Filed 5/27/10 In re Reese CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re THOMAS REESE III On Habeas Corpus.	B220858 (Los Angeles County Super. Ct. Nos. BH006321, BA108906)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Peter P. Espinoza, Judge. Petition granted.

Richard D. Pfeiffer, under appointment by the Court of Appeal, for Defendant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Anya M. Binsacca and Steven G. Warner, Deputy Attorneys General, for Plaintiff and Respondent.

Pro. per. petitioner Thomas Reese III seeks review of the November 16, 2009 order of the superior court, denying his petition for writ of habeas corpus. Reese's habeas petition challenges the April 28, 2009 denial of parole for three years by the Board of Parole Hearings.

In light of Reese's involvement in self-help and vocational programming, the lack of any serious disciplinary reports, the prison psychologist's conclusion that he presents a low risk to the community upon release, and his solid parole plans, we grant the petition.

FACTS

Reese's minimum parole eligibility date is July 2, 2010.

Commitment offense

On March 3, 1995, when he was 16 years old, Reese and two cohorts robbed two bank tellers. A few days later, Reese and another youth approached victim Christopher Lewis at a bus stop; using a handgun, Reese shot Lewis in the face.

In 1995, Reese entered a plea to second degree murder with the use of a firearm (Pen. Code, §§ 187, subd. (a), 12022.5), two counts of robbery (Pen. Code, § 211); and one count of assault with a firearm (Pen. Code, § 245, subd. (a)(2)).

Pre-prison social history

Reese was born on October 14, 1978, in Los Angeles. Although not a substance abuser, Reese's father engaged in the sale of drugs. When Reese was six years old, his father was convicted of selling drugs and was sentenced to state prison for 10 years. During his father's incarceration, Reese and his mother lived with maternal grandparents. His grandfather abused alcohol. During his childhood and teen years, Reese's mother abused cocaine; she was imprisoned during part of his childhood for selling drugs. His uncles stole from his grandparents to buy drugs. Reese's younger brother is now serving time in prison on a conviction for attempted murder. Reese regularly exchanges letters with members of his family. His mother, who now lives in Texas, visits him about three times per year. His father visits two to three times per year.

Reese's parents transferred him to a different junior high school after he was "jumped" by gang members who lived in a different neighborhood. He completed high

school while incarcerated in the juvenile section of Los Angeles County jail. He denies any gang involvement, although the Office of the District Attorney reported Reese to be a "well-known (to police) member of the Swan Gang, a sect of the Bloods."

Reese abused marijuana for two and one-half months, several times per week, when he was 16 years old. He stopped using marijuana two months before committing the subject offenses.

Juvenile history

After he committed the subject offenses, but before he became a suspect, Reese was arrested for possession of marijuana. He was placed in a diversion program, which he attended only twice.

Institutional programming

In prison, Reese has worked as a porter and a cook and is now employed as a recreation aide. Reese earned a vocational upgrade to Machine Shop.

Reese has participated in many self-help programs, including anger management, stress management, Alternatives to Violence, Non-Violent Communications Group, IMPACT program, Criminal and Gang Members Anonymous, Yokefellows, and Alcoholics Anonymous/Narcotics Anonymous.

Reese is a member of the Dean's Council for the School of the Bible, participates as a teacher in the School of the Bible, and oversees the communion ministry.

Reese is certified as an HIV counselor and volunteers in hospice care.

In-prison disciplinary actions

Reese has never had a serious discipline report.[1]

Reese had several 128A minor disciplinary reports: the last in 2006 for bringing a Bible to his work assignment; in 2005 for being out of bounds; in 2003 for cuddling up to

[1] In hearings before the Board of Parole Hearings, the terms "115" and "128" refer to disciplinary reports on the inmate. The 115 report is more serious than the 128, sometimes designated as a "128 Chrono" or a "128-A." Note that, "[t]hough 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.)

his visitor; in 2002 for being late to work; twice in 2001 for being late to work; in 2000 for misusing a telephone; and in 1998 for delaying lockup.

