Filed 6/2/08 In re Armstrong CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re HOWARD ARMSTRONG on Habeas Corpus.	D051629 (San Diego County Super. Ct. No. HC18110)

Appeal from an order of the Superior Court of San Diego County, George W. Clarke, Judge. Affirmed.

Howard Armstrong was sentenced in 1988 to 17 years to life in prison after a jury found him guilty of second degree murder with a firearm. Armstrong, now 53 years old, has remained in prison for nearly 20 years. After several unsuccessful parole hearings, the Board of Prison Terms (BPT), now the Board of Parole Hearings, found him suitable for parole at his 2006 suitability hearing when it concluded Armstrong did not pose an unreasonable risk of danger to society if released. However, Governor Arnold Schwarzenegger reversed the BPT's decision, finding Armstrong posed an unreasonable risk of danger to society if released. Armstrong successfully petitioned the trial court for a writ of habeas corpus in the trial court. Ben Curry, acting warden of the Correctional

Training Facility (Warden), appeals the trial court's order granting Armstrong's petition for a writ of habeas corpus, arguing Governor Schwarzenegger's decision was supported by some evidence and therefore must affirmed.

I

FACTS

A. The Commitment Offense

In 1986 Armstrong was a drug dealer. The victim, Mr. Sanders, was one of Armstrong's customers. On multiple occasions, Sanders had defaulted on his drug debts to Armstrong and Armstrong reacted by pointing a gun at Sanders's head as a threat. On one occasion, Armstrong pointed an unloaded gun at Sanders's head, pulled the trigger, and said "I'm going to kill you like this."

On October 24, 1986, Armstrong went to Sanders's apartment with a loaded gun. Sanders's body was discovered that morning with a near-contact gunshot wound to the forehead. Armstrong admitted he fired the lethal shot. One witness told police the witness had spoken with Armstrong after the shooting and Armstrong admitted he had gone over to the apartment to "take care of [Sanders]" and had done so. Another witness told police Armstrong stated he had "some trouble" with Sanders and went to his apartment to "rough [Sanders] up but [he] got cocky" and "I lost my temper and I hurt him pretty good."

Armstrong claimed the shooting was an accident. He went to Sanders's apartment and found a note attached to the front door demanding Sanders pay a debt owed to others. In Armstrong's version of the events, he entered the apartment with his gun drawn, found

it had been ransacked, and located Sanders. An argument ensued, and Sanders jumped up as though to attack Armstrong. In response, Armstrong swiped his gun hand at Sanders to fend him off. The gun fired once and killed Sanders.

Armstrong was 31 years old at the time of the murder. A jury convicted him of second degree murder, with a true finding on the use of a firearm allegation, and he was sentenced to a prison term of 17 years to life.

B. Armstrong's Performance in Prison

Armstrong remained entirely discipline free during his incarceration. In addition to his unblemished discipline record, he furthered his vocational training through numerous programs, became involved in the Alcoholics Anonymous and Narcotics Anonymous programs, and consistently received laudatory reviews from prison staff. His numerous psychological reports during the past few years have been favorable and stated his potential for violence was no greater than that of the average citizen in the community.

C. Other Suitability Factors

Armstrong had marketable skills, realistic parole plans, and available support from his family and his stable marriage. Armstrong had no prior criminal record. At the time of the murder, Armstrong was undergoing significant stress in his life, including the loss of his job and the break-up of a long-term relationship associated with his drug use.

II

HISTORY OF PROCEEDINGS

A. The Prior BPT Proceedings

Armstrong's minimum eligible parole date was in 1998. Although Armstrong apparently had several hearings before the BPT during the next eight years, the BPT found him unsuitable for parole at each of the prior hearings.

However, at his 2006 parole hearing, the BPT concluded Armstrong was suitable for parole. The BPT considered Armstrong's testimony at the hearing, as well as the written reports. The BPT relied on his realistic parole plans and marketable skills, his demonstrated commitment to sobriety, his remorse and insight into his behavior, and his maturation and conduct during the previous 18 years to find he did not pose an unreasonable risk of danger to society if released on parole.

