SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date:	DECEMBER 14, 2009			
Honorable:	PETER ESPINOZA	Judge	J. A. RAMIREZ	Deputy Clerk
	NONE	Bailiff	NONE	Reporter

(Parties and Counsel checked if present)

BH 006184
In re,
TOMMY ALDREDGE,
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 July 10, 2009 by the Petitioner, the Return filed on October 19, 2009 by the Warden and the Traverse filed on November 13, 2009 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 of Parole Hearings ("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 June 14, 1983 after a conviction for murder in the second degree. He was sentenced to 15 years to life. His minimum parole eligibility date was May 13, 1991. He had served nearly 26 years in prison at the time of the hearing.

Facts

The record reflects that on July 19, 1982, the Petitioner was resting at home because he had a headache and hypertension. While he was resting, the Petitioner's brother-in-law, Harrison Hubbard, came into his home uninvited, began yelling at the Petitioner and pulled him out of bed. The Petitioner told Hubbard to leave, but he refused and continued yelling and making threats against the Petitioner. The Petitioner then went into his study, where Hubbard followed him and knocked him down. At that point, the Petitioner retrieved a shotgun, which was hidden under a sofa, and ordered Hubbard out of the house. Hubbard began to back out of the house, but continued making threats against the Petitioner. The Petitioner fired five shots at the victim, hitting him in the right shoulder, the stomach and the right leg and killing him. See 2009 Board Hearing Transcript (HT), pgs. 10-11; 1983 Probation Officer's Report (POR), pgs. 5-7. The Petitioner then called 911 to report the shooting. HT, pg. 23; POR, pg. 6.

Upon his arrest, the Petitioner told police that Hubbard had been angry and repeatedly told the Petitioner "you are not leaving alive." The Petitioner also told police that as the victim was backing out of the house, he

was reaching for his pocket and that the Petitioner believed the victim was reaching for a weapon when he fired. It was later determined that the victim had a can of beer in his pocket. No weapon was found on the victim. The Petitioner also claimed that he could only recall firing the first shot. POR, pgs. 7-8. The Petitioner has maintained this version of the offense throughout his incarceration. HT, pgs. 13-14; 2008 Psychological Report (PR), pg. 6.

The Petitioner has no prior convictions. HT, pg. 40; POR, pg. 4. Throughout his incarceration for the commitment offense, the Petitioner received only one serious discipline in 1999 for over-familiarity with staff. HT, pg. 41. He earned a vocation in data processing and a B.A. degree in theology. He also has approximately 97 credits toward a B.A. degree in business administration and is working on a Masters degree in theology. HT, pgs. 44, 50; PR, pg. 3. Prior to 2000, the Petitioner participated in numerous self-help programs, including cognitive behavior modification, stress management, individual therapy, anger management, life skills courses and Bible studies. PR, pg.2. Since that time, he has been working toward his Masters degree and has done self-study reading. HT, pg. 65; PR, pgs. 2-3. During that time period, he was also hospitalized for multiple ailments, including a heart attack, removal of his prostate, a hip replacement, and a hernia repair. He is also being treated for diabetes, asthma and hypertension. HT, pgs. 42-44, 47, 51. He is now 60 years old.

Upon his release, the Petitioner plans to live with his daughter. He also has offers of residence with other family members. The Petitioner received a job offer to work as a staff member at a church and has $200,000 in stocks and other investments. Additionally, the Petitioner is entitled to more than $1,800 per month in disability payments. HT, pgs. 55-61.

The Petitioner's 2008 psychological report indicated that he presents a low risk of future violence and recidivism. PR, pgs. 10-12. The report noted that he has never possessed an antisocial mindset and has fairly good insight into his offense. PR, pg. 11.[1]

[1] The Board found this report "inconclusive", because it considered the Petitioner's programming prior to 2000 and not the lack self-help programs after 2000. However, the report acknowledged that the Petitioner did not participate in any self-help programs after 2000 but still concluded that he poses a low risk of violence and recidivism. PR, pgs. 7, 10-12. Further, the prior programs were properly considered.

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The Board's Decision

The Board found the Petitioner unsuitable for parole after 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 on his commitment offense, his lack of insight into the offense and his failure to participate in self-help programs since 2000.

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.

The Commitment Offense

The Board found that the Petitioner's commitment offense was especially heinous, atrocious, or cruel, in part, because it was carried out in a dispassionate and calculated manner and demonstrated an exceptionally callous disregard for human suffering. Cal. Code Regs., tit. 15, § 2402, subds. (c)(1)(B) and (c)(1)(D). The Court finds no evidence in the record to support these findings. There is no evidence that the Petitioner planned the offense, nor that he shot the victim execution-style. The record indicates that the Petitioner shot the victim while under significant stress, after the victim threatened him, assaulted him and refused to leave. Thus, the offense was not dispassionate and calculated. See *In re Scott* (2005) 133 Cal.App.4th 573, 596-97. Further, although the Petitioner shot the victim multiple times, he did not intentionally subject the victim to prolonged pain and suffering, nor was the offense more violent than is ordinarily seen in a murder. Thus, the offense did not demonstrate an exceptionally callous disregard for the victim's suffering. See *In re Scott* (2004) 119 Cal.App.4th 871, 891-92.

