

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: MAY 25, 2011  
Honorable: PATRICIA SCHNEGG  
NONE

Judge: E. HERNANDEZ  
Bailiff: NONE

Deputy Clerk  
Reporter

(Parties and Counsel checked if present)

BH007454

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 November 10, 2010 by the Petitioner, the Return filed on March 28, 2011 by the Respondent and the Traverse filed on April 11, 2011 by the Petitioner. The Petition challenges the Governor's August 30, 2010 decision to reverse the Board of Parole Hearings' (Board) April 5, 2010 finding that the Petitioner is suitable for parole.

Having independently reviewed the record, and giving deference to the broad discretion of the Governor 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 Governor's decision must be vacated and the Board's grant of parole reinstated.

The Petitioner was received in the Department of Corrections on July 15, 1992 after a conviction for second degree murder and attempted murder. He was sentenced to a term of 15 years to life in prison. His minimum parole eligibility date was April 20, 2001. He has now served 18 years in prison.

## 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. 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 Return, Exhibit 1.)

The Petitioner pled guilty to second degree murder and attempted murder. At the 2010 Board hearing, he accepted full responsibility for the murder and expressed remorse. 2010 Board Hearing Transcript (HT), pgs. 42-46, 117-121. He has stated that prior to the offense, his girlfriend told him that she had been assaulted

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by members of another gang. She was upset and he decided to retaliate. 2008 Psychological Report (PR), pg. 3.

The Petitioner was 19 at the time of the offense and is now 38 years old. He has no juvenile criminal record. As an adult, he was convicted of the sale and transportation of cocaine 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. He had dropped out of high school prior to the committing the murder. PR, pg. 4.

In prison, the Petitioner received three 115 disciplines, the last of which occurred in 1997 (missing tweezers). His first 115 occurred in 1993 and involved an alleged self-infliction of stab wounds. 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. He also received a 115 for fabricating the story about the stabbing. Governor's Reversal letter (GR), pg. 1.

While in prison, the Petitioner received his GED and earned several college credits. 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, and he has attended self-help programs such as Stress and Emotional Well-Being, Skills for Reducing Stress, Negative Emotions, Anger and Communication, Family and Other Relationships, Anger Management, Thinking Errors, Conflict Anger Lifelong Management, and Anger, Triggers, Cravings, and Avoiding Relapse. GR, pg. 2; see also, PR, pgs. 2-3.

The Petitioner's most recent psychological report was favorable and noted that he expressed full responsibility and deep remorse for the crime. 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. The Petitioner also has multiple residential plans, job opportunities, and marketable skills upon release on parole. HT, pgs. 84-86.

The Board's Finding of Suitability

The Board found the Petitioner suitable for parole on April 5, 2010. After considering the Petitioner's commitment offense, his prior criminal record, and his social history, the Board determined that he would not

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pose an unreasonable risk of danger to society. The Board noted that the Petitioner had not received any serious discipline since 1997. The Board also considered the Petitioner’s 2008 psychological report, which was supportive of his release. HT, pgs. 123-133.

The Governor’s Reversal

The Governor reversed the Board’s finding of suitability on August 30, 2010. The Governor based his decision on the Petitioner’s commitment offense and his lack of insight into the commitment offense. Additionally, the Governor considered the opposition to parole by the Los Angeles County District Attorney’s Office. While such opposition must be considered, it may not serve as the basis for a denial of parole. Penal Code § 3042. The Governor concluded that the negative factors outweighed the positive factors cited by the Board.

Standard of Review

The Governor is constitutionally authorized to make “an independent decision” as to parole suitability. See *Rosenkrantz*, 29 Cal.4th at 670. The Governor must consider “all relevant, reliable information available” and his decision must not be arbitrary or capricious. *Id.*; 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 Governor’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.

Pre-Commitment Factors

The Governor found that the Petitioner’s commitment offense was especially heinous, atrocious, or cruel, because the offense involved multiple victims and was carried out in a dispassionate and calculated manner. GR, pg. 2. Cal. Code Regs., tit. 15, § 2402, subs. (c)(1)(A) and (c)(1)(B). The Court agrees. The Petitioner shot and killed one victim and shot at another victim. By the Petitioner’s own admission, he decided to do so to retaliate for an alleged prior incident involving his girlfriend.

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However, the Governor may base a reversal of parole upon immutable factors, such as the circumstances of the offense, 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 does not continue to indicate a current risk of violence, after 18 years of violence-free and substance abuse-free rehabilitation, absent a rational nexus between those facts and current dangerousness. *Id.* at 1227.

The Governor also considered the Petitioner’s lack of insight and inadequate level of responsibility, as discussed below.

### The Petitioner’s Insight

The Governor also found the Petitioner lacks insight regarding his offense, because his versions regarding the offense over the years has changed, which may reflect a lack of acceptance of full responsibility for the murder. GR, pgs. 2-4. The Governor noted that the Petitioner denied committing the offense at various times, including as recently as 2000. At that time, the Petitioner also accused the officer who wrote the report in his case of impropriety in a corruption investigation, which suggested that the Petitioner was minimizing his own responsibility. However, the Governor also noted that in 2004, the Petitioner finally admitted his role to a psychological evaluator. GR, pg. 3.