In November 2006 Governor Arnold Schwarzenegger reversed the BPT's decision because he found Armstrong did pose an unreasonable risk of danger to society if released. The reason given for this finding was that the crime was especially aggravated because it involved some premeditation.[1] Governor Schwarzenegger found the "gravity

---

[1] The Governor's decision also mentions that Armstrong had not yet secured a job offer, and finding a way to financially support himself would be essential to Armstrong's success on parole. Additionally, the Governor stated that "[a]lthough Mr. Armstrong says he is remorseful and accepts responsibility for his actions, he maintains that the shooting was an accident." However, the Governor's decision did not find that Armstrong's lack of a job made his release dangerous to the community, and he did not find that Armstrong in fact did not have remorse for his actions that made him a danger to the community. We therefore confine our review to the evidence of unsuitability credited by the Governor and do not consider unsuitability factors apparently discounted by the

of the murder perpetrated by Mr. Armstrong presently outweighs the positive factors [and] I believe [Armstrong's] release would pose an unreasonable risk of danger to society at this time."

The Habeas Proceedings

Armstrong petitioned the San Diego County Superior Court for a writ of habeas corpus, alleging Governor Schwarzenegger's reversal of the BPT's decision violated his due process and equal protection rights because the governor's unsuitability determination was not supported by the evidence, was arbitrary and capricious, and was incorrectly based solely on the offense. The trial court issued an order to show cause, and specifically invited the Governor in his return to articulate " 'why [Armstrong's] underlying crime continues to make him an unreasonable risk to public safety.' " The trial court, concluding that neither the original decision nor the return to the order to show cause answered this inquiry, found the Governor's decision was not supported by some evidence. Accordingly, the trial court vacated the Governor's decision and reinstated the BPT's determination granting Armstrong's parole.

Warden appeals the trial court's order, arguing the Governor's decision was supported by some evidence. We conclude the Governor's decision reversing the BPT's order violated due process because the Governor's finding that Armstrong posed an unreasonable danger if released was contrary to the only reliable evidence of his current dangerousness.

Governor. (*In re Elkins* (2006) 144 Cal.App.4th 475, 493 (*Elkins*); *In re DeLuna* (2005) 126 Cal.App.4th 585, 593-594.)

III

LEGAL STANDARDS

A. The Parole Decision

The decision whether to grant parole is a subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that should be guided by a number of factors, some objective, identified in Penal Code section 3041 and the BPT's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The Governor's decision to affirm, modify, or reverse the decision of the BPT is based on the same factors that guide the BPT's decision (Cal Const., art. V, § 8(b)), and is based on "materials provided by the parole authority." (§ 3041.2, subd. (a).) "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the Board's decision." (*Rosenkrantz*, at pp. 660-661.)

In making the suitability determination, the BPT and the Governor must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, reference to section 2042 refers to the regulations), including the nature of the commitment offense and behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude toward the crime; and parole plans. (§ 2402, subd. (b).) The circumstances that tend to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel

manner;[2] (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously 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. (§ 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (*Id.* at subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense 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 on release; and (9) has engaged in institutional activities that show an enhanced ability to function within the law on release. (§ 2402, subd. (d).)

These criteria are "general guidelines," illustrative rather than exclusive, and "the importance attached to [any] circumstance [or combination of circumstances in a

---

[2] Factors that support the finding the crime was committed "in an especially heinous, atrocious or cruel manner" (§ 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

particular case] is left to the judgment of the [BPT]." (*Rosenkrantz, supra,* 29 Cal.4th at p. 679; § 2402, subds. (c), (d).) Thus, the endeavor is "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz,* at p. 655.) Because parole unsuitability factors need be found by only a preponderance of the evidence, the Governor may consider facts other than those found true by a jury or judge beyond a reasonable doubt. (*Id*. at p. 679.)

