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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re Robert Smith, on Habeas Corpus.	C064700, C065545 (Super. Ct. No. 074350)

Original proceeding in the Court of Appeal. First petition dismissed as moot; second petition denied.

Rich Pfeiffer and Brandie Grover Devall for petitioner.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Julie L. Garland, Senior Assistant Attorney General, Jennifer A. Neill, Christopher J. Rench, Jessica N. Blonien and Krista Leigh Pollard, Deputy Attorneys General, for respondent.

When a prisoner convicted of murder by strangulation clenches both fists in apparent anger during a parole-suitability hearing, does his demeanor constitute some evidence that if released he would pose an unreasonable risk of danger to public safety? The Board of Parole Hearings (Board) denied petitioner Robert Smith parole after serving 29 years for the second degree murder of his wife, despite his perfect prison record, including extensive rehabilitative programming, years of

therapy in anger management and self-esteem, a stellar work history, a "low" or "below average" risk of future violence rating, and a viable and realistic parole plan. We are compelled to deny the most recent petition for habeas corpus in deference to the separation of powers, the Board's executive authority to set parole, and the limited scope of judicial review of petitioner's due process challenge when, as here, there is "some evidence" to support the Board's denial. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1190-1191 (*Lawrence*); see *In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255 (*Shaputis*).)[1]

FACTS

In this very difficult case, we present two sides of the ledger: the first are those facts presented by petitioner to demonstrate he poses no current danger to public safety, and the second are those facts relied upon by the Board in support of its finding that he does pose an unreasonable risk of danger. Our analysis of the legal standard follows.

No Danger. Petitioner has been a model prisoner for 29 years. He has not committed a single rule infraction. His demonstrated commitment to education, work, therapy, and

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[1] We issued an order to show cause in the earlier petition for writ of habeas corpus (case No. C064700) and now dismiss that petition as moot. Even if we assume petitioner was denied due process during the 2008 hearing, the remedy would be to order a new parole-suitability hearing, which petitioner already had in September 2009 and which is the subject of the second petition for habeas corpus before us. (*In re Prather* (2010) 50 Cal.4th 238, 294 (*Prather*).)

spiritual growth supports his claim that, at 59 years old, he understands his errors in judgment and why he committed such an atrocious crime. His hard work and hard-earned insights, in his view, assure his complete rehabilitation.

Petitioner earned an associate of arts degree before entering prison. In prison, he earned vocational certificates in sheet metal work and forklift operation. He has completed and participated in a vast array of substance abuse, self-help, and therapy programs, including "Stress and Emotional Well-Being," "Negative Emotions," "Life Skills and Self-Development," "Creative Options," "Anger Management and Communication," "Planning for Sobriety," "Beyond Anger," "Turning Point Focus," Alcoholics Anonymous, "Introduction to Self-Help" groups, "Triggers, Cravings, and Relapse Prevention," "Sexually Transmitted Diseases," "Affects [*sic*] of Crime on Self, Family and Community," "The Way to Happiness," and "Learning Improvement Course."

Petitioner worked extensively with prison therapists to gain an understanding into his offense and to enhance his self-esteem. In 1985 he admitted guilt and abandoned his cover-up fabrication. His file is replete with commendations from prison officials.

Since 2005 petitioner has worked in the furniture factory under the auspices of the Prison Industries Authority. His work supervisors' reports are consistently "exceptional to above-average." He was promoted to lead man in 2008.

Petitioner has been studying the catechism of the Catholic faith with the Catholic chaplain. In 2009 he was baptized and confirmed in the Catholic Church.

Carol Fetterman, Ph.D., conducted a forensic evaluation in preparation for petitioner's 2008 parole-suitability hearing. She wrote: "The inmate has worked hard in therapy and self-help activities to come to terms with the underlying causes of his commitment offense. He has gained in-depth, psychological insight that in no way takes away from his acceptance of responsibility for his crime. It is possible to understand one[']s psychodynamics and the etiology of one[']s behaviors without blaming those factors or excusing oneself. The inmate seems to have achieved such an understanding as he . . . accepts total responsibility and has sincere remorse. He stated in the interview of 02-11-08 that 'I was unfaithful, I killed her, I denied my guilt and I hurt everyone. There is no way to express how sorry I am. In no way, shape or form did she deserve what I did. She loved me to the best of her ability and I should have gone through with the divorce so she could have led her life.'"

