

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: MAY 24, 2010

Honorable: PETER ESPINOZA

NONE

Judge

N. NAVAL-ESTRADA

Bailiff

NONE

Deputy Clerk

Reporter

(Parties and Counsel checked if present)

BH 006570

In re,
HAROLD ZEIGLER,
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 December 22, 2009 by the Petitioner, the Return filed on April 5, 2010 by the Warden and the Traverse filed on April 19, 2010 by the Petitioner. The Petitioner challenges the Governor’s November 19, 2009 decision to reverse the Board of Parole Hearings’ (Board) June 25, 2009 finding that he is suitable for parole.

Having independently reviewed the record, and 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 May 20, 1988 after a conviction for second degree murder. He was sentenced to 15 years to life. His minimum parole eligibility date was January 16, 1998. He has now served 22 years in prison.

Facts

The record reflects that on September 10, 1987, the Petitioner stole William Abeytia’s car while Mr. Abeytia was using a nearby pay phone. As the Petitioner was driving away, Mr. Abeytia grabbed the passenger door of his car. The Petitioner continued driving at approximately 60 miles per hour as Mr. Abeytia hung on the side of the car. The Petitioner then hit a curb, causing Mr. Abeytia to hit a pole and fall. The Petitioner drove away and was later apprehended by police. Mr. Abeytia died later at a hospital, as a result of the injuries he sustained when he hit the pole. See 2009 Board Hearing Transcript (HT), pgs. 11-12. The Petitioner stated that he was under the influence of alcohol, cocaine and PCP at the time of the offense and that he swerved to avoid an oncoming car when he hit the curb. HT, pgs. 12-14. He accepted responsibility for the offense. HT, pg. 15.

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The Petitioner was previously convicted of a misdemeanor for taking a vehicle without the owner's consent, stemming from an incident in which he misused a company vehicle. HT, pg. 27. He told the Board that he had been addicted to alcohol and drugs since he was about 18 years old, resulting in his losing his job and becoming intermittently homeless, as he was at the time of the commitment offense. HT, pg. 14.

In 2001, the Petitioner received his only 115 discipline in prison for possession of a narcotic after he placed morphine that was prescribed by a prison doctor to treat a shoulder injury in his pocket, rather than ingesting it. The Petitioner claims he did not need the pain killer at the time and had previously suffered side effects from the drug, so he decided not to immediately take it. He received two negative counseling chronos during his incarceration, including his last in 2002 for smoking tobacco. HT, pgs. 35-36, 40.

In prison, the Petitioner participated in numerous self-help programs, including Anger Management, Substance Abuse Therapy Group, Christian studies, life skills programs and the Balanced Re-entry Activity Group program. He has also been continuously involved in Alcoholics Anonymous and Narcotics Anonymous for more than 16 years. HT, pgs. 15, 33; 2009 Governor's Reversal Letter (GR), pg. 2. He earned his high school diploma and completed college courses. HT, pg. 30. He also earned vocations in sewing machine repair and floor mechanics and has worked in PIA textiles for over 10 years with positive work reports. HT, pgs. 30-34.

Upon his release, the Petitioner plans to live with his sister, who has offered residential and financial support. HT, pg. 20. He also received an offer of housing and a job offer from the PREP transitional program. HT, pg. 22. Additionally, the Petitioner indicated that he could find work in his previous vocation as a truck driver. HT, pgs. 20-21. The Petitioner has also sought an outside Alcoholics Anonymous sponsor. HT, pg. 23.

The Petitioner's 2007 psychological report indicated that he falls within the low risk ranger on all testing instruments and that he presents an overall low risk of future violence and recidivism. See 2007 Psychological Report (PR), pg. 6. The report noted that the Petitioner has been committed to being substance abuse-free and has a positive outlook. PR, pg. 2. The report further determined that the Petitioner's risk of danger had not increased because of the 2001 discipline. PR, pg.6. The Los Angeles District Attorney did not register opposition to finding the Petitioner suitable for parole. HT, pg. 44.

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The Board's Finding of Suitability

The Board held a subsequent parole suitability hearing on June 25, 2009, after this Court granted the Petitioner's prior Petition for Writ of Habeas Corpus, which challenged the Board's 2008 finding of unsuitability.¹ The Court's April 2, 2009 decision held that the Board's findings regarding the Petitioner's commitment offense, social history and the 2001 115 did not provide some evidence of the Petitioner's current dangerousness.

After reconsidering the above factors, the Board determined that the Petitioner would not pose an unreasonable risk of danger to society. The Board noted that the Petitioner has sincere remorse for the offense, that he has realistic plans for his release and that his positive programming and prison record indicate that he has enhanced his ability to function within the law upon his release. The Board also noted that the Petitioner is now 51 years old, which reduces the probability of recidivism. HT, pgs. 50-55.

The Governor's Reversal

The Governor reversed the Board's finding of suitability on November 19, 2009. The Governor based his decision on the Petitioner's commitment offense, his institutional behavior, his lack of insight regarding the offense and comments made in a 1993 psychological report. The Governor concluded that the negative factors outweighed the positive factors cited by the Board. GR, pgs. 1-3.

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.

¹ See *In re Zeigler* (BH005486) April 2, 2009.

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The Commitment Offense

The Governor found that the Petitioner's commitment offense was especially heinous, atrocious, or cruel, because it demonstrated an exceptionally callous disregard for human suffering and the motive was very trivial in relation to the offense. Cal. Code Regs., tit. 15, § 2402, subs. (c)(1)(D) and (c)(1)(E). There is no evidence to support the former finding. Although the Petitioner's reckless actions resulted in the victim's death, the record does not indicate that he intentionally inflicted prolonged pain or suffering on the victim, nor did his actions amount to a more violent assault than is ordinarily seen in a murder. See *In re Scott* (2004) 119 Cal.App.4th 871, 891-92.

