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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

JUSTO AVALOS,

On Habeas Corpus.

B202101

(Los Angeles County
Super. Ct. No. BH004543)

PETITION for a writ of habeas corpus following order of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Petition granted.

Justo Avalos, in pro. per., and Nancy L. Tetreault, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, and Jennifer L. Dolan, Deputy Attorney General, for Respondent.

In 1984, Justo Avalos was convicted of second degree murder and sentenced to an indeterminate prison term of 15 years to life. In 2006, the Board of Parole Hearings found Avalos suitable for parole and set a parole date. The Governor reviewed the Board's decision and reversed it, finding Avalos was not suitable for parole. Avalos challenges that decision by way of the petition for a writ of habeas corpus now before us, contending the Governor's decision is not supported by "some evidence." We agree, and therefore grant the petition as prayed.¹

FACTS

A. The Commitment Offense

At about 1:30 a.m. on May 10, 1981, Justo Avalos and Jose Cisneros walked out of the Wagon Wheel Bar where Avalos worked as the manager, arguing about a waitress Avalos had fired. Juan Manriques, who knew both men, followed them outside and told them to stop arguing. The three men returned to the bar but a few minutes later Cisneros said he was going home and left the bar. Avalos followed Cisneros. Manriques, knowing that Avalos carried a gun, also went outside and saw Avalos shoot Cisneros four times. At the time of the shooting, the unarmed Cisneros had his hands by his sides and offered no resistance. Cisneros died from multiple gunshot wounds.²

¹ We recognize that this issue is pending before the Supreme Court in *In re Dannenberg* (2007) 156 Cal.App.4th 1387, review granted February 13, 2008, S158880, *In re Jacobson* (2007) 154 Cal.App.4th 849, review granted December 12, 2007, S156416, *In re Shaputis* (Aug. 21, 2007, D049895) [nonpub. opn.], review granted October 24, 2007, S155872, *In re Cooper* (2007) 153 Cal.App.4th 1043, review granted October 24, 2007, S155130, and *In re Lawrence* (2007) 150 Cal.App.4th 1511, review granted September 19, 2007, S154018.

² As described by Avalos's lawyer at his 2006 parole hearing, Avalos "was working in a bar, he's trying to deposit money, he has past experience with this customer[], he has arguments, he's been threatened by him, and at some point a confrontation as to whether the bar maid should be rehired or not after she's been stealing from the bar."

Avalos fled to Mexico (he was here illegally at the time of the murder) but was apprehended about two years later when he returned to the United States. He was convicted of one count of second degree murder, and (in April 1984) sentenced to state prison for a term of 15 years to life. We affirmed the judgment. (*People v. Avalos* (Jul. 17, 1985, B005547) [nonpub. opn.])

B. The Parole Hearing

By the time of Avalos's 2006 hearing, he had been a model prisoner for 23 years. In all that time, he had one "115 rule violation" in 2003 because he participated in a "work stoppage" involving "the entire work force at Chuckawalla State Prison," all 700 of whom were issued rule violation reports notwithstanding that they believed they would be assaulted by other prisoners if they went to work, and one "128 counseling chrono" from 2001 for "tenting [his] bunk" (pulling his blankets down around it so staff could not see what he was doing).³ He has the lowest (best) custody rating possible for a life term prisoner.

While incarcerated, he has worked as a cook and porter, and at the time of his parole hearing worked in the gymnasium as a recreation coordinator. All his reports reflect above average behavior in all the positions he has held. He attends ESL classes and has completed vocational landscaping and nursing programs. His instructors describe him as "a role model" because of his excellent attitude and behavior. He participates in Alcoholics Anonymous.

³ According to the California Code of Regulations, a "CDC 115" documents misconduct believed to be a violation of law or is otherwise not minor in nature; a "CDC Form 128-A" documents incidents of minor misconduct. (See Cal. Code Regs., tit. 15, § 3312, subd. (a)(2) & (3); *In re Gray* (2007) 151 Cal.App.4th 379, 389; *In re Bettencourt* (2007) 156 Cal.App.4th 780, 789, fn. 3.)