Based on his commitment offense; postconviction record; family, developmental, educational, marital, employment, medical, and psychiatric histories; parole plans; and his current medical status, Dr. Fetterman concluded that "the inmate poses a **low** risk to become involved in a violent offense if released into the community." Her conclusion was consistent with those of previous evaluators.

Unreasonable Risk of Danger. In finding petitioner unsuitable for parole because he currently poses an unreasonable risk of danger, the Board relied on the gravity of the commitment offense, petitioner's inadequate control over his anger, his lack of insight, and his shallow understanding of coping skills. We examine the quantum of evidence of each of the Board's concerns.

There is indeed something particularly grisly about the act of strangulation. There was evidence of manual strangulation, but petitioner ultimately tied pantyhose tightly around his wife's neck. There was also evidence of a struggle. When his wife's body was discovered, she was clasping a clump of petitioner's hair. Her hair and his hair were found in the knots of the pantyhose used to strangle her. Thus, there was compelling evidence the killing was the result of uncontrolled rage.

Petitioner, as recounted above, presented evidence that as a result of participation in many rehabilitative programs, he has learned to control his anger. The Board spent considerable time probing his understanding of what triggered his anger and what techniques he had learned to control it. Petitioner acknowledged that anger and his lack of control of that anger were causative factors. He insisted he understood anger was a choice and he could control it. Yet at his parole-suitability hearing, petitioner raised his voice, clenched his fists, and had a red face during a routine discussion regarding his understanding of the commitment offense.

The presiding commissioner explained: "[The Board looks] at all factors of this case from the beginning, to where you were, to where you are saying that you are now, what caused you to commit this crime, and the potential risk to the public if you were released. So all of this is important and it's important for this [Board] to understand, as well as we can during this hearing, the person you were and the person you are telling you are now, and so I believe that's what the Commissioner is trying to get at, that's what I'm trying to get at. But when I see someone sitting across with [*sic*] me with both fists clinched, a face red, and appearing to be agitated and angry over a conversation, I'm concerned."

The Board also cited petitioner's lack of insight "into the causative factors/underlying reasons related to this crime." The Board noted, "The prisoner went into significant detail about how his relationship with his mother contributed to the commitment offense. The panel viewed his explanation as blaming others, particularly his mother, and that he see[s] himself as a victim . . . ." The Board was troubled by petitioner's continued focus on his mother's behavior because a 2005 psychological evaluation had found that his focus on other people's behavior instead of his own responsibility demonstrated a lack of insight. The Board also noted that petitioner's "crime certainly was one of domestic violence at its worst level. Yet, [he] was unable to address how he has identified triggers directly related to domestic violence and other avenues to cope with such issues."

Finally, the Board concluded "the prisoner's unstable social history" contributed to his unsuitability for parole. In the Board's view, petitioner has "a history of unstable or tumultuous relationships with others because he failed to profit from society's attempt to correct his prior juvenile criminality. Also, his problematic relationships, specifically with [his] mother and [his] wife, Polly."

The Board found petitioner presents an unreasonable risk of danger if released from prison. It deferred his next parole-suitability hearing for three years. Petitioner filed a petition for writ of habeas corpus in the trial court, which the court denied. He filed a petition for writ of habeas corpus in this court, and we issued an order to show cause. We now consider the merits of his petition.

DISCUSSION

I

The Legal Ledger

Statutory and Regulatory Framework. The Board is the agency within the executive branch charged with determining whether an inmate should be paroled and, if so, setting a release date. (Penal Code, §§ 3040, 5075 et seq.)[2] Pursuant to section 3041, subdivision (a), the Board "shall normally set a parole release date" one year prior to the inmate's minimum eligible parole release date. Pursuant to section 3041,

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[2] All further undesignated statutory references are to the Penal Code.

subdivision (b), the Board must set a parole release date unless the Board determines that "public safety requires a more lengthy period of incarceration."

The California Code of Regulations, title 15, section 2402 sets forth the criteria tending to establish suitability and unsuitability for parole of inmates who committed murders on or after November 8, 1978. Circumstances tending to show suitability for parole include that the inmate (1) does not have a juvenile record of assaulting others or committing crimes with the potential of personal harm to victims; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life, especially if the stress built up over a long period; (5) committed the crime as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release, or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities suggesting an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

Circumstances tending to establish unsuitability for parole include that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems

related to the offense; and (6) has engaged in serious misconduct while in prison or jail. (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

Scope of Judicial Review. Because the Board is statutorily appointed to determine an inmate's suitability for parole and uniquely positioned to assess his or her credibility, the scope of judicial review is exceedingly narrow. "[T]he judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658, abrogated in part in *Lawrence*, *supra*, 44 Cal.4th at pp. 1205-1206.) "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence" are within the Board's exclusive authority. (*Id.* at p. 677.)

