Filed 4/28/09 In re Prather CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re MICHAEL B. PRATHER, on Habeas Corpus.	B211805 (Los Angeles County Super. Ct. No. BH005392)

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

Rich Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Jennifer A. Neill and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

This habeas corpus proceeding arises from the denial of a parole date for petitioner Michael Prather (Mr. Prather) by the Board of Parole Hearings (Board), after a hearing which was held on November 28, 2007. On December 30, 2008, we issued an order to show cause to review the Board's action and appointed counsel for Mr. Prather. We received a return to the petition from the Attorney General and a traverse from Mr. Prather. After finding that the Board lacked "some evidence" that Mr. Prather's release on parole would constitute an "unreasonable risk" of danger to the community under either state or federal constitutional standards, we issue a writ vacating the Board's denial and order it to find Mr. Prather suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new evidence of Mr. Prather's conduct in prison subsequent to his 2007 parole hearing supports a determination that he currently poses an unreasonable risk of danger to society if released on parole.

FACTS

Mr. Prather was 23 years old at the time of the commitment offense. However, by that time, he had a lengthy record due in part to his membership in the Black Lords gang. Mr. Prather had been convicted of, inter alia, carrying a concealed weapon, disorderly conduct while under the influence of drugs or alcohol, burglary and assault with a deadly weapon.

On the night of the life crime, on December 20, 1982, Elroy Ruiz and Randolph William Carrier drove to McArthur Park in Long Beach, California in order to buy a $10 bag of marijuana. Once they arrived at the park, they asked Mr. Prather for a "dime bag." Mr. Prather pointed the men to his two companions, Donald Ray Mitchell and Mark Anthony Hall. He also told Mr. Ruiz to give him his wallet, at which time one of Mr. Prather's associates reached through the window of the car and grabbed Mr. Ruiz's left shoulder. Mr. Prather then produced a handgun and Mr. Ruiz attempted to drive away. However, his car stalled. Someone yelled "shoot him" at which point Mr. Prather fired

his handgun and killed Mr. Ruiz. Mr. Prather's companions then began hitting Mr. Carrier through the open car window. Mr. Carrier handed his wallet to one of Mr. Prather's cohorts and was then able to drive away.[1]

PROCEDURAL HISTORY

At his plea hearing, Mr. Prather pled guilty to murdering Mr. Ruiz in violation of Penal Code section 187(a)[2] as well as the personal use of a firearm pursuant to sections 12022.5 and 1203.06, subdivision (1). He also pled guilty to violating sections 664 and 211 (attempted robbery of Mr. Ruiz) and attempted murder with the use of a firearm, and admitted to being an aider and abettor with the use of a firearm in the robbery of Mr. Carrier. Thereafter, Mr. Prather was sentenced to 25 years to life in prison for the killing of Mr. Ruiz with a two year enhancement for the use of a firearm, and seven years for robbery with the use of a firearm to run concurrently with the life term. His minimum parole eligibility date was October 12, 2000.

Mr. Prather's initial parole suitability hearing was conducted in September 1999. The Board found Mr. Prather unsuitable for parole and set a new parole hearing date for four years hence.

On March 25, 2004, the Board again denied Mr. Prather a parole date on the ground that he posed an unreasonable risk of harm to society.

Mr. Prather's third suitability parole hearing was held on September 29, 2005. At this hearing, the Board found that Mr. Prather would not pose an unreasonable risk of

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[1] Mr. Prather has told two versions of the events of December 20, 1982. In one version, he admitted that he shot Mr. Ruiz. In another version, he insisted that Mr. Mitchell shot Mr. Ruiz. However, at the time he pled guilty to the first degree murder of Mr. Ruiz, the prosecuting attorney who took his plea believed that Mr. Mitchell was the shooter. Mr. Prather confessed to being the shooter despite the fact that such an admission would subject him to harsher penalties and more prison time.