Remorse

In 2009, Reese explained to Gary L. Hitchcock, Ph.D., that he shot Lewis in revenge after hearing that Lewis had shot Reese's best friend, Bernard, rendering him permanently paralyzed. When Reese shot Lewis, he experienced "'all the anger I felt at the time of Bernard's shooting.'" After shooting the victim, Reese "'felt embarrassed and ashamed; I felt like a piece of [excrement] that I had actually shot somebody.'" He described the murder as a "cold-blooded, unprovoked, senseless murder."

Reese and Bernard had been best friends since they were eight years old. Reese felt responsible for Bernard's being shot and the resultant permanent paralysis, because Bernard was shot while "go[ing] to the store for [Reese's] mother."

Reese also explained to Dr. Hitchcock that Reese had committed the robbery after he fell under the influence of an "older individual" who was 30 years old at the time and planned the robbery. That older individual was armed, but neither Reese nor Reese's friend was armed. They approached the tellers, but did not say anything; the older individual did all the talking. The trio took $5,200 from the tellers. No shots were fired.

Parole plans

Reese told the prison psychologist that he plans to live with his father or his fiancée; he has a job offer as a food preparer at Soul Food Express. He would like to work part time and go to school.

At the parole hearing, the commissioners set forth numerous offers of housing and employment. Reese told the commissioners that his first choice was to work in hospice with the organization, Getting Out by Getting In, but he had not wanted to tell the psychologist about the position until it was confirmed in writing. Getting Out by Getting In accepted Reese into its "rigorous" training program, where Reese would join more than 30 graduate students in psychology. Additionally, Getting Out by Getting In offered Reese transitional housing in its sober living home in Inglewood. It also offered Reese a

part-time job in hospice because of his expertise in hospice care and his "dedication to . . . [a] life of service."

The Union Rescue Mission accepted Reese into its 12-month Christian Life Discipleship Program. Human Potential Consultants offered housing and programming to Reese. Sister Mary Sean Hodges of PREP offered Reese housing at the PREP Francisco Home and a job as a clerk at $10 per hour, for 30 hours per week, during the transition period. The Amer-I-Can program offered him a job as a motivational speaker at $10 per hour.

Reese's brother and his fiancée have a car for him, and Reese's fiancée will provide him with transportation.

Reese plans to continue to participate in self-help programming, including Anger Management Prevention and Biblical 12-Step Recovery through the Union Rescue Mission.

2009 Comprehensive Risk Assessment

The 2009 Comprehensive Risk Assessment, prepared by Dr. Hitchcock and approved by Steven Walker, Ph.D., concludes that Reese presents in the low range of psychopathy, a low risk for future violence, a low risk for violent recidivism, and an overall low risk for violence in the free community.

April 28, 2009 parole hearing

In denying parole for three years,[2] Presiding Commissioner Chrones stated: "The crimes that you committed, the circumstances in which you were raised, any marijuana use as a kid, that's all in your past and nothing can ever be changed about that and it's to some extent always going to be a consideration in suitability, but it will not always be as much of a consideration as we still find it today.

"But I think more importantly we have some concern with your insight and we talked about this during the hearing and, you, it's real obvious to both Commissioner Petrakis and myself is that you have—well, aside from us knowing that you have been

[2] The excerpts from the reporter's transcript of the parole hearing are not edited for grammar or punctuation.

very active in self-help which is evident from the copious amounts of documentation that we have on it, I think it's very obvious to everybody in the room that you have retained a lot of the teachings from your self-help and it's been a varied type of self-help, not only for substance abuse but for anger management and gang involvement and a myriad of things that we're going to talk about later. And we kind of heard a little bit of that in your discussion of—when you discussed what you felt was insight into your behavior and you talked about how you grew up in bad neighborhood . . . .

"And you were very straightforward with us today. You discussed the crime at length; you didn't hold back anything; and I can't tell you how appreciative we are that you were able to share that with us today. You do not minimize the fact that you cold-bloodedly made a decision to murder Christopher [Lewis] and that's what you went and did. You didn't mince your words. I think your forthrightness in discussing what you did has come to you over the past years. . . . I think as you have taken your self-help and as you have learned, number one, what's expected of you from society and what's expected of you from the Board of Parole Hearings, I think you have learned that it's better to kind of fall on the hand grenade, as one would say, and just say it like it is.

