

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: OCTOBER 5, 2010
Honorable: PETER ESPINOZA
NONE

Judge J. A. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH006547
In re,
CARL MACK,
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 December 14, 2009 by the Petitioner, the Return filed on August 10, 2010 by the Warden, and the Traverse filed on August 30, 2010 by the Petitioner. The Petitioner challenges the Board of Parole Hearings' (Board) February 26, 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. Thus, the Board's decision must be vacated.

The Petitioner was received in the California Youth Authority (CYA) on November 6, 1985 and was later received in the Department of Corrections on September 22, 1987, after being convicted of second degree murder and robbery. He was sentenced to 16 years to life in prison. His minimum parole eligibility date was January 17, 1994. He has spent nearly 25 years in prison and the CYA for the commitment offense.

Facts

The record reflects that on May 5, 1984, the Petitioner and about 15 fellow gang members of the Watts Baby Locks (associates of the Grape Street Crip gang) attacked the victim, 17-year old Robert Jackson, Jr., in a movie theatre. The victim was a member of the rival Bloods gang. The Petitioner and his crime partners punched, pushed, and stomped on the victim, and the Petitioner stabbed him once in the chest, killing him. 1985 Probation Officer's Report (POR), pgs. 1-2. The Petitioner stated that the victim told him to take out some barrettes that were in his hair, which precipitated the assault. 2009 Psychological Report (PR), pg. 7.

In addition, on May 26, 1984, the Petitioner and other crime partners were involved in the robbery of a woman who was holding her baby on a bus. The Petitioner's role was to hold the back doors of the bus open for a fast exit. POR, pgs. 2-3; 2009 Board Hearing Transcript (HT), pg. 43.

The Petitioner was 16 years old at the time of these offenses and is now 42 years old. He had been associated with gangs since the age of 8 and was arrested numerous times as a juvenile. He was adjudicated for battery at age 11 (a school fight with a tape measure as weapon) and for possession of a weapon at age 15 (a

Minutes Entered
10-05-10
County Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: OCTOBER 5, 2010
Honorable: PETER ESPINOZA
NONE

Judge J. A. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH006547
In re,
CARL MACK,
Petitioner,
On Habeas Corpus

Counsel for Respondent:

friend riding with him on a bike had a gun). POR, pg. 4; HT, pgs. 7-11. The Petitioner was in the 10th grade when he committed the murder and robbery. He stated that he dropped out of gang activity in 1993. The record does not indicate any further gang activities. PR, pg. 3.

While in prison, he has received two 115 disciplines, including one in 1990 for distribution of narcotics for sale and one in 1996 for falsification of records related to completion of a GED. HT, pg. 17; PR, pg. 9. He received his GED and plans on attending college courses. He has a vocation in graphic arts and has received exceptional or above average performance ratings in several work capacities. PR, pg. 4. He began regularly attending Alcoholics/Narcotics Anonymous groups in 2002. He has also attended numerous self-help programs, including Anger Management, Advanced Anger Management, Conflict Resolution, and others. PR, pgs. 8-9.

The Petitioner's most recent psychological report which was conducted in 2009 was generally favorable and concluded that he was a low risk of future violence. PR, pg. 13. It found that he has empathy and remorse for the crimes, understands the gravity of his offenses, is "penitent for his crimes" and has "adequately explored the commitment offenses and come to terms with these crimes." PR, pg. 8.

The Petitioner plans on living with his aunt in her home but also has an offer to live with his fiancé. He has a job offer and plans to explore other job possibilities. HT, pgs. 37-40, 47; PR, pg. 4.