[2] All future references are to the Penal Code unless otherwise indicated.

danger to society and set his first parole release date. In reaching its conclusion, the Board stated it took into consideration "each and every factor particularly relative to the commitment offense, Mr. Prather's criminal history as well as the 115s Mr. Prather incurred throughout his incarceration." It also noted the many gains which Mr. Prather had made during the then-23 years he had been imprisoned including obtaining his GED, becoming proficient in three different potential occupations and participating in numerous self-help groups and programs. The Board also stressed that Mr. Prather had maintained strong family ties while incarcerated, had shown remorse for his crime and had received favorable psychological reports as far back at 1999. The Board imposed certain conditions in granting parole, to each of which Mr. Prather agreed.

However, on February 24, 2006, Governor Schwarzenegger reversed the Board's ruling on the ground that the governor believed that Mr. Prather would "pose an unreasonable risk of danger to society if paroled at this time." Governor Schwarzenegger based his reversal on the commitment offense as well as Mr. Prather's criminal history prior to the murder of Mr. Ruiz.

Mr. Prather's fourth parole hearing before the Board took place on October 6, 2006. Once again, the Board granted Mr. Prather a parole date and in doing so stated:

> "Mr. Prather, the panel reviewed all information received from the public and relied on the following circumstances *in concluding that [Mr. Prather] is suitable for parole and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison.* [Mr. Prather] has no juvenile record of assaulting others. While in prison he has enhanced his ability to function within the law upon release through participation in educational programs, self help and therapy, vocational programs and institutional job assignments. Because of maturation, growth, greater understanding and advanced age, has a reduced probability of recidivism, has realistic parole plans which include a job offer and family support, has maintained close family ties while in prison and has maintained positive institutional behavior which indicates significant improvement and self control and shows signs of remorse."

Despite the Board's ruling and its statements setting forth its reasoning for granting Mr. Prather a parole date, the governor again reversed the Board's decision and again based his decision primarily on the commitment offense.

Mr. Prather came before the Board again on November 28, 2007. Although he had not been involved in any conduct for which he was disciplined since the hearing in which he was granted parole a little more than one year before, this time the Board denied his application for parole on the ground that he was not yet suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. In a direct reference to the two previous panels which had granted Mr. Prather parole, the Board took pains to point out that each panel which conducted a parole hearing for any inmate was "like a brand new Panel [sic]" and therefore "certainly . . . not bound by any previous Panels [sic]."

In denying Mr. Prather a parole date for one year, the November 28th panel stated that it had begun with the commitment offense and noted that "[y]ou know that that always is the one that we start with." It recounted the circumstances of the commitment offense and reasoned that it "was carried out in an especially cruel and callous manner." The Board also stressed Mr. Prather's criminal history prior to the life crime as well as the institutional 128s (the last one which occurred in 2002, four years prior to the first time Mr. Prather was granted a release date) and his six 115 disciplinary reports, the last of which occurred in 1994. Further, the Board stated that it was concerned with Drs. Walker and Terani's reports that Mr. Prather had a moderately low likelihood of violence if released. Finally, the Board based its decision on the fact that the District Attorney's Office of Los Angeles County opposed a grant of parole; it had received correspondence from the City of Long Beach Police Department, and the points which the governor raised in opposition to the two prior grants of parole.

On July 2, 2008, Mr. Prather petitioned the superior court for a writ of habeas corpus in an attempt to reverse the Board's denial. On August 26, 2008, the superior court denied Mr. Prather's petition on the ground that there was "some evidence" in the record to support the Board's finding that Mr. Prather posed an unreasonable risk of

danger to society and was, therefore, unsuitable for parole. The superior court based its decision on California Code of Regulations, title 15, section 2402 and *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667. This petition followed.

STANDARD OF REVIEW

In August of 2008, in *In re Lawrence* (2008) 44 Cal.4th 1181, our Supreme Court set forth the standard of review for courts to apply when determining whether the Board acted outside its authority in refusing to grant parole to an inmate. Specifically, the Supreme Court stated "that because the core statutory determination entrusted to the Board . . . is whether the inmate poses a *current* threat to public safety, the standard of review properly is characterized as 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, italics added.) Accordingly, we review the Board's decision to determine whether Mr. Prather poses a danger to society *today*.