"Now, insight into why you did that, because I don't think it had anything to do with your upbringing and I'm not sure why you felt that there were no other—that there was no other way to deal with what you felt guilt about for your friend, Bernard. So, on one hand, you do have insight into a lot of kind of how you got to wanting to shoot him but you're still not real good on the fact that it's one thing to want to shoot somebody; it's a whole other thing to go do it. And I'm not sure that there's not some more that you need to learn on that perspective.

"And then, additionally with the robberies you did, not quite a week before the life crime, you had mentioned that you lived in a gang-infested neighborhood, they were always harassing you and trying to get you involved in the gangs and you were strong enough to stay out . . . . [W]hen Bernard got shot you said that you just gave in. But then you mentioned that the two individuals that—well, especially the older individual that you committed the robbery with—he was 30, you were 16, that's quite old enough to

know better—he wasn't a gang member, this was not a gang-induced robbery so to speak. So, doing the robbery really had nothing to do with pressure from the gang and I think we discussed this at length and we're just not clear as to how that all ties together. I think there's another piece that maybe is missing that you may or may not know what it is now but I absolutely know that you have the ability to figure it out.

"And then, when you talk about your gang involvement, there's still I think some minimization on your part to really say what your involvement was with the Bloods prior to your life crime because you admit after your life—I'm sorry, before your life crime, after Bernard got shot that you basically just decided that, you know, 'Yeah, I guess I was just not involving myself and that was stupid. I'm just going to go ahead and do it,' like you just gave up, which makes sense, except again the robbery had nothing to do with the gang so I'm not sure where that anger comes from. But for somebody who was not involved officially with the Swan group, the fact that the DA's Office had information that they tried to dissuade your eye witness from testifying, that says a lot. They don't do that for just everybody, especially if you didn't ask them or you didn't know anything about it prior to. And again, I think there's just a little bit more that needs to be done with respect to insight and information about that aspect of things."

Commissioner Chrones continued: "And obviously 128's are our counseling chronos, we all understand that, and you made a statement in your closing that you didn't have any serious disciplinaries and that the 128's that you got were honest mistakes or misunderstandings and that there was no willful disobedience. And for the most part, you can kind of say that. Certainly as a new inmate, misunderstandings and mistakes can happen but you had three in 2001 and 2002 from CMC from the same vocational instructor for tardiness for the most part except there was one where you told him that you didn't come to class that day because you needed to attend to some legal work or mail a legal document and that was more important to you. And I'm not saying that that's the most serious thing in the entire world but when you say you didn't ever do anything willful, that was pretty willful. I mean, you did what you wanted to do and you made a choice and you took the 128A. And I read all of them and to be honest with you,

your real (inaudible) instructor was very generous to you because he kept telling you and every single 128A, it states that you were warned verbally a number of times prior to the 128A and the next time you're going to get a 115 and there were two next times and he didn't ever write you a 115. And again, a long time ago but when you say that it was misunderstanding, not so much. That last one being inappropriate material on the jobsite, which was a Bible, the fact that it was a Bible, unfortunately, does not make it any different or better than if it had been a magazine, even though I'm sure that it's hard to kind of swallow that one a little bit and I understand that."

Denial of writ petition

Respondent court determined that some evidence supports the Board's decision.

DISCUSSION

Responsibility of the Board

Penal Code section 3041, subdivision (b), requires the Board to set a release date. It provides that the Board "shall set a release date unless it determines that the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed . . . ."[3] Accordingly, "California prisoners whose sentences provide for the possibility of parole [are vested] with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." (*Irons v. Carey* (9th Cir. 2007) 505 F.3d 846,

[3] All statutory references are to the Penal Code. Section 3041, subdivision (a), provides, in pertinent part: "One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime."

850, cf. *Hayward v. Marshall* (9th Cir. Apr. 22, 2010, No. 06-55392) __F.3d.__ [2010 WL 1664977, 5].)

Every inmate "is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against its abrogation.'" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664.) "[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1211.)

