

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: JUNE 28, 2010

Honorable: PATRICIA SCHNEGG
NONE

Judge B. PEREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH006288

In re,
FRANCISCO RAMIREZ
Petitioner,

Counsel for Petitioner:

Counsel for Respondent:

On Petition for Writ of Mandate

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 August 13, 2009 by the Petitioner, the Return filed on May 18, 2010 by the Warden, and the Traverse filed on May 25, 2010 by the Petitioner. The Petitioner challenges the Governor's June 25, 2009 decision to reverse the Board of Parole Hearings' (Board) January 28, 2009 finding that he 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 December 18, 1987 after a conviction for second degree murder. He was sentenced to 17 years to life. His minimum parole eligibility date was November 6, 1997. The Petitioner has served 22 years in prison.

Facts

On April 6, 1986, the Petitioner and other members of the 18th street gang decided to retaliate for an apparent attack by rival Florencia gang members. The Petitioner and others confronted the victim, Harry Lopez, and the Petitioner shot and killed him. The Petitioner was arrested shortly thereafter and initially denied being the shooter. However, he later acknowledged to police that he had been the shooter and also that he had been drinking for several hours prior to committing the offense. 1987 Probation Officer's Report (POR), pgs. 2-3, 11).

The Petitioner was 24 at the time of the offense and is now 48 years old. Prior to the offense, he had no juvenile adjudications. However, as an adult, he had been convicted of possession of a dangerous weapon (knife). He also admits to having used PCP and cocaine. POR, pgs. 6-7. During his many years in prison, he has had two 115 disciplines, including for possessing another inmate's property and possession of pruno in 1990. 2009 Board Hearing Transcript (HT), pg. 35; June 25, 2009 Governor's Reversal (GR), pg. 2.

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In prison, the Petitioner received his GED and took additional courses. GR, pg. 2. He completed vocational training in small engine repair, paint and decoration, and landscape and horticulture and he earned a certificate as an upholstery sewer. He availed himself of numerous self-help classes and has been active in Alcoholics Anonymous and Narcotics Anonymous. *Id.* The Petitioner is an illegal resident alien and has developed realistic parole plans, including offers of residence and support in Mexico from family. HT, pgs. 16-18, 22. He also has offers of residence from family members in California. 2007 Psychological Report (PR), pg. 2.

The Petitioner's 2007 psychological evaluation concluded that he is a low risk of future violence. PR, pg. 5. It stated that he had been active in AA since 1995 and that his global assessment of functioning is 90 on a scale of one to 100. PR, pgs. 4, 6. It found that his general risk of recidivism is in the medium category, largely on the basis of historical factors. PR, pg. 5. The report also noted that the Petitioner accepted full responsibility for the crime and expressed remorse. PR, pg. 6.

The Board's Finding of Suitability

At its hearing of January 28, 2009, the Board found that the Petitioner was suitable for parole and would not pose an unreasonable risk of danger to society. HT, pgs. 61-70. The Board emphasized that despite the serious nature of the commitment offense, the Petitioner's suitability was indicated by, among other things, his genuine remorse for the offense and his positive record while in prison. HT, pg. 63.

The Governor's Reversal

The Governor reversed the Board's finding of suitability on June 25, 2009. The Governor based his decision on the Petitioner's commitment offense, concerns raised in his psychological report, his lack of insight regarding the offense, and his inadequate parole plans. GR, pgs. 2-3.

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.

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The Commitment Offense

The Governor found that the Petitioner's commitment offense was especially heinous because it demonstrated an exceptionally callous disregard for human life and suffering, and because the motive for the crime (retaliation) was exceedingly trivial in relation to the magnitude of the crime. GR, pg. 2. See Cal. Code Regs., tit. 15, § 2402, subs. (c)(1)(D), (c)(1)(E).

The Court finds that there is no evidence that the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. An "exceptionally callous disregard for human suffering" means that "the offense in question 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 Petitioner shot the victim, which 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. However, there is evidence to support the Governor's finding that the motive for the offense, gang retaliation, was extremely trivial in relation to the murder of the victim.

The Governor may base a denial or reversal of parole on the circumstances of the commitment offense, or other immutable factors, only if those facts support the ultimate conclusion that the inmate continues to pose an unreasonable risk to public safety. *In re 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.*

In this case, the Governor concluded that a rational nexus between the offense and current dangerousness existed on the basis of the Petitioner's psychological report, lack of insight, and deficiencies in the Petitioner's parole plans. These issues are addressed below.

The Petitioner's Psychological Report

The Governor cited concerns in the Petitioner's 2007 mental health evaluation. The report which gave him an overall "low" rating for future violence, a "moderate" rating based on historical factors, and a "medium" risk of general recidivism. The Governor concluded that the Petitioner still poses an increased risk of committing future crimes, as a result of this evaluation. GR, pgs. 2-3. However, it is evident that the report was favorable with regard to the essential question of the Petitioner's risk of future violence, as he was assessed as an overall low risk, and his record while in prison does not support a finding that he would be likely to violate

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the conditions of parole if he were released. Moreover, the immutable aspects of his historical factors which were indicated in the 2007 report do not provide some evidence of current dangerousness. See *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1490. Thus, the Court finds that the Petitioner's psychological report does not provide a rational nexus between the offense and his current dangerousness.

Insight

The Governor also cited a sentence in the report which stated that the Petitioner "appears to have only a superficial understanding of the underlying dynamics related to the violence that occurred in the crime and found that the Petitioner lacks insight regarding the offense." GR, pg. 3; PR, pg. 6. However, the same paragraph in the report contains several positive references to the Petitioner's acceptance of responsibility, his expressions of remorse, and his stable emotions. The report concludes that in the clinical or more current and dynamic domain of risk assessment, the Petitioner "presents as low risk of future violence." PR, pg. 6. (Emphasis in original.) Here, the record does not support the Governor's finding that the petitioner lacks insight. As noted in *In re Calderon* (2010) 184 Cal.App.4th 670, the incantation of "lack of insight" has no talismanic quality, but is probative only to the extent shown by the record and indicative of current dangerousness.

Parole Plans

The Governor expressed concerns that while the Petitioner has developed marketable skills in prison, he has not secured employment and has failed to establish a relapse prevention program. GR, pg.3. The applicable regulations require that an inmate have realistic plans for release or marketable skills. Cal. Code Regs., tit. 15, § 2402, subd. (d) (9). In this case, the Petitioner has both realistic plans and marketable skills, and as noted in *In re Criscione* (2009) 173 Cal.App.4th 60, 75-76, a specific job offer is not necessary when the inmate has marketable skills.

The Court finds that there is ample evidence in the record of the Petitioner's suitability for parole. He does not have a juvenile record of assaulting others. Cal. Code Regs., tit. 15, § 2402, subd. (d)(1). He has had reasonably stable relations with others. Cal. Code Regs., tit. 15, § 2402, subd. (d)(2). He has expressed remorse for the offense. Cal. Code Regs., tit. 15, § 2402, subd. (d)(3). He lacks a 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 48 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

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Petitioner's institutional behavior and activities also indicate an enhanced ability to function within the law upon release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(9).

Conclusion

The Court finds that Governor's June 25, 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 January 28, 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 order is signed and filed this date. The clerk is directed to give notice to all parties.

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

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