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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re KLUDIP S. KLER, on Habeas Corpus.	A128153 (Alameda County Super. Ct. No. CH-9135)

In 1989, petitioner Kuldip S. Kler was convicted of second degree murder and sentenced to an indeterminate term of 15 years to life in prison. In May 2009, we granted petitioner's petition for writ of habeas corpus that challenged his June 22, 2007 parole denial. (*In re Kler* (May 19, 2009, A121800) [nonpub. opn.].) In September 2009, the Board of Parole Hearings (Board) held a new hearing and found petitioner suitable for parole, a decision the Governor, in February 2010, reversed, relying exclusively on the facts of the commitment offense and petitioner's purported lack of insight. Petitioner has filed another petition, challenging the Governor's reversal, which we shall grant.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the entire Background section, and part II of Discussion section.

BACKGROUND[*]

Because the facts of the commitment offense and most of petitioner's post-conviction record were set forth in detail in our 2009 opinion (*In re Kler*, *supra*, A121800), we present an abbreviated narrative.

1. The Commitment Offense[*]

On February 25, 1987, 10-month-old Simron Kler died from injuries sustained while she was at home alone with petitioner, her father. Rupinder Kler, Simron's mother and petitioner's wife, was at work that morning until called home by petitioner. Shortly thereafter, police and fire department personnel were dispatched to the apartment. We observed in our opinion affirming petitioner's conviction that "[f]irefighters responding to a 911 call from the aunt at 4:33 a.m. found Simron was not breathing and began CPR. She was bruised on her torso and had abrasions on her face and mouth." (*People v. Kler* (Jan. 29, 1991, A046790) [nonpub. opn.], p. 2.) An ambulance was called and paramedics found Simron "bruised from head to foot, blue, cool and unresponsive. They rushed her to a hospital emergency room, where she was similarly observed and pronounced dead on arrival at 5:08 a.m." (*Id.* at p. 3.) The autopsy revealed that the beating was fierce: "Simron died of blunt force trauma, having suffered 110 bruises and scrapes over her arms, legs, torso, neck and body. Internal injuries included eight broken ribs, liver, intestinal, lung and chest cavity bruising, and lacerations of the duodenum and small bowel mesentery." (*Ibid*.) As noted by the Board in 2007, "the beating of Simron Kler was so extensive and thorough that she had in her vaginal area, blood coming from that area, which is indicative of literally the internal organs being pulverized." (*In re Kler, supra,* A121800, at p. 2.)

Initially, petitioner gave differing version of how Simron died. His sister-in-law explained at the trial that when she arrived that night, petitioner told her that "he was feeding the child when she started gagging." (*People v. Kler, supra*, A046790, at p. 3.)

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[*] See footnote, *ante*, page 1.

[*] See footnote, *ante*, page 1.

Petitioner explained to a responding officer and to the child's pediatrician (who happened to be on-call at the emergency room when Simron was taken to the hospital) that "[t]he child awoke crying at 3:15 a.m.; he took her from her crib, brought her into the living room, got a bottle and began feeding her; and part way through the feeding she began breathing heavily and vomiting." (*Ibid*.) Yet, at trial petitioner claimed that he inflicted the fatal injuries while unconscious during an epileptic seizure. (*Ibid.*)

There was also evidence of prior abuse. Petitioner's wife informed the police that she had observed prior bruising on the child. She "told a police detective that she had noticed bruises on Simron before which concerned her, that defendant admitted slapping Simron when she cried and would not sleep . . . ." (*People v. Kler, supra*, A046790, at p. 3.) Later his wife "saw bruises on Simron again, while bathing her the week before the death, and that when she accused him of further hitting, [petitioner] said the child had fallen down." (*Ibid.*) Tellingly, the autopsy "revealed older rib fractures that had occurred on two to four different occasions." (*Ibid*.)

2. The 2007 Parole Hearing and Board Decision[*]

At the June 22, 2007 parole hearing, petitioner acknowledged, as he has since the 1997 parole hearing, that he killed Simron. He explained that he was taking care of his daughter while his wife worked the night shift. After he went to bed around 2:30 or 3:00 in the morning, Simron woke him crying; he gave her a bottle and put her back in her crib. Fifteen minutes later she again awoke crying; petitioner attempted to quiet her and again put her back in the crib. When Simron woke a third time he "lost control" and "started beating her." Petitioner also acknowledged, as he had since 1999, that he had hit Simron on days prior to inflicting the injuries that caused her death. He told the Board that while he only recalled slapping Simron prior to her February 25, 1987 murder, he was responsible for her pre-existing injuries—i.e., bruises and broken ribs—and that those injuries could not have been caused by slapping. In other words, he accepted

[*] See footnote, *ante*, page 1.

responsibility for the previous beatings of Simron, although he did not specifically remember the attacks. (*In re Kler, supra*, A121800, at p. 3.)

Much of the remainder of the hearing was spent on petitioner's exemplary prison record. He was twice disciplined for relatively minor infractions early in his prison career, in 1994 and 1998. Although there are no Sikh programs (his own religion), petitioner has participated in almost 40 religion and bible study classes, and competed an impressive amount of self-help and counseling. "For instance, according to the 2007 Mental Health Evaluation, in the two years between his 2005 and 2007 hearings, petitioner completed at least 75 Correctional Learning Network programs." (*In re Kler, supra*, A121800, at p. 7.)

"Petitioner also received commendations for his excellent ceramics work, which he donates for sale to benefit various charities. His pottery and other handiwork has been donated to the 2000, 2002, and 2003 Annual Art Sales and the San Joaquin County Child Abuse Prevention Council, where his gifts were auctioned and helped raise $16,000 for that charity." (*In re Kler, supra*, A121800, at p. 7.)

