

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: MARCH 18, 2010  
Honorable: PETER ESPINOZA  
NONE

Judge J. A. RAMIREZ  
Bailiff NONE

Deputy Clerk  
Reporter

(Parties and Counsel checked if present)

BH 006366

In re,  
LARRY JOHNSON,  
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 September 14, 2009 by the Petitioner, the Return filed on January 23, 2010 by the Warden and the Traverse filed on February 16, 2010 by the Petitioner. The Petitioner challenges the Board of Parole Hearings' (Board) July 7, 2009 finding that he is not suitable for parole. The 2009 hearing was held in response to this Court's May 22, 2009 order, which held that the Board's 2008 decision finding the Petitioner unsuitable was not supported by the record.

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 December 9, 1983 after a conviction for first degree murder with a firearm enhancement. He was sentenced to 26 years to life. His minimum parole eligibility date was May 7, 2000. He has now served 26 years in prison.

### Facts

The record reflects that on October 7, 1982, the Petitioner and Lawrence Anthony decided to rob a check cashing establishment. Anthony, who was armed with a gun, went into the store and confronted the victim, Frank Blackwell, as the Petitioner watched through the window. Witnesses heard two gunshots and the Petitioner and Anthony fled the scene. Blackwell was killed. See 2009 Board Hearing Transcript (HT), pgs. 9-13. The Petitioner's crime partner told him that he fired the gun when the victim attempted to grab it from him. The Petitioner admits that he planned the robbery, but claims that he did not believe anyone would be harmed. HT, pgs. 14-15; 2007 Psychological Report (PR), pg. 3.

The Petitioner was previously convicted of receiving stolen property in 1980. HT, pg. 17. He was honorably discharged from the National Guard and worked at a shipyard as a driver prior to the offense. HT, pgs. 22-23, 27. He had also completed two years in community college. HT, pg. 17.

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The Petitioner received five 115 disciplines in prison, including two in 1986 for disobeying an order and possession of a shank, one in 1990 for failing to respect the rights of others, one in 1991 for initiating a fight in which he was stabbed by another inmate, and his last in 2006 for possession of tobacco. HT, pgs. 31-33. The Petitioner earned a vocation in landscaping and a partial vocation in electronics in prison and participated in several self-help programs, including self study and Alcoholics Anonymous. HT, pgs. 27-30.

Upon his release, the Petitioner plans to live with his parents and has a job offer with a family business for \$300 per week. He also contacted a substance abuse out-patient program and has developed a relapse prevention plan for his release. HT, pgs. 39-40, 44, 53. The Petitioner has family and community support. HT, pgs. 40-44.

The Petitioner's 2007 psychological report assessed the Petitioner as a low risk of future violence and indicated that he fell within the low range on all testing instruments. PR, pgs. 6-7. The report noted that the Petitioner has been sober throughout his incarceration and knows the 12 steps. The report also indicated that the Petitioner has identified factors that contributed to his participation in the offense, that he has appropriate insight and that his plans are feasible. PR, pgs. 3, 6-7.

The Court's Previous Grant

The Petitioner was previously found unsuitable for parole on August 27, 2008. The Board based its denial on the Petitioner's commitment offense, his prior conviction for receiving stolen property in 1980 and his 2006 115 for possession of tobacco. The Petitioner challenged that decision in a Petition for Writ of Habeas Corpus, filed on December 23, 2008. On May 22, 2009, this Court granted the Petition, holding that the Board's decision was not supported by some evidence and ordered the Board to reconsider its decision at a new hearing. See Order Re: Writ of Habeas Corpus (BH005702).

The Board's Decision

The Board again found the Petitioner unsuitable for parole after a parole reconsideration hearing held on July 7, 2009. The Petitioner was denied parole for one year. The Board concluded that the Petitioner would pose an unreasonable risk of danger to society and a threat to public safety. The Board considered the Petitioner's offense and prior convictions, but acknowledged that the Court already determined that these factors would not support a denial. HT, pg. 61. The Board based its decision on the Petitioner's 115 received in

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2006, indicating that it disagreed with the Court's assessment of that discipline, on the Petitioner's insight regarding the offense, and on his "superficial" knowledge of the 12 steps. HT, pgs. 64-75.

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 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.

The 2006 115

The Board indicated that it took "umbrage with the court in regard" to its prior determination regarding the 115 in 2006 for possession of tobacco. The Board said it was concerned, because the Petitioner risked his freedom by breaking prison rules. The Board also indicated that the Petitioner had been investigated regarding whether he was obtaining the tobacco from outside the prison and that it was concerned the Petitioner could have sold the tobacco to other inmates. However, the rules violation report does not indicate either that the Petitioner was found to have received the tobacco from outside the prison, or that he sold or furnished tobacco to other prisoners and he has never been disciplined for those actions. See Return, Exhibit 8.<sup>1</sup> As this Court already held, the Petitioner's possession of tobacco did not involve behavior that could lead to violence or criminal conduct upon his release and, thus, is not evidence of a risk of danger to society.