In determining whether a life prisoner will pose an unreasonable risk of danger to society if released from prison, the Board considers all relevant and reliable informations. The regulations set forth a nonexclusive list of circumstances tending to show suitability or unsuitability for release. (Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) Factors tending to indicate suitability include: significant life stress motivated the crime, the inmate's age, the inmate's postparole plans are realistic, and the inmate's positive institutional behavior. (*Id*., § 2402, subd. (d).) Circumstances tending to show unsuitability include that the commitment offense was committed "in an especially heinous, atrocious or cruel manner,"[4] the inmate's previous record of violence, unstable social history, and serious misconduct while incarcerated. (*Id*., § 2402, subd. (c).) "In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1205.)

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[4] The regulation specifies the factors to be considered in determining whether the offense was committed in an especially heinous, atrocious or cruel manner as: "(A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

The "core determination" thus "involves an assessment of an inmate's *current* dangerousness." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1205.) The Board is authorized "to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.'" (*Id*. at pp. 1205–1206, quoting *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.) "[D]irecting the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate's threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1219.)

As a result, the "statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1211.) The Board can, of course, rely on the aggravated circumstances of the commitment offense [among other factors] as a reason for finding an inmate unsuitable for parole; however, "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his . . . current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his . . . commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Id.* at p. 1214.)

Standard of review

The standard of review is "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1191.) "[W]hen a court reviews a decision of the Board . . . , the relevant inquiry is whether some evidence supports the *decision* of the

Board . . . that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]" (*Id.* at p. 1212.) The appellate court must uphold the decision denying parole if "'some evidence' in the record supports the conclusion that petitioner poses an unreasonable public safety risk . . . ." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1255.)

"[T]he determination whether an inmate poses a current danger is not dependent upon whether his or her commitment offense is more or less egregious than other, similar crimes. [Citation.] Nor is it dependent solely upon whether the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense. Rather, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citations.]" (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221.)

"In sum, the Board . . . may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board . . . ." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221, italics in original.)

"This standard is unquestionably deferential, but certainly is not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and

the necessary basis for the ultimate decision—the determination of current dangerousness." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1210.)

No evidence shows that Reese continues to pose an unreasonable risk to public safety

The Board set forth the offenses that Reese committed when he was 16 years old as one basis for the denial of parole, but did not explain how those crimes continue to demonstrate that Reese currently poses a threat to public safety. The Board acknowledged Reese's outstanding history of self-help programming and his leadership in helping other inmates, but did not appear to consider these achievements in the context of exploring Reese's current dangerousness. We cannot discern the Board's rationale in apparently determining that Reese's years of self-improvement are as naught because of crimes he committed as a youth.

The Board criticized Reese for his minimization of his gang alliance, but, at the same time, commented that neither the murder nor the bank robberies were related to any gang activity. It appears that the Board, itself, minimized Reese's gang activity.

One factor upon which the Board relied was lack of insight, but in its decision, the Board was contradictory in pinpointing any specific lack of insight on the part of Reese. The presiding commissioner stated that, "on one hand, you do have insight into a lot of kind of how you got to wanting to shoot him but you're still not real good on the fact that it's one thing to want to shoot somebody; it's a whole other thing to go do it. And I'm not sure that there's not some more that you need to learn on that perspective." This equivocal statement does not support a finding by the Board of any lack of insight.

The Board references Reese's 128A disciplinary reports; however, it is not clear how and to what extent the Board actually relied on the reports in apparently concluding Reese continues to pose an unreasonable risk to public safety. The presiding commissioner stated that the tardiness reports "were a long time ago" and the discipline report for having brought a Bible to work was "hard to swallow that one a little bit and I understand that."

Reese's successful participation in self-help and vocational programming; the absence of any serious disciplinary reports; the prison psychologist's determination that,

in each and every category, Reese presents a low risk to the community upon release; and his solid parole plans—these factors demonstrate compellingly that no evidence supports the Board's decision that Reese "would pose an unreasonable risk of danger to society or a threat to public safety if released from prison."

DISPOSITION

The petition for a writ of habeas corpus is granted, and the Board's decision is hereby vacated. The Board is directed to find Thomas Reese III suitable for parole unless, within 30 days of the finality of this decision, the Board holds a parole suitability hearing and finds, based on new evidence, that he currently poses an unreasonable risk of danger to society if released on parole.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.