According to his most recent psychiatric evaluation, he has no mental illnesses or disorders and, “[w]ithin a controlled setting, it appears [his] propensity for violence is less than that of the average inmate and within . . . the community it would be much less than the average citizen based on his disciplinary record, insight gained into his prior behavior, and knowledge of alternatives to violence acquired by Mr. Avalos.” He has no substance abuse history. While in prison, he suffered a heart attack, and he has high blood pressure as well as arthritis.⁴

This is the way Avalos (through an interpreter) described the commitment offense and his remorse to the psychiatric evaluator (as set out in the report considered by the Board): “Since the beginning I have agreed that I committed the crime. After the first 15 minutes after the crime happened I regretted this action. I have never committed any other crime and in prison I have never gotten into trouble. If I ever saw the victim now, I would tell him how sorry I was and how sorry I am. I would get on my knees. I have never stopped feeling guilty for what I have done. I have regretted this ever since it happened. All I can do is apologize for this act. I regret what I have done! Regarding the crime, I was called by the waitress because the victim was disrupting the bar, the pool table, slashing it, cutting the towels in the restrooms. This happened prior to the day of the crime. He would ask the waitress for beer and then would not pay for it. I was threatened by the victim that if I did not rehire the waitress I would be killed. I was very scared! Today, I have learned how to deal with threats in other ways that are non-violent. I used to have great pride. I didn’t know what respect was. I have learned now to replace this and live with other people and

⁴ According to the psychiatric report, Avalos had “a series of hospitalizations for heart problems” (he was hospitalized in 1994 and 2002). His health related problems are: “angina and acute M.I., generally bad heart, arthritis, and high blood pressure.”

racers. I have learned to apologize. I have learned to lead a different lifestyle and how to work with people. On my own, I have learned how to read and write with the help of my cellmates. I have learned to act differently!"

Avalos was 43 years old at the time of the murder and was 69 at the time of his parole hearing. The commitment offense was his only crime (he has no adult or juvenile record in Mexico or in the United States). When released, he intends to return to Jalisco, Mexico where he has two truck-driving jobs waiting for him, as well as housing, transportation, and medical care. At the parole hearing, the Deputy District Attorney said he had "no idea why [Avalos] did what he did or why he had the gun," and thus was "at a total loss as to make any sense out of" the crime. The deputy noted that he would not oppose parole if he could be certain that Avalos would return to Mexico, but ultimately he took no position as to whether parole should be granted.

Avalos's lawyer suggested to the Board that parole was long overdue, pointing out that Avalos had only one year of formal education and had struggled throughout his prison life to learn English, with some success.⁵ She pointed out that the commitment offense was "very much out of character," that Avalos had definite and realistic plans for a job and living arrangements, and that he posed no threat to the public.

⁵ It may be that Avalos had no formal education at all. According to his psychiatric evaluation, he has "[n]o formal education [and] never went to school. He did not earn his GED in prison and did not attend any college or university classes. While [incarcerated] he has completed [some] educational courses and programs, [but they are] limited because of his inability in the beginning to speak or write English but he has completed vocational landscaping."

C. The Board's Decision

On August 1, 2006, the Board of Parole Hearings found Avalos suitable for parole and found that he would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison, and orally explained its decision this way:

"[He has] no juvenile record of assaulting others. [He has] a stable social history [and] reasonably stable relationships with others in his home country and city. While in prison[, he] has enhanced his ability to function within the law upon release in that he has participated in self-help and therapy programs. He has two vocational certificates and positive job assignments. He does not have a significant criminal history. Because of maturation and growth and greater understanding[, he] has reduced [the] probability of recidivism. He has realistic parole plans, including a job offer and family support in his home country. [He] [h]as maintained positive institutional behavior, which indicates a significant improvement in self-control.

"He shows signs of remorse, even understands the nature and magnitude of the offense and accepts responsibility for the criminal behavior. Additionally, he is of advanced age, poor medical health, he had a heart attack recently, two weeks ago, while being interviewed by his attorney. Psychiatric report . . . is favorable, in that the doctor assesses the risk of danger if released from prison as much less than that of the average citizen. . . ."

The Board repeated these findings in its written report, and also noted that the "murder was spontaneous in reaction to threats and conduct of the victim."