Moreover, although the Board has been granted broad authority in rendering its decisions concerning an applicant's suitability for parole and judicial review is limited, "a petitioner 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.' [Citation.]" (*In re Lawrence, supra,* at p. 1205.) Therefore, we apply these principles when determining that Mr. Prather was unreasonably denied a parole date by the Board. Utilizing the *Lawrence* standard, the Board's decision to deny parole to Mr. Prather is not based on any evidence which rationally supports the Board's view that Mr. Prather poses an unreasonable risk of danger *at the present time* if he were released from prison.

DISCUSSION

Title 15, section 2281 of the California Code of Regulations sets forth the factors to be considered by the Board when determining whether an inmate is a proper candidate for parole. This regulation mandates that the Board assess whether an inmate poses an

unreasonable risk of danger to society if he or she is released from prison. In rendering its decision, the Board is required to take into account the nature of the crime, the inmate's social background, his or her rehabilitative efforts, demonstration of remorse, past criminal history and any mitigating circumstances of the crime. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) The Board must set a release date at a parole suitability hearing unless it determines that "consideration of the public safety requires a more lengthy period of incarceration for this individual." (Pen. Code, § 3041, subd. (b).) Generally, "parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." [Citation.] (*In re Lawrence, supra,* at p. 1204.)

The Attorney General argues that Mr. Prather is not a proper candidate for parole because his risk of committing a violent act if paroled was in the moderately low category. However, the 2005 psychological evaluation to which both the Attorney General and the Board referred, is the same report upon which two prior Board panels found Mr. Prather to be suitable for parole. Moreover, while the November 28, 2007 panel may not be bound by the two previous panels' decisions based upon the same set of facts, it did not have any new evidence before it to support its denial of parole. It only re-interpreted the 2005 psychological report. Further, as far back as 1990, prison staff psychologist Stephen J. Clavere, Ph.D. concluded that Mr. Prather's violence potential had "*been reduced to the point of negligibility*." (Italics added.) Also, in his 1999 report, Dr. Pesavento stated that he did not see any "significant risk factors towards violence" when evaluating Mr. Prather. In fact, the entire record before the Board at the November 28, 2007 hearing is devoid any evidence whatsoever to support its conclusion that Mr. Prather's release on parole would pose a *current* threat to public safety.

Mr. Prather has expressed remorse for the crime he committed. Moreover, unlike Mr. Shaputis, Mr. Prather has gained insight through both AA and NA into the reasons for his actions and has acknowledged that he participated in a crime which led to the

death of another human being.[3] (While it is true that Mr. Prather has vacillated as to who actually did the shooting on the night of the commitment offense, he or a person who was with him, he has acknowledged that he caused a great deal of pain to the victim, his family and others and has, thus, achieved the requisite insight into the crime to be paroled at this time regardless of who actually fired the shot.) He has acknowledged that his use of alcohol and other drugs contributed to both the commitment offense and those he perpetrated before December of 1982. Accordingly, he has participated faithfully in both AA and NA and has joined the religion of Islam which prohibits drinking alcohol or consuming any illegal substances. He has learned several skills while in prison which will lead to employment if he is paroled, including landscaping, cabinet making, dry cleaning, working in the prison furniture factory and its textile mill.

Mr. Prather has maintained and strengthened his family relationships while in prison and his family is very supportive of him.

Mr. Prather has sought out and participated in a variety of self-help programs including Literacy in Action, Robert's Literacy Program, Life Skills Full Recovery, Morals and Values, Arabic Readings, Creative Conflict Resolution, Substance Abuse Programming, Anger Management Classes, Creative Conflict Resolution and several FEMA courses.

Both his 115s and 128s occurred years before the November 28, 2007 hearing.

In addition, Mr. Prather submitted many letters of support including one from the Archdiocese of Los Angeles which was authored by Sister Mary Sean Hodges of the Re-Entry Program and addressed to Governor Schwarzenegger. Sister Mary Hodges also wrote to Avenal State Prison on September 14, 2007 and confirmed that Mr. Prather

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[3] Thus, unlike Mr. Shaputis who refused to recognize his prior domestic abuse toward both his first and second wives as well as the rape/molestation of one of his daughters, the allegations of which Mr. Shaputis termed "inexplicable," as well as Mr. Shaputis's failure to come to grips with and lack of insight into his long history of domestic abuse (*In re Shaputis* (2008) 44 Cal.4th 1241), Mr. Prather has recognized the damage and pain which his actions caused.

would be provided a position as a clerk in The Partnership for Re-Entry Program and furnished with housing in a sober living facility upon his release.

