

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: SEPTEMBER 13, 2010
Honorable: PETER ESPINOZA
NONE

Judge J. A. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH006687

In re,
ROGER HAIRSTON,
Petitioner,
On Habeas Corpus

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 February 10, 2010 by the Petitioner. The Court has also read and considered the Return filed on July 30, 2010 by the Warden and the Traverse filed on August 17, 2010 by the Petitioner. The Petitioner challenges the Governor's November 12, 2009 decision to reverse the Board of Parole Hearings' (Board) June 24, 2009 finding that he is suitable for parole.¹

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, 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, 1986 after a conviction for second degree murder with the use of a firearm. He was sentenced to 17 years to life. His minimum parole eligibility date was September 22, 1996. The Petitioner has served 24 years in prison.

Facts

On December 29, 1985, the Petitioner shot and killed Christine Lee Bilhimer. The Petitioner was in a car in a restaurant parking lot with two male companions, and the victim was in another car with two male companions. The Petitioner approached the vehicle with a handgun and ordered the victim's male companions to get out of the car. The Petitioner and the victim argued and struggled in the backseat. The Petitioner shot the victim as she raised her arm to defend herself. The gunshot passed through the victim's right forearm into her head. 1986 Probation Officer's Report (POR), pg. 2; 2009 Board Hearing Transcript (HT), pgs. 9-10, November 12, 2009 Governor's Reversal (GR), pg. 1.

According to the Petitioner, the victim had stolen one of his vehicles and he approached her in order to make her tell him its location. He claimed that the shooting was accidental as the gun had discharged during the

¹ The Governor also reversed a Board finding that the Petitioner is suitable for parole in 2005. In addition, this Court granted the Petitioner's Petition for Writ of Habeas Corpus with regard to a 2008 Board hearing which found him to be unsuitable for parole. *In re Hairston* (BH005552).

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struggle. POR, pg. 10. He expressed remorse when he was arrested and the record indicates that he “appears to genuinely regret” killing the victim. POR, pg. 10; HT, pgs. 10-11. The Petitioner, who is married with six children, stated that he understood the pain he had inflicted to the victim’s family because he had six children of his own. HT, pgs. 11-13.

The Petitioner was 54 at the time of the commitment offense and is now 79 years old. He was previously convicted as an adult for burglary in 1960, carrying a concealed weapon in 1968, and receiving stolen property in 1974. HT, pgs. 23-24. His institutional record in prison includes a single 115 discipline for using foul language in 1989. HT, pg. 29; GR, pg. 2. While in prison, he also earned his GED and took multiple courses in Bible study. He participated in self-help and therapy, including Alcoholics Anonymous, Alternatives to Violence, Breaking Barriers, Human Kindness, The Key to Fatherhood, How to Become a Father, Healing for the Angry Heart, Veteran’s Self-Help Group, and Let’s Save America. He has vocations in electronics, appliance repair, auto shop and auto mechanics. In addition, the Petitioner has maintained supportive relations with friends and family during his incarceration and has adequate parole plans, including offers of residence and social security benefits. HT, pgs. 14-15; GR, pgs. 2-3.

The Petitioner’s 2007 psychological report found that he is a low risk of future violence. January 17, 2007 Psychological Report (PR), pg. 5. The report also stated that there was “no evidence to suggest Mr. Hairston has a problem with drugs/alcohol.” PR, pg. 4. However, the evaluator also stated that he did not believe the Petitioner “fully accepts responsibility for his life crime, either because he doesn’t believe he was at fault and/or because he has limited capacity to experience emotion.” PR, pg. 3.

The Board’s Finding of Suitability

On June 24, 2009, the Board found that the Petitioner was suitable for parole and would not pose an unreasonable risk of danger to society. The Board stated that despite the serious nature of the commitment offense and the Petitioner’s prior criminal history, his suitability was indicated by his positive institutional record, expression of remorse, marketable skills and realistic parole plans. HT, pgs. 44-52. In addition, the District Attorney’s Office did not recommend opposition to the Petitioner’s parole suitability. HT, pg. 38.

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The Governor's Reversal

The Governor reversed the Board's finding of suitability on November 12, 2009. The Governor based his decision on the Petitioner's commitment offense, his failure to accept full responsibility for the offense, and his lack of insight regarding the causative factors related to the crime. GR, pgs. 3-4.

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 because it involved multiple victims, was carried out in a dispassionate and calculated manner, and the motive for the offense was extremely trivial. GR, pg. 3. See Cal. Code Regs., tit. 15, § 2402, subs. (c)(1)(A), (c)(1)(B), and (c)(1)(E).²

The Court finds that there is some evidence to support a finding that the offense involved multiple victims, as the Petitioner threatened all three passengers in the vehicle during the confrontation. The Court also finds that there is some evidence that the offense was carried out in a dispassionate and calculated manner as the Petitioner deliberately armed himself and confronted the victim and her companions. In addition, there is some evidence to support a finding that the motive for the offense, which was the missing vehicle, was extremely trivial in relation to the murder.

² The record does not support a finding that the offense demonstrated an exceptionally callous disregard for human suffering, as that finding requires that the offense must have been committed in a more aggravated or violent manner than that ordinarily shown in the commission of second degree murder. *In re Scott* (2004) 119 Cal.App.4th 871, 891. Here, the offense was no more aggravated or violent than is ordinarily shown in a second degree murder. See *In re Lee* (2006) 143 Cal.App.4th 1400, 1412.

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The Governor may base a reversal of parole on the circumstances of the commitment offense only if those facts support the ultimate conclusion that the inmate continues to pose an unreasonable risk to public safety. *Lawrence*, 44 Cal.4th at 1221. Thus, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, including the passage of time and attendant changes in the inmate’s psychological or mental attitude, are such that they continue to be predictive of current dangerousness. *Id.* Here, the offense alone is not some evidence of current danger in light of the Petitioner’s 24 years of violence-free, and substance-abuse free rehabilitation.

The Governor has concluded that a rational nexus between the offense and Petitioner’s current dangerousness exists on the basis of the Petitioner’s failure to fully accept responsibility for the offense, and his lack of insight regarding the causative factors underlying the offense, as discussed below.

Failure to Accept Full Responsibility

The Governor stated that the Petitioner had not yet accepted full responsibility for the murder because he has “continuously minimized his conduct” in the offense. GR, pg. 3. The Governor cited statements that the Petitioner made shortly after the offense occurred, as well as statements made while in prison that the gun accidentally fired during the struggle, suggesting that he believed the offense was accidental rather than premeditated. HT, pg. 10.

The record indicates that the Petitioner has always accepted responsibility for the offense. The Probation Officer’s Report reflects his statement shortly after the offense that his actions resulted in a loss of life, which he regrets. POR, pg. 10. That report also noted that the Petitioner and the victim “were observed struggling in the back seat of the vehicle” and a gunshot was heard. POR, pg. 2. The Court of Appeal also stated that the Petitioner and the victim were “struggling” and the Petitioner was seen raising his arm. *People v. Hairston* (No. B021767), pg. 7 (Return, Exhibit 4.) The fact that the Petitioner was seen raising his arm during a struggle does not, as the Governor suggests, refute the Petitioner’s version that the shooting occurred during a struggle.

As indicated by the California Supreme Court in *In re Shaputis* (2008) 44 Cal.4th 1241, 1260, an inmate’s inability to gain insight regarding his antisocial behavior may provide some evidence that he remains dangerous and is unsuitable for parole. However, in the present case, the record indicates that the Petitioner accepted responsibility for the offense shortly after the offense occurred and that he continues to do so. HT, pg. 42. Further, his version of the offense over the years has been consistent. The issue is whether the Petitioner’s

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version provides evidence that he remains a current risk of violence after 24 years of rehabilitation, and the Governor provided no evidence to support that conclusion. See *In re Calderon* (2010) 184 Cal.App.4th 670, 690.

Lack of Insight and Remorse

The Governor also expressed concern that the Petitioner lacks “insight into the causative factors of his life offense and failure to exhibit genuine empathy and remorse for his victim.” GR, pg. 4. The Governor cited statements in the Petitioner’s 2007 psychological report that suggest that the Petitioner either has little empathy or lacks the capacity to be empathetic. For example, the evaluator concluded the Petitioner:

“ . . . has little insight about himself or his behavior, relying instead on stereotypical views based on religion. This area of behavior is usually amenable to change; however, Mr. Hairston has shown very little interest – and may not have the ability – to address this problem.” GR, pg. 4; PR, pg. 5.

The report, which concluded that despite these issues, the Petitioner is a low risk of future violence, raises several notable concerns. Firstly, there are several references to the Petitioner’s inability to show remorse, no matter what he says or does. For example, the evaluator stated that when asked about the crime, the Petitioner responded “in a flat, matter-of-fact manner: I did it and take responsibility for my action.” This admission of the Petitioner’s responsibility led the evaluator to conclude, without explanation in the next sentence, that “I do not believe Mr. Hairston full accepts responsibility for his life crime. . .” PR, pg. 3.³

Secondly, the evaluator appears to rely upon his opinion regarding the Petitioner’s religious beliefs to support his conclusion that the Petitioner is unable to address the problem of showing remorse. The evaluator indicated that the deficit in Petitioner’s ability to show emotion is “the result of the superficial worldview of a religious fundamentalist rather than as a suggestion of underlying psychopathology” and that “he has little insight about himself or his behavior, relying instead on stereotypical views based on religion.” PR, pgs. 4-5.

Finally, and most importantly, the evaluator incorrectly refers several times to “Mr. Daniels” in making his conclusions, indicating that the evaluator made significant errors in preparing the report and possibly mixed up the Petitioner’s case with another inmate’s case. PR, pg. 7.

³ The evaluator also concluded that “this superficial, emotionally blunted account of his life crime represents the best of Mr. Hairston’s ability to explore himself or develop insight into his behavior.” PR, pg. 3.

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The record before the Governor was filled with numerous references to the Petitioner’s acceptance of responsibility and expression of regret, including shortly after his arrest. See POR, pg. 10. During the 2009 hearing, the Board referred to an interview with the Petitioner on August 16, 2002 in which the evaluator stated “Hairston has demonstrated sincere remorse. He appears to genuinely regret taking human life.” HT, pgs. 10-11. The Petitioner related to the Board that he had composed letters on four occasions to the victim, which was suggested in a self-help group that he attended. HT, pg. 11. He related to the Board that as a parent, he could imagine the “devastating” effect of the murder from the standpoint of the victim’s parents. HT, pg. 12. He also related how several self-help courses he has taken have assisted his understanding of the issue. HT, pg. 13. At the conclusion of the hearing, the Petitioner stated the following:

“First and foremost, I wish to express my sincere remorse for taking the life of a fellow human being. I wish I could do more than express my remorse but with the exception of praying for the salvation of her soul and for forgiveness, unfortunately more than that, I cannot do. . . . I have never denied being solely responsible for the death of my victim. . .” HT, pgs. 41-42.

The Court finds that the statements in the 2007 psychological report which were cited by the Governor were filled with errors and questionable statements about the Petitioner’s religious views, and do not provide some evidence of his lack of insight. This is especially true because the Petitioner still fell within the low risk range for future violence under the standard risk assessment tests.

The Petitioner’s adequate insight is shown in the record by his numerous statements accepting responsibility and expressing remorse, his letters written to the victim, his work in self-help programs, and in his statements made to the Board.

Conclusion

As noted by the Board, there is evidence in the record of the Petitioner’s suitability for parole. He does not have a juvenile record. Cal. Code Regs., tit. 15, § 2402, subd. (d)(1). He has expressed remorse for the offense. 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 54 years old at the time of the offense and is now 79 years old, which reduces the probability of recidivism. Cal. Code Regs., tit. 15, § 2402, subd. (d)(7). He has developed realistic plans for his release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). The Petitioner’s institutional behavior and rehabilitative programming also indicate an enhanced ability to function within the law upon release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(9).

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The Court finds that Governor's November 12, 2009 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. *In re Ross* (2009) 170 Cal.App.4th 1490, 1513. The Petition for writ of habeas corpus is granted.

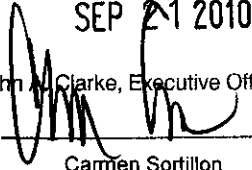
As nothing in the record suggests that the Petitioner is unsuitable for parole, the Governor's reconsideration would be futile. The Governor is ordered to vacate his decision and the Board's June 24, 2009 decision is hereby reinstated. The Petitioner is ordered released in accordance with the parole 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.
523 West Sixth St., Suite 1109
Los Angeles, CA 90014
Attorney for Petitioner Roger Hairston

Department of Justice – State of California
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Gregory J. Marcot, Deputy Attorney General
110 West A Street, Suite 1100
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SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Clara Shortridge Foltz Criminal Justice Center 210 West Temple Street Los Angeles, CA 90012	CONFORMED COPY OF ORIGINAL FILED Los Angeles Superior Court
PLAINTIFF/PETITIONER: ROGER HAIRSTON	SEP 21 2010 John A. Clarke, Executive Officer/Clerk By  , Deputy Carmen Sortillon
CLERK'S CERTIFICATE OF MAILING CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)	CASE NUMBER: BH006687

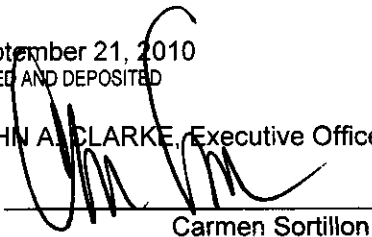
I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served:

- | | |
|--|---|
| <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
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.

September 21, 2010
DATED AND DEPOSITED

JOHN A. CLARKE, Executive Officer/Clerk

By: , Clerk
Carmen Sortillon

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