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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL ALBERT GUARDADO,
Petitioner,
v.
MARGARITA PEREZ, et al.,
Respondents.

No. C 05-00194 CW
ORDER GRANTING
PETITIONER'S
EMERGENCY
APPLICATION FOR
ENFORCEMENT OF WRIT
OF HABEAS CORPUS BY
RELEASE OF PRISONER
AND STAYING ORDER

On April 9, 2008, the Court issued an Order Granting Petition for Writ of Habeas Corpus in which it invalidated the 2006 decision of the Board of Parole Hearings (Board) that Petitioner was unsuitable for parole and ordered the Board to hold a re-hearing in accordance with the findings in the Order. On June 3, 2008, Respondent filed a notice of appeal of the Court's judgment. Respondent moved to dismiss the appeal voluntarily and on September 5, 2008, the Court of Appeal issued its mandate granting Respondent's motion. On August 12, 2008, the Board held a re-hearing and again found Petitioner unsuitable for parole. On January 22, 2009, the Court issued an Order Granting Petitioner's Application for Order Enforcing Writ of Habeas Corpus which found that the Board's August 12, 2008 decision was not supported by some

1 evidence and ordered the Board to submit its parole denial to the
2 Governor. The Board did so and the Governor waived review of the
3 Board's decision. On June 23, 2009, the Board set a release date
4 for Petitioner based on this Court's order and issued a release
5 memorandum indicating that Petitioner was eligible for release. On
6 July 21, 2009, the Governor issued an opinion reviewing and
7 reversing the Board's decision. Pursuant to the Governor's
8 decision, Petitioner remains incarcerated.

9 On August 28, 2009, Petitioner filed this emergency motion
10 asking the Court to enforce its April 9, 2008 judgment by ordering
11 his immediate release from prison. Respondents oppose the motion
12 and Petitioner has filed a reply. The matter was taken under
13 submission. Having considered all the papers filed by the parties,
14 the Court grants Petitioner's motion, remands the case to the Board
15 and orders it to authorize Petitioner's release. The Court stays
16 its order, to allow Respondents to seek a further stay from the
17 Court of Appeals.

18 DISCUSSION

19 Petitioner argues that: (1) the Governor's July 21, 2009
20 decision was not based on some evidence that Petitioner presented a
21 danger to the public if he were released on parole; (2) the
22 Governor's decision was untimely; (3) the Governor waived review of
23 the Board's 2008 decision; (4) the Governor is judicially estopped
24 from re-visiting the issue of Petitioner's eligibility for release;
25 and (5) the Governor's decision was outside the scope of the June
26 23, 2009 Board hearing. Respondents argue that the Governor
27 properly reviewed the Board's June 23, 2009 decision and that,
28 until Petitioner exhausts state court remedies, the Court lacks

1 jurisdiction to review the Governor's decision.

2 I. Jurisdiction and Exhaustion

3 Respondents assert that, because the Governor is not a named
4 respondent in the petition, he is not bound by this Court's orders.
5 The proper respondent in a federal habeas corpus petition is the
6 petitioner's immediate custodian because this person is the only
7 one who can produce "the body" of the petitioner. Brittingham v.
8 United States, 982 F.2d 378, 379 (9th Cir. 1992). The Court's
9 order is addressed to Petitioner's custodian.

10 Respondents assert that Petitioner must exhaust his state
11 remedies regarding the Governor's July 21, 2009 decision by filing
12 a new petition in state court and only then may Petitioner return
13 to federal court to challenge the Governor's decision. Except for
14 the general principle that federal habeas petitions must be
15 exhausted in state court, Respondent offers no authority for this
16 assertion.

17 Habeas courts are empowered to assess compliance with their
18 mandates. Judulang v. Chertoff, 562 F. Supp. 2d 1119, 1126 (S.D.
19 Cal. 2008). Where a habeas petitioner has secured a conditional
20 release, he or she is entitled to the court's continuing
21 supervision to ensure compliance with its order. Id. Otherwise,
22 the habeas court's grant of relief would be meaningless. Id. A
23 district court, on habeas review, may order a petitioner's release
24 and this power continues after the grant of a conditional order.
25 Phifer v. Warden, United States Penitentiary, Terre Haute, Indiana,
26 53 F.3d 859, 864 (7th Cir. 1995). A conditional order is
27 essentially an accommodation accorded to the state indicating that
28 a constitutional infirmity justifies a petitioner's release, and

1 allowing the state to cure the error. Id. at 864-65. Failure of
2 the state to cure the error justifies the district court's release
3 of the petitioner. Id. at 865.