By contrast, the November 28th panel had absolutely no new evidence before it which would support its conclusion that Mr. Prather constituted an unreasonable risk to society *at the present time* if he were to be granted parole. It merely used the 2005 psychological evaluation in a different fashion and required Mr. Prather to furnish a new report in order to delay Mr. Prather's release on parole. Therefore, the Board has failed to show that its reinterpretation of Mr. Prather's 2005 psychological report constitutes "some evidence" or even a modicum of evidence that he is *currently* dangerous. (*In re Lawrence, supra,* at p. 1191, emphasis added.) Thus, the evidence relied on by the Board in this case, such as it is, does not provide "some evidence" that Mr. Prather remains a *current* threat to public safety. "Accordingly, [the Board's] decision is not supported by 'some evidence' of current dangerousness." (*In re Lawrence, supra,* at p. 1227.) Specifically, as set forth above, the record before the Board at the November 28, 2007 parole suitability hearing is devoid of any evidence to support the conclusion that Mr. Prather's release would constitute a current threat to public safety.

The Supreme Court in *Rosenkrantz, supra,* 29 Cal.4th at page 658, stated, "If the [Board's] decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." However, as discussed in *Lawrence*, the Supreme Court instructed the reviewing court not to examine simply whether some evidence supports the existence of certain factors related to unsuitability for parole, but rather, considering the entire record presented at the parole hearing, "whether some evidence supports the *decision* of the Board . . . that the inmate constitutes a current threat to public safety." (*In re Lawrence, supra,* at p. 1212.) Because we have concluded that no such evidence exists in "the full record before the Board" (*id.* at p. 1221), vacating the denial of parole and directing the Board to conduct a new hearing on the same record would be a meaningless exercise in this case.

(*In re Gray* (2007) 151 Cal.App.4th 379, 411.) Thus, there is no reason to order the Board to conduct any further hearing in this matter in the absence of some new evidence about Mr. Prather's post-hearing conduct. (*In re Singler* (2008) 169 Cal.App.4th 1227, 1245 [directing the Board to hold a new hearing and to find Mr. Singler suitable for parole "unless *new evidence* of his conduct and/or change in mental state *subsequent to the 2006 parole hearing* is introduced and is sufficient to support a finding that he currently poses an unreasonable risk of danger to society if released on parole"].)

Accordingly, rather than order Mr. Prather released forthwith, we direct the Board to find Mr. Prather suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that *new and different evidence than that presented at the hearing in 2007 of Mr. Prather's conduct in prison* supports a determination that he currently poses an unreasonable risk of danger to society if released on parole.

DISPOSITION

The petition for writ of habeas corpus is granted. The Board is directed to find Mr. Prather suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new and different evidence of Mr. Prather's conduct in prison subsequent to his 2007 parole hearing supports a determination that he currently poses an unreasonable risk of danger to society if released on parole. In the interests of justice and to prevent frustration of the relief granted, this decision shall be final as to this court five days after it is filed. (Cal. Rules of Court, rule 8.264(b)(3); *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1492.)

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ARMSTRONG, Acting P. J.

I concur:

MOSK, J.

KRIEGLER, J., Dissenting.

I respectfully dissent. Petitioner Michael B. Prather's psychological evaluation as a "moderately low" risk of future violence, combined with the especially cruel or callous nature of the murder and his poor criminal and prison disciplinary records constitute "some evidence" that Prather remains a current threat to public safety, as that term is defined in *In re Lawrence* (2008) 44 Cal.4th 1181, 1212 and *In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255. I would not overturn the decision of the Board of Prison Terms denying parole.[1]

The Board's Findings

First, the Board found the commitment offense was carried out in an especially cruel or callous manner. The decedent was shot while trying to make a $10 marijuana purchase. The decedent's companion was beaten and robbed by Prather and his crime partners. Although the murder was not sophisticated, there was an element of planning in the robbery. Neither the decedent nor his companion was a threat to Prather. The motive for the robbery was economic gain, but Prather admitted he had money at the time of the offenses.

