

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: NOVEMBER 2, 2010  
Honorable: PETER ESPINOZA  
NONE

Judge J. RAMIREZ  
Bailiff NONE

Deputy Clerk  
Reporter

(Parties and Counsel checked if present)

BH006905  
In re,  
ARTIS DYER,  
Petitioner,  
On Habeas Corpus

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 April 19, 2010 by the Petitioner, the Return filed on September 13, 2010 by the Respondent and the Traverse filed on September 24, 2010 by the Petitioner. The Petitioner challenges the Board of Parole Hearings' (Board) April 28, 2009 finding that he is not suitable for parole.

Having independently reviewed the record and giving deference to the broad discretion of the 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 April 27, 1990 after a conviction for second degree murder with a firearm. He was sentenced to a term of 17 years to life in prison. His minimum parole eligibility date was September 23, 2000. He has now served 20 years in prison.

## Facts

The record reflects that on May 24, 1989, the Petitioner visited his cousin, Ronald Dyer, with friends and asked him to go out that night. Ronald refused to join the Petitioner, because he was spending time with a girlfriend and the two began to argue. The Petitioner fired a gun in the air at the front door of Ronald's house. Ronald told the Petitioner to leave and they argued again. Ronald then attempted to call the police, but another relative stopped him. As they continued to argue, the Petitioner shot Ronald several times in the chest, killing him, and then ran away. See October 6, 1992 Appellate Court Decision, pgs. 2-3. The Petitioner admitted the facts of the offense and indicated that he became angry when Ronald refused to go out with him. He stated that he decided to shoot Ronald, because the victim made several comments about his girlfriend and about his will to shoot that made him feel inferior. He indicated that he was very intoxicated at the time of the offense. See 2009 Board Hearing Transcript (HT), pgs. 13-14, 52-54.

The Petitioner was previously adjudicated as a juvenile for robbery after stealing a bike from another juvenile in 1982 and for grand theft auto after he was caught stripping a car in 1986. As an adult, the Petitioner was convicted of driving under the influence of alcohol three times in 1987 and five days before the commitment offense, on May 20, 1989. See 1989 Probation Officer's Report (POR), pg. 3.

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In prison, the Petitioner received only one 115 discipline, for inciting violence in 1993. He has been free of any serious discipline for 17 years. HT, pg. 40; 2008 Psychological Report (PR), pg. 5. The Petitioner completed vocations in office services and graphic communication and worked as a lead man in the machine shop. HT, pgs. 41-42. He served as a peer mentor in the Walden House Substance Abuse Program since 2006 and participated in several self-help programs, including Narcotics Anonymous, Alcoholics Anonymous, Anger Management and life skills programs. HT, pgs. 26-27, 42-45. He also completed some college-level courses and received positive chronologies from prison staff. HT, pg. 44; PR, pg. 3.

Upon his release, the Petitioner plans to reside at the Cedar House transitional substance abuse treatment residential program. The program is near his mother's home, where he plans to reside after one year at Cedar House. HT, pg. 24. He obtained an outside substance abuse sponsor, who lives in the same area. HT, pg. 28. He also was accepted in the Walden House transitional program and received a job offer with a plumbing company. HT, pgs. 26, 34. The Petitioner provided numerous letters of support from family and friends. HT, pgs. 28-37.

The Petitioner's 2008 psychological report indicated that he presents an overall very low risk of future violence and that he scored within the low or very low ranges on all testing instruments. The Petitioner was given a Global Assessment of Functioning score of 95 out of 100. The evaluator concluded that the Petitioner accepts responsibility for his offense and understands the causative factors leading to the offense. PR, pgs. 5, 7-8.

The Board's Decision

The Board found the Petitioner unsuitable for parole after a parole consideration hearing held on April 28, 2009. The Petitioner was denied parole for three years. The Board concluded that the Petitioner would pose an unreasonable risk of danger to society and a threat to public safety. The Board based its decision on the Petitioner's commitment offense, his prior offenses and problems with alcohol and his insight regarding the offense.

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

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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.

Pre-Commitment Factors

The record supports the Board’s finding that the Petitioner’s commitment offense was especially heinous, atrocious, or cruel, because the motive was very trivial in relation to the offense. HT, pgs. 71, 81; Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)( E).<sup>1</sup> The Petitioner shot his cousin merely because they were arguing after the victim refused to go out with the Petitioner. This was a very trivial motive in relation to shooting the victim multiple times and killing him.

The Board may base a denial of parole upon 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 alone does not continue to indicate a current risk of violence, after 20 years of rehabilitation.

The Board also considered the Petitioner’s prior offenses and history of drinking, which began at an early age (13). HT, pgs. 79, 82; Cal. Code Regs., tit. 15, § 2402, subds. (b) and (c)(2). The Petitioner was convicted of robbery, after forcibly stealing a bike as a juvenile, and has a history of driving under the influence and abusing alcohol. HT, pgs. 5-6; POR, pg. 3. However, like the commitment offense, the Petitioner’s priors, which do not involve physical injury to any party, are immutable factors and his prison record indicates 17 years of exemplary behavior. Moreover, the Petitioner has participated in substance abuse programming since 1995 and has never been disciplined for substance abuse in prison. HT, pgs. 40, 43. The Board provided no nexus between the Petitioner’s prior offenses or his prior substance abuse and his current dangerousness and, thus, these factors may not serve as a basis for a denial of parole. See *In re Criscione* (2009) 173 Cal.App.4th 60, 76; *In re Rico* (2009) 171 Cal.App.4th 659, 674, 685-86.