B. Standard for Judicial Review of Parole Decisions

Rosenkrantz

In *Rosenkrantz,* the California Supreme Court addressed the standard the court must apply when reviewing parole decisions by the executive branch. The court first held that "the judicial branch is authorized to review the factual basis of a decision of the [BPT] denying parole in order to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPT] supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra,* 29 Cal.4th at p. 658.) *Rosenkrantz* further held "courts properly can review a Governor's decisions whether to affirm, modify, or reverse parole decisions by the [BPT] to determine whether they comply with due process of law, and that such review properly can include a determination of whether the factual basis of such a decision is supported by some evidence in the record that was before the [BPT]." (*Id.* at p. 667.)

The *some evidence* standard is extremely deferential and requires "[o]nly a modicum of evidence." (*Rosenkrantz, supra,* 29 Cal.4th at p. 677.) A court may not

vacate an administrative decision subject to the *some evidence* review simply because it disagrees with the assessment of the Governor. (*Id.* at p. 679.) The decision must be "devoid of a factual basis" to be overturned. (*Id*. at p. 658.) Because judicial review of a parole denial is to ensure a decision is not arbitrary and capricious, thereby depriving the prisoner of due process of law, "the court may inquire only whether some evidence in the record before the [BPT] supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Id*. at pp. 657-658.)

The discretion over parole suitability determinations, although broad, is not absolute. (*In re Scott* (2004) 119 Cal.App.4th 871, 884.) *Rosenkrantz* explained "that the judicial branch is authorized to review the factual basis of a decision of the [BPT] denying parole in order to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPT] supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the [BPT] to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) Thus, the extremely deferential standard, although vesting in the Governor the power to resolve evidentiary conflicts and assign the weight to be given to the evidence (*id*. at p. 677), is not the equivalent of judicial abdication, because the court must be satisfied the evidence substantiates the ultimate conclusion that the prisoner's release currently poses an

unreasonable risk of danger to the public. (*In re Lee* (2006) 143 Cal.App.4th 1400, 1408 (*Lee*).) It violates a prisoner's right to due process for the Governor to attach significance to evidence that forewarns no danger to the public or relies on an unsupported conclusion. (See, e.g., *In re DeLuna, supra,* 126 Cal.App.4th at p. 597 [BPT concluded, contrary to psychological evaluations, that inmate needed therapy, and faulted inmate facing deportation for failing to learn English]; *In re Scott* (2005) 133 Cal.App.4th 573, 597-603 (*Scott*) [Governor misconceived inmate's history of violent crime and nature of the commitment offense]; *Lee,* at pp. 1411-1414 [Governor overstated seriousness of commitment offense and improperly faulted inmate for late acceptance of responsibility].)

The Scott/Lee Application of Rosenkrantz

In *Scott* and *Lee*, the courts sought to reconcile *Rosenkrantz's* deferential *some evidence* standard with the Supreme Court's commensurate recognition that two other principles must also guide appellate review of a parole decision: the inmate has a liberty interest in the hope for parole and the central inquiry under the statutory scheme must remain focused on whether the inmate would currently pose a danger to society if released on parole. (*Rosenkrantz, supra,* 29 Cal.4th at pp. 654-655, 683.) In *Scott* and *Lee*, the courts sought to apply *Rosenkrantz's* standards where the sole reason[3] for

---

3 Although both *Scott* and *Lee* examined decisions by the Governor that cited one factor in addition to the circumstances of the offense, those courts found no evidentiary support for the added reason. (*Scott, supra,* 133 Cal.App.4th at p. 603; *Lee, supra,* 143 Cal.App.4th at p. 1414.)

denying parole was that the circumstances of the offense involved conduct above the minimum necessary to commit the offense.[4]