The record does support the finding that the Petitioner's motive to steal the victim's vehicle was very trivial in relation to his continuing to drive recklessly while the victim was attached to the car, resulting in the victim's death. However, like the Board, 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 circumstances of the offense will rarely provide some evidence of current dangerousness. *Id.* at 1211. Here, the commitment offense does not continue to indicate a current risk of violence, after 22 years of violence-free rehabilitation.

The Petitioner has no juvenile record and does not have a significant criminal history. Cal. Code Regs., tit. 15, § 2402, subs. (d)(1) and (d)(6). He accepts responsibility for the offense, has repeatedly expressed remorse and wrote letters of apology to the victim's family. Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); HT, pgs. 15, 17, 41, 46-47. He committed the offense during a period of significant stress due to his addiction and homelessness. Cal. Code Regs., tit. 15, § 2402, subd. (d)(4). His present age reduces the probability of recidivism. Cal. Code Regs., tit. 15, § 2402, subd. (d)(7). He has developed realistic parole plans for his release, including relapse prevention plans. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). Finally, the Petitioner's positive rehabilitation and program participation in prison 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. Therefore, the Governor's findings regarding his offense, absent a rational nexus between those

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facts and current dangerousness, do not provide some evidence of unsuitability. *Lawrence*, 44 Cal.4th at 1227. The Governor asserts that the Petitioner’s institutional misconduct, his insight regarding the offense and a 1993 psychological report provide such a nexus. These factors are discussed below.

The Petitioner’s Institutional Misconduct

The Governor considered the Petitioner’s 2001 discipline for possession of a narcotic and the negative counseling he received in 2002 for smoking tobacco. Cal. Code Regs., tit. 15, §2402, subd. (c)(6). As noted in this Court’s previous order, the narcotic referred to in the 2001 115 was legitimately prescribed to the Petitioner and while the Petitioner’s choice to wait to take the prescribed pill violated prison rules, the incident occurred nine years ago and did not involve violence or illicit substance abuse. Further, the Petitioner’s most recent psychological report indicated that the 2001 discipline did not increase his risk of danger. PR, pg. 6. Such remote discipline for minor misconduct does not provide some evidence of current unsuitability. See *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491.

Similarly, the negative counseling for smoking in 2002 was for minor conduct that is not illegal outside of prison. Such a minor incident, which did not even result in a serious discipline, and is not related to the Petitioner’s criminal history, may not serve as the basis for reversing the Board’s finding of suitability. *In re Smith* (2003) 109 Cal.App.4th 489, 505.

The Petitioner’s Insight

The Governor also found that the Petitioner has not gained insight into his offense. The Governor noted that the Petitioner initially denied involvement in the offense when discussing it with the probation officer in 1988 and that he complained about the seriousness of his sentence during a 1993 psychological evaluation. However, these remote, attenuated statements do not provide evidence of unsuitability in light of the Petitioner’s more recent statements since at least 2002, in which he accepts full responsibility for the offense. See *In re Vasquez* (2009) 170 Cal.App.4th 370, 385-86.

The Governor also faulted the Petitioner’s current claim that he crashed into the curb because he swerved to avoid another car. The Petitioner’s version is not directly contradicted by the record and is, thus, not evidence of a lack of insight. See *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112; *In re Scott* (2005) 133

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Cal.App.4th 573, 600. Further, the Petitioner accepts full responsibility for his offense and repeatedly expressed remorse. HT, pgs. 15, 17, 41, 46-47. He also explicitly acknowledged that his choices caused the victim's death. HT, pg. 47. Moreover, the Petitioner's most recent psychological report indicated that the Petitioner has insight and poses a low risk of future violence and recidivism. PR, pg. 6. The Governor's belief that the Petitioner lacks insight, absent any evidence in the record indicating such a lack, does not provide evidence sufficient to reverse the Board's finding of suitability. See *In re Dannenberg* (2009) 173 Cal.App.4th 237, 255-56.

The 1993 Psychological Report

The Governor also cited several negative comments in the Petitioner's 1993 psychological report. However, this very dated report does not provide some evidence of the Petitioner's unsuitability, in light of his many positive reports since then, including his most recent in 2007, which was supportive of release. See *Lawrence*, 44 Cal.4th at 1223-24; *In re Gaul* (2009) 170 Cal.App.4th 20, 38.

Conclusion

The Governor's November 19, 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 June 25, 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.

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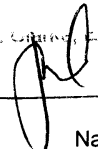
Counsel for Respondent:

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:

Department of Justice – State of California
Office of the Attorney General
Charles Chung, Deputy Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

Marilee Marshall, Esq.
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Los Angeles, CA 90014
Attorney for Petitioner, Harold Zeigler

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		FILED Los Angeles Superior Court
PLAINTIFF/PETITIONER: HAROLD ZEIGLER		JUN 03 2010 John A. Clarke, Executive Officer/Clerk By  , Deputy Nariza Naval-Estrada
CLERK'S CERTIFICATE OF MAILING CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)		CASE NUMBER: BH006570

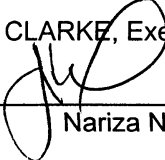
I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served:

- | | |
|----------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
| <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.

06/03/10
DATED AND DEPOSITED

JOHN A. CLARKE, Executive Officer/Clerk

By: , Clerk
Nariza Naval-Estrada

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