

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**DEPT 100**

Date: DECEMBER 7, 2009  
Honorable: PETER ESPINOZA  
NONE

Judge J. A. RAMIREZ  
Bailiff NONE

Deputy Clerk  
Reporter

(Parties and Counsel checked if present)

BH 006085

In re,  
SERGIO AYALA,  
Petitioner,  
On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

Nature of Proceedings: ORDER RE: PETITION FOR WRIT OF HABEAS CORPUS

The Court has read and considered the Petition for Writ of Habeas Corpus filed on June 10, 2009 by the Petitioner, the Return filed on October 5, 2009 by the Attorney General and the Traverse filed on November 2, 2009 by the Petitioner. The Petitioner challenges the Board of Parole Hearings' ("Board") December 18, 2008 finding that he is not suitable for parole.

Having independently reviewed the record and giving deference to the broad discretion of the Board of Parole Hearings ("Board") in parole matters, the Court concludes that the record does not contain "some evidence" to support the determination that the Petitioner currently presents an unreasonable risk of danger to society and is, therefore, not suitable for release on parole. See *In re Lawrence* (2008) 44 Cal.4th 1181, 1205-06; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667; Cal. Code Reg. tit. 15, § 2402. Thus, the Board's decision must be vacated.

The Petitioner was received in the Department of Corrections on July 15, 1992 after a conviction for murder in the second degree. He was sentenced to 15 years to life. His minimum parole eligibility date was April 20, 2001. He had served over 16 years in prison at the time of the hearing.

Facts

The record reflects that on October 15, 1990, the Petitioner and other members of the Crazy Rider gang were in a vehicle which drove down an alley where Esteban Hernandez and Virgilio Prado were seated. The Petitioner was a passenger and he asked the victims where they were from. Before they could reply, he opened fire with a shotgun. Prado ducked but Hernandez was hit in the chest. A bicyclist then passed the vehicle and the Petitioner allegedly shot at him but missed. Probation Officer's Report (POR), pgs. 2-3 (See Petition, Exhibit C.)

The Petitioner pled guilty to second degree murder and attempted murder. He accepts full responsibility for the murder, but his story differs from the official facts in certain respects. He stated at the hearing that just prior to the offense, his girlfriend had told him that she had been assaulted by members of another gang. She was very upset and he decided to retaliate. The Petitioner also stated that he went to the location of the offense and shot one time at the two victims without speaking to them. He denied having shot at a bicyclist, stating that

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he shot only once and was not charged with or convicted of any crime regarding to the bicyclist. Board Hearing Transcript (HT), pgs. 10-13, 78.

The Petitioner was 19 at the time of the offense and is now 38 years old. He has no juvenile criminal record, but he was convicted of the sale and transportation of cocaine as an adult and placed on probation. He was also arrested for grand theft auto and joyriding, which led to a violation of probation. POR, pgs. 6-7. The Petitioner started associating with gangs when he was 17 years old, and he dropped out of high school prior to the committing the murder. February 26, 2008 Psychological Report (PR), pg. 4.

Since the Petitioner was received in prison, he has had a generally positive prison record. He has had three 115s, the last of which occurred in 1997 (missing tweezers). HT, pgs. 38-40. His first 115 occurred in 1993 and involved an alleged self-infliction of stab wounds. HT, pg. 38. The Petitioner later told prison authorities that he was stabbed by a gang member in prison, but he chose not to disclose this fact because he was afraid of gang retaliation. HT, pgs. 55-56, 60-62. He also received a 115 for fabricating the story about the stabbing. HT, pgs. 39-40.

While in prison, the Petitioner has received his GED and has earned several college credits. HT, pgs. 43-44. He has completed vocations in auto body, upholstery, office services and computer programming. He has received exceptional work performance ratings. He has been active in Alcoholics Anonymous and Narcotics Anonymous for many years. PR, pgs. 2-3.

The Petitioner's most recent psychological report was favorable. It noted that he expressed "full responsibility" for the crime. PR, pg. 4. He also expressed deep remorse. PR, pgs. 3-5. His global assessment of functioning was 90 on a scale of 100. The report concluded that he was a low risk of future violence. PR, pg. 7.