"The evaluations and psychological reports before the Board were also supportive. The 2003 Life Prisoner Evaluation Report states that in 1997 petitioner 'admitted guilt to the instant offense and expressed remorse for his actions,' and in 1999 he explicitly acknowledged that he had abused Simron on more than one occasion. The report concluded with the following recommendation:

> " 'This writer believes the prisoner would probably pose a low degree of threat outside an institutional setting, considering the commitment offense, prior record, prison adjustment and Staff Psychologist Dr. Roger Kotila's, Mental Health Evaluation of 7-14-99, in which he states in part, " . . . this man would be a good candidate for parole. The likelihood of his committing future violence is low." "From a psychiatric view point, he is a good candidate for parole with low risk of future violence, and a high probability that he will be a law abiding citizen." He

also has a strong support system of family and friends, which give him an excellent chance of success.'[1]

"The psychological reports all also found that petitioner presented a below-average risk for reoffending. For instance, in the 1999 Mental Health Evaluation, the psychologist concluded that '[t]he likelihood of [petitioner] committing future violence is very low' and that '[f]rom a psychiatric view point, he is a good candidate for parole with low risk of future violence, and high probability that he will be a law-abiding citizen.' That positive conclusion is echoed in [his 2007] Mental Health Evaluation . . . . That report recognizes that '[a]ll factors that have been identified in the research as positive indicators of success on parole are present in Mr. Kler's case,' and concludes that the '[a]ssessment of dangerousness if released into the community is seen as below average in comparison with other inmates.' " (*In re Kler*, *supra*, A121800, at pp. 8-9.)

"After considering [this] evidence, the Board found that petitioner's release 'would pose an unreasonable risk of danger to society or a threat to public safety.' The factors relied upon by the Board were the cruel manner of the crime, that the offense was 'carried out dispassionately,' an escalating pattern of behavior (as exhibited by the prior beatings of Simron), and callous disregard for human suffering. The Board also found it 'noteworthy' that petitioner 'only recently acknowledged the crime itself' and 'has only in part and only very recently started talking about preexisting injuries that the child had and even today, doesn't recall some substantial rib injuries that were preexisting.' The Board also found it 'noteworthy' that petitioner 'only acknowledge[d] that he slapped her once prior to the death.' This led the Board to believe that 'acceptance of total responsibility is only now starting to come out with Mr. Kler.'

"Finally, the Board 'note[d] that [it found that] the letters from Mr. Kler's wife had some particularly disturbing information in them'; namely, that 'she seems to be

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[1] "Apparently the format of the Life Prisoner Evaluation Reports changed, as the two subsequent ones, dated 2005 and 2007, do not contain a recommendation to the Board regarding whether or not petitioner should be paroled." (*In re Kler*, *supra*, A121800, at p. 9, fn. 1.)

deeply in love or committed to her husband [and] stuck up completely and totally for him.' Because of her level of devotion to her husband, the Board concluded that '[s]he seems to be a troubled woman with regard to commitment of love in this case.' Given this 'over the top' family support, the Board was not sure whether petitioner's wife and other family members would 'stand up to' petitioner 'if he were to be going down the wrong road.' "" (*In re Kler, supra*, A121800, at pp. 9-10.)

3. Our Prior Decision[*]

We granted the petition for writ of habeas corpus, finding that the Board's decision to deny parole was not supported by "some evidence" that petitioner would pose an unreasonable risk to public safety. (*In re Kler, supra*, A121800, at p. 19.) We did so because all of the factors the Board relied upon were immutable. Specifically, the Board denied parole based on the following factors: (1) the commitment offense was carried out in an especially cruel manner; (2) the offense was carried out dispassionately; (3) there was an escalating pattern of child abuse; and (4) the offense was carried out in a manner that demonstrated exceptional callous disregard for human suffering. We assumed these findings were supported by the record, but recognized that they all pertain to the commitment offense and thus cannot be used to deny parole unless it can be shown that they "support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (In re *Lawrence* (2008) 44 Cal.4th 1181, 1221 (*Lawrence*).) As the Board did not connect the facts of the commitment offense to a *continued* unreasonable risk of public safety in any respect, we concluded that the immutable factors did not provide "some evidence" that petitioner continues to be an unreasonable risk to public safety. (*In re Kler, supra*, A121800, at p. 13.)

We also reviewed the factors the Board cited as "noteworthy," although it was not clear from the record that they were considered by the Board as a basis for denying parole. (*In re Kler, supra*, A121800, at p. 13.) "[Those] 'noteworthy' factors were: (1) that petitioner 'only acknowledge[d] that he slapped [his daughter] once prior to the

[*] See footnote, *ante*, page 1.

death'—leading the Board to conclude that 'acceptance of total responsibility is only now starting to come out'; and (2) that the letters submitted indicating family support were 'disturbing' and 'over the top,' which lead the Board to conclude that petitioner's wife 'seems to be a troubled woman' who might not 'stand up to' petitioner." (*Id.* at pp. 13-14.)

We found the factors cited by the Board either were not supported by the record or did not provide "some evidence" that petitioner remains an unreasonable risk to safety. Specifically, the conclusions that petitioner only now acknowledged one prior slapping and that petitioner's " 'acceptance of total responsibility is only now starting to come out' " were not supported by the record, as petitioner acknowledged multiple incidents of prior abuse, for which he accepted responsibility since 1999. (*In re Kler, supra,* A121800, at p. 14.) Regarding the support letters, we found it "inexplicable" that a loving, stable relationship with his wife, which is a factor that tends to show he is suitable for parole (see Cal. Code Regs., tit. 15, § 2281, subd. (d)(2)), would be used *against* petitioner. (*In re Kler, supra,* A121800, at pp.15-16.) We ended our opinion by observing that "the only factors supported by the record that the Board relied on in denying parole are immutable ones: the circumstances of the commitment offense. As we have said, since 1997 petitioner has accepted full responsibility for his crime, and since 1999 has acknowledged his prior abuse of his daughter. He has been a model prisoner in almost every regard and enjoys strong family and community support. Importantly, the psychological evaluations are all very positive, indicating a low risk of recidivism. Indeed, the reports conclude that '[t]he likelihood of [petitioner] committing future violence is very low' and that, '[f]rom a psychiatric view point, he is a good candidate for parole with low risk of future violence, and high probability that he will be a law-abiding citizen.' In short, there is no evidence whatsoever supporting the conclusion that petitioner '*continues* to pose an unreasonable risk to public safety' (*Lawrence, supra,* 44 Cal.4th at p. 1221) and is therefore unsuitable for parole." (*In re Kler, supra,* A121800, at p. 18.)

4. The 2009 Parole Hearing and Board Decision[*]

Following our reversal, the Board held a new hearing on September 18, 2009, at the conclusion of which the Board granted parole. That hearing mostly plowed the same fields that had been covered in the 2007 hearing, addressing petitioner's stressful situation that led to the commitment offense, his exemplary record in prison, and his parole plans. Once again, he explained that, because he was "ignorant … at [the] time," he hit his daughter when he became frustrated with her: "I was immature and I was raised the way that we were taught that the man never cried. Man never complained. And I kept all the feelings to myself. I never told my wife I couldn't handle it. I can't handle this. So I didn't know at that time there is many other ways that I know right now to release the pressure. So I took all the pressure and released on her." He gained this insight into his crime because he was "deeply impacted" by his actions; the "death in itself for my daughter has deeply touched me. I never, ever thought in my life that I would kill somebody, and [never] my own child."

