the inmate is suitable for release on parole.

(b) (1) Within 10 days following any decision granting parole, the board shall send the inmate a written statement setting forth the reason or reasons for granting parole, the conditions he or she must meet in order to be released, and the consequences of failure to meet those conditions.

(2) Within 20 days following any decision denying parole, the board shall send the inmate a written statement setting forth the reason or reasons for denying parole, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated.

(3) The board shall schedule the next hearing, after considering the views and interests of the victim, as follows:

(A) Fifteen years after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the decision denying parole are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the inmate than 10 additional years.

(B) Ten years after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the decision denying parole are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the inmate than seven additional years.

1) →

(C) Three years, five years, or seven years after any hearing at which parole is denied, because the criteria relevant to the decision denying parole are such that consideration of the public and victim's safety requires a more lengthy period of incarceration for the inmate, but does not require a more lengthy period of incarceration for the inmate than seven additional years.

(4) The board may in its discretion, after considering the views and interests of the victim, advance a hearing set pursuant to paragraph (3) to an earlier date, when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the inmate provided in paragraph (3).

(5) Within 10 days of any board action resulting in the rescinding of parole, the board shall send the inmate a written statement setting forth the reason or reasons for that action, and shall schedule the inmate's next hearing in accordance with paragraph (3).

(c) The board shall conduct a parole hearing pursuant to this section as a de novo hearing. Findings made and conclusions reached in a prior parole hearing shall be considered in but shall not be deemed to be binding upon subsequent parole hearings for an inmate, but shall be subject to reconsideration based upon changed facts and circumstances. When conducting a hearing, the board shall admit the prior recorded or memorialized testimony or statement of a victim or witness, upon request of the victim or if the victim or witness has died or become unavailable. At each hearing the board shall determine the appropriate action to be taken based on the criteria set forth in paragraph (1) of subdivision (b) of Section 3041.

(d) (1) An inmate may request that the board exercise its discretion to advance a hearing set pursuant to paragraph (3) of subdivision (b) to an earlier date, by submitting a written request to the board, with notice, upon request, and a copy to the victim which shall set forth the change in circumstances or new information that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration of the inmate.

(2) The board shall have sole jurisdiction, after considering the views and interests of the victim to determine whether to grant or deny a written request made pursuant to paragraph (1), and its decision shall be subject to review by a court or magistrate only for a manifest abuse of discretion by the board. The board shall have the power to summarily deny a request that does not comply with this subdivision or that does not set forth a change in circumstances or new information as required in paragraph (1) that in the judgment of the board is sufficient to justify the action described in paragraph (4) of subdivision (b).

(3) An inmate may make only one written request as provided in paragraph (1) during each three-year period. Following either a summary denial of a request made pursuant to paragraph (1), or the decision of the board after a hearing described in subdivision (a) to deny parole, the inmate shall not be entitled to submit another request for a hearing pursuant to subdivision (a) until a three-year period of time has elapsed from the summary denial or decision of the board.

(Amended by Stats. 2015, Ch. 470, Sec. 4. (SB 230) Effective January 1, 2016. Note: This section was amended on Nov. 4, 2008, by initiative Prop. 9.)

(2)

California Penal Code Section 3051

CA Penal Code § 3051 (2017)

(a) (1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger, or was under 18 years of age as specified in paragraph (4) of subdivision (b), at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) "Incarceration" means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) "Controlling offense" means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b) (1) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(4) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(3) →

(f) (1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) This section is not intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. A subsequent youth offender parole hearing shall not be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i) (1) The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of the act that added paragraph (2) by July 1, 2015.

(2) (A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2017.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2021. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before July 1, 2017.

(3) (A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by January 1, 2020.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by January 1, 2022. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before January 1, 2019.

(4) The board shall complete, by July 1, 2020, all youth offender parole hearings for individuals who were sentenced to terms of life without the possibility of parole and who are or will be entitled to have their parole suitability considered at a youth offender parole hearing before July 1, 2020.

(Amended by Stats. 2017, Ch. 684, Sec. 1.5. (SB 394) Effective January 1, 2018.)

(4)

FOR A TOTAL OF 655 DAYS.