Second, the Board noted Prather's previous record, which included violent or assaultive behavior. His pattern of criminal conduct was escalating. Prather was on probation at the time of the commitment offenses and was not in compliance with

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[1] To be sure, there is much to be said for Prather's positive efforts at rehabilitation. The Board would certainly not abuse its discretion in granting parole on this record, but it is not obligated to do so.

probationary conditions. Previous attempts at rehabilitation had failed. Prather's criminal history included carrying a concealed weapon, being under the influence of a controlled substance, loitering on school grounds, carrying a loaded weapon, and misdemeanor assault with a deadly weapon.

Third, although Prather had been discipline free since 2002, the Board did note that he accumulated thirteen 128's and six 155's during his incarceration.

Fourth, the Board placed emphasis on the psychological reports that found Prather to be a "moderately low" risk for violence if released. The Board noted that it saw evaluations on other life prisoners that reflected a low risk of violence "every week when we do Panels," but Prather's level of risk was slightly higher and not "totally supportive of release."

Application of Appropriate Criteria

The factors tending to show unsuitability for parole are found in title 15, section 2402, subdivision (c) of the California Code of Regulations.[2] Among the factors relevant in this case are that the commitment offenses were committed "in an especially heinous, atrocious or cruel manner" because the incident involved multiple victims and the motive for the crime was very trivial in relation to the offense; the prisoner has a previous record of violence; and institutional behavior involving serious misconduct in prison. (See *In re Shaputis, supra,* 44 Cal.4th at pp. 1256-1257.)

The following information is to be considered by the Board in determining parole suitability: "All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the

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[2] Hereafter cited as "Regs."

base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (Regs, tit. 15, § 2402, subd. (b).)

Each of the four factors relied upon by the Board to deny parole to Prather is supported by substantial evidence, and Prather does not seriously contend otherwise. The question thus presented is whether the Board could determine that those factors indicate Prather continues to pose an unreasonable risk to public safety if released. I believe the Board could make such a find based upon the record presented.

The tipping point in this case is the psychological report placing Prather in the "moderately low" range of risk for future violence. As noted by the Board, life inmates with a low risk for future violence are not uncommon, but Prather's assessment was somewhat higher. (See *In re Reed* (2009) 171 Cal.App.4th 1071, 1079 [some evidence supported the Board's decision to deny parole to inmate with a risk of violence lower than an average inmate].) When the psychological report is considered in conjunction with the other factors pointing toward unsuitability, including Prather's attack on multiple victims and the trivial motive for the offenses, and his record of criminal convictions and prison disciplinary actions, there is certainly "some evidence" to support a denial of parole. Indeed, Prather's disciplinary record in prison, in and of itself, is sufficient to support the Board's decision. (*Id*. at p. 1084.)

The fact that two prior Board panels found Prather suitable for parole based upon essentially the same evidence and psychological evaluations did not bar the current Board from reaching a different conclusion. There is nothing in the law to support the notion that the current Board is estopped by prior determinations of the Board, particularly when those prior determinations were overturned by the Governor. The issue is not what the

Board has done in the past, but rather whether there is "some evidence" to support its current determination that Prather is not suitable for release at this time because he continues to present an unreasonable risk to public safety. I suggest that relying on prior Board determinations runs afoul of the "extremely deferential" standard of review requiring courts to uphold a Board's decision if supported by "some evidence." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 665; *In re Reed, supra*, 171 Cal.App.4th at pp. 1083-1084.)

The record in this case is certainly as strong as in *In re Shaputis*, *supra*, 44 Cal.4th 1241, in which our Supreme Court held the circumstances of the commitment offense combined with the inmate's failure to gain insight into his commitment offense was sufficient to support the Governor's reversal of a grant of parole. Indeed, Shaputis's psychological reports concluded he presented a low risk of future violence absent a relapse into alcoholism (*id.* at p. 1280), yet the Supreme Court upheld the Governor's determination based on a finding of present dangerousness. The same result should apply here to the Board's determination.

I would deny the petition for writ of habeas corpus.

KRIEGLER, J.