Next, petitioner's time in prison was discussed. The Board also observed that petitioner did not have any new discipline since the last hearing and that his prior discipline record was "very minimal." In addition to the impressive amount of counseling and programming petitioner had participated in before the last hearing, petitioner also completed several more programs in the interim between the 2007 and 2009 hearings, including another anger management program and "Path to Prosperity."

Also discussed was the new psychological evaluation. Entitled "Comprehensive Risk Assessment," the purpose of the evaluation was to assess petitioner's "violence potential in the free community." It concluded, "[a]fter weighing all of the data from the available records, the clinical interview, and the risk assessment data" that "Mr. Kler presents a relatively **Very Low Risk** for violence in the free community." In doing so, the assessment reviewed petitioner's parole plans, his mental health history, his "insight/self assessment," his "remorse and insight into life crime," his criminal history,

[*] See footnote, *ante*, page 1.

his institutional history and programming, and his potential for violence based on the available empirical data and risk assessment tools. The Board quickly acknowledged that all the objective data in the evaluation indicated petitioner was a low risk, but also read into the record the section of the report where the evaluator observed that he "did not get the sense that Mr. Kler actually fully understands how he could have committed this crime against his own infant child and he did not satisfactorily explain why he beat the baby over a period of four months. His remorse for having committed the crime is limited by the limited extent to which he understands his behavior at the time."

Petitioner's parole plans were also explored by the Board. As he had at the last hearing, petitioner presented several detailed parole plans. They included plans for parole in India, if he is deported, and plans within California in Placer County (where his wife lives), Alameda County (the county where he was convicted), and Southern California. All of the plans included housing, jobs offers, and numerous letters of support.

After hearing the evidence, the Board granted parole. In doing so, the Board reviewed the events of the crime, including petitioner's initial lies about how his daughter died and then his acceptance of responsibility for the crime. Petitioner's lack of criminal record, his "stable social history," and his record in prison were all mentioned in support of parole. Particularly noteworthy to the Board was that petitioner "kept working" on his programming and counseling while challenging the 2007 denial through the court system: "That was important for us to see and that did speak positively of you here today." In fact, the Board observed that over his 20 years in prison, petitioner has "done a lot of work" to gain insight and maturity. Also noted by the Board were petitioner's positive psychological evaluations. Upon granting parole, the Board set the term at 19 years.

5. The Governor's Reversal[*]

Pursuant to his constitutional prerogative, the Governor reversed the Board's grant of parole. Regarding the crime itself, the Governor found it to be "especially atrocious

[*] See footnote, *ante*, page 1.

because [petitioner] was in a position of trust regarding his particularly vulnerable baby daughter." Additionally, the Governor expressed his "concern that Kler lacks full insight into the circumstances of the murder," evinced by several factors, including petitioner's faulty memory and his "minimization of responsibility." Because of this lack of insight, the Governor concluded that petitioner "does not fully comprehend his murderous conduct" and "has not adequately explained why he beat his daughter for four months prior to her death," leading the Governor to conclude "that Kler would still present a current, unreasonable risk of danger to society if released at this time."

DISCUSSION

I. May—And Should—We Consider This Petition in the First Instance?

After the Governor's reversal, petitioner filed the instant petition without first seeking relief in the trial court. The Governor argues that rule 8.385(c)(2), of the California Rules of Court[2] prohibits us from entertaining this petition in the first instance. It is true that rule 8.385, which was enacted in response to *In re Roberts* (2005) 36 Cal.4th 575 (*Roberts*), requires a petition challenging denial of parole to be first filed in the superior court. But the rule is inconsistent with our state Constitution and the *Roberts* decision.

The California Rules of Court are enacted by the Judicial Council of California. The Judicial Council, which is charged by the state Constitution with "improv[ing] the administration of justice," is authorized to "adopt rules for court administration, practice and procedure," which shall "not [be] inconsistent with statute." (Cal. Const., art. VI, § 6.) "The rules have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions." (*In re Richard S.* (1991) 54 Cal.3d 857, 863.)

Rule 8.385(c)(2) states that "[a] Court of Appeal *must* deny without prejudice a petition for writ of habeas corpus that challenges the denial of parole or the petitioner's

[2] All future rule references are to the California Rules of Court unless stated otherwise.

suitability for parole if the issue was not first adjudicated by the trial court that rendered the underlying judgment." (Rule 8.385(c)(2), italics added.) Although the word "must" is not unclear, any possible ambiguity is eradicated by rule 1.5, which explains that " '[m]ust' is mandatory," while " '[s]hould' expresses a preference or a nonbinding recommendation." (Rule 1.5(b)(1) and (5).) Thus, rule 8.385 requires an appellate court to deny without prejudice a petition for writ of habeas corpus challenging a parole decision unless it was first presented to the trial court. The Advisory Committee comment to rule 8.385 explains that "[s]ubdivision (c)(2) is based on the California Supreme Court decision in *In re Roberts*[, *supra*,] 36 Cal.4th 575, which provides that petitions for writ of habeas corpus challenging denial or suitability for parole are first to be adjudicated in the trial court that rendered the underlying judgment." (Advisory Com. com., Deerings Ann. Codes, Rules (2010 supp.) foll. rule 8.385, p. 53.)

This requirement is inconsistent with our state Constitution. As petitioner points out, this court—like *all* courts in California—has original jurisdiction in writ proceedings. Article IV, section 10 of the California Constitution provides that "[t]he Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings." This "original jurisdiction" means that a petition for writ of habeas corpus may be filed in the first instant in the superior court, Court of Appeal, or the California Supreme Court. (*People v. Romero* (1994) 8 Cal.4th 728, 737.)

Having original jurisdiction and exercising it are two separate things. It has long been the law in California that, while a Court of Appeal may have original jurisdiction in a habeas corpus proceeding, it has the discretion to deny a petition without prejudice if it has not been first presented to the trial court. As the Fifth District Court of Appeal observed almost half a century ago: "There is no question but that this court has jurisdiction to issue the writ of habeas corpus. [Citation.] But this court has discretion to refuse to issue the writ as an exercise of original jurisdiction on the ground that application has not been made therefor in a lower court in the first instance." (*In re*

Hillery (1962) 202 Cal.App.2d 293, 294.) In that case, the petition, which was filed directly in the Court of Appeal, was denied because the petitioner did not show "that any extraordinary reason exists for action by this court, rather than by the Superior Court of the State of California . . . ." (*Ibid*.)

