

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date:	MARCH 16, 2010	Judge	J. A. RAMIREZ	Deputy Clerk
Honorable:	PETER ESPINOZA	Bailiff	NONE	Reporter
	NONE			
(Parties and Counsel checked if present)				
	BH 006348			
	In re,		Counsel for Petitioner:	
	MIGUEL OROZCO,			
	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 September 14, 2009 by the Petitioner, the Return filed on January 27, 2010 by the Warden and the Traverse filed on February 18, 2010 by the Petitioner. The Petitioner challenges the Governor’s June 16, 2009 decision to reverse the Board of Parole Hearings’ (Board) January 26, 2009 finding that the Petitioner is suitable for parole.

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 September 17, 1982 after a conviction for second degree murder. He was sentenced to 15 years to life. His minimum parole eligibility date was October 15, 1991. The Petitioner has served 27 years in prison.

Facts

The record reflects that on September 12, 1981, the Petitioner was drinking at a bar when he got into an argument with William Bates. He and Bates began to fight and Bates hit the Petitioner in the face. The Petitioner left the bar, but waited in his truck in the parking lot. Approximately 15 minutes later, Bates and Josie Martinez exited the bar and drove off on Bates’ motorcycle. The Petitioner followed them and when Bates stopped in a left turn lane, the Petitioner slammed his truck into the back of the motorcycle. Martinez was thrown from the motorcycle into the street. Bates was thrown onto the hood of the Petitioner’s truck and his motorcycle was impaled on the front grill of the truck. The Petitioner continued to drive, with Bates on the hood of his truck, until he finally stopped and fled on foot. Martinez died at the scene and Bates was seriously injured, but survived. The Petitioner was apprehended shortly afterward and his blood-alcohol content was later measured at .11 percent. See 1982 Probation Officer’s Report (POR), pgs. 4-5; 2009 Board Hearing Transcript (HT), pg. 10.

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The Petitioner told the Board that he rammed into the motorcycle when Bates stopped in the turn lane. He admitted that he was enraged by the bar fight, so he pursued the victims and ran straight into the motorcycle, not caring about harming the victims at that time. HT, pgs. 11-12; 2008 Psychological Report (PR), pgs. 4-5.

The Petitioner was previously convicted of receiving stolen property in 1976 and driving under the influence in 1978. He admitted to the Board that he had driven while intoxicated on several occasions for which he was not caught. HT, pgs. 17, 56-57. Cal. Code Reg. tit. 15, § 2402, subd. (c)(2). The Petitioner also told the Board that he drank excessively on a daily basis at the time of the offense and that he used drugs. HT, pgs. 14-16.

The Petitioner received 11 serious 115 disciplines in prison, including seven disciplines involving substance abuse. He was discipline once for violence in 1989 for assaulting an inmate. His last 115 was received in 1989 for trafficking drugs in prison. The Petitioner admitted that from 1987 to 1989, he engaged in drug trafficking for the Mexican Mafia prison gang. HT, pgs. 19, 51-52; PR, pg. 3.

The Petitioner disassociated from the Mexican Mafia in 1990. HT, pgs. 52, 88, 96-97. Since that time, he has not received any serious discipline and he has maintained his sobriety. HT, pgs. 14, 46, 91; PR, pg. 8. The Petitioner participated in Alcoholics Anonymous, Bible studies, as well as numerous other self-help programs, including anger management, stress management and gang awareness programs. HT, pgs. 27, 37-40, 47, 67. He earned a GED in prison, as well as vocations in welding, small engine repair, auto body and auto painting. HT, pgs. 34, 48. He now works as a teaching assistant in auto body, receiving above average work reports. HT, 36.

The Petitioner's 2008 psychological report indicated that he presents a low overall risk of future violence and that he fell within the low range for all testing instruments. PR, pgs. 7-9. The report noted that the Petitioner accepts responsibility for his offense, understands his prior substance abuse problems and has not exhibited impulsive or negative behavior for 20 years. PR, pg. 8. The report also concluded that the Petitioner has feasible and comprehensive parole plans and significant support. PR, pg. 4.

The Board's Finding of Suitability

The Board found the Petitioner suitable for parole on January 26, 2009. After considering the Petitioner's commitment offense, prior offenses and substance abuse, as well as his early prison misconduct, the

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Board determined that he would not pose an unreasonable risk of danger to society. HT, pgs. 85-88. The Board noted the Petitioner's positive rehabilitative and discipline-free record for the past 20 years, his marketable skills, his realistic parole plans and his insight regarding his offense and prior substance abuse in finding him suitable for parole. HT, pgs. 89-94. The Board also considered that the Petitioner has no juvenile offenses, no significant history of violent crime and that his advanced age reduces the probability of recidivism. HT, pgs. 97. The Board found that the Petitioner's psychological report was supportive of his release. HT, pg. 89.

The Governor's Reversal

The Governor reversed the Board's finding of suitability on June 16, 2009. The Governor based his decision on the Petitioner's commitment offense, his history of substance abuse, his insight regarding the offense and his parole plans. The Governor concluded that the negative factors outweighed the positive factors cited by the Board. See 2009 Governor's Reversal Letter, pgs. 1-4.