More recently, the Supreme Court has succinctly articulated the applicable standard of review as follows: "[B]ecause 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 because the inmate's due process interest in parole mandates a meaningful review of a denial-of-parole decision, the proper articulation of the standard of review is whether there exists 'some evidence' that

an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor. [Citation.]" (*Shaputis*, *supra*, 44 Cal.4th at p. 1254; see *Lawrence*, *supra*, 44 Cal.4th at p. 1191.) The circumstances of the commitment offense, as well as any other factor suggesting unsuitability, "establish unsuitability if, and only if, those circumstances are probative of the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.)

Thus, while our review must be deferential, it is not "toothless." (*Lawrence*, *supra*, 44 Cal.4th at p. 1210.) "'[D]ue 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." (*Ibid.*) Where the Board relies on one or more factors to support a denial of parole, we must determine whether those factors, when considered in light of the other factors in the record, are predictive of the current danger posed by the inmate. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1254-1255.)

Some Evidence. *Lawrence* and *Shaputis*, issued by the Supreme Court on the same day, apply the "some evidence"

standard and arrive at opposite results. In *Lawrence*, the Governor's decision vacating the Board's grant of parole was not supported by "some evidence" of current dangerousness, whereas "some evidence" the petitioner remained dangerous supported the Governor's decision to set aside the Board's grant of parole in *Shaputis*. We examine the quantum of evidence in each case to gain insight into what modicum of evidence satisfies the legal threshold.

In *Lawrence*, the defendant murdered her lover's wife by shooting and stabbing her repeatedly. After remaining a fugitive for 11 years, she voluntarily turned herself in. The Board found the defendant suitable for parole based on multiple positive factors, including an exemplary record of rehabilitation, her acceptance of responsibility, and her close family ties. The Governor reversed the Board based on the gravity of the commitment offense. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1190, 1193.)

The Supreme Court concluded that the Governor's decision was not supported by some evidence the defendant remained a threat to public safety. The court noted that during her nearly 24 years of incarceration, the defendant had participated in many years of rehabilitative programming specifically tailored to address the circumstances that led to the crime, including anger management programs. The court also noted the passage of time since the crime, the defendant's age and lack of criminal history before and after the crime, her lack of serious rules violations, the stress she was under at the time of the crime,

and the unlikelihood that the same circumstances would reoccur. According to the court: "[W]e conclude that the unchanging factor of the gravity of petitioner's commitment offense had no predictive value regarding her *current* threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole at the present time." (*Lawrence*, *supra*, 44 Cal.4th at p. 1226.)

By contrast, some evidence did support the Governor's conclusion that Shaputis posed a current risk to public safety. That evidence included his failure to take responsibility for his wife's murder, "and despite years of rehabilitative programming and participation in substance abuse programs, [he] has failed to gain insight into his previous violent behavior, including the brutal domestic violence inflicted upon his wife and children for many years preceding the commitment offense." (*Shaputis*, *supra*, 44 Cal.4th at p. 1246.) The circumstances surrounding the shooting were especially aggravated. Shaputis, a heavy drinker with a blood alcohol level between .14 percent and .24 percent, shot his wife in the neck at very close range and most likely from less than 12 to 16 inches. Although the murder was his first felony conviction, he had a long and violent criminal record. (*Id.* at pp. 1247-1248.)

The low risk-of-violence rating he received was accompanied by the cautionary warning "'as long as he maintains sobriety and involvement in an active relapse prevention program.'" (*Shaputis*, *supra*, 44 Cal.4th at p. 1251.) The same assessment also confirmed that Shaputis "had a 'schizoid quality to

interpersonal relationships,' and noted that [he] 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." (*Ibid.*) The report advised external verification of his sobriety given that his third wife was a recovering alcoholic. (*Id.* at p. 1252.)

In both *Lawrence* and *Shaputis*, as here, the petitioners' conduct in prison was exemplary. All three petitioners demonstrated consistent progress toward rehabilitation. Yet there was evidence in *Shaputis* demonstrating a palpable nexus between the character of the petitioner at the time he shot his wife and his character at the time of his most recent parole hearing, albeit when he was 71 years old. In other words, Shaputis's failure to take responsibility for past violence and his lack of insight into his behavior, when taken into consideration with the particularly egregious circumstances surrounding the shooting, constitute some evidence he continues to be a danger to society.