The Board's Decision

The Board found the Petitioner unsuitable for parole at a parole consideration hearing held on February 26, 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 primarily on the commitment offense, his prior criminal record, his lack of insight and minimization of his role in the offense, his institutional behavior, and his parole plans. HT, pgs. 55-62. In addition, the Board noted that the District Attorney's Office had opposed the Petitioner's release. While this is not a factor on which the Board may rely to deny parole, such opposition may be properly considered. 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 paramount consideration in making a parole eligibility decision is the potential threat to public safety upon an

Minutes Entered
10-05-10
County Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: OCTOBER 5, 2010
Honorable: PETER ESPINOZA
NONE

Judge J. A. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH006547
In re,
CARL MACK,
Petitioner,
On Habeas Corpus

Counsel for Respondent:

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 Commitment Offense and Prior Criminal Acts

The Board concluded that the commitment offense was dispassionate and calculated, exhibited an exceptionally callous disregard for human suffering, and was based on an inexplicable motive. HT, pg. 55. Cal. Code Regs., tit. 15, § 2402, subds. (c)(1)(B), (c)(1)(D) and (c)(1)(E). The Court finds that there is no evidence to support a finding that the offense was dispassionate or calculated, as it resulted from an insult made in a theatre among rival gang members, rather than as a result of a planned assault. There is also no evidence that the motive for the offense was inexplicable, as it resulted from a critical comment.

However, the Court finds that there was some evidence in the record that the offense exhibited an exceptionally callous disregard for human suffering, as the victim was punched, pushed, and stomped on and stabbed. *In re Scott* (2004) 119 Cal.App.4th 871, 891. In addition, the Court finds that there is some evidence to support the Board's consideration of the Petitioner's prior criminal acts as a juvenile, which included battery and possession of a weapon. Cal. Code Regs., tit. 15, § 2402, subd. (c)(2).

The Board may base a denial of parole on immutable factors, such as the circumstances of the commitment offense or prior criminal acts, only if those facts support the ultimate conclusion that the inmate is currently dangerous. *Lawrence*, 44 Cal.4th at 1221. Thus, the relevant inquiry is whether the pre-commitment factors, 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 Board also found that the Petitioner's lack of insight and minimization with regard to the offense, his institutional behavior, and issues with respect to his parole plans, provide a nexus between the pre-commitment factors and his current dangerousness, as discussed below.

Lack of Insight and Minimization of Responsibility

The Board stated that the Petitioner lacks insight into the causative factors of the offense because the Petitioner "went for the victim with your knife and you killed him." HT, pg. 56. The Board also cited language

Minutes Entered
10-05-10
County Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: OCTOBER 5, 2010
Honorable: PETER ESPINOZA
NONE

Judge J. A. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH006547
In re,
CARL MACK,
Petitioner,
On Habeas Corpus

Counsel for Respondent:

in the Petitioner’s most recent psychological report, which the Board concluded showed the Petitioner’s “minimization.” The Board stated the following:

“But we see on page 7 your minimization. You state:
‘Two rival gangs got into it. I got some barrettes in my hair. He wanted me to take them out. We got into a fight. I stabbed him.’
That doesn’t explain everyone else overwhelming him, and we do not believe that the interview was well done with respect to that problem.” HT, pgs. 56-57.

An inmate’s inability to gain insight regarding his antisocial behavior may provide some evidence that he remains dangerous and is unsuitable for parole. *In re Shaputis* (2008) 44 Cal.4th 1241, 1260. Here, the Board’s description of the offense and its reference to the Petitioner’s description, provide no evidence of his current lack of insight or his minimization. The Board’s reference to the psychological report also ignored several references on the same page of the report in which the Petitioner expressed remorse and responsibility for the offense, as well as insight. See PR, pg. 7. For example, the psychological report discussed the Petitioner’s insight and concluded:

“In summary, the inmate admits responsibility for killing the victim in the controlling offense and participating in the subsequent robbery. He does not minimize his actions related to these crimes. He showed understanding of causative factors underlying the controlling offense and the robbery offense, and factors underlying his long pattern of criminal and violent behavior generally. He demonstrated empathy and remorse for his crimes against the victims. He understands the gravity of his crimes and is penitent for his crimes. The inmate has adequately explored the commitment offenses and come to terms with these crimes.” PR, pg. 8.

The Court finds that the Board’s conclusion that the Petitioner lacks insight regarding his offense, absent evidence in the record to support that finding, does not provide evidence upon which to deny parole. See *In re Calderon* (2010) 184 Cal.App.4th 670, 690; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 255-56.