4 As noted above, over one and one-half years ago, this Court
5 issued its Order granting Petitioner a writ of habeas corpus,
6 finding that "the Board's continued reliance on the commitment
7 crime alone violated Petitioner's due process rights, and the state
8 court's contrary finding was an unreasonable application of Supreme
9 Court law." April 9, 2008 Order at 18-19. The Court remanded to
10 the Board to hold a new hearing so that it could correct the
11 constitutional error. However, on August 12, 2008, the Board again
12 found Petitioner unsuitable for parole citing the commitment
13 offense, Dr. Richard Starrett's April 29, 2008 psychological report
14 and its opinion that Petitioner had only recently gained insight
15 into his responsibility for the commitment offense. Petitioner
16 filed an application to enforce the habeas writ and, in their
17 opposition, Respondents argued, as they do here, that Petitioner
18 must first exhaust state remedies again before he may challenge the
19 Board's August 12, 2008 decision in this Court. In the January 22,
20 2009 Order Granting Petitioner's Application to Enforce the Writ,
21 this Court rejected Respondents' exhaustion argument, explaining
22 that Petitioner's application was not a new habeas petition, but
23 was directed at the Board's compliance with the Court's April 9,
24 2008 Order. The Court addressed the merits of the Board's decision
25 and concluded that the Board failed to cite some evidence, apart
26 from the commitment offense which was insufficient, that Petitioner
27 would be a danger to the public safety if released. Thus, the
28 Board had failed to evaluate Petitioner's suitability for parole in

1 accordance with the April 9, 2008 Order. Noting that California
2 law allowed the Governor to review any decision of the Board
3 regarding the parole of an inmate sentenced to an indeterminate
4 prison term based upon a murder conviction, the Court remanded the
5 case to the Board to submit to the Governor its August 12, 2008
6 decision denying parole along with this Court's April 9, 2008
7 Order. January 22, 2009 Order at 11. The Court expressly retained
8 jurisdiction over the petition. Id. The Governor waived review of
9 the Board's decision.

10 After some procedural delays, the Board met on June 23, 2009,
11 and, in compliance with the Court's April 9, 2008 and January 22,
12 2009 Orders finding Petitioner suitable for parole, granted
13 Petitioner parole. The Board set a base term of confinement of 168
14 months which was less than the 235 months that Petitioner had
15 served. The Board noted that because Petitioner had served more
16 than the base term, he would not "have to wait around for a release
17 date."

18 As noted above, however, Petitioner was not released. The
19 Governor intervened, reversed the Board's decision, and Petitioner
20 remains in prison.

21 As a matter of state law, California Penal Code § 3041.2(a),
22 the Governor must base his decision on the same record that was
23 before the Board at its 2006 and 2008 hearings on Petitioner's
24 suitability for parole. This is the same record that was before
25 this Court when it issued its rulings in this case and the same
26 record that is now before this Court. Based on the above sequence
27 of events and the fact that this Court retained jurisdiction over
28 this case to ensure that its Orders would be followed, the Court

1 has jurisdiction to review the Governor's decision for compliance
2 with its orders. Petitioner's application is not a new habeas
3 petition, but is directed at the Governor's compliance with the
4 Court's April 9, 2008 Order. It is unnecessary to require that
5 Petitioner retread his steps by filing a new petition in state
6 court so that he may again come before this Court on the same facts
7 that are now before this Court. Therefore, the Court reviews the
8 merits of the Governor's decision.¹

9 II. Governor's Decision

10 The Governor provided the following reasons for his reversal
11 of the Board's grant of parole: (1) the second-degree murder of
12 which Petitioner was convicted was especially atrocious because the
13 manner in which the victim was killed -- being chased down by a
14 gang of teenagers, including Petitioner, being beaten, kicked and
15 then shot as he begged for his life -- demonstrated an
16 exceptionally callous disregard for the victim's life and
17 suffering; (2) the motive for the murder -- one of the young people
18 with Petitioner wanted the victim's hat -- was very trivial in
19 relation to the magnitude of the crime; (3) Petitioner lacks full
20 insight into the circumstances of the offense and minimizes his
21 role in the crime because he has denied repeatedly that he had a
22 gun at the time of the murder; (4) Petitioner's June, 2008 mental
23 health evaluation indicated that he had a "low to moderate" risk
24 for violence "when compared to similar inmates" and "continues to
25 deny that he was the shooter." The Governor summarized the

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27 ¹Because the Court grants relief based on the merits of the
28 Governor's decision, it does not address Petitioner's procedural
arguments.

1 evidence for his decision as follows:

2 The gravity of the crime supports my decision, but I am
3 particularly concerned that Guardado continues to
4 minimize his actions and that the June 2008 mental health
5 evaluator² concluded that he poses an increased risk for
6 future violence because he fails to accept full
responsibility. This evidence indicates to me that
Guardado still poses a risk of violent recidivism and
that his release from prison at this time would pose an
unreasonable risk to public safety.

7 Governor's Decision at 3-4.

8 A. Commitment Offense and Trivial Motive

9 The Governor's first two reasons, that the crime was egregious
10 and the motive was trivial, were addressed by the Court in its
11 April 9, 2008 Order as follows:

12 It is undeniable that the offense was heinous, atrocious
13 and cruel, demonstrating a callous disregard for human
14 suffering. These facts will never change. However, the
15 Ninth Circuit has held that continuous reliance over time
16 on static factors such as the commitment offense could
violate due process. . . . The question is whether it is
reasonable to find after almost thirty years that the
facts of the offense constitute some evidence that
Petitioner would be a danger to society if released.