Finally, the Board noted that his parole plans were "excellent" and included multiple residential plans, job opportunities, and marketable skills. HT, pg. 113.

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## The Board's Decision

The Board found the Petitioner unsuitable for parole after a parole consideration hearing held on December 18, 2008. The Petitioner was denied parole for five years. The Board concluded that the Petitioner was unsuitable for parole and would pose an unreasonable risk of danger to society and a threat to public safety. The Board based its decision primarily on his commitment offense, previous criminal conduct, and his lack of adequate insight into the offense. In addition, the Board noted that the District Attorney's Office and Los Angeles Police Department had opposed the Petitioner's release. While this is not a factor on which the Board may rely to deny parole, such opposition may be properly considered. Penal Code § 3042.

## Standard of Review

The Board must consider "all relevant, reliable information available" and its decision must not be arbitrary or capricious. *Rosenkrantz*, 29 Cal.4th at 670; Cal. Code Regs., tit.15, § 2402, subd. (b). The paramount consideration in making a parole eligibility decision is the potential threat to public safety upon an inmate's release. The Board's decision must be based upon some evidence in the record of the inmate's current dangerousness. *Lawrence*, 44 Cal.4th at 1205-06. Only a modicum of such evidence is required. *Id.* at 1226.

## The Commitment Offense and Prior Criminal Record

The Board found that the Petitioner's commitment offense was especially heinous, atrocious, or cruel because it involved multiple victims and "some level of calculation" because the Petitioner was specifically looking for Mr. Hernandez to kill him. HT, pgs. 112, 114; Cal. Code Regs., tit. 15, § 2402, subs. (c)(1)(A) and (c)(1)(B). The Court agrees that there were multiple victims. The Petitioner was convicted of the murder of Esteban Hernandez and the attempted murder of Virgilio Prado. The Court also finds that there was some evidence that the crime was carried out in a dispassionate and calculated manner, as the Petitioner admitted that he was determined to retaliate for the alleged assault on his girlfriend.

In addition, the Board found that the Petitioner's prior criminal history, which included the sale of cocaine and a probation violation based on a subsequent arrest and failures to appear, were supportive of its decision to deny parole. The Court finds that although the narcotics conviction was properly considered by the

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Board, it does not support a denial of parole as it did not involve violence. Cal. Code Regs., tit. 15, § 2402, subds. (b) and (c) (2).<sup>1</sup>

The Board may base a denial of parole upon the circumstances of the offense or other immutable factors only if the facts are probative of the “ultimate conclusion that an inmate continues to pose an unreasonable risk to public safety.” *Lawrence*, 44 Cal.4th at 1221. Here, the commitment offense and prior criminal conduct does not continue to indicate a current risk of violence, after more than 16 years of rehabilitation. The Petitioner has no juvenile record. Cal. Code Regs., tit. 15, § 2402, subd. (d)(1). He has expressed remorse for his conduct, stating that it was not justified for any reason, and he also wrote letters of apology to the victims’ families. HT, pgs. 12-13, 31, 103; Cal. Code Regs., tit. 15, § 2402, subd. (d)(3). There is some evidence that the crime occurred during a period of significant stress, as the Petitioner apparently reacted in anger after his girlfriend told him she was assaulted by other gang members. Cal. Code Regs., tit. 15, § 2402, subd. (d)(4). He lacks a history of violent crime. Cal. Code Regs., tit. 15, § 2402, subd. (d)(6). He has realistic parole plans for his release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). In addition, the Petitioner’s behavior and participation in rehabilitative programs has enhanced his ability to function within the law upon his release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(9).

Because the Petitioner’s post-conviction record supports a finding that he no longer poses a danger to public safety, the Board’s findings regarding his commitment offense and prior criminal acts, absent a rational nexus between those facts and current dangerousness, do not provide some evidence of unsuitability. *Lawrence*, 44 Cal.4th at 1227. As discussed below, the Board also noted the Petitioner’s lack of insight as a basis for its denial of parole.

