

APR 23 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK DELAPLANE,

Petitioner - Appellant,

v.

JOHN MARSHALL, Warden,

Respondent - Appellee.

No. 04-55194

D.C. No. CV-01-04856-JFW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted March 3, 2008
Pasadena, California

Before: GIBSON**, O'SCANNLAIN, and GRABER, Circuit Judges.

The State of California Board of Prison Terms ("Board") cited Delaplane's escalating pattern of criminal conduct, the multiple victims, the murder of a witness who was planning to testify against him, and the fact that he was convicted

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

of first-degree murder, when it refused to set a parole release date. The Board also noted the District Attorney's opposition to parole, and it found that Delaplane "needs continued therapy in order to face, discuss, understand and cope with stress in a non-destructive manner" and that he "continues to be unpredictable and a threat to others" in the absence of further progress. These findings are supported by the record, including Delaplane's continuing denial of the murder and including psychological evaluations, during a period of more than a decade, which characterized Delaplane as manipulative. The Board thus relied on "some evidence" in support of its decision. *Biggs v. Terhune*, 334 F.3d 910, 915 (9th Cir. 2003).

For this reason, it cannot be said that the California Supreme Court, in denying Delaplane's habeas petition, acted in a way that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008), does not counsel otherwise for several reasons. Here, unlike in *Hayward*, the Board did not have "successive favorable views of his application for release." *Id.* at 546. Rather, the Board never has recommended parole. In *Hayward*, unlike in this case, the initial crime resulted from "unusual provocation,"

id. at 544, rather than from a calculated effort to silence a witness. And unlike Delaplane, “Hayward has accepted responsibility for his crime.” *Id.*

AFFIRMED.