Presumably all prisoners serving life terms have committed heinous crimes. That immutable evidence alone is not sufficient to deny parole. "Indeed, it is not the circumstance that the crime is particularly egregious that makes a prisoner unsuitable for parole—it is the implication concerning future dangerousness that derives from the prisoner's having committed that crime. Because the parole decision represents a prospective view—essentially a prediction concerning the future—and reflects an uncertain conclusion, rarely (if ever) will the existence of a

single isolated fact in the record, evaluated in a vacuum, suffice to support or refute that decision." (*Lawrence*, *supra*, 44 Cal.4th at pp. 1213-1214.)

Petitioner argues that his case is more analogous to *Lawrence* than to *Shaputis*. In support he cites cases applying the *Lawrence* criteria to reverse the Board's denial of parole, based on evidence very similar to the evidence he presented at his own parole hearing. We agree the parallels are striking.

For example, in *In re Rico* (2009) 171 Cal.App.4th 659 (*Rico*), abrogated in part in *Prather*, *supra*, 50 Cal.4th at page 252, "the record before the [Board] at the 2007 hearing is devoid of evidence supporting a finding that Rico's release would pose an unreasonable risk to public safety. Rico was an accomplice in a reprehensible, gang-related driveby shooting of a rival gang member committed almost 17 years ago. However, the undisputed evidence demonstrates he has since renounced his gang affiliation, changed his attitude, remained free of serious discipline in prison since 1995, expressed genuine remorse, furthered his education and vocational skills, attended AA and NA, and developed realistic parole plans." (*Id.* at p. 686.)

We provided another apt summary of the evidence in *In re Palermo* (2009) 171 Cal.App.4th 1096 (*Palermo*), abrogated in part in *Prather*, *supra*, 50 Cal.4th at page 252, as follows: "In sum, defendant had no prior criminal history; the killing of the victim was not so calculated and evil as to indicate, without more, that he remains a continuing danger to the public 21 years later; he has expressed remorse and accepted full responsibility

for the killing, albeit believing he is guilty only of manslaughter; during his 20 years of custody in prison, he received only three disciplinary writeups, all for nonviolent and relatively minor misconduct; he has effectively participated in rehabilitative programs; psychological evaluators opine he no longer represents a danger to public safety if released on parole; he has job skills and job offers if released; and he has a supportive family willing to ease his transition back into society. Applying the principles expressed in *Lawrence*, *supra*, 44 Cal.4th 1181, we are compelled to conclude that, in light of the nature of defendant's crime, the period of time that has elapsed since the crime, the affirmative evidence of his preconviction and postconviction conduct and his current mental state shown by his rehabilitative efforts and psychological evaluations, and his future prospects if granted parole, there is no evidence to support the Board's finding that he poses a danger to public safety if released on parole." (*Id.* at p. 1112.)

Petitioner, like his counterparts in *Rico* and *Palermo*, demonstrated remarkable restraint while confined and took advantage of a wide array of rehabilitative programming. He too expressed remorse and offered a solid future plan if released. Indeed, the Board acknowledged his steady and solid progress over 29 years of incarceration. Particularly impressive is the fact he has never received a disciplinary write-up. His job performance has been exemplary and the Board did not express any reservations about his parole plans.

But we, unlike the Board, are not statutorily charged with the duty to determine whether an inmate is suitable for release. The inmate does not appear before us, and therefore we have no ability to assess whether what he says squares with how he says it. In other words, we cannot critique his demeanor to ascertain whether anger or rage simmer or sizzle beneath the façade of a well-rehearsed performance. That is not to suggest that petitioner's rehabilitation is not genuine. But it is to acknowledge the extraordinary limits placed on judicial review of a Board's determination to deny parole. Our search is not for evidence of suitability, for clearly petitioner offers a compelling story of rehabilitation, but for "some evidence" that he continues to pose a danger. We conclude that the record demonstrates the necessary modicum of evidence.

The Board, as described above, focused on petitioner's anger as a causative factor. The commissioners probed petitioner about the issue, his understanding of why he was angry, his ability to identify triggers, and the strategies he had developed to deal with anger as it erupted. During this discussion, the presiding commissioner pointed out petitioner displayed obvious indicia of anger—a red face, raised voice, and clenched fists.