Roberts does not overturn that longstanding rule. In *Roberts*, the California Supreme Court addressed which trial court should hear a habeas corpus petition challenging denial or suitability for parole: the superior court in the county of conviction or the superior court in the county of incarceration. (*Roberts, supra*, 36 Cal.4th at pp. 579-580.) In one of its closing paragraphs, the *Roberts* court "direct[ed]" that, "among the three levels of state courts, a habeas corpus petition challenging a decision of the parole board *should* be filed in the superior court, which *should* entertain in the first instance the petition." (*Id*. at p. 593, italics added.) And, as *In re Hillery* instructs, in most instances, a habeas corpus petition "should" be filed in the superior court. (*In re Hillery, supra*, 202 Cal.App.2d at p. 294.) But the language in *Roberts* does not divest the courts of appeal of original jurisdiction in petitions for writ of habeas corpus, as granted by article IV, section 10 of the California Constitution. Nor does it dictate that in all cases such habeas corpus petitions *must* be filed in the superior court—only that challenges to parole "should" first be filed in the superior court (*Roberts, supra*, 36 Cal.4th at p. 593) unless "extraordinary reason exists for action by" the appellate court in the first instance (*In re Hillery*, at p. 294). Thus, we conclude that rule 8.385 is inconsistent with the California Constitution to the extent it requires petitions for writ of habeas corpus challenging denial of parole to be first filed in the superior court; additionally, the rule goes beyond the dictates in *Roberts*, which states that such petitions "should" first be heard at the trial level. (*Roberts*, at p. 593.)

This case presents an "extraordinary" situation justifying the exercise of our constitutional prerogative. Most habeas corpus petitions challenging denial or suitability for parole do not follow a reversal by the Court of Appeal. This case does, of course. Indeed, here, the issues presented directly flow from our prior decision and the limited

hearing conducted after our decision. As such, no court is better suited to first consider this petition; no court is more familiar with the intricate details of the case. Thus, we find this to be one of the rare cases where the directive that "a habeas corpus petition challenging a decision of the parole board should be filed in the superior court" (*Roberts*, *supra*, 36 Cal.4th at p. 593) does not apply.[3]

II. The Governor's Reversal Was Not Supported By "Some Evidence" That Petitioner Remains An Unreasonable Risk For Violence If Released[*]

"The state may not deprive any person of life, liberty, or property without due process of law. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7.) '[T]he due process clause requires, among other things, that the factual basis of a decision by the Board [or Governor] denying parole must be premised upon some evidence relevant to the factors the Board is required to consider.' (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 663.) In summarizing the due process that must be accorded a prison inmate eligible for release on parole, our Supreme Court has made clear that the Board and the Governor exercise great—but not unbounded—discretion: 'the Board "shall normally set a parole release date" one year prior to the inmate's minimum eligible parole release date, and shall set the date "in a manner that will provide uniform terms for offenses of similar gravity and magnitude *in respect to their threat to the public* . . . ." ([Pen. Code,] § 3041, subd. (a), italics added.) Subdivision (b) of section 3041 provides that a release date must be set "unless [the Board] determines that the gravity of the current convicted offense or

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[3] This finding is not unprecedented. We have previously allowed a habeas to be directly filed in our court in *In re Scott* (2005) 133 Cal.App.4th 573 (*Scott II*), which presented itself in the same posture as this case: we reversed the Board in *In re Scott* (2004) 119 Cal.App.4th 871 (*Scott I*); the Board subsequently granted parole upon remand. When the Governor reversed the Board's grant, petitioner Scott filed his petition directly in this court and we considered the case. (*Scott II*, at p. 578.) In another case presenting unusual circumstances, the court in *In re Gaul* (2009) 170 Cal.App.4th 20, entertained in the first instance a habeas corpus petition challenging the parole denial where that court was concurrently entertaining petitioner's habeas corpus from a prior hearing. (*Id*. at p. 31.)

[*] See footnote, *ante*, page 1.

offenses, or the timing and gravity of current or past convicted offense or offenses, 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 at this meeting." [Citation.]' (*In re Lawrence* (2008) 44 Cal.4th 1181, 1201-1202 (*Lawrence*).) In making that determination, '[t]itle 15, section 2281 of the California Code of Regulations [(Regs., § 2281)] sets forth the factors to be considered by the Board in carrying out the mandate of the statute. The regulation is designed to guide the Board's assessment of whether the inmate poses "an unreasonable risk of danger to society if released from prison," and thus whether he or she is suitable for parole. (Regs., § 2281, subd. (a).) The regulation also lists several circumstances relating to *unsuitability* for parole . . . and the mitigating circumstances of the crime. (Regs., § 2281, subd. (d).) Finally, the regulation explains that the foregoing circumstances "are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." (Regs., § 2281, subds. (c), (d).)' (*Lawrence*, at pp. 1202-1203, fins. omitted.)

"The regulatory factors 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 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., § 2281, subd. (b).)' (*Lawrence*, *supra*, 44 Cal.4th at p. 1202, fn. 6.)

"The factors showing an inmate unsuitable for release on parole 'are: (1) a commitment offense carried out in an "especially heinous, atrocious or cruel manner"; (2) a "[p]revious [r]ecord of [v]iolence"; (3) "a history of unstable or tumultuous

relationships with others"; (4) "[s]adistic [s]exual [o]ffenses"; (5) "a lengthy history of severe mental problems related to the offense"; and (6) "[t]he prisoner has engaged in serious misconduct in prison or jail." (Regs., § 2281, subd. (c)(1)-(6).) This subdivision further provides that "the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." (Regs., § 2281, subd. (c).)' (*Lawrence*, *supra*, 44 Cal.4th at p. 1202, fn. 7.)

