

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 24 2008

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

CHRIS FOWLER,

Petitioner - Appellee,

v.

ATTORNEY GENERAL FOR THE
STATE OF CALIFORNIA; WILLIAM
SULLIVAN, Warden,

Respondents - Appellants.

No. 07-16096

D.C. No. CV-02-02250-GEB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Argued and Submitted June 9, 2008
San Francisco, California

Before: SCHROEDER and LEAVY, Circuit Judges, and FAIRBANK**, District
Judge.

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

** The Honorable Valerie Fairbank, United States District Judge for the
Central District of California, sitting by designation.

The State of California, on behalf of Warden William Sullivan, appeals from the district court's order granting Chris Fowler's petition for a writ of habeas corpus under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 2253. We review de novo a district court's decision to grant a 28 U.S.C. § 2254 petition, *see Yee v. Duncan*, 463 F.3d 893, 897 (9th Cir. 2006), and we reverse.

The district court erred when it granted the petition and issued the writ on the basis that the California Board of Prison Terms' February 10, 2000, denial of parole violated Fowler's due process rights. *See Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127-29 (9th Cir. 2006). In determining the issue before us, we follow our prior decisions, which have held that due process requires that there be some evidence to support the decision to deny parole. *See Sass*, 461 F.3d at 1128-29; *Irons v. Carey*, 505 F.3d 846, 850-51 (9th Cir. 2007).¹ Here, there was some evidence, the 1994 psychological report showing Fowler's continued potential for violence and the failure of subsequent psychological reports fully to evaluate the findings of the 1994 report.

¹ Sullivan's argument that clearly established Supreme Court law does not require that there be some evidence is foreclosed by our prior decisions. *See United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992) ("one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel").

Because the California Board of Prison Terms' February 2000 decision denying Fowler parole is supported by some evidence, the state court's decision rejecting Fowler's due process claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d)(1); *see also Irons*, 505 F.3d at 851.

REVERSED.