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, atrocious, or cruel, because multiple victims were injured or killed during the offense and because the offense demonstrated an exceptionally callous disregard for human suffering. Cal. Code Regs., tit. 15, § 2402, subds. (c)(1)(A) and (c)(1)(D). The record supports these findings. Martinez was killed and Bates was seriously injured when the Petitioner crashed into the motorcycle. The Petitioner then continued to speed away with the injured Bates on the hood of the truck, leaving Martinez to die in the street. This demonstrates an exceptionally callous disregard for the victims' suffering.

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However, the Governor may base a reversal 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. Particularly after an inmate has served his suggested base term, the underlying facts of the offense will rarely constitute a valid basis for a reversal of a finding of suitability. Here, the commitment offense, which occurred 28 years ago, does not continue to indicate a current risk of violence, after decades of rehabilitation.

As noted by the Board, the Petitioner has no juvenile record and lacks a significant history of violent crime. Cal. Code Regs., tit. 15, § 2402, subds. (d)(1) and (d)(6). He expressed remorse for the offense and wrote a letter of apology to the victims and their families. Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); HT, pg. 23. The Petitioner was 26 years old at the time of the offense and is now 55 years old, which reduces the probability of recidivism. Cal. Code Regs., tit. 15, § 2402, subd. (d)(7). He developed plans for his release, including offers of residence, a job offer, marketable skills and a relapse prevention plan. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). The Petitioner has not received any serious discipline for the past 20 years and he participated in numerous self-help, educational and vocational programs in prison, enhancing 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 after 1989 strongly supports a finding that he no longer poses a danger to public safety. Therefore, the Governor's findings regarding the offense, absent a rational nexus between those facts and current dangerousness, do not provide some evidence of unsuitability. *Lawrence*, 44 Cal.4th at 1227. The Governor asserts that the Petitioner's substance abuse history before and early in prison, his statements regarding his offense and his parole plans provide such a nexus. These issues are discussed below.

The Petitioner's Substance Abuse

The Governor found that the Petitioner frequently abused alcohol and drugs at the time of the offense and that he continued to abuse drugs in prison until 1989. The Governor expressed concern that the Petitioner did not have a written relapse prevention plan, in light of his history of substance abuse. The Petitioner's past substance abuse, particularly his continued abuse and trafficking of drugs in prison until 1989, would certainly have indicated a current risk of danger at that time. However, the Petitioner has been sober for 20 years, has attended Alcoholics Anonymous since the 1990s and has developed a relapse prevention plan, including participation in the Freedom in Christ substance abuse program near his proposed residence. He also indicated

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that he would attend additional Alcoholics Anonymous meetings upon his release. HT, pgs. 19, 46, 70. Additionally, his psychological evaluation indicated that he has insight into his former substance abuse. PR, pg. 8. The Petitioner is not required to prepare a *written* relapse prevention plan in order to be found suitable for parole. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8); *In re Andrade* (2006) 141 Cal.App.4th 807, 816-17¹ (inmates are only required to have “realistic” parole plans, not fool-proof or iron-clad parole plans).

The Petitioner’s Insight

The Governor noted that the Petitioner previously indicated that his running into the victims’ motorcycle was accidental. An inmate’s claim that an offense was accidental may indicate that he lacks insight regarding his offense and is a current risk of danger to society, when that claim is not supported by the record. See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260. However, since at least 2006, the Petitioner has admitted that he intentionally hit the motorcycle. He admitted to the Board in 2009 that, due to his rage after the bar fight, he intended to harm Bates and did not care if Martinez was there. He also admitted that he knew the victims were stopped in front of him, that he accelerated toward them anyway and that he ran straight into them. HT, pgs. 12, 18, 73. The Petitioner also acknowledged his past minimization of his offense and indicated that it was wrong. HT, pgs. 25-26; PR, pgs. 4-5.

The Petitioner’s current statements and his most recent psychological report indicate that he has insight into and no longer minimizes his offense. Thus, his past minimization no longer provides evidence of a current risk of dangerousness. See *In re Vasquez* (2009) 170 Cal.App.4th 370, 385-896 (past statements do not support a finding of unsuitability where more current statements contradict such a finding); *In re Lee* (2006) 143 Cal.App.4th 1400, 1414 (tardiness of an acceptance of responsibility is irrelevant if the acceptance is genuine).

The Petitioner’s Vocational Plans

The Governor also faulted the Petitioner’s proposed vocational plans, indicating that the location of the Petitioner’s job offer was too far from his proposed residence (a distance of approximately 32 miles). However, while such a commute would be significant, it is not unrealistic. Further, the Petitioner is not required to have a job offer to be suitable for release. He is only required to have marketable skills under the regulation, which he has developed in his vocational programs, as discussed above. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). Thus, the Governor’s concern regarding the Petitioner’s potential commute does not support his finding that the Petitioner is currently dangerous. See *In re Criscione* (2009) 173 Cal.App.4th 60, 75-76.

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

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Conclusion

The Petitioner's record since 1989 has been exemplary and the Governor did not provide a nexus between his past antisocial conduct and his current dangerousness. The Governor's June 16, 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. Therefore, 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 December 18, 2008 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:

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