"On the other hand, factors showing an inmate suitable for release 'are: (1) the absence of a juvenile record; (2) "reasonably stable relationships with others"; (3) signs of remorse; (4) a crime committed "as the result of significant stress in [the prisoner's] life"; (5) battered woman syndrome; (6) the lack of "any significant history of violent crime"; (7) "[t]he prisoner's present age reduces the probability of recidivism"; (8) "[t]he prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release"; and (9) the inmate's "[i]nstitutional activities indicate an enhanced ability to function within the law upon release." (Regs., § 2281, subd. (d)(1)-(9).)' (*Lawrence*, *supra*, 44 Cal.4th at p. 1203, fn. 8.)[4]

"The Governor may conduct a de novo review of the Board's decisions on the basis of the same factors the Board is required to consider. (*Lawrence*, *supra*, 44 Cal.4th at p. 1203, fn. 9; Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2.) 'As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision.' (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.) It is clear, however, that 'the aggravated nature of a commitment offense does not, in every case, provide relevant evidence that an inmate remains dangerous, and a focus upon the

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[4] "The factors set forth in Regs., section 2402, which pertain to murders committed on or after November 8, 1978, and specified attempted murders, are identical [to] those set forth in section 2281. The reasons the same provisions are repeated are set forth in Regs., section 2400." (*In re Calderon* (2010) 184 Cal.App.4th 670, 684, fn. 5 (*Calderon*).)

egregiousness of the commitment offense to the exclusion of other relevant evidence has proved in practice to obscure the core statutory emphasis upon *current* dangerousness . . . ,' and the relevant inquiry is therefore ' "*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.*" ' (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255 (*Shaputis*), italics added.)

"*Lawrence* and *Shaputis* instruct that, in reviewing parole determinations by the Governor, '[o]ur deferential standard of review requires us to credit the Governor's findings if they are supported by a modicum of evidence. [Citation.] This does not mean, however, that evidence suggesting a commitment offense was "especially heinous" or "particularly egregious" will eternally provide adequate support for a decision that an inmate is unsuitable for parole. . . . [T]he Legislature specifically contemplated both that the Board "shall normally" grant a parole date, and that the passage of time and the related changes in a prisoner's mental attitude and demeanor are probative to the determination of current dangerousness.' (*Lawrence, supra*, 44 Cal.4th at p. 1226.)

"In other words, as we have previously observed, the exceedingly deferential nature of the 'some evidence' standard does not convert a reviewing court ' "into a potted plant." ' (*Lawrence, supra*, 44 Cal.4th at pp. 1211-1212, quoting [*Scott I, supra*,] 119 Cal.App.4th 871, 898 . . . .) We must ensure that the denial of parole is based on 'some evidence' of current dangerousness. '[S]uch evidence " 'must have some indicia of reliability.' " ' (*Scott I,* at p. 899.) '[T]he "some evidence" test may be understood as meaning that suitability determinations must have some rational basis in fact.' ([*Scott II, supra*,] 133 Cal.App.4th 573, 590, fn. 6 . . . .) As Justice Moreno stated neatly in his concurring opinion in *Lawrence*: 'a parole date *shall* normally be granted *except when*

some evidence of current dangerousness, after considering the totality of the circumstances, justifies denial of parole.' (*Lawrence*, *supra*, 44 Cal.4th at p. 1230 (conc. opn. of Moreno, J.), italics added.)" (*Calderon*, *supra*, 184 Cal.App.4th at pp. 683-686.)

The Governor's reversal of Kler's parole does not survive scrutiny under the foregoing principles.

A. No evidence shows the commitment offense is predictive of Kler's current dangerousness[*]

The commitment offense is one of only two factors indicative of unsuitability a prisoner cannot change (the other being his prior record of violence), and reliance on such an immutable factor may therefore be unfair and contrary to the rehabilitative goals of our penal system and the requirements of due process. (*Scott II, supra*, 133 Cal.App.4th at pp. 594-595.) "The commitment offense can negate suitability only if the circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison," keeping in mind that "the predictive value of the commitment offense may be very questionable after a long period of time." (*Id*. at p. 595, fn. omitted; accord, *Lawrence, supra,* 44 Cal.4th at pp. 1219-1221.)

As our high court has made clear, at some point, "when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, *his or her past offense may no longer constitute a reliable or accurate indicator of the prisoner's current dangerousness*." (*Lawrence*, *supra*, 44 Cal.4th at p. 1219, italics added.) Therefore, "when evaluating whether an inmate continues to pose a threat to public safety, both the Board and the Governor *must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation.*" (*Ibid*., italics added.) In doing so, "the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety and thus may not

[*] See footnote, *ante*, page 1.

be released on parole. [Citations.]" (*Id*. at p. 1210.) Thus, as the *Lawrence* court explained, " '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. 'It is well established that a policy of rejecting parole solely upon the basis of the type of offense, without individualized treatment and due consideration, deprives an inmate of due process of law.' [Citation.]" (*Ibid*.)

Here, the Governor does not articulate a nexus between the nature of the offense and Kler's current dangerousness, more than two decades after the commitment offense. *Lawrence* and *Shaputis* make clear that " '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 or the Governor.' " (*Shaputis*, *supra*, 44 Cal.4th at p. 1255, quoting *Lawrence*, *supra*, 44 Cal.4th at p. 1221.) Even assuming the crime is shockingly vicious or otherwise heinous, this "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 postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Lawrence*, at p. 1214.) As we have previously held, otherwise such a statement simply "could be repeated . . . until [the petitioner] dies or is rendered helpless by the infirmities of sickness or age." (*Scott II*, *supra*, 133 Cal.App.4th at p. 595, fn. 8.) Because he does not articulate a nexus between the nature of petitioner's offense and current dangerousness, the Governor may not properly rely on this factor in reversing the Board's grant of parole.

B. The postconviction factors the Governor relied upon do not provide evidence Kler is currently dangerous[*]

As noted above, the Governor found that Kler currently poses a threat to public safety because he "lacks full insight into the circumstances of the murder and his role in the offense." In explaining this finding, the Governor expressed his concern that petitioner minimized his responsibility, "does not fully comprehend his murderous conduct," and "has not adequately explained why he beat his daughter for four months prior to her death." Because of this, the Governor concludes "that Kler would still present a current, unreasonable risk of danger to society if released at this time." Just as his reliance on the nature of the commitment offense to reverse parole was improper, the Governor's finding that petitioner is currently dangerous because of "lack of insight" is legally insufficient, and is unsupported by the record.

