

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: JANUARY 10, 2011
Honorable: PATRICIA SCHNEGG
NONE

Judge E. HERNANDEZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH007051

In re,
NELSON L. THOMAS,
Petitioner,

Counsel for 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 June 9, 2010 by the Petitioner, the Return filed on November 9, 2010 by the Respondent and the Traverse filed on December 6, 2010 by the Petitioner. The Petitioner challenges the Board of Parole Hearings' (Board) February 10, 2010 finding that he is not suitable for parole.¹

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 March 15, 1983 after a conviction for first degree murder with a firearm. He was sentenced to a term of 27 years to life in prison. His minimum parole eligibility date was August 21, 2000. He has now served over 27 years in prison.

Facts

The record reflects that on March 28, 1981, the Petitioner was under the influence of drugs when he pointed a shotgun at Freddie Smith, Lee Lang and Harvey Thornsberg and yelled "this is a stickup." The victims indicated that they had no money, so the Petitioner lowered his gun told them to "get on then." Lang then approached the Petitioner and yelled at him. The Petitioner again raised the shotgun and shot Lang, killing him. See 1984 Appellate Court Decision (ACD), pgs. 2-3. The Petitioner claims he suspected the victims had previously stolen a television from his car. He stated that he brought the gun for protection while confronting the victims and that he does not recall shooting Lang, due to his state of intoxication. See 2010 Board Hearing Transcript (HT), pgs. 12-13, 16.

The Petitioner was adjudicated as a juvenile for petty theft and grand theft auto in 1961 and for three burglaries in 1962 and 1963. He has several prior adult convictions for failing to appear on traffic warrants and

¹ The February 2010 hearing was held as a rehearing of a 2007 finding of unsuitability pursuant to the Board's subsequent finding that the panel considered erroneous information at the 2007 hearing. See October 27, 2009 Miscellaneous Decision, Petition Exhibit E, pg. 2.

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theft-related offenses between 1964 and 1981. The Petitioner was also convicted of discharging a firearm into a home after he shot into an empty room at his girlfriend's house in 1970 and of assault with a deadly weapon after he pointed a gun at a gas station attendant, who then shot the Petitioner, in 1980. See 1983 Probation Officer's Report (POR), pgs. 4-7.

In prison, the Petitioner has never been disciplined for any misconduct. HT, pg. 74. He completed a vocation in janitorial services and worked as a clerk. He also participated in several self-help programs, including individual and group therapy, Alcoholics Anonymous, Alternatives to Violence, Anger Management, Stress Management and Victim Awareness. He is currently medically unassigned and cannot participate in programs due to severe health problems. HT, pgs. 55, 66-75; 2009 Psychological Report (PR), pg. 12. Upon his release, the Petitioner plans to live with his wife. He has a job offers to work as a clerk or as a janitor, which he stated he would do if he is medically able. He has also been accepted to a transitional housing program and is eligible for Social Security and Disability payments. The Petitioner provided several letters indicating family support for his release. HT, pgs. 67-69, 88, 91-100.

The Petitioner's 2009 psychological report indicated that he is an overall low to moderate risk of future violence and that he fell within the moderate or medium ranges on testing instruments. The elevated risk assessment was based on historical factors and the evaluator noted that due to the extent of negative historical factors, the assessments were not amenable to change. PR, pgs. 13-15.

The Board's Decision

The Board found the Petitioner unsuitable for parole after a parole consideration hearing held on February 10, 2010. The Petitioner was denied parole for two years.² 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 prior offenses, his insight, his parole plans and his psychological report.

² The rehearing was conducted pursuant to the standards applicable prior to the passage of Marsy's Law. The Board failed to provide a separate statement of reasons justifying the two-year denial under those standards, as required. See *In re Jackson* (1985) 39 Cal.3d 464, 479. However, as discussed below, the Board's finding of unsuitability was not supported by evidence in the record. Therefore, the failure to justify the postponement is moot.

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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.

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 attacked or killed during the offense 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).³ The Petitioner pointed his gun at three victims and fatally shot one. He confronted the victims either to rob them or to retrieve a television he believed they stole and then shot Lang merely because he yelled at the Petitioner. These were very trivial motives for the offense. The Board also properly considered the Petitioner’s extensive criminal history, including many theft-related offenses and two prior incidents in which he used a gun. Cal. Code Regs., tit. 15, § 2402, subd. (c)(2).

The Board may base a denial of parole upon immutable factors, such as the circumstances of the offense or previous criminality 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, such immutable factors will rarely constitute a valid basis for a finding of unsuitability. *Id.* at 1211. Here, the Petitioner’s commitment offense and prior offenses do not continue to indicate a current risk of violence, after more than 27 years of exemplary, discipline-free rehabilitation absent a rational nexus between those facts and current dangerousness. *Id.* at 1227.