In *Scott*, the court cautioned that, where the sole basis for denying parole is that the gravity of the offense showed the inmate posed a current danger if released, the test to be applied "must be properly understood" to encompass a recognition that "[t]he commitment offense is one of only two factors indicative of unsuitability a prisoner cannot change (the other being his 'Previous Record of Violence'). Reliance on such an immutable factor '*without regard to or consideration of subsequent circumstances*' may be unfair [citation], and 'runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation.' [Citation.] The commitment offense can negate suitability only if 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. *Yet, the predictive value of the commitment offense*

---

4 *Rosenkrantz*, explaining why the nature of the offense must "involve particularly egregious acts beyond the minimum necessary to sustain a conviction for second degree murder," stated that, "In some circumstances, a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation--*for example where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense*. Denial of parole under these circumstances would be inconsistent with the statutory requirement that a parole date normally shall be set 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public. . . .' [Citation.] 'The [BPT's] authority to make an exception [to the requirement of setting a parole date] based on the gravity of a life term inmate's current or past offenses should not operate so as to swallow the rule that parole is 'normally' to be granted. . . . [¶] Therefore, a life term offense or any other offenses underlying an indeterminate sentence must be particularly egregious to justify the denial of a parole date.' [Quoting *In re Ramirez* (2001) 94 Cal.App.4th 549, 570.]" (*Rosenkrantz, supra*, 29 Cal.4th at p. 683, italics added; accord, *In re Dannenberg* (2005) 34 Cal.4th 1061, 1094-1095.)

may be very questionable after a long period of time. [Citation.] Thus, denial of release solely on the basis of the gravity of the commitment offense *warrants especially close scrutiny*" on appeal. (*Scott, supra*, 133 Cal.App.4th at pp. 594-595, italics added, fns. omitted.)

The *Lee* court, also seeking to apply *Rosenkrantz's* test, noted evidence that a commitment offense involved conduct above the minimum necessary to commit the offense is not the end of the inquiry because such evidence "does not necessarily equate to some evidence the [inmate's] release [on parole] unreasonably endangers public safety." (*Lee, supra*, 143 Cal.App.4th at p. 1409, fn. omitted.) *Lee* also echoed *Scott's* sentiments when *Lee* confirmed that the lengthy passage of time in its case made the "crimes have little, if any, predictive value for future criminality." (*Id*. at p. 1412.)[5]

Other courts have agreed the appropriate inquiry focuses not on whether a *reason* given by the Governor finds evidentiary support, but instead on whether the evidence supports the conclusion of dangerousness. (See *In re Tripp* (2007) 150 Cal.App.4th 306, 313 [" 'Only a modicum of evidence is required.' . . . On the other hand, the evidence must substantiate the ultimate conclusion that the prisoner's release currently poses an

---

5 The federal courts have also recognized the diminishing value of the circumstances of the offense as it recedes into history. Although it is true that "the circumstances of the crime and motivation for it may indicate a petitioner's instability, cruelty, impulsiveness, violent tendencies and the like . . . , after fifteen or so years in the caldron of prison life, not exactly an ideal therapeutic environment to say the least, and after repeated demonstrations that despite the recognized hardships of prison, this petitioner does not possess those attributes, the predictive ability of the circumstances of the crime is near zero." (*Irons v. Warden* (E.D. Cal. 2005) 358 F.Supp.2d 936, 947, fn.2, revd. *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846.)

unreasonable risk of danger to the public. [Citations.] It violates a prisoner's right to due process when the Board or Governor attaches significance to evidence that forewarns no danger to the public or relies on an unsupported conclusion."]; *In re Barker* (2007) 151 Cal.App.4th 346, 366 [same].) Additionally, other courts have declined to uphold a denial of parole when the sole cited basis for finding current dangerousness was the commitment offense where such offense was of increasingly ancient vintage and was unaccompanied by more recent manifestations of continued antisocial tendencies. As articulated by the court in *Elkins, supra,* 144 Cal.App.4th at pp. 498-499, "[t]he commitment offense . . . is an unsuitability factor that is immutable and whose predictive value 'may be very questionable after a long period of time [citation].' [Citing *Scott, supra,* 133 Cal.App.4th at p. 595.] We have also noted, as has our Supreme Court, strong legal and scientific support that 'predictions of future dangerousness are exceedingly unreliable,' even where the passage of time is not a factor and the assessment is made by an expert. [Citation.] Reliance on an immutable factor, without regard to or consideration of subsequent circumstances, may be unfair, run contrary to the rehabilitative goals espoused by the prison system, and result in a due process violation. [Citation.]"[6]