To support this finding, the Governor's letter reversing petitioner's parole first chronicled the evolution of petitioner's acceptance of responsibility for the crime and prior beatings of Simron, beginning with his claims of innocence and that the prior bruising was from accidents. Next, the Governor cited statements by the 2003, 2005, 2007, and 2009 Boards.[5] The 2003 Board stated that it was " 'not sure whether [petitioner is] truly and totally accepting responsibility for what [he] did.' " In 2005, the Board suggested petitioner participation in more " 'self-help' " programs because of his " 'continued minimization of [his] participation in the abuse of [his] daughter.' " The 2007 Board stated that " 'the acknowledgement for the crime and the acceptance of total responsibility is only now starting to come out.' " And the 2009 Board stated that petitioner " 'still want[s] to downplay' " his conduct. Also cited by the Governor was the 2009 mental-health evaluator's concern over petitioner's inability to " 'fully explain how he could have beaten a baby to death. This aspect of the crime seems to be as puzzling to Mr. Kler as it is to others.' " Finally, the Governor found statements by petitioner and

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[*] See footnote, *ante*, page 1.

[5] Of course, statements by the Board are just that—statements. What they are not is evidence, let alone "some evidence" in support of a decision to deny parole.

"[t]he letters of support from Kler's family and friends . . . troubling, as they suggest that Kler characterizes his baby daughter's death as nothing more than an unfortunate event." The Governor arrived at this conclusion because the letters of support "refer to Simron's murder as a 'mistake,' 'misfortune,' 'bad luck,' or 'accident,' " and petitioner "consistently referred to Simron's death as a 'mistake.' " From all this, the Governor concluded that petitioner is minimizing his responsibility, "does not fully comprehend his murderous conduct," and, therefore, "lacks insight into his life crime."

Before explaining why the Governor's concern that petitioner lacks insight has no basis in the record, we repeat our observation in *Calderon, supra,* 184 Cal.App.4th 670: "Before August 21, 2008, the date *Lawrence, supra*, 44 Cal.4th 1181 and *Shaputis, supra*, 44 Cal.4th 1241 were decided, virtually all decisions of the Board and Governor denying parole relied primarily on the gravity of the commitment offense. (See *Lawrence,* at p. 1206 [noting 'the practical reality that in every published judicial opinion [reviewing a parole decision], the decision of the Board or the Governor to deny or reverse a grant of parole has been founded in part or in whole upon a finding that the inmate committed the offense in an "especially heinous, atrocious or cruel manner" '].) In the aftermath of *Lawrence* and *Shaputis,* the denial of parole now seems usually based, at least in part, upon the inmate's asserted 'lack of insight' in some respect, which has become the new talisman. [¶] The intensified interest in this very subjective factor—which is *not* among the criteria indicative of unsuitability for release on parole set forth in the governing regulations (Regs., §§ 2281, 2402)—derives, of course, from the Supreme Court's opinion in *Shaputis*, in which the Governor's reversal of a grant of parole was upheld because his reliance on the gravity of the inmate's commitment offense was coupled with concern about the inmate's 'lack of insight into the murder and into the years of domestic violence that preceded it.' (*Shaputis, supra*, 44 Cal.4th at p. 1258.) The weight placed on this factor by the *Shaputis* court has stimulated far greater use of it by the Board and Governor than was formerly the case. Considering that 'lack of insight' is not among the factors indicative of unsuitability for parole specified in the sentencing regulations and

has been rarely relied upon by the Board or Governor in the past, the increasing use of this factor is likely attributable to the belief of parole authorities that, as in *Shaputis*, 'lack of insight' is more likely than any other factor to induce the courts to affirm the denial of parole. But the incantation of 'lack of insight,' a more subjective factor than those specified in the regulations as indicative of unsuitability, has no talismanic quality. Like all evidence relied upon to find an inmate unsuitable for release on parole, 'lack of insight' is probative of unsuitability only to the extent that it is both (1) demonstrably shown by the record and (2) rationally indicative of the inmate's current dangerousness. [¶] That was clearly the case in *Shaputis*. Despite powerful evidence he killed his wife intentionally, Shaputis still claimed the shooting was accidental. In addition to his unjustified denial of personal responsibility, a recent psychological assessment explained why Shaputis 'seemed to have "limited . . . insight" regarding his antisocial behavior and the circumstance that his history of alcohol abuse was closely associated with his history of domestic violence.' (*Shaputis*, . . . at p. 1251,)" (*Calderon*, *supra*, 184 Cal.App.4th at pp. 688-690, fn. omitted.)

Turning to the case at hand, it is hard to know exactly what the Governor means by his statement that Kler "lacks insight into his life crime," given, as we just explained, "insight" is inherently subjective. (See *Calderon*, *supra* , 184 Cal.App.4th at p. 690.) As in *Calderon*, "we assume the *Shaputis* court assigned the word 'insight' its ordinary meaning, which is 'perception,' 'discernment,' or '[u]nderstanding.' " (*Ibid*., quoting 7 Oxford English Dict. (2d ed. 1989), p. 1026.) So, presumably, by saying Kler "lacks insight into his life crime," the Governor means only that, because Kler does not adequately understand his role in the commission of his crime, he fails to appreciate why he committed the crime, and this failure renders him presently dangerous. This reasoning has no support in the record.

Kler fully acknowledged at the 2007 and 2009 hearing his role in the commission of his offense and the circumstances behind it. The murder was the product of numerous significantly stressful events occurring at the same time, driving him to a crescendo of

frustration, resulting in his loss of self-control. As we described in our 2009 decision, "[i]n discussing the commitment offense, petitioner explained the circumstances leading to Simron's death: He had recently immigrated to the United States from his native India 'with a dream that I would be very successful' and was single-minded towards that end, to the point that he worked day and night for nine months straight. Given that he had also recently married and had a child, he was also under considerable stress. Because of this drive and stress, 'whenever [the] baby cried, it irritated' him. He explained that his drive for success, the stress he was under at work and at home, and the irritation all contributed to losing control and inflicting mortal injuries on his daughter, which occurred shortly after 2:30 or 3:00 a.m. after he had just finished working and gone to sleep." (*In re Kler*, *supra*, A121800, at pp. 6-7.)

At the 2009 hearing, petitioner explained that, because of his upbringing, he did not seek out help to alleviate that frustration: "I was immature and I was raised the way that we were taught that the man never cried. Man never complained. And I kept all the feelings to myself. I never told my wife I couldn't handle it. I can't handle this. So I didn't know at that time there is many other ways that I know right now to release the pressure. So I took all the pressure and released on her."

