SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date:	FEBRUARY 25, 2011			
Honorable:	PATRICIA SCHNEGG	Judge	E. HERNANDEZ	Deputy Clerk
	NONE	Bailiff	NONE	Reporter

(Parties and Counsel checked if present)

BH007340
In re,
MAURO PEREZ,
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 September 28, 2010, by Mauro Perez ("Petitioner"), the Return filed on January 12, 2011, by the Respondent, and the Traverse filed on January 27, 2011, by Petitioner. Petitioner challenges Governor Arnold Schwarzenegger's reversal of the Board of Parole Hearings' ("Board") April 8, 2010 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 Petitioner currently presents an unreasonable risk of danger to society. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1205-06; Cal. Code Regs., tit. 15, § 2402.)

Petitioner was received in the Department of Corrections on August 8, 1989, after a conviction for second degree murder with use of firearm. He was sentenced to a total of 17 years to life in prison. His minimum parole eligibility date was November 1, 1999. The record reflects that on June 30, 1988, in front of a bar, Petitioner walked up to the victim, whom he had lost a fist fight with about three weeks earlier, and shot him once in the head. Petitioner had a brief conversation with the victim who was standing at a traffic sign. Petitioner says that he shot the victim because the victim was walking towards him in a threatening manner with something in his hand. The victim was carrying a tamale.

The Board found Petitioner suitable for parole after a parole consideration hearing held on April 8, 2010. However, on August 30, 2010, Governor Arnold Schwarzenegger reversed the Board's decision. The Governor concluded that Petitioner was unsuitable for parole and would pose an unreasonable risk of danger to society and a threat to public safety. The decision was based on Petitioner's commitment offense, a lack of insight, and his institutional misconduct.

The Governor is constitutionally authorized to make "an independent decision" as to parole suitability. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 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).) While the Governor must consider the factors reviewed by the Board, he may weigh those factors differently. (*In re Elkins* (2006) 144 Cal.App.4th 1181, 1213.) 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. (*In re Lawrence* (2008) 44

Cal.4th 1181, 1205-1206.) Only a modicum of such evidence is required. (*Id.* at 1226.) However, "the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254.)

The Governor concluded that the commitment offense was especially atrocious. (Cal. Code Regs., tit. 15, §2402, subd. (c)(1)(A).) The Governor supported this conclusion by noting that the victim posed no threat to Petitioner and the crime was committed with an exceptionally callous disregard for human suffering. "[E]xamples of aggravated conduct reflecting an 'exceptionally callous disregard for human suffering,' are . . . 'torture,' as where the '[v]ictim was subjected to the prolonged infliction of physical pain through the use of non-deadly force prior to act resulting in death,' and 'severe trauma,' as where '[d]eath resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with a weapon not resulting in immediate death or actions calculated to induce terror in the victim.'" (*In re Scott*, (2004) 119 Cal.App.4th 871, 891.) The evidence cited by the Governor does not support his determination that the crime was committed with an exceptionally callous disregard for human suffering or that the crime was especially atrocious.

However, even if the life crime was especially atrocious, after a long period of time, immutable factors, such the commitment offense, may no longer indicate a current risk of danger to society in light of a lengthy period of positive rehabilitation. (*In re Lawrence*, supra, 44 Cal.4th 1181, 1211.) Where other factors indicate a lack of rehabilitation, the aggravated circumstances of the commitment offense may provide some evidence of current dangerousness, even decades after its commission. (*Id.* at 1228.) Here, the Governor cited to concerns about Petitioner's insight and institutional misconduct as evidence that he continues to be dangerous. The Governor's reliance on these factors to show current dangerousness was erroneous.

The Governor was concerned that Petitioner lacked insight because "he has consistently minimized his conduct in the crime over the years." (Governor's Reversal, p. 2.) Specifically, the Governor was concerned about Petitioner's claim that he shot the victim because he was scared of the victim, and that he thought the victim was holding a weapon. The victim said at his 2010 Board hearing that he thought the victim had a knife in his hand, but it turned out to be a tamale. He elaborated that when you open a tamale, the husk can sort of look like a knife. When asked by the Board whether his crime was self-defense he said, "Well, I [will] put it this way, I was afraid I was going to get hurt, and I just put a stop to it." While an inmate's assertion that he or