---

6 Additionally, *Elkins* recognized that, where the gravity of the crime becomes the central focus of the suitability hearing, the inmate is given a Hobson's choice, because " '[a] parole hearing [also] does not ordinarily provide a prisoner a very good opportunity to show his offense was not committed "in an especially heinous, atrocious or cruel manner," even if such evidence exists and the prisoner is willing to run the risk his effort to make such a showing will be seen as unwillingness to accept responsibility and therefore evidence of unsuitability.' [Quoting *Scott, supra,* 133 Cal.App.4th at pp. 600-601, fn. 13]." (*Elkins, supra,* 144 Cal.App.4th at p. 499.)

Singler

The court in *In re Singler* (2008) 161 Cal.App.4th 281 (*Singler*)) examined *Rosenkrantz's* deferential standard of judicial review considering the construction articulated by the *Scott/Lee/Elkins* line of cases and distilled a slightly modified test for judicial review of a denial of parole in those limited cases where the sole articulated ground for denying parole was the facts of the offense. *Singler* first noted that, when it originally considered the inmate's writ petition challenging the BPT's denial of parole, it summarily denied the writ petition because it interpreted *Rosenkrantz's* deferential standard of review as conferring on the BPT "*great, indeed almost unlimited, discretion*" to predict future dangerousness (*Singler*, at p. 285), and under this strict interpretation of *Rosenkrantz*, the *Singler* court originally believed it was constrained to affirm the denial of parole if there was any evidence the commitment offense involved any conduct beyond the minimum necessary to sustain a conviction for second degree murder. (*Singler*, at pp. 285-286.) However, *Singler* then noted the Supreme Court subsequently granted Singler's petition for review and transferred the matter back to the *Singler* court with directions to vacate the denial of the petition "and to order the Board to show cause why it '**did not abuse its discretion and violate due process in finding** [the inmate] unsuitable for parole . . . and why [the inmate] remains a danger to public safety,' " followed immediately by citations to the specific pages of the *Scott, Lee,* and *Elkins* cases construing *Rosenkrantz* in the manner discussed above. (*Singler,* at p. 286.)

The *Singler* court, noting its original disposition was reached based on a strict construction of *Rosenkrantz's* "great deference" standard, stated that "[i]t appears,

however, that in granting review and transferring the matter back to us for reconsideration in light of additional authorities, the California Supreme Court believes we construed the standard of review articulated in *Rosenkrantz* too narrowly and were too deferential to the Board's finding. We reach this conclusion because of the specific citations to authority included in the Supreme Court's order, i.e., authorities interpreting *Rosenkrantz* in a manner that appears to give courts greater leeway in reviewing the Board's finding that an inmate remains a danger to public safety" (*Singler, supra,* 161 Cal.App.4th at p. 299), and that "[t]he Supreme Court's order . . . indicates to us the Supreme Court has endorsed subsequent Court of Appeal decisions that give courts greater leeway in reviewing the Board's determination . . . ." (*Id.* at p. 287.)

Singler's review of the analysis contained in the passages in *Scott, Lee,* and *Elkins* cited in the Supreme Court's remand order led *Singler* to conclude these cases applied a "judicial gloss" on *Rosenkrantz* and created a slightly modified approach to judicial review of parole denials based solely on the commitment offense. (*Singler, supra,* 161 Cal.App.4th at pp. 300-301.) *Singler* concluded, "[a]s we now understand the test apparently embraced by the California Supreme Court, a court may overturn the Board's denial of parole based solely on the nature of the commitment offense if (1) a significant period of time has passed since the crime, (2) there is uncontroverted evidence of the inmate's rehabilitation, and (3) the crime was not committed in such an especially heinous, atrocious, or cruel manner so as to undermine the evidence that the inmate's rehabilitative efforts demonstrate he no longer would be a danger to society if released on parole." (*Id*. at p. 301.)