The Board also found that the offense was especially heinous, atrocious, or cruel, because the motive was very trivial in relation to the offense. Cal. Code Regs., tit. 15, § 2402, subds. (c)(1)(E). The Court finds that there is some evidence in the record to support this finding. Although the Petitioner claims he thought the victim was reaching for a weapon when he fired the first shot, he never saw any weapon, as the victim was not

armed. Further, after the first shot struck the victim, he no longer posed a threat. Thus, the shots fired after that point were apparently out of anger. This was a very trivial motive for shooting the victim four more times.

The Board may base a denial 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. Here, the commitment offense alone does not continue to indicate a current risk of violence, after 26 years of violence-free rehabilitation.

The Petitioner has no juvenile or adult criminal history. Cal. Code Regs., tit. 15, § 2402, subds. (d)(1) and (d)(6). He has experienced reasonably stable relationships with others, as evidenced by his continued family support. Cal. Code Regs., tit. 15, § 2402, subd. (d)(2); HT, pgs. 55-61. The Petitioner expressed remorse for the victim and the victim's family and his psychological report indicated that he has insight into his offense. Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); HT, pgs. 21-23; PR, pg. 11. He was under significant stress at the time of the offense, due to his illness and the victim's threats and assault. Cal. Code Regs., tit. 15, § 2402, subd. (d)(4). The Petitioner's advanced age reduces the probability of recidivism. Cal. Code Regs., tit. 15, § 2402, subd. (d)(7). He has realistic parole plans including several offers of residence, financial stability and a job offer. Cal. Code Regs., tit. 15, § 2402, subd. (d)(8). Finally, the Petitioner's participation in self-help programs, as well as his educational and vocational achievements have enhanced his ability to function within the law upon his release. Cal. Code Regs., tit. 15, § 2402, subd. (d)(9).

Because the Petitioner's entire post-conviction record strongly supports a finding that he no longer poses a danger to public safety, the Board's findings regarding the 27 year-old 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 Board also considered the Petitioner's insight and his failure to participate in self-help programs since 2000, as discussed below.

The Petitioner's Insight

The Board found that the Petitioner lacks insight into the reasons he committed his offense. Evidence that an inmate is unable to gain insight into his prior anti-social behavior, despite years of rehabilitative programs, provides some evidence of a current risk of danger and supports a denial of parole. See *In re*

Shaputis (2008) 44 Cal.4th 1241, 1260. Here, the Board noted that in response to questions regarding the reason he shot the victim, the Petitioner stated that he was angry and afraid and that "no reason" is good enough to justify the offense. HT, pg. 76. These statements do not indicate that the Petitioner does not understand the causative factors of his offense. The Petitioner indicated that he shot the victim because he was afraid of the victim and because he was angry. HT, 20-21; PR, pg. 7. His statement that no reason could justify his actions indicates that he does have insight and understands how his actions were wrong. In his psychological evaluation, the Petitioner also identified ways in which he could have avoided violence after the victim's assault. PR, pg. 7. Thus, the Petitioner has demonstrated an understanding of the causative factors underlying his offense.

The Board also found that the Petitioner does not understand the nature and magnitude of his offense, because he claims that he can only recall firing the first shot and provided two different answers regarding the victim's position when he fired the shots. However, the Petitioner's lack of recall of firing the subsequent shots and the victim's exact location at the time does not indicate that he lacks insight into his offense. He accepts responsibility for the offense and has made efforts to enhance his memory, including therapy and hypnosis. HT, pg. 13; PR, pg. 7. The Petitioner's psychological report concluded that he realizes that he overreacted to the victim's actions and understands that the overreaction was due to his feelings of anger and fear. PR, pg. 12.

The Petitioner accepts responsibility for his offense and demonstrated remorse. HT, pgs. 21-24; PR, pg. 7. Thus, there is no evidence in the record to support the Board's finding that the Petitioner lacks insight.

The Petitioner's Self-help Programming

The Board also cited the Petitioner's failure to participate in further self-help programs, as recommended by previous panels. As noted above, the Petitioner has not participated in self-help programs since 2000. However, the record indicates that the Petitioner did participate in numerous such programs prior to 2000 and there is no evidence to suggest that he did not benefit from those programs. PR, pg. 7. The Petitioner has been actively involved in coursework toward a Masters degree and has been engaged in self-study since 2000. Further, the Petitioner's multiple ailments and hospitalizations during that time would have made consistent participation in scheduled self-help programs difficult. HT, pgs. 42-44, 47, 51.

The Petitioner's only act of violence was the commitment offense. There is no evidence that he lacks insight or remorse, nor is there any evidence to suggest that has any psychological or behavioral issues which

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would require additional self-help programming. Thus, the Board's general finding that the Petitioner needs further self-help programming may not support a finding of unsuitability. See *In re Roderick* (2007) 154 Cal.App.4th 242, 274.

Conclusion

The Board's February 26, 2009 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. Therefore, 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 within 120 days, finding the Petitioner suitable, unless new and different evidence subsequent to the 2009 hearing is sufficient to support a finding that he currently poses an unreasonable risk of danger. See *In re Singler* (2008) 169 Cal.App.4th 1227, 1245.

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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