<sup>1</sup> The Board also found that the Petitioner had an unstable social history because he became a gang member, used drugs and alcohol and dropped out of school. HT, pg. 112; Cal. Code Regs., tit. 15, § 2402, subd. (c)(3). However, there must be evidence of bad relationships to support that finding. *In re Roderick* (2007) 154 Cal.App.4th 242, 268. The Court finds that there the record does not contain some evidence that the Petitioner had unstable or tumultuous relationships with others.

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## The Petitioner's Lack of Insight

The Board found while the Petitioner showed "some insight" into the causative factors of his life crime, there were "multiple conflicts" between his statements regarding the crime and also regarding his discipline while in prison. HT, pg. 113. The Board noted that the conflicts put the Petitioner's veracity in question, which suggests a lack of insight and possible minimization of his responsibility. HT, pg. 114. Based on the testimony during the hearing, the lack of insight appears to refer to the Petitioner's assertion that he retaliated for an assault on his girlfriend as well as his changed version regarding the 115 in prison for a self-inflicted stabbing.

Evidence that an inmate's character remains unchanged from the time of the offense, or that he is unable to gain insight into his prior anti-social behavior despite years of rehabilitative programs, may provide some evidence of a current risk of danger to support a denial of parole. See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260. In *Shaputis*, the California Supreme Court affirmed the Governor's finding that the inmate was not suitable for parole in light of his commitment offense and his continued lack of insight, as evidenced by his glib statements regarding the murder of his wife, including that he "had a little accident" and his psychological report's statements that he had "a schizoid quality to interpersonal relationships" and "limited insight" regarding his past behavior. *Id.* at 1251. The Court noted that Mr. Shaputis' offense was the culmination of a pattern of brutalizing behavior toward his wife and other family members over many years. *Id.* at 1259.

However, the Petitioner's case is distinguishable from *Shaputis*. Unlike Mr. Shaputis, who abused his wife for many years before murdering her without any significant provocation, the Petitioner has no history of violence and apparently committed his offense following his girlfriend's assertion that she had been assaulted. The Board tacitly affirmed the Petitioner's version of the events, as it found that the Petitioner "was specifically looking for Mr. Hernandez to kill him." HT, pg. 114. See also, *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112 (if an inmate's version of the offense is not impossible, delusional, dishonest or irrational, it may not indicate a lack of insight sufficient to deny parole).

In addition, the Board's finding that the Petitioner lacked insight because of his version of the 115 that he received in 1993 is without merit. The Petitioner maintained that he was stabbed by an inmate, but he told authorities that he stabbed himself to avoid gang retaliation or involvement. Rather than support a finding of his unsuitability, this event, which is the only incidence of violence during his term in prison, generally shows his seriousness about avoiding gang involvement.

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Furthermore, unlike *Shaputis*, the Petitioner's most recent psychological report does not support the Board's determination that the Petitioner lacks insight. Rather, the report concludes that the Petitioner has insight into the background factors that contributed to the crime, appropriate remorse, and accepts full responsibility for the murder of Mr. Hernandez. PR, pgs. 7-8. It found that he had responded well to treatment, does not have a negative attitude and is not outwardly impulsive. PR, pg. 7. Significantly, the report also affirmed that he had separated from gang activity for many years. PR, pg. 8.

On the basis of this record, the Court finds that there is no nexus between the Petitioner's 19 year-old commitment offense, which was his only act of violence, and his current dangerousness.

## Conclusion

The Board's December 18, 2008 decision, finding the Petitioner unsuitable for parole, is not supported by some evidence in the record of the Petitioner's current risk of danger to society. Therefore, the petition for writ of habeas corpus is granted. The Board is ordered to vacate its decision denying parole and thereafter conduct a new parole hearing for the Petitioner in conformity to the decision of this Court within 120 days.

The court order is signed and filed this date. The clerk is directed to send notice.

A true copy of this minute order is sent via U.S. Mail to the following parties:

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