Institutional Behavior

The Board also noted that the Petitioner’s institutional behavior included two 115 disciplines as well as a recent 128 discipline in 2007. HT, pg. 57. The Court finds that the two 115 disciplinary actions, the last of which occurred in 1996, are not some evidence of current danger. Neither discipline involved violence, and the

Minutes Entered
10-05-10
County Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: OCTOBER 5, 2010
Honorable: PETER ESPINOZA
NONE

Judge J. A. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH006547

In re,

CARL MACK,

Petitioner,

On Habeas Corpus

Counsel for Respondent:

fact that the Petitioner has had 14 years without any serious discipline is evidence of his rehabilitation. *In re Calderon* (2010) 184 Cal.App.4th 670, 687-688 (early misconduct is not some evidence of dangerousness after many discipline-free years of rehabilitation). In addition, the Court finds that the 128 discipline for an altered radio which the Petitioner received in 2007 does not provide some evidence of current dangerousness. See *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491; *In re Smith* (2003) 109 Cal.App.4th 489, 505 (minor discipline is not a sufficient basis for a finding of unsuitability).

Parole Plans

The Board also found that the Petitioner's parole plans were inadequate. The record indicates that he has an offer of residence from his aunt and his fiancé. Further, his aunt offered him a job of taking care of her son, who requires around-the-clock care, and his fiancé indicated that she offered a home, transportation, and has enough money saved to deal with immediate necessities. HT, pgs. 37-40.

The Board indicated that the Petitioner must "get a letter from the county or have your aunt secure a letter from the county that would in fact verify that you were in a position to be paid for the care of your cousin." HT, pg. 58. The Board concluded that "it's not a bad parole plan to live with your aunt and take care of cousin" but the additional verification was also important. HT, pgs. 58-59.

The Petitioner has multiple offers of residence, a job offer, as well as a marketable skill in graphic arts. The Court finds that his parole plans do not provide some evidence of current dangerousness or a nexus with the pre-commitment factors, as the plans are adequate under the applicable regulations. Cal. Code Regs., tit. 15, § 2402, subd. (d)(9). See *In re Andrade* (2006) 141 Cal.App.4th 807, 816-817¹ (inmate needs "realistic" plans, not fool-proof or iron-clad plans).

Conclusion

There are numerous factors in the record which provide evidence of the Petitioner's rehabilitation since he was incarcerated for the committing offense and his lack of current dangerousness. He expressed remorse at the hearing. Cal. Code Regs., tit. 15, § 2402, subd. (d)(3). His present age reduces the probability of recidivism. Cal. Code Regs., tit. 15, § 2402, subd. (d)(7). He has adequate plans for parole. Cal. Code Regs., tit. 15, § 2402,

¹ Abrogated on other grounds by Lawrence, 44 Cal.4th at 1215 fn. 14.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: OCTOBER 5, 2010
Honorable: PETER ESPINOZA
NONE

Judge J. A. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH006547
In re,
CARL MACK,
Petitioner,
On Habeas Corpus

Counsel for Respondent:

subd. (d)(8). His institutional behavior and rehabilitation indicate an enhanced ability to function within the law upon 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 Court finds that the Board's decision that the Petitioner is unsuitable for parole is not supported by some evidence in the record. 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, 304-307.

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.
523 West Sixth St., Suite 1109
Los Angeles, CA 90014
Attorney for Petitioner Carl Mack

Serena M. Sanders, Esq.
Angelo, Kilday, & Kilduff
Attorneys at Law
601 University Ave., Suite 150
Sacramento, CA 95825
Attorneys for Respondent

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: CARL MACK	OCT - 6 2010 John A. Clarke, Executive Officer/Clerk By <u>Carmen Sortillon</u> , Deputy Carmen Sortillon
CLERK'S CERTIFICATE OF MAILING CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)	CASE NUMBER: BH006547

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.

October 6, 2010
DATED AND DEPOSITED

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

Marilee Marshall, Esq.
523 West Sixth St., Suite 1109
Los Angeles, CA 90014
Attorney for Petitioner Carl Mack

Serena M. Sanders, Esq.
Angelo, Kilday, & Kilduff
Attorneys at Law
601 University Ave., Suite 150
Sacramento, CA 95825
Attorneys for Respondent