D. The Governor's Reversal

On December 21, 2006, the Governor reversed the Board's decision. After describing the commitment offense and noting Avalos's illegal entry into the United States, the Governor's decision continues thus:

"During his incarceration for the life offense, Mr. Avalos was disciplined one time, in 2003, for participating in an organized work strike. He was also counseled one time, in 2001, for minor misconduct. [¶] I considered various positive factors in reviewing whether Mr. Avalos is suitable for parole at this time. In addition to maintaining an almost discipline-free conduct record, Mr. Avalos made efforts in prison to enhance his ability to function within the law upon release. He completed several adult basic education and English-as-a-Second-Language courses. He also completed vocational training in landscape maintenance and nursery operations. He received additional training in refrigeration and air conditioning. He held institutional jobs such as cook, porter and dental technician, and he worked in the recreation department. He availed himself of some self-help and therapy, including Alcoholics Anonymous, Life Skills and Alternatives to Violence. He maintains seemingly supportive relationships with family and friends and he received some positive evaluations from mental-health and correctional professionals over the years. Subject to deportation to Mexico upon release, Mr. Avalos reportedly plans to live with family in Mexico and pursue one of several employment offers. He made alternate plans, in the event he is not deported, to live with family in Los Angeles County, his county of last residence.

"Despite the positive factors I have considered, the second-degree murder for which Justo Avalos was convicted was especially grave, in part

because the manner in which he killed Jose Cisneros -- shooting him four times while [Cisneros] was unarmed and posed no threat to him, and then fleeing -- demonstrated an exceptionally callous disregard for [Cisneros's] suffering and life. And because [Cisneros] presented no immediate threat to [Avalos], the motive for the crime appears to be trivial in relation to the offense. In its decision to deny parole to [Avalos], the 2001 Board said '[t]he motive for this crime is, to this day, lacking in explanation.' According to the Court of Appeal opinion, [Avalos] 'followed his unarmed victim from the bar and shot him as he stood with his arms at his side' The opinion also noted that '[t]he three eyewitnesses to the shooting testified that the victim was unarmed and that no weapon was found on the ground next to the body. Evaluation of [Avalos's] testimony that he either acted in self-defense, or fired one shot accidentally, was within the sole province of the trial court which was free to disbelieve [Avalos's] belated and contrived version of his reasons for shooting an unarmed man.' [Avalos] had numerous opportunities to stop during this crime -- he could have simply allowed [Cisneros] to leave the bar, and could have stopped after each of the first three gunshots was fired -- yet he chose to continue. . . . ***The gravity of the second-degree murder committed by Justo Avalos is alone sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety risk.***

"Although Justo Avalos says he accepts responsibility for his actions and is remorseful, he does not seem to understand why he murdered Jose Cisneros. For instance, [Avalos] told the 2006 Board that he shot [Cisneros] because 'I got scared, from fear, because of what he was saying. I guess I don't even know how I shot him when I say [*sic*] the gun there in my hand. I stuck my hand in the little bag and that's when I shot him. I don't even know why.' When asked by

the 2001 Board why he shot [Cisneros], [Avalos] said, 'I don't know. I don't know. He was my best friend. I don't know.' He also said '[s]omeone had called me from a restaurant for me to come outside and pick up a burrito that someone had sent for me. So when I went outside, he came out after me. And he told me that if the waitress wasn't coming back, he was going to kill me that night. But I didn't believe him. I continued to eat my burrito. Then he jumped at me and that is when I pulled out the gun, but I don't know how. I don't know why.' [Avalos] later said, 'I think I shot him out of fear Fear of him hitting me, or I don't know. Like I said, I even asked myself, why did I shoot him? Could it be fear? I mean, what else could it be?' In its decision to deny parole to [Avalos], the 2001 Board said 'our concern is that after all these years in prison, the inmate still cannot tell the Panel why he shot this victim. He has given numerous stories over the years, as to the circumstances and why. However, he has not been able today, to come to grips with why he shot this individual. That is an extremely important part of rehabilitation and must be accomplished before the prisoner could be released.'

"At age 70 now, after being incarcerated for more than 23 years, Justo Avalos made some creditable gains in prison. But given the current record before me, and after carefully considering the very same factors the Board must consider, I find that the negative factors weighing against Mr. Avalos' parole suitability presