

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: AUGUST 29, 2011
 Honorable: PATRICIA SCHNEGG
 NONE

Judge | E. HERNANDEZ
 Bailiff | NONE

Deputy Clerk
 Reporter

(Parties and Counsel checked if present)

BH007589

In re,
 JOHN M. JENKINS,
 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 January 4, 2011 by the Petitioner, the Return filed on July 28, 2011 by the Respondent and the Traverse filed on August 1, 2011 by the Petitioner. The Petitioner challenges the Board of Parole Hearings' (Board) September 1, 2010 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 January 22, 1991 after a conviction for second degree murder with a firearm. He was sentenced to a term of 18 years to life in prison. His minimum parole eligibility date was August 16, 2002. He has now served 20 years in prison.

Facts

The record reflects that on July 25, 1990, the Petitioner approached Eric Howard, grabbed him by the shirt, pointed a gun at him and asked if he was a Crip. Howard did not answer and the Petitioner fired the gun several times, killing Howard. The Petitioner then fired toward the crowd near Howard, striking Ricky Garrett in the buttocks. See 1990 Probation Officer's Report (POR), pg. 2. The Petitioner claims he was drunk and that someone in the group threw a bottle at him. He said that his actions against Howard were an overreaction to that provocation. He also claims that a crime partner fired at the crowd and struck Garrett. See 2010 Board Hearing Transcript (HT), pgs. 10-13.

The Petitioner was 24 years old at the time of the offense and is now 45 years old. As a juvenile, the Petitioner was adjudicated for burglary in 1981 and twice for possession of PCP for sale in 1982. As an adult, the Petitioner was convicted of possession of a controlled substance three times between 1985 and 1987 and served time in prison following a conviction for possession of a controlled substance for sale in 1987. POR, pg. 4; HT, pgs. 37-38. He was a member of the Bloods gang and admits he sold drugs and abused alcohol. HT,

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pgs. 12, 19. During his incarceration for the commitment offense, the Petitioner received five 115 disciplines, including his last in 2000 for failure to adhere to grooming standards.¹ HT, pgs. 46-47.

In prison, the Petitioner completed a GED, as well as vocational programs in electronics technician, plumbing and air conditioning and refrigeration. He took college level business courses. He also participated in rehabilitative programs, including Alcoholics Anonymous, Narcotics Anonymous, Anger Management, Breaking Barriers, Alternatives to Violence and substance abuse courses. HT, pgs. 48-62. Upon his release, the Petitioner plans to live at one of two transitional programs in which he has been accepted. He developed a relapse-prevention plan and demonstrated family support. HT, pgs. 31-36, 70.

The Petitioner's 2009 psychological report indicated that he is an overall low-moderate risk of future violence. The report indicated that he fell within the low-moderate range on tests measuring psychopathic traits and propensity for violence and within the medium range on the test measuring risk of general, non-violent recidivism. See 2009 Psychological Report (PR), pgs. 8-10. The evaluator indicated that the Petitioner's scores were elevated by his history and that he did not exhibit any clinical, or dynamic factors which elevate his risk. PR, pgs. 8-10.

The Board's Decision

The Board found the Petitioner unsuitable for parole after a parole consideration hearing held on September 1, 2010. 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 need for greater insight regarding gang participation and his risk assessment in his psychological report. Additionally, the Board 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.

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

¹ The Board also noted that the Petitioner received nine 115s during his prior prison term.

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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.

Pre-Commitment Factors

The record supports the Board's finding that the Petitioner's commitment offense was especially heinous, atrocious, or cruel, because multiple victims were injured or killed 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).² According to the record, the Petitioner shot two victims, killing one and injuring another. He apparently attacked the victims because a bottle was thrown at him and because he thought they were rival gang members. These are very trivial motives for shooting two people and killing one.

The record also supports the Board's finding that the Petitioner has an unstable social history. Cal. Code Regs., tit. 15, § 2402, subd. (c)(3). The Petitioner was a gang member and admits that he sold drugs and frequently abused alcohol. HT, pgs. 12, 19. He was also adjudicated for or convicted of numerous drug-related offenses and served a prior prison term for possession of narcotics for sale. This indicates a history of tumultuous relationships and an unstable social history.

However, the Board may base a denial of parole upon immutable factors, such as the circumstances of the offense and the Petitioner's antisocial history, only if those 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, immutable factors will rarely support a denial of parole. *Id.* at 1211. Here, the Petitioner's commitment offense and criminal history do not continue to indicate a current risk of violence, after 20 years of violence-free rehabilitation, absent a rational nexus between those facts and his current dangerousness. *Id.* at 1227.

² There is no evidence to support the Board's finding that the offense demonstrated an exceptionally callous disregard for human suffering under Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(D). The Petitioner's actions were not more aggravated and violent than is ordinarily shown in the commission of a murder. See *In re Scott* (2004) 119 Cal.App.4th 871, 891-92.

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The Board also considered the Petitioner's insight and his psychological report, as discussed below.

The Petitioner's Insight

The Board also found the Petitioner lacks insight regarding the effect of his offense and gang lifestyle on the community. An inmate's failure to gain insight regarding the nature and magnitude of his offense or the causative factors leading to his offense provides some 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, 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.

The Petitioner stated that he became a gang member because of peer pressure, explaining that his friends were becoming gang members, so he felt he should follow them.³ HT, pgs. 33-34. He also indicated that he is no longer involved with gangs, that he has outgrown such activity, and that he would not be involved in any gang activities again, because they cause too much damage to society. HT, pgs. 19-20, 79-80; PR, pg. 3. The Petitioner further stated that if could change his past, he would not have chosen to be involved with gangs. PR, pg. 6. The Board did not point to any evidence in the record suggesting the Petitioner has been involved with gangs since his incarceration. Further, the Petitioner's parole plans include transitional housing, to ensure he has support and positive influences in preventing him from being involved in antisocial groups upon his release. HT, pgs. 31, 36.

The Petitioner accepts responsibility for his offense and expressed remorse, including to the victim's family. HT, pg. 22; PR, pg. 7. The Board's finding that he needs to further develop his insight is not sufficient to deny the Petitioner parole, as he accepts responsibility for the material aspects of his offense and understands the causes that led to the offense. See *In re Ryner* (2011) 196 Cal.App.4th 533, 549.

³ The Board dismissed the Petitioner's explanation, concluding that because the Petitioner is a large person, he would not be susceptible to peer pressure. There is no evidence in the record to refute the Petitioner's claim and the Board may not base its finding that the Petitioner lacks insight on speculation regarding the Petitioner's motives.

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The Petitioner's Psychological Report

Finally, the Board determined that the Petitioner's psychological report was "not totally favorable" because he fell within the low-moderate range for his risk assessment. PR, pg. 10. However, as noted above, the only elevating risk factors listed in the report were historical factors that the Petitioner cannot change. PR, pgs. 7-10. Where an elevated risk assessment is based solely on attenuated factors, it alone does not provide evidence to support a finding of unsuitability. See *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1490.

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 family support. 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 lacks any significant history of violent crime. Cal. Code Regs., tit. 15, § 2402, subd. (d)(6). The Petitioner was 24 years old at the time of the offense and is now 45 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 at two transitional homes and a job offer from one transitional program. 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).

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, subd. (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 September 1, 2010 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.

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Counsel for Petitioner:

Counsel for Respondent:

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 Street, Suite 1109
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Attorney for Petitioner, John M. Jenkins

Department of Justice – State of California
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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: JOHN M. JENKINS	SEP 02 2011 John A. Clarke, Executive Officer/Clerk By <u>Virginia Torres</u> , Deputy
CLERK'S CERTIFICATE OF MAILING CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)	CASE NUMBER: BH007589

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 2, 2011
DATED AND DEPOSITED

JOHN A. CLARKE, Executive Officer/Clerk

By: Virginia Torres, Clerk

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