Applying this analysis to the facts presented in *Singler*, the court concluded a significant amount of time (nearly 25 years) had passed, the other suitability factors (including an unblemished disciplinary record in prison) uniformly favored parole, and the facts of the crime (although above the minimum necessary to sustain a conviction for second degree murder) were not so " 'especially heinous, atrocious or cruel' [citation] as to undermine the evidence that his rehabilitative efforts demonstrated he no longer would be a danger to public safety if released on parole." (*Singler, supra,* 161 Cal.App.4th at p. 301.) Accordingly, the *Singler* court ruled the circumstances of the commitment offense did not provide evidence supporting denial of parole.

Conclusion

We agree that the discretion conferred on the Governor is broad but not absolute, and the *Scott/Lee/Elkins* construction of *Rosenkrantz* gives substance to the role of the judiciary to ensure due process is satisfied by closely reviewing the factual basis of a decision finding the inmate's release *currently* poses an unreasonable risk of danger to the public based solely on the facts of a decades-old offense. Accordingly, where a significant period of time has passed since the crime, and there is uncontroverted evidence of the inmate's rehabilitation, we will closely scrutinize the facts of the offense to determine whether it was committed in such an especially heinous, atrocious, or cruel manner that it would undermine the evidence that the inmate's rehabilitative efforts while incarcerated demonstrate he or she no longer would be a danger to society if released on parole.

IV

ANALYSIS

The evidence on the "suitability" factors all favored the grant of parole to Armstrong. He did not have a record of violent crime, either as a juvenile or as an adult. He had a relatively stable social history, and committed the crime as the result of significant stress in his life. He has made realistic plans for release and has marketable skills that can be used on release. He has shown signs of remorse and accepted his culpability for the murder. His age reduces the probability of recidivism, and his unblemished 20-year record while incarcerated shows his capacity to function within the law on release. (§ 2402, subd. (d).) The BPT concluded the evidence on these considerations uniformly militated in favor of parole, and the Governor's decision essentially left unchallenged the BPT's findings on these factors.

The Governor's only articulated ground for finding Armstrong posed an unreasonable risk of danger to society was that the crime was especially aggravated because it involved some premeditation. However, a significant period of time (nearly 20 years) had passed between the crime and the parole hearing. The evidence is also uncontroverted that, during this 20 year hiatus, Armstrong committed no other violent offense, either before being incarcerated or during his nearly 19 years of incarceration. Indeed, during his time in prison, he did not commit a single infraction of prison rules that might have suggested any lingering inability to conform his behavior to the requirements of society. Instead, there is uncontroverted evidence of Armstrong's

rehabilitative efforts while incarcerated, including his longstanding commitment to sobriety to obviate a principal causative factor in his single violent episode.

We therefore must assess whether, despite the significant passage of time marked by a consistent and uninterrupted pattern of conduct demonstrating Armstrong no longer poses a danger to society, there is evidence suggesting Armstrong nevertheless remains a danger to society. We must decide whether the evidence cited by the Governor shows the crime was committed in such an especially heinous, atrocious, or cruel manner that the Governor could conclude, despite two decades of untarnished behavior, Armstrong "will be [un]able to live in society without committing additional antisocial acts." (*Rosenkrantz, supra*, 29 Cal.4th at p. 655.)