Petitioner minimizes the incident. In fact, he puts an entirely different spin on his behavior, suggesting that he was demonstrating his ability to control himself. He also contends he honestly and transparently revealed all the various sides of his personality, including his sense of humor, his frustration,

his remorse, and his sincerity. His version could very well be a more accurate reflection of his inner reality than what the commissioners chose to believe. We cannot say.

But we also cannot say that the Board's observation of petitioner's angry demeanor does not constitute some evidence that he continues to be a danger to public safety. While petitioner's rehabilitation in many other respects may be comparable to *Lawrence*, *Rico*, and *Palermo*, there was no evidence that any of those petitioners had lost their composure at their parole hearings or in any other way demonstrated that anger was bubbling just beneath the surface of their polished presentations. For petitioner, that anger once led to rage, which led to the violent strangulation of his wife. Thus, there is the requisite nexus between the facts of the commitment offense, involving, as it did, uncontrolled anger, and petitioner's current disposition, in which anger continued to rear its ugly face.

Moreover, the Board did not deny parole based on petitioner's angry outburst alone. The Board also expressed its concern about petitioner's lack of insight into why he strangled his wife. We recognize that an inmate is faced with the difficult challenge of assuming personal responsibility for the crime and yet also demonstrating an understanding of what caused him to commit it. So, for example, in this case, petitioner contends that the Board misconstrued his attempt to explain his mother's over-protectiveness as a deflection of personal responsibility. He cites to a number of times when he clearly

stated that he did not blame his mother for his criminal behavior and that he understood she had done the best she could. Her shortcomings in parenting did not give him the license to kill.

But this is a dispute we need not resolve. If "lack of insight" had been the only evidence of unsuitability, we would be compelled to examine the evidence more closely. It was not. The Board's concern was petitioner's ability to control his anger, and his deflection of responsibility was less important than the fact the conversation triggered an angry response. Given that petitioner had strangled his wife in an uncontrolled rage, any visible demonstration of anger would be pertinent to the Board's assessment of whether he currently posed a danger. We cannot dismiss evidence of agitation and anger, particularly when it was displayed during a parole-suitability hearing. If petitioner could not maintain a cool composure before the very commissioners who he knew held his ticket to freedom, there is certainly some evidence to support their conclusion that he remains a danger to society.

As we conceded at the outset, we find the calculus here exceedingly difficult. We recognize the factual parallels to cases like *Lawrence*, *Rico*, and *Palermo*, just to name a few, in which the courts found no evidence to support either the Governor's or the Board's conclusion that the petitioners remained dangerous after lengthy periods of incarceration, during which they engaged in fruitful rehabilitation. Nevertheless, the Supreme Court has continued to defer to the

executive branch of government and to severely limit the scope of appellate review to determine only if there is "some evidence" to support the Board's finding the inmate is unsuitable for parole. Because there is that modicum of evidence here, we must deny the petition for habeas corpus.

II

The Next Hearing

Petitioner also contends the Board's postponement of his next parole-suitability hearing for three years violates the ex post facto constitutional proscription. It is true, as petitioner points out, that a modification of the procedures governing the frequency of parole-suitability hearings constitutes an ex post facto violation when the inmate can show that the modification creates a significant risk of extending his incarceration. (*Garner v. Jones* (2000) 529 U.S. 244, 251 [146 L.Ed.2d 236].) Petitioner, however, has not demonstrated that the three-year deferral created a significant risk of extending his incarceration.

Pursuant to former section 3041.5, subdivision (b)(2)(B), future parole hearings for murderers could be deferred up to five years. The 2008 amendment to this section, enacted by initiative (Prop. 9, as approved by voters, Gen. Elec. (Nov. 4, 2008)) increased the maximum parole denial period from five years to fifteen years. Here, petitioner was denied parole for three years, a deferral period clearly allowed under former section 3041.5. He therefore cannot demonstrate he was at risk

of a greater length of incarceration under the new law than was allowed under the old law. There is no ex post facto violation.

DISPOSITION

The petition for writ of habeas corpus filed in case No. C064700 is dismissed as moot. The order to show cause, having served its purpose, is discharged.

The petition for writ of habeas corpus filed in case No. 65545 is denied. The order to show cause, having served its purpose, is discharged.

RAYE, P. J.

We concur:

BLEASE, J.

MAURO, J.