

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: DECEMBER 14, 2009  
Honorable: PETER ESPINOZA  
NONE

Judge J. A. RAMIREZ  
Bailiff NONE

Deputy Clerk  
Reporter

(Parties and Counsel checked if present)

BH 006029

In re,  
CESAR CHAVEZ,  
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 May 14, 2009 by the Petitioner, the Return filed on October 16, 2009 by the Attorney General and the Traverse filed on November 18, 2009 by the Petitioner. The Petitioner challenges the Governor's January 22, 2009 decision to reverse the Board of Parole Hearings' ("Board") August 26, 2008 finding that the Petitioner is suitable for parole.

Having independently reviewed the record, 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 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 October 13, 1993 after a conviction for murder in the second degree and attempted murder. Board Hearing Transcript (HT), pg. 14. He was sentenced to 15 years to life. His minimum parole eligibility date was September 4, 2002. He had served 16 years in prison at the time of the reversal.

## Facts

The record reflects that on August 6, 1992, the Petitioner and other members of the Lunatics gang arrived at a theater and a confrontation occurred with members of a rival gang. The Petitioner and Humberto Duran pushed and shoved each other. The Petitioner took a pistol and brandished it toward Duran, who slapped it away. The Petitioner shot into the ground and then shot toward Duran as he came at the Petitioner. Duran was shot and injured. As the Petitioner ran, he continued to shoot toward the group of rivals. Alejandro Zumudio, a close friend of the Petitioner, was shot to death. Probation Officer's Report (POR), pgs. 2-3.

The Petitioner was 17 when he committed the offenses and is now 34 years old. He had no previous criminal record. During his many years in prison, he received a single 115 for possessing an inmate-manufactured tattoo gun. The Petitioner maintains that it belonged to his cellmate. HT, pgs. 14-15. He has received no 128A chronos while in prison and has had an excellent overall prison record. The Petitioner was in the 11th grade in high school when he committed the offenses. He received his high school diploma and GED

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in prison. He has completed several college courses and is pursuing an AA degree. He has vocational training in auto trim and upholstery, and he completed numerous self-help courses, including anger management and Bible study. HT, pgs. 16-17.

The Petitioner stated that he used alcohol and marijuana prior to the commitment offenses and was “really drunk” on that day. June 3, 2008 Psychological Report (PR), pg. 2. Although he had consistently been in Alcoholics Anonymous while in prison, he has been on the Alcoholics Anonymous waiting list at his current prison location. PR, pg. 4; HT, pg. 20. He told the Board that he believed he was an alcoholic. He also showed familiarity with the 12-steps in AA. HT, pgs. 20-22.

The Petitioner has adequate residential plans, job offers, and marketable skills. HT, pgs. 17, 31-32; Governor’s Reversal (GR), pg. 2. He has close family ties and numerous offers of support. GR, pg. 2. Furthermore, the Petitioner’s 2008 psychological report concluded that the he presents a low risk of future violence. PR, pg. 10. The report noted that the Petitioner has no prior criminal record, an excellent record in prison, and a history of participation in substance abuse treatment. *Id.* The report also concluded that he appeared “to have insight into the nature of the controlling offense and continues to address his substance abuse issues.” PR, pg. 9. It reported that the Petitioner “developed some viable coping strategies that he has used effectively in recent years, which may help him manage the stress and frustration he will experience if granted parole.” *Id.*

The Board’s Finding of Suitability

The Board found the Petitioner suitable for parole on August 26, 2008. After considering the Petitioner’s commitment offense, the Board determined that he would not pose an unreasonable risk of danger to society because the positive aspects of his record heavily outweighed the negative considerations. HT, pg. 57. The Board found that the Petitioner had no juvenile or adult criminal history. HT, pg. 58; Cal. Code Regs., tit. 15, § 2402, subs. (d)(1) and (d)(6). The Board stated that has had a stable social history. HT, pg. 58; Cal. Code Regs., tit. 15, § 2402, subd. (d)(2). The Board noted that the Petitioner exhibited genuine remorse. HT, pg. 57; Cal. Code Regs., tit. 15, § 2402, subd. (d)(3). It found that the Petitioner has realistic parole plans and has enhanced his ability to function within the law upon his release. HT, pg. 57; Cal. Code Regs., tit. 15, § 2402, subs. (d)(8) and (d)(9).