The trial court and the BPT concluded, and we agree, that given the lengthy passage of time and the gains made by Armstrong in prison, his 1986 crime does not provide some evidence to support the conclusion he remains a danger today. The only basis articulated in the Governor's decision for concluding the crime showed Armstrong remains dangerous was that there was evidence Armstrong "premeditated on some level to kill" the victim. Although the Governor is correct that premeditation goes "beyond the minimum elements necessary to sustain a second-degree murder conviction," premeditation is not the equivalent of conduct by Armstrong during the crime that depicted an *especially* heinous, atrocious, or cruel personality.[7] Evidence of particularly

---

[7] The types of actions by an inmate that might permit the Governor to conclude the criminal conduct was especially depraved are absent here. There were not multiple victims. Armstrong did not abuse, defile, or mutilate the victim during or after the offense, and there was no other conduct demonstrating an exceptionally callous disregard

heinous conduct could suggest a psychopathy so indelible that it might remain unabated, even after the passage of a 20-year period marked by blameless conduct, and pose a danger to society were the inmate released on parole. In contrast, although premeditation can elevate the legal consequences of Armstrong's conduct by making him liable for first degree murder, it is largely irrelevant to assessing an inmate's current dangerousness because even an inmate convicted of first degree murder cannot be denied parole absent some other evidence to support a finding he or she retains antisocial impulses that would endanger society. (See, e.g., *In re Barker, supra*, 151 Cal.App.4th at pp. 370-378 [inmate convicted of first degree murder entitled to parole where circumstances did not involve particularly egregious conduct and no other evidence inmate posed an unreasonable risk to public safety]; *Elkins, supra*, 144 Cal.App.4th at pp. 495-503 [same].)

Moreover, it appears Armstrong is rapidly approaching, and may have already passed, the minimum eligible parole date (MEPD) even had he been *convicted* of first degree murder. As recognized by Justice Moreno in his concurrence in *Rosenkrantz,* " 'In some circumstances, a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation--for example where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense.' . . . [¶] Although I agree that evidence of premeditation and deliberation supports the conclusion that petitioner's crime was

---

for human suffering. Although Armstrong's motive for the crime did not justify the murder, the impetus for the crime--an addict seeking payment from a recalcitrant buyer--cannot be characterized as inexplicable or trivial. Finally, there was no evidence Armstrong acted in a dispassionate, cold or calculated manner when he killed the victim.

particularly egregious for a *second degree* murder, it is another matter whether any evidence would support the same conclusion for a *first degree* murder. Other than felony murders, first degree murders by definition involve premeditation and deliberation. . . . Furthermore, petitioner's offense did not appear to partake of any of those characteristics that make an offense particularly egregious under the Board of Prison Terms' parole eligibility matrix for first degree murders . . . [¶] The significance of the above observations is this: there will come a point, which already may have arrived, when petitioner would have become eligible for parole if he had been convicted of first degree murder. Once petitioner reaches that point, it is appropriate to consider whether his offense would still be considered especially egregious for a *first degree* murder in order to promote the parole statute's goal of proportionality between the length of sentence and the seriousness of the offense. [Citation.] Under this circumstance, the justification for denying his parole would become less clear, even under the deferential 'some evidence' standard." (*Rosenkrantz, supra,* 29 Cal.4th at pp. 689-690, conc. opn. of Moreno, J.)

Because Armstrong might be nearing or may already have surpassed the MEPD had his conviction had been for first degree murder, his continued incarceration "based upon the nature of the offense alone might rise to the level of a due process violation" (*Rosenkrantz, supra,* 29 Cal.4th at pp. 689-690, conc. opn. of Moreno, J.) because there is no evidence his offense would qualify as an aggravated form of *first* degree murder. Because premeditation during a commitment offense does not alone suffice to warrant denial of parole when the inmate is otherwise eligible for parole and there is a complete absence of any other evidence warranting a finding of current dangerousness, we

conclude the trial court correctly held the Governor's decision was not supported by some evidence.