³ 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). A callous disregard for human suffering means the offense must have been 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. Here, there is no evidence that anyone was beaten, tortured, or intentionally subjected to prolonged pain or suffering. *Id.*

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

The Petitioner’s Insight

The Board found that the Petitioner lacks insight regarding his offense, because he claims he does not recall shooting Lang, because he did not list anger when asked about his weaknesses during his psychological evaluation and because the Board found he failed to recognize the causative factors leading to his prior antisocial conduct. HT, pgs. 133-134, 137-139. An inmate’s failure to gain insight regarding his offense may provide evidence to support a finding of unsuitability. See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260.

The Petitioner has consistently stated that he does not recall shooting Lang and his lack of recall due to intoxication is not evidence of a lack of insight. See *In re Juarez* (2010) 182 Cal.App.4th 1316, 1339-40. Further, the fact that he did not list anger as a current weakness during his psychological evaluation does not support a finding of unsuitability, because the Board did not point to any evidence in the record indicating that the Petitioner continues to struggle with his anger. In fact, the record indicates that the Petitioner has participated in Anger Management and Alternatives for Violence programs and that he has never acted out in anger in prison, as evidenced by his lack of any discipline in over 27 years. HT, pgs. 72-74.

Additionally, the Board found that the Petitioner lacks insight regarding the causative factors leading to his antisocial history and the offense. An inmate’s failure to gain insight regarding his offense or the factors leading to his offense may provide evidence to support a finding of unsuitability. See *In re Shippman* (2010) 1885 Cal.App.4th 446, 458-59. However, the Board pointed to no evidence in the record to support its finding. The Petitioner acknowledged the negative influence of his addiction and former substance abuse and his prior problems in dealing with his anger, he admitted that he was “all wrong” in committing his offense, he discussed why he became involved in antisocial activities, and he discussed possible factors that could become triggers for antisocial conduct in the future and how he would deal with those triggers. HT, pgs. 13, 17, 29-30, 35, 60-61; PR, pg. 11. Further, the Petitioner’s psychological report indicated that he has an “adequate level of self-awareness” and that he has “a reasonable level of remorse and insight into personal factors which contributed to the crime.” PR, pgs. 7, 12.

The Board’s belief that the Petitioner lacks insight is not supported by evidence in the record and does not support a finding of unsuitability. See *In re Macias* (2010) 189 Cal.App.4th 1326, ---; *In re Powell* (2010)

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188 Cal.App.4th 1530, 1543; *In re Calderon* (2010) 184 Cal.App.4th 670, 690; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 255-56.

The Petitioner's Parole Plans

The Board also found the Petitioner's parole plans were not adequate. The Board doubted that the Petitioner could perform his duties in the positions currently offered to him. The Board also faulted the Petitioner for stating that he could rely upon Social Security and Disability payments, to which he is entitled. However, the Petitioner's parole plans include several options for financial and residential support and are "realistic" within the meaning of the regulation. See *Powell*, 188 Cal.App.4th at 1543 (citing *In re Andrade* (2006) 141 Cal.App.4th 807, 816-17); Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). The Board may not deny him parole based on his inability to work due to a medical disability or on his realistic plan to avail himself of the financial programs to which he is entitled based on that disability.

The Psychological Report

The Board determined that the Petitioner's psychological report was not supportive of release in finding him unsuitable for parole. HT, pg. 135. The Board may properly consider the report, as it is relevant to a finding of suitability. See *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202; Cal. Code Regs., tit. 15, § 2402, subd. (b). However, the report indicated that the risk assessment's elevating factors were entirely historical in nature. The evaluator noted that due to the Petitioner's extensive history, his scores on that basis are not amenable to change, that he does not have any clinical or dynamic factors that are predictive of recidivism and that, "there is a great difference between his attitude and behavior prior to prison, and his attitude and behavior in prison." PR, pgs. 13-15. Thus, the risk assessment, elevated only by historical factors, does not provide evidence that the Petitioner is currently dangerous. 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). The Petitioner was 35 years old at the time of the

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offense and is now 65 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 offers of residence, job offers and eligibility for Social Security and Disability payments. 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 after 27 years of exemplary rehabilitation.

The Board's February 10, 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.

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 and Associates, Inc.
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523 W. Sixth Street, Suite 1109
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Attorney for Petitioner, Nelson L. Thomas

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601 University Avenue, Suite 150
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Attorney for Respondent

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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 JAN 20 2011 John A. Clarke, Executive Officer/Clerk By <u>Virginia Torres</u> , Deputy Virginia Torres
PLAINTIFF/PETITIONER: NELSON L. THOMAS		
CLERK'S CERTIFICATE OF MAILING CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)		CASE NUMBER: BH007051

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.

January 20, 2011
DATED AND DEPOSITED

JOHN A. CLARKE, Executive Officer/Clerk

By: Virginia Torres, Clerk
Virginia Torres

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