An inmate’s failure to gain insight regarding the nature and magnitude of his offense or to express genuine remorse provides some evidence that he is currently dangerous. See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260. However, a lack of insight must be demonstrably shown in the record and indicative of current dangerousness in order to serve as a basis for finding an inmate unsuitable for parole. See *In re Powell* (2010) 188 Cal.App.4th 1530, 1542.

In the present case, the Petitioner fully acknowledged his sole responsibility for the offense at the 2010 Board hearing. HT, pgs. 20-23, 117-121. He also did so in his previous hearing in 2008.<sup>1</sup> Further, his most recent psychological report in 2008 analyzed the Petitioner’s insight in the following passage on pages 8 and 9:

<sup>1</sup> See Los Angeles Superior Court order, *In re Ayala* (BH006085), December 7, 2009, pgs. 5-6.

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“The inmate acknowledged that his association with gangs was a major contributing factor in the controlling case. He acknowledged this crime most likely would not have occurred if he had not been involved in or associating with a gang. Additional contributing factors in the controlling case were the inmate’s anger over the disrespect towards his girlfriend, his strong feelings for his girlfriend, and his reported “protectiveness.” Noteworthy is that the inmate’s anger was a major influential factor in his criminal behavior. He has spent time attempting to remediate this problem. Mr. Ayala has made efforts to understand his background and other influential factors that might have been involved in, or were contributors to, the controlling case. He continues to work on remediation in these areas. It is unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate. . . .”

The Court finds that the record in the present case does not support the Governor’s finding that the Petitioner lacks insight or that he fails to accept full responsibility for the commitment offense. As noted in *In re Twinn* (2010) 190 Cal.App.4th 447, 469-470, an inmate’s prior minimization is not evidence of a current lack of insight when the inmate currently accepts full responsibility. See also, *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112;<sup>2</sup> *In re Juarez* (2010) 182 Cal.App.4th 1316, 1339-1340.

Conclusion

The Petitioner does not have a juvenile record of assaulting others. Cal. Code Regs., tit. 15, § 2402, subd. (d)(1). He has experienced reasonably stable relationships with others, as evidenced by his continued support of family and friends. Cal. Code Regs., tit. 15, § 2402, subd. (d)(2). He expressed remorse and accepts responsibility for his offense. Cal. Code Regs., tit. 15, § 2402, subd. (d)(3). He committed the offense as a result of significant stress in his life (the assault on his girlfriend). Cal. Code Regs., tit. 15, § 2402, subd. (d)(4). He lacks any significant history of violent crime. Cal. Code Regs., tit. 15, § 2402, subd. (d)(6). The Petitioner was 19 at the time of the offense and is now 38, which reduces the probability of recidivism. Cal. Code Regs., tit. 15, § 2402, subd. (d)(7). He has realistic plans for his release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). Finally, his participation in educational, vocational and self-help programs has enhanced his ability to function within the law upon his release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(9).

<sup>2</sup> Disapproved on other grounds in *In re Prather* (2010) 50 Cal.4th 238, 252-253.

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The Governor's August 30, 2010 decision to reverse the Board's finding that the Petitioner is suitable 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. As nothing in the record suggests that the Petitioner is unsuitable for parole, the Governor's reconsideration would be futile. The Governor is ordered to vacate his decision and the Board's April 5, 2010 decision is hereby reinstated. The Petitioner is ordered released in accordance with the parole date that the Board calculated. See *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491; *In re Masoner* (2009) 179, Cal.App.4th 1531, 1541.

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:

Marilee Marshall, Esq.  
Marilee Marshall & Associates, Inc.  
Attorneys at Law  
523 W. Sixth St., Suite 1109  
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Sacramento, CA 95825  
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<b>SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES</b>	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Clara Shorridge Foltz Criminal Justice Center 210 West Temple Street Los Angeles, CA 90012	<b>CONFORMED COPY</b> OF ORIGINAL FILED Los Angeles Superior Court
PLAINTIFF/PETITIONER:  SERGIO AYALA	MAY 26 2011  John A. Clarke, Executive Officer/Clerk By <u>Virginia Torres</u> , Deputy Virginia Torres
<b>CLERK'S CERTIFICATE OF MAILING</b> CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)	CASE NUMBER:  BH007454

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served:

- |  |   |
|--|---|
| <input type="checkbox"/> Order Extending Time            | <input checked="" type="checkbox"/> Order re: Petition for Writ of Habeas Corpus  |
| <input type="checkbox"/> Order to Show Cause             | <input type="checkbox"/> Order re: Writ Error Coram Nobis   |
| <input type="checkbox"/> Order for Informal Response     | <input type="checkbox"/> Order re: Appointment of Counsel   |
| <input type="checkbox"/> Order for Supplemental Pleading | <input type="checkbox"/> Copy of Petition for Writ of Habeas Corpus /Suitability<br>Hearing Transcript for the Attorney General (San Diego) |

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to the cause. I served this document by placing true copies in envelopes addressed as shown below and then by sealing and placing them for collection; stamping or metering with first-class, prepaid postage; and mailing on the date stated below, in the United States mail at Los Angeles County, California, following standard court practices.

May 26, 2011  
DATED AND DEPOSITED

JOHN A. CLARKE, Executive Officer/Clerk

By: Virginia Torres, Clerk  
Virginia Torres

Marilee Marshall, Esq.  
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