The fallacy of the Governor's claim petitioner lacks insight is also borne out by the most recent psychological evaluation of Kler, a nine-page forensic mental health assessment conducted on February 6, 2009, by forensic psychologist Martin H. Williams, Ph.D. This report was based not only on Dr. Williams's interview with Kler, but also on his assessment of numerous "collateral sources," such as Kler's CDCR central file (C-File), CDCR unit health record, and previous forensic mental health assessments of Kler. Additionally, Dr. Williams utilized two "empirically based" guides concerning the "risk of future violence," namely "the Psychopathy Checklist-Revised (PCL-R) and the Historical-Clinical-Risk Management-20 (HCR-20)."

Echoing his testimony at both the 2007 and 2009 hearing is petitioner's explanation of the crime to Dr. Williams. In the section aptly named "Inmate's

Understanding of Life Crime," Dr. Williams states: "Mr. Kler places his crime in the context of extreme stress, sleep deprivation and overwork. He states he was a recent immigrant to the US and wanted to realize the American Dream. He worked very hard as an insurance agent with Farmers Insurance. He states he worked until 3AM and then awoke again at 6AM. He says he was under tremendous stress and could not tolerate the crying of his 10 month old daughter. [¶] On the night in question, his wife was at work due to a schedule change at the electronics plant where she was an assembler. Mr. Kler states that the wife usually cared for the baby at night. He states that when his wife learned she had to work that night, Mr. Kler assured her that he could care for the baby. Mr. Kler states that the baby awoke, and he fed her a bottle. However, the baby did not stop crying after the feeding. Mr. Kler states that he hit the baby, hoping it would stop her crying. It did not, and he again hit her. Mr. Kler reports that the more he hit the baby, the louder she would cry. He admits beating her badly until he noticed her breathing was labored. He picked her up and tried to comfort her. The fire department was called, and she died at the hospital. Mr. Kler states, 'Sure I beat her, so she wouldn't cry, but I never beat her to kill her.' [¶] Mr. Kler explains, 'My main goal was to succeed, succeed, succeed, I was under so much stress. I never asked anybody for help, I was on my own. I was very successful in the insurance company, and we were planning to buy a home in Newark.' Mr. Kler states that his hitting of the child took place over a period of about four months."

Later, in the "Remorse and Insight Into Life Crime" section, Dr. Williams explained: "Mr. Kler cries as he speaks to me. He states, 'I never understood that she was crying because that was her only way to communicate at the time, she knew no language. I understand that now, but I did not understand that at the time. She was my own blood, she was my own child.' [¶] Mr. Kler appears to be very remorseful, and he freely admits all aspects of the crime. However, other than extreme stress and sleep deprivation, Mr. Kler cannot fully explain how he could have beaten a baby to death. This aspect of the crime seems as puzzling to Mr. Kler as it is to others."

In the section entitled "Insight/Self-Assessment," Dr. Williams states that he found Kler to be sincerely remorseful and insightful: "Mr. Kler's overall demeanor and his presentation appeared to be consistent with his stated religious beliefs and stated remorse. Although it is possible that Mr. Kler was merely stating that which was socially appropriate under the circumstances, my professional judgment is that Mr. Kler was sincere. Mr. Kler certainly has the intelligence to dissimulate based on his understanding of the responses the Parole Board would consider desirable. However, Mr. Kler is also a very earnest individual and actually appears to be 'an open book.' "

The Governor's conclusion that Kler is currently dangerous due to his lack of insight into the circumstances behind his crime wholly ignores this undisputed evidence, and thereby distorts the record. But, the Governor may not do that. As we stated in *In re Moses* (2010) 182 Cal.App.4th 1279, 1308, "[t]he Governor cannot simply ignore the undisputed evidence of . . . taking responsibility and repeated expressing of remorse." Nor does simply parroting the phrase "lack of insight" address the pertinent question: Whether the inmate currently constitutes an unreasonable risk of dangerousness if released. The objective evidence here says petitioner does not. Both the PCL-R and HCR-20 find petitioner to be a "very low risk." On the Level of Service/Case Management Inventory (LS/CMI) (an actuarial instrument designed to evaluate levels of risk to recidivate), petitioner's "score indicates that he is in the very low category, having scored lower than 99% of the North American sample of incarcerated male offenders." After "weighing all of the data from the available records, the clinic interview, and the risk assessment data, [Dr. Williams] opined that Mr. Kler presents a relatively **Very Low Risk** for violence in the free community."

Of course, the Governor is not bound by the psychological report's finding and he may exercise his own judgment in determining whether to reverse a grant of parole. (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1202 [recommendation in psychological evaluation "does not necessarily dictate the . . . parole decision"].) Thus, we turn to the factors cited by the Governor in support of his conclusion. Regarding petitioner's

purported minimizing of responsibility, we addressed a similar finding by the 2007 Board that "petitioner's 'acceptance of total responsibility is only now starting to come out,' " and found it unsupported by the record because "[f]or almost 10 years, petitioner has consistently admitted and accepted responsibility for his prior abuse Simron." (*In re Kler*, *supra*, A121800, at p. 14.) We noted that "[i]t is true that petitioner testified before the Board that prior to the morning in question he only remembers having slapped Simron. Yet he specifically accepted full responsibility for causing Simron's preexisting broken ribs, which he acknowledged could not have been caused by mere slapping. Petitioner's inability to remember exactly how he previously injured his daughter is thus relatively insignificant. [¶] Moreover, denying petitioner parole because he did not remember prior instances of hitting his child, but only slapping her (while accepting that, in view of her serious prior injuries she had been hit and only he could have been responsible) places petitioner in an impossible situation. If, taking the cue from the Board, he stated that he now remembered hitting the child, the Board could deny parole on the ground that petitioner's acceptance of responsibility was recent, still evolving, and incomplete. The process of determining whether to grant or deny parole does not permit placing an inmate in such a catch-22. Decisions must be made on the basis of the evidence presented and, as we have said, the uncontradicted evidence shows that, whether or not he *remembered* the nature of the beatings that took place before the morning of his daughter's death (i.e., whether it consisted of slapping or hitting), petitioner has long accepted personal responsibility for the *commission* of the prior beatings that resulted in her preexisting broken ribs. Under the facts here, the failure to remember specific prior acts does not suggest a failure to accept full responsibility. [¶] Nor did petitioner accept responsibility begrudgingly. He openly acknowledged the prior abuse and that he was the sole perpetrator. Nor did he try to minimize or deflect his personal responsibility. Petitioner's acceptance of such responsibility was noted by all the prison or mental health evaluators whose psychological reports uniformly concluded

that petitioner is an excellent candidate for parole." (*In re Kler, supra*, A121800, at pp. 14-15.)