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## The Governor's Reversal

The Governor reversed the Board's finding of suitability on January 22, 2009. The Governor based his decision primarily on the Petitioner's commitment offense and a psychological evaluation in 2006 which raised concerns about his alcoholism and his need for further AA and self-help. GR, pg. 2. In addition, the Governor noted that the District Attorney's Office had opposed the Petitioner's release. While this is not a factor on which the Governor may rely to deny parole, such opposition may be properly considered. Penal Code § 3042.

## 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.

## The Commitment Offense

The Governor found that the Petitioner's commitment offense was especially heinous, atrocious, or cruel because the offense involved multiple victims and because the motive was very trivial in relation to the offense. Cal. Code Regs., tit. 15, § 2402, subds. (c)(1)(A) and (c)(1)(E). The Court agrees. The commitment offense resulted in one victim's death and another victim's injury as a result of the shooting. Additionally, there is some evidence that the motive was very trivial in relation to the offense, as the shooting was precipitated by a rivalry between two party gangs.

However, the Governor may base a reversal of parole upon the circumstances of the offense and 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. Particularly after an inmate has served his suggested base term, the underlying circumstances of the commitment offense alone will rarely constitute a valid basis for a reversal of parole without other evidence of current dangerousness. *Id.* at 1211.

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Here, the commitment offense alone does not continue to indicate a current risk of violence, after 16 years of violence-free rehabilitation. As noted above, the Petitioner’s post-conviction record supports the Board’s finding that he no longer poses a danger to public safety, and the Governor’s determination regarding the offense does not provide some evidence of unsuitability, absent a rational nexus between those facts and current dangerousness. *Lawrence*, 44 Cal.4th at 1227. The Governor also considered the Petitioner’s 2006 psychological report, which raised concerns regarding his alcohol use and need for further self-help and treatment, as discussed below.

The 2006 Psychological Report

The Governor focused on the 2006 psychological report that raised concerns about the Petitioner’s current dangerousness, despite the presence of a more recent report. The Governor noted that the 2006 report indicated that when the Petitioner was asked if he would not resort to drinking alcohol again, the Petitioner responded “I can’t promise that.” GR, pg. 2. That report opined that the Petitioner would benefit from ongoing AA meetings and additional techniques and insight into how to handle stress. The 2006 report also stated that he appeared only “moderately motivated to make constructive changes in his life.” *Id.*

The Governor chose to focus on the 2006 evaluation in making his determination that the Petitioner is a current risk of danger, rather than on the 2008 psychological evaluation which was relied upon by the Board. As noted in *In re Gaul* (2009) 170 Cal.App.4th 659, 674-675, past psychological reports which are not supportive of release or indicate a lack of insight do not constitute some evidence upon which a denial of parole may be based, when more recent reports are supportive of release. See also, *In re Rico* (2009) 171 Cal.App.4th 659, 677. Thus, the issue is whether the overall record supports the Governor’s concerns about the Petitioner’s views of his use of alcohol or his commitment to dealing with his alcoholism.

The Petitioner discussed his views about his alcoholism at the Board hearing at length. He referred to the process of learning that he was an alcoholic and how pride initially prevented his acceptance that he was addicted. HT, pg. 22. He discussed how his use of alcohol at a young age changed his life, lowering his school grades and making him a more selfish person who made poor choices. HT, pgs. 42-43. The 2008 psychological report indicated that “the inmate has a history of attending Narcotics Anonymous and Alcoholics Anonymous in prison.” PR, pg. 5. That report also noted that he is not attending current treatment only because he is on the waiting list. The Petitioner also affirmed that he believed that AA will be necessary upon his release. *Id.* Thus, the record indicates that the Petitioner has an understanding of the role alcohol played in

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the offenses, an understanding of his addiction, and a commitment to continue AA upon release. The Court finds that the record does not contain some evidence to support the Governor's reversal of the Board's grant of parole on the basis of the Petitioner's former views regarding his use of alcohol, or his need for further treatment.

Conclusion

The Governor's January 22, 2009 decision to reverse the Board's August 26, 2008 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. Thus, the Governor is ordered to vacate his decision and the Board's finding of suitability for parole is hereby reinstated.

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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