17 . . .

18 In light of Petitioner's entire record -- including his
19 age at the time of the crime, his violence-free years
20 before he was arrested, his lengthy incarceration, his
21 rehabilitation through education, good conduct and
charitable work -- his commitment offense, which occurred
twenty-nine years ago, no longer constitutes "some
evidence" that his release will pose an imminent danger
to public safety.

22 April 9, 2009 Order at 12, 18.

23 In reaching this conclusion, the Court scrutinized the entire
24 record, noting also Petitioner's lack of violent behavior in
25 prison, his positive plans for parole and his positive
26

27 ²The Governor's reference to a June, 2008 mental health
28 evaluator appears to pertain to Dr. Starrett's April 29, 2008
psychological evaluation.

1 psychological evaluations. The Court will not repeat this analysis
2 here, but underscores that, for many reasons, the unchanging facts
3 of the commitment offense and the trivial motive for the offense no
4 longer comprise some evidence that Petitioner would currently be a
5 danger to the public if released.

6 B. Petitioner's Lack of Insight

7 The Governor found that Petitioner lacked insight into the
8 commitment offense because he did not admit he was the shooter and,
9 from this, the Governor concluded that Petitioner may commit
10 similar crimes if released. In its April 9, 2008 Order, the Court
11 addressed this same argument as presented by the Board and noted
12 that California Penal Code § 5011(b) prevented the Board from
13 requiring that an inmate admit guilt to any crime for which he or
14 she was committed. The Court found that the Board could not deny
15 Petitioner parole for not admitting to all of the facts of the
16 crime as interpreted by the Board. The same reasoning applies to
17 the Governor's reliance on this factor. Therefore, the fact that
18 Petitioner did not admit he was the shooter cannot be relied upon
19 as some evidence that he is currently a danger to the public if
20 released.

21 C. Mental Health Evaluations

22 In the Board's August 12, 2008 decision denying parole, it
23 characterized Dr. Richard Starrett's April 29, 2008 psychological
24 report as not being totally supportive of release because Dr.
25 Starrett found that Petitioner has a low to moderate propensity for
26 violence when compared to similar inmates. This is the same
27 argument relied upon by the Governor.

28 In its January 22, 2009 Order, the Court pointed out that Dr.

1 Starrett's 2008 finding contradicted the findings in 1999 and 2004
2 psychological evaluations that Petitioner has a low propensity for
3 violence. January 22, 2009 Order at 9. The Court explained:

4 That Petitioner was continuously involved in positive
5 programming and education from 2004 to 2008 without any
6 incidents that would indicate a propensity for violence
7 makes it unreasonable to conclude that, during this time,
8 Petitioner's propensity for violence changed for the
9 worse. This conclusion is supported by the July 18, 2008
10 psychological evaluation by Dr. Melvin Macomber who
11 opined that Dr. Starrett had used inappropriate measures
12 for his risk assessment of Petitioner and thus his
13 conclusion was invalid. Dr. Macomber concluded that
14 Petitioner "does not pose any more risk to society than
15 the average citizen," and that "the results of
16 psychological testing and interviewing indicate that Mr.
17 Guardado is probably one of the least dangerous people
18 the state has."

19 January 22, 2009 Order at 9-10.

20 Thus, the April 29, 2008 psychological evaluation does not
21 provide some evidence of Petitioner's current dangerousness.

22 In sum, the Governor failed to cite some evidence that
23 Petitioner currently poses a danger to society if released, to
24 support his decision reversing the Board's grant of parole.
25 Therefore, the Governor's decision violated Petitioner's due
26 process right to parole and must be reversed. Because the record
27 is complete and cannot be augmented, remand to the Governor is
28 unnecessary. Therefore, the Court remands this case to the Board
to release Petitioner on parole.

Because a case raising many of the issues here is pending
before an en banc panel of the Ninth Circuit, Hayward v. Marshall,
512 F.3d. 536 (9th Cir. 2008), reh'g en banc granted, No. 06-55392,
slip op. 5923 (9th Cir. May 16, 2008), the Court will stay
Petitioner's actual release for ten days to allow Respondent to
seek a further stay from the Court of Appeals.

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CONCLUSION

Accordingly, Petitioner's motion for enforcement of writ of habeas corpus is granted. This case is remanded to the Board to order Petitioner's release. Petitioner's release is stayed for ten days to allow Respondents to seek a further stay from the Court of Appeals. Respondents shall file a report with the Court in ten days, indicating whether they have sought or received a stay from the Ninth Circuit, or have released Petitioner.

IT IS SO ORDERED.



Dated: December 14, 2009

CLAUDIA WILKEN
United States District Judge