DISPOSITION

The judgment of the trial court is affirmed, and the Governor's decision reversing the 2006 BPT decision finding Armstrong suitable for parole and setting a parole date is vacated. The stay issued by this court on October 31, 2007, is hereby vacated. As in *Elkins, supra*, 144 Cal.App.4th at page 503, the BPT is ordered to release Armstrong forthwith pursuant to the conditions set forth in the 2006 decision by the BPT. Because Armstrong's release would have been final well over one year ago, and in the interests of justice, this opinion shall be final as to this court immediately. (Cal. Rules of Court, rule 8.264(b)(3).)

McDONALD, Acting P. J.

I CONCUR:

McINTYRE, J.

O'Rourke, J., dissenting.

I respectfully dissent. I would reverse the trial court's order granting Armstrong's petition for habeas corpus because Governor Schwarzenegger's decision – in particular, the Governor's finding that Armstrong's offense was premeditated and went beyond the minimum elements necessary to sustain a second-degree murder conviction – has some evidentiary support. Thus, under the extremely deferential review standards set forth in *In re Dannenberg* (2005) 34 Cal.4th 1061 and *In re Rosenkrantz* (2002) 29 Cal.4th 616, the trial court was required to deny Armstrong's petition.

The majority concedes the record here contains evidence that the manner in which Armstrong committed his crime meets that standard. They reason, however, that premeditation is not the equivalent of conduct by Armstrong during the crime that depicted an especially heinous, atrocious, or cruel personality. (Maj. opn., *ante,* at pp. 18-19.) They also maintain that the record contains no evidence that Armstrong acted in a dispassionate, cold or calculated manner when he killed his victim. (*Id*. at pp. 18-19, fn. 7.)

In my view, the latter characterization of the record is incorrect. Notably, Armstrong declined to discuss the facts of the commitment offense at his parole hearing and the Board of Parole Hearings (Board) advised him it accepted the findings of this court as true. The record considered by the Governor shows that Armstrong, a drug dealer who had previously pointed an unloaded gun at the victim's head and threatened to kill him over drug debts ("I'm going to kill you like this"), took a loaded gun into the victim's residence and shot him in the head; the victim's death was caused by a "near-

contact gunshot wound to the left forehead, one-half inch above the medial border of the left eyebrow and three-quarter inch to the left of the midline." Thus, the victim was shot near the middle of his forehead at extremely close range, and the type and manner of injury permit the Governor to characterize the incident as a dispassionate, cold, and calculated "execution-style" killing. This, combined with Armstrong's prior multiple threats to the victim, and a witness statement in a probation officer's report that Armstrong stated he had gone to the victim's apartment to "take care of him" and that he woke the victim and "took care of him," shows that Armstrong's crime was committed "in an especially heinous, atrocious or cruel manner." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(B).) Armstrong's crime reflects "exceptional callousness and cruelty" to the victim (*Dannenberg*, *supra*, 34 Cal.4th at p. 1098), and it constitutes "some evidence" to support the Board's unsuitability determination under the limited and extremely deferential review standard. (*Rosenkrantz*, *supra*, 29 Cal.4th at pp. 652, 665, 677; *Dannenberg*, at p. 1084.) This element alone is sufficient to support the Governor's reasoning. (*Rosenkrantz*, at p. 682; *Dannenberg*, at p. 1094.)

Further, I do not accept the majority's reasoning, which is based on several appellate decisions (e.g., *In re Singler* (2008) 161 Cal.App.4th 281; *In re Tripp* (2007) 150 Cal.App.4th 306; *In re Elkins* (2006) 144 Cal.App.4th 475; *In re Lee* (2006) 143 Cal.App.4th 1400; *In re Scott* (2005) 133 Cal.App.4th 573), that depart from the judicial review standards expressed in *Rosenkrantz* and *Dannenberg*. In my view, these decisions impermissibly permit a reviewing court to balance and weigh the parole suitability and unsuitability factors, contrary to the standards established by the California Supreme

Court. (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.) As *Rosenkrantz* explains, "[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Ibid*.)

Because the Governor's decision has a factual basis in the record, I would reverse the trial court's order granting Armstrong's petition.

_____
O'ROURKE, J.