The Board also considered the Petitioner’s insight regarding the offense, as discussed below.

<sup>1</sup> The Board’s finding that the Petitioner’s offense was dispassionate is not supported by the record. The Petitioner shot the victim during a heated argument. Thus, it was not carried out in a dispassionate and calculated manner. See *In re Weider* (2006) 145 Cal.App.4th 570, 587-88; *In re Scott* (2005) 133 Cal.App.4th 573, 596-97; Cal. Code. Regs., tit. 15, § 2402, subd. (c)(1)(B).

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The Petitioner's Insight

The Board found that, while the Petitioner "did demonstrate some insight into the causative factors of his life crime..." and has "significantly developed over the years", he nevertheless needs "some additional exploration" regarding his offense, as his full acceptance of responsibility is recent. HT, pgs. 79-80. An inmate's failure to accept responsibility or gain insight regarding the causative factors leading to his offense may provide evidence that he is currently dangerous. See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260; *In re Shippman* (2010) 185 Cal.App.4th 446, 458-59. However, here, the record does not support the Board's finding.

The Board noted that the Petitioner previously indicated that the gun went off accidentally during a struggle. HT, pgs. 58, 80. As the Petitioner explained, he initially had trouble accepting full responsibility for his offense, because of the pain he had caused his family, but later realized that he was entirely to blame. He no longer minimizes his offense and admits that he intentionally shot his cousin. HT, pgs. 14, 60. The Petitioner's past claims regarding his offense are not evidence of his current dangerousness, given that his more current statements indicated that he accepts full responsibility for his offense. See *In re Vasquez* (2009) 170 Cal.App.4th 370, 385-86; *In re Lee* (2006) 143 Cal.App.4th 1400, 1414.

The Board also indicated that the Petitioner needs to further explore the causative factors leading to his offense. HT, pg. 80. However, the Petitioner did explain that he shot his cousin due to his impairment and his anger, which arose after his cousin refused him and made comments that made him feel inferior. He admitted that he was attempting to exert his authority in the situation. HT, pgs. 13-14, 52-54. He expressed remorse for his actions and discussed how he would avoid substance abuse and losing control in anger in the future. HT, pgs. 15-16, 18-19, 49-50. Further, his psychological report indicated that he accepts responsibility and "clearly can state the underlying cause of the offense and how the offense occurred" in concluding that the Petitioner is a very low risk of future violence. PR, pg. 8.

The Board pointed to no other evidence to provide a nexus between the Petitioner's explanations regarding the offense and his current dangerousness. The Board's belief that the Petitioner lacks insight, absent any evidence to support that finding, does not provide some evidence upon which a denial of parole may be based. See *In re Calderon* (2010) 184 Cal.App.4th 670, 690; *In re Dannenberg* (2009) 173, Cal.App.4th 237, 255-56.

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## Conclusion

There is ample evidence in the record which weighs in favor of the Petitioner's suitability. He 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 family support. HT, pgs. 28-37; Cal. Code Regs., tit. 15, § 2402, subd. (d)(2). He expressed remorse and accepts responsibility for his offense. HT, pgs. 15, 18-19; Cal. Code Regs., tit. 15, § 2402, subd. (d)(3). He lacks any significant history of violent crime. Cal. Code Regs., tit. 15, § 2402, subd. (d)(6). The Petitioner was 20 years old at the time of the offense and is now 42 years old, which reduces the probability of recidivism. Cal. Code Regs., tit. 15, § 2402, subd. (d)(7). He has realistic plans for his release, including acceptance in transitional programs, offers of residence from family and a job offer. 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).

Because the Petitioner's post-conviction record strongly supports a finding that he no longer poses a danger to public safety, the Board's findings regarding the Petitioner's offense, his prior offenses and prior substance abuse, absent a rational nexus between those facts and current dangerousness, do not provide some evidence of unsuitability. *Lawrence*, 44 Cal.4th at 1227. The Board did not articulate any such nexus.

The Board must set a parole date, unless a prisoner is unsuitable, meaning the prisoner poses an unreasonable risk of danger to society, based on all relevant, reliable information available to the panel. Cal. Code Regs., tit. 15, § 2402, subds. (a) and (b); Penal Code § 3041. In this case, there is no evidence indicating that the Petitioner's release would unreasonably endanger public safety.

The Board's April 28, 2009 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. 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 within 120 days, in accordance with this decision and *In re Prather* (2010) 50 Cal.4th 238, 306-307.

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

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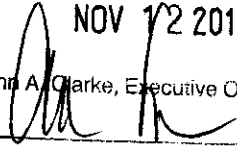
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A true copy of this minute order is sent via U.S. Mail to the following parties:

Marilee Marshall, Esq.  
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<b>SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES</b>	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Clara Shortridge 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:  ARTIS DYER	NOV 12 2010 John A. Clarke, Executive Officer/Clerk By  , Deputy Carmen Sortillon
<b>CLERK'S CERTIFICATE OF MAILING</b> CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)	CASE NUMBER:  BH006905

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 |

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.

November 12, 2010  
DATED AND DEPOSITED

JOHN A. CLARKE, Executive Officer/Clerk  
By: , Clerk  
Carmen Sortillon

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