she is less culpable than the evidence demonstrates can be equated with a lack of insight, this is not always the case. (*In re Smith* (2009) 171 Cal.App.4th 1631, 1639; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112; *In re McCLendon* (2003) 113 Cal.App.4th 315, 322.) In order for a claim of accident or self-defense to show a lack of insight, the claim must "strain credulity such that . . . [the claim] is delusional, dishonest, or irrational." (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1112.) Here, that is not the case. Petitioner was beaten up by the victim three weeks prior to the life crime, and the victim was a convicted cocaine dealer. At the time of his death, the victim had three bindles of cocaine on him that were packaged in the manner in which cocaine is sold. (Appellate Decision, p.3.) Petitioner knew that the victim was a cocaine dealer. (*Ibid.*) It does not unreasonable to assume that cocaine dealers are often armed and dangerous. Considering the circumstances, it is not delusional, dishonest, or irrational for Petitioner to be scared of the victim and believe he had a weapon.

Petitioner's claim is readily distinguishable from the other cases where claims of minimization were found to be evidence of a lack of insight. In the case *In re Shaputis* (2008) 44 Cal.4th 1241, 1248, 1260, the inmate was found to have a dangerous lack of insight because he claimed that the shooting was unintentional, despite evidence showing that it was impossible to fire the gun accidentally. Here, Petitioner's claim is not impossible, and he is not minimizing his culpability to such an extent that he denies intentionally firing the gun. In the case *In re Smith* (2009) 171 Cal.App.4th 1631, the inmate was found to have a dangerous lack of insight because she claimed to have not participated in the deadly beating of her young child, despite her previous confession and the testimony of one of her children saying that the inmate participated in the beating. Here, Petitioner has never changed his story from admitting culpability to denying it; he has always maintained that he was fearful of the victim and thought the victim had a weapon. (Probation Report, p. 11.) In addition, he does not claim to have not participated in the murder, as Smith did. In the case *In re McCLendon* (2003) 113 Cal.App.4th 315, 319-320, 322, the inmate was found to have a dangerous lack of insight because he claimed the shooting of his estranged wife was unintended despite barging into her home at midnight wearing rubber gloves and carrying a loaded handgun, a wrench, and a bottle of industrial acid. Here, there is no similar evidence that dictates the essence of this offense. Furthermore, there is a lack of compelling evidence to refute Petitioner's claim that he was fearful of the victim and thought he had a knife. Respondent suggests that, "[a]t face value, the shooting looks to be a clear retaliation for the previous fight with the victim." (Return, p. 7:9-10.) However, a "hunch" or "gut-feeling" that Petitioner is lying about thinking that the victim was armed is not enough to provide "some evidence" of current dangerousness. There needs to be stronger evidence refuting Petitioner's claim, in order for his claim to be evidence of a lack of insight.

In *Shaputis*, the prisoner's delusional claim of accident was evidence of a lack of insight because it was impossible to fire the gun accidentally. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1248, 1260.) In *Smith*, the prisoner's dishonest claim that she did not participate in the beating-death of her child was contradicted by her own long and detailed confession and the testimony of her surviving three-and-a-half-year-old child. (*In re Smith* (2009) 171 Cal.App.4th 1631, 1633-1634.) In *McClendon*, the inmate's irrational claim of having no intent to kill his estranged wife was evidence of a lack of insight because the claim went completely against the evidence of how he barged into her residence and what he was carrying with him. Even in *In re Palermo* (2009) 171 Cal.App.4th 1096, where it was held that the inmate's claim of accident was not evidence of a lack of insight, there was more evidence in the record to refute the inmate's claim of accident than there is here.[1] Here, while Petitioner's assertion that he was scared of the victim and thought he had a weapon does not excuse him from the crime of second degree murder, it does not provide any evidence of current dangerousness.

Finally, the Governor said that Petitioner's institutional misconduct supports his decision that Petitioner is currently dangerous. When a "prisoner has engaged in serious misconduct in prison or jail," it is a factor that "tend[s] to indicate unsuitability for release." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(6).) A 115 is given to a prisoner when he or she engages in serious misconduct. "When misconduct is believed to be a violation of law or is not minor in nature, it shall be reported on a CDC Form 115." (Cal. Code Regs., tit. 15, § 3312(a)(3).) The more recent the serious misconduct, the stronger it will support a finding of current dangerousness. In addition, violent 115s and substance abuse 115s are more relevant to a finding of dangerous than other 115s. Here, Petitioner received only one 115 during his entire period of incarceration, in 1991. This is an excellent prison record. The Governor was not concerned about Petitioner's 115, however, he was concerned about 128s that Petitioner received in 2008, for tenting, and 2007 for being out of bounds.