YOU ARE ORDERED TO PAY A RESTITUTION FINE IN THIS MATTER OF $1,000 THROUGH THE DEPARTMENT OF CORRECTIONS IN A MANNER PRESCRIBED BY THE DEPARTMENT OF CORRECTIONS.

WHILE IN STATE PRISON, MR. DREW, YOU MAY EARN GOODTIME CREDITS WHICH WILL REDUCE YOUR PRISON TERM. AT SOME TIME YOU MAY BE PLACED ON PAROLE. IF YOU VIOLATE ANY TERMS AND CONDITIONS OF YOUR PAROLE, YOU'LL BE SENT BACK TO STATE PRISON FOR UP TO ONE YEAR FOR EACH VIOLATION.

AS FAR AS YOUR APPEAL RIGHTS, MR. DREW, YOU HAVE THE RIGHT TO FILE AN APPEAL FROM THIS CONVICTION WITHIN 60 DAYS OF TODAY'S DATE.

YOU'RE ENTITLED TO TRANSCRIPTS OF ALL PROCEEDINGS IN THIS MATTER, ALL TRANSCRIPTS PROVIDED AT NO COST TO YOU.

IF YOU DO NOT HAVE THE FUNDS TO HIRE AN ATTORNEY FOR THE PURPOSES OF YOUR APPEAL, YOU MAY PETITION THE COURT OF APPEAL FOR APPOINTED COUNSEL AT NO COST TO YOU.

YOU MUST KEEP THE COURT OF APPEAL ADVISED OF YOUR WHEREABOUTS, SIR, AT ALL TIMES SO THEY CAN COMMUNICATE WITH YOU CONCERNING ANY MATTER ON YOUR APPEAL.

I UNDERSTAND YOUR ATTORNEY DOES HAVE AT THIS TIME YOUR NOTICE OF APPEAL. AND YOU'RE GOING TO SIGN THAT TODAY; IS THAT CORRECT?

MR. WEHRMEISTER: THAT'S CORRECT, YOUR HONOR.

THE DEFENDANT: YES.

THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT YOUR APPEAL RIGHTS, MR. DREW?

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION **CDC Form 128B**

CDCR Number: H80484 Name: KARL DEMONE DREW Housing: B 002 1101001L

PELICAN BAY STATE PRISON

[X] Inmate meets the youth offender criteria pursuant to PC 3051. **YPED: March 16, 2016**

(If the inmate is determinately sentenced and their EPRD is earlier than their YPED, the EPRD will control.)

[ ] Inmate does not meet the youth offender criteria pursuant to PC 3051.

- [ ] Controlling offense committed after age 23.
- [ ] Committed new crime after age 23 resulting in life term.
- [ ] Committed new crime after age 23 with malice aforethought.
- [ ] Controlling offense sentenced per PC 1170.12, PC 667(b)-(i).
- [ ] Controlling offense sentenced per PC 667.61.
- [ ] Sentenced to Life Without Possibility of Parole (LWOP) or Condemned.

Print Name/Title: G. Shepherd Signature: G Shepherd

Date: November 9, 2015 Institution: CAL

YOUTH OFFENDER ANALYSIS

(10)

PROOF OF SERVICE BY MAIL

BY PERSON IN STATE CUSTODY
(Fed. R. CIV. P. 5:528 U.S.C. 1746)

I, KARL DREW, declare: I am over eighteen (18) years of age and am a party to this action. I am a resident of Pelican Bay State Prison, in the County of Del Norte, State of California. My State Prison address is: Pelican Bay State Prison, PO Box 7500, Housing Unit B-4 Cell Number 212, Crescent City, CA 95532-7500.

On the 27TH day of MAY, I served the following document(s):

WRIT OF HABEAS (CORAM NOBIS)

On the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, with postage thereon fully paid, in the United States mail in a receptacle so provided at Pelican Bay State Prison, Crescent City, CA 95532, and addressed as follows:

OFFICE OF THE CLERK
SUPREME COURT OF THE U.S
WASHINGTON, D.C. 20543

OFFICE OF THE ATTORNEY GENERAL
455 GOLDEN GATE AVENUE; SUITE 11000
SAN FRANCISCO, CA. 94102-7004

I declare under penalty of perjury that the foregoing is true and correct.

KARL DREW
Inmate Signature

5-27-2024
Date

Additional material from this filing is available in the Clerk's Office.