Nonetheless, the Attorney General, arguing that the Governor's conclusion is supported by "some evidence," points to petitioner's repeated statements that, prior to the murder, petitioner remembers slapping, not hitting, his daughter, "[d]espite the uncontroverted evidence that the victim suffered broken ribs on two to four occasions before her death." From this the Attorney General concludes that "[i]n essence, if Kler could not accurately describe how he previously abused his infant daughter, it is reasonable to conclude that he would do it again."

This position is undercut by recent Court of Appeal decisions. For instance, in *In re Juarez* (2010) 182 Cal.App.4th 1316, the Board denied parole, in part because Mr. Juarez could not remember his commitment offense due to a PCP blackout. The Court of Appeal reversed: "Juarez's failure to recall the details of his commitment offense or certain previous criminal activities has no bearing on his current dangerousness in light of his taking responsibility for the crime and his substance abuse problems, the sincerity of which is *not* disputed. As the assistant district attorney stated at the Board hearing, Juarez's failure to recall the details of the commitment offense 'is not dispositive of anything.' " (*Id*. at pp. 1341-1342.)

Similarly, the Third Appellate District granted relief where the petitioner insisted he killed his girlfriend accidentally, as "[petitioner's] version of the shooting of the victim was not physically impossible and did not strain credulity such that his denial of an intentional killing was delusional, dishonest, or irrational." (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1112.) There, the "defendant accepted 'full responsibility' for his crime and expressed complete remorse; he participated effectively in rehabilitative programs while in prison; and the psychologists who evaluated him opined that he did not represent a risk of danger to the public if released on parole. Under these circumstances, his continuing insistence that the killing was the unintentional result of his foolish

conduct (a claim which is not necessarily inconsistent with the evidence) does *not* support the Board's finding that he remains a danger to public safety." (*Ibid*.)

Additionally, the evidence before the 2009 Board belies the Attorney General's position. Petitioner continues to only recall slapping his daughter prior to the murder, but still accepts full responsibility for breaking her ribs—and acknowledges that it would take more than slapping to cause such injuries. What petitioner "minimizes" is his memory, not his culpability. And, despite the Attorney's General's unsupported pop-psychology contentions to the contrary, there is no evidence in the record that petitioner's faulty memory indicates that he would be an unreasonable risk for violence if released on parole.

Nor is anything changed by the statement in the 2009 mental health evaluation that the Governor relies upon. First, as noted above, that evaluation is extremely positive, concluding that petitioner is a "very low risk." Moreover, the Governor cherry-picks two sentences, taken out of context of the rest of the evaluation, and condemns petitioner for not being able to explain a "puzzle"—i.e., how he could kill his own child—that "seems as puzzling to Mr. Kler *as it is to others*." (Italics added.) The Governor's conclusion that the inability to explain the unexplainable equates to a lack of insight or minimizing his responsibility is neither explained nor supported in the record. As noted above, the report is overwhelmingly positive and the two sentences relied upon the Governor cannot be stripped of that context. Nor do those two sentences constitute "some evidence" of current dangerousness. Rather, the Governor's reasoning places petitioner in another catch-22: according to the Governor, petitioner lacks insight because he cannot answer a question that has no satisfactory answer—why someone would kill their own child. The fact that this is as puzzling to Kler "as it is to others" does not make him an unreasonable risk of dangerousness.

Finally, the Governor is wrong in concluding that use of the word "mistake" shows that petitioner is minimizing responsibility. First, under the definition of that word, Simron's death was a "mistake." According to the Cambridge Dictionary of

American English, a mistake is "an action or decision that is wrong or produces a result that is not correct or not intended." (See http://dictionaries.cambridge.org/define.asp?key=mistake*1+0&dict=A.) Similarly, Merriam-Webster's Collegiate Dictionary defines the noun mistake as "a wrong judgment." (Webster's 11th New Collegiate Dictionary (2003) p. 795.) Certainly, petitioner's murder of Simron was "an action . . . that [was] wrong" and a "wrong judgment." Second, the context of Kler's use of the word "mistake" undercuts the Governor's concerns. Petitioner is not a native English speaker, whose use of the language is far from perfect—a fact that is more than evident from the transcript of the hearing. The Governor is not permitted to seize upon one word, which is technically correct, to give the false impression that petitioner is cavalier about the murder. Indeed, review of the whole record shows that petitioner made a mistake, one that he explained at the recent 2009 Board hearing "deeply touched" him because he never "thought in my life that I would kill somebody, and [never] my own child." What he unquestionably does not do is treat the death of his first born child cavalierly.

More curious is the Governor's concern about the letters of support from *petitioner's family and friends* and how these letters indicate that *petitioner* should not be paroled. We confronted a slightly different twist on this same factor in the prior decision and found use of it to deny parole "inexplicable." (*In re Kler, supra,* A121800, at p. 15.) In 2007, the Board found " 'the letters from Mr. Kler's wife had some particularly disturbing information in them.' " (*Id*. at p. 10.) Specifically, the Board said that " 'she seems to be deeply in love or committed to her husband [and] stuck up completely and totally for him.' " (*Ibid*.) As we summarized it, "[g]iven this 'over the top' family support, the Board was not sure whether petitioner's wife and other family members would 'stand up to' petitioner 'if he were to be going down the wrong road.' " (*Ibid*.) We found this "inexplicable," because "[i]t is difficult to understand how the loving support of petitioner's wife or other members of his family renders him an unreasonable risk to public safety. It cannot reasonably be inferred from his wife's letter that she

would encourage or indulge assaultive or other criminal conduct on his part." (*Id*. at p. 15.) Similarly, the imperfect word choices of petitioner's family and friends does not indicate that petitioner is a risk or that they would encourage or indulge assaultive or other criminal conduct by petitioner.

In sum, the factors relied upon by the Governor to find petitioner lacks insight are not supported by the record, nor do they lead to the conclusion that petitioner would be an unreasonable risk of violence if released on parole. As such, the Governor's reversal of the 2009 Board's grant of parole was constitutionally infirm and must be reversed.

DISPOSITION

The petition for writ of habeas corpus is granted. The Governor is hereby ordered to vacate his decision of February 9, 2010, which reversed the Board's 2009 grant of parole. The Board's 2009 grant of parole is reinstated. In the interests of justice, this opinion is made final as to this court seven days from the date of filing. (Rule 8.387(b)(3)(A).)

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Kline, P.J.

We concur:

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Lambden, J.

_____
Richman, J.

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