The Petitioner's Insight

The Board found that the Petitioner lacks insight into his offense, because he previously made varying statements regarding whether the gun used by his crime partner was his, because he does not fully understand the causative factors leading to his offense and because his statements regarding insight seemed "self-based". An inmate's failure to gain insight into his offense, despite years of rehabilitative programming, may indicate a current risk of danger. See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260.

Here, although the Petitioner did not shoot the victim, he accepted responsibility for his offense, admitted that he planned the robbery and admitted that he knew his crime partner was armed with a gun. See

<sup>1</sup> The Board also indicated that the Petitioner was found with 50 cans of loose tobacco and a rolling machine. HT, pg. 54. However, according to the rules violation report, the Petitioner was found with two plastic bags of tobacco on his person.

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PR, pgs. 3-4. He expressed remorse for the offense and acknowledged that "it must have been a horrible loss to the victim's family". He discussed the reasons he became involved in the offense, indicating that he saw an easy way to get money and that he thought that was important at the time. He also stated that he had to change his way of thinking and discussed how his programming in prison helped him to do so. PR, pg. 4. His psychological evaluator indicated that his insight into his offense was "appropriate". PR, 7. Thus, the Board's finding that the Petitioner lacks insight into his offense is not supported by the record.

The Petitioner's Substance Abuse Programming

The Board also concluded that the Petitioner's understanding of his 12-step programs was not complete, because it was not satisfied with his explanation of what Step Four meant. HT, pgs. 46-48. However, the Petitioner has been sober throughout his incarceration and participated in Alcoholics Anonymous, Narcotics Anonymous and a six-week relapse prevention course. HT, pg. 28; PR, pg. 7. He told the Board that he tries to "live the way I interpreted the steps to be" and has contacted a substance abuse program for assistance upon his release. HT, pgs. 44, 50. His psychological report indicated that the Petitioner "knows the 12 steps and understands the need for life-long treatment". PR, pg. 7. Thus, there is no evidence that the Petitioner does not understand his substance abuse programming, or that he needs additional programming in order to be suitable for release.

Conclusion

The Petitioner has no juvenile record and lacks a significant history of violent crime. Cal. Code Regs., tit. 15, § 2402, subs. (d)(1) and (d)(6). He demonstrated remorse and his psychological report indicated that he has appropriate insight into his offense. Cal. Code Regs., tit. 15, § 2402, subd. (d)(3). The Petitioner was 20 years old at the time of the offense and is now 51 years old, which reduces the probability of recidivism. Cal. Code Regs., tit. 15, § 2402, subd. (d)(7). He has realistic parole plans, including offers of residence, a job offer, marketable skills and a relapse prevention plan. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). Finally, the Petitioner has participated in numerous programs and has enhanced his ability to function within the law upon his release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(9). The Petitioner's post-conviction record strongly supports a finding that he no longer poses a danger to public safety and the Board's findings did not provide a rational nexus between the Petitioner's past antisocial conduct and his current dangerousness. Thus, the Board's finding of unsuitability is not supported by some evidence. *Lawrence*, 44 Cal.4th at 1227; *In re Criscione* (2009) 173 Cal.App.4th 60, 74-75.

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The Board's July 7, 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. Therefore, 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. As there is no evidence in the record that supports a finding that the Petitioner is not suitable for parole, the Board is directed to find him suitable for parole unless new or different evidence indicates his current dangerousness. See *In re Masoner* (2009) 172 Cal.App.4th 1098, 1109-1110.

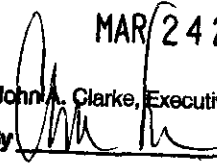
The court order is signed and filed this date. The clerk is directed to send notice.

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

Marilee Marshall, Esq.  
Marilee Marshall & Associates, Inc.  
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523 W. Sixth Street, Suite 1109  
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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 OF ORIGINAL FILED Los Angeles Superior Court</b>  MAR 24 2010  John A. Clarke, Executive Officer/Clerk By:  , Deputy Carmen Sortillon
PLAINTIFF/PETITIONER:  LARRY JOHNSON		
<b>CLERK'S CERTIFICATE OF MAILING</b> CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)		CASE NUMBER:  BH006366

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.

March 24, 2010  
DATED AND DEPOSITED

JOHN A. CLARKE, Executive Officer/Clerk

By: , Clerk  
Carmen Sortillon

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