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[1] There, the inmate claimed that his murder was the "unintentional result of an accidental shooting when he foolishly played with a gun he believed to be unloaded." (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1110.) However, as the dissent pointed out, there was a 10-year-old boy who heard a woman scream about 6 seconds before the shooting, and there were fresh abrasions on the victim's left knee, which completely went against the inmate's claim that after she was shot she stood up and he slowly carried her away. Furthermore, neither Petitioner nor a Department of Justice expert could reproduce the method in which Petitioner claimed to have emptied the barrel, which left a bullet loaded in the gun. (*Id.* at 1114-1115.) This last piece of evidence alone makes the inmate's claim *extremely* unlikely.

"Though not evidence of any of the listed unsuitability factors, a CDC 128-A may be considered by the Board in reaching its parole decision." (*In re Reed* (2009) 171 Cal.App.4th 1071, 1084.) While a 128 can be evidence of dangerousness in very specific circumstances, those circumstances do not exist here. In *Reed*, the Court allowed the denial based on a 128 to stand because the "[b]oard relied on petitioner's receipt of a CDC 128-A only because it violated a prior direction of the Board, and because, unlike the defendant in Smith, petitioner had an extensive history of institutional misconduct." (*In re Reed* (2009) 171 Cal.App.4th 1071, 1086.) Here, Petitioner does not have an extensive history of institutional misconduct. In contrast, he has very little. Petitioner's 128s do not provide any evidence of current dangerousness.

Though the Governor is free to weigh the available evidence as he chooses, he is only permitted to reverse the Board's finding of suitability when there is "some evidence" to support the conclusion "that the inmate constitutes a threat to public safety." (*In re Lawrence, supra,* at 1212.) Here, the Governor's reversal is not supported by some evidence in the record that Petitioner is currently dangerous. Therefore, the petition for writ of habeas corpus is granted. Because the reversal was not supported by "some evidence," the Governor's order to reverse the Board's grant of parole to Mauro Perez is vacated and the Board's parole release order is reinstated. (See *In re Lawrence, supra,* at 1229 [affirming Court of Appeal decision reinstating Board's finding of suitability and ordering inmate's immediate release]; *In re Masoner, supra,* 179 Cal.App.4th 1541 [remand of parole suitability determination to Governor after court determines that Governor's decision is not supported by "some evidence" would "violate principles of due process and eviscerate judicial scrutiny of the Governor's parole review decisions"]; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257 ["Because we have reviewed the materials that were before the Board and found no evidence to support a decision other than the one reached by the Board, a remand to the Governor would amount to an idle act."].)

The Petitioner is to be "released forthwith pursuant to the conditions set forth in the Board's [April 8, 2010], decision." (*In re Aguilar, supra,* 161 Cal.App.4th 1491.)

The court order is signed and filed this date. The clerk is directed to send notice.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date:	FEBRUARY 25, 2011			
Honorable:	PATRICIA SCHNEGG	Judge	E. HERNANDEZ	Deputy Clerk
	NONE	Bailiff	NONE	Reporter

(Parties and Counsel checked if present)

BH007340
In re,
MAURO PEREZ,
Petitioner,

On Habeas Corpus

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Counsel for Respondent:

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

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Minutes Entered
02-25-11
County Clerk

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 MAR 04 ~~FEB 25~~ 2011 John A. Clarke, Executive Officer/Clerk By _____, Deputy Virginia Torres
PLAINTIFF/PETITIONER: MAURO PEREZ	
CLERK'S CERTIFICATE OF MAILING CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)	CASE NUMBER: BH007340

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:

- ☐ Order Extending Time
- ☐ Order to Show Cause
- ☐ Order for Informal Response
- ☐ Order for Supplemental Pleading
- ☒ Order re: Petition for Writ of Habeas Corpus
- ☐ Order re: Writ Error Coram Nobis
- ☐ Order re: Appointment of Counsel
- ☐ 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.

March 4, 2011
DATED AND DEPOSITED

JOHN A. CLARKE, Executive Officer/Clerk

By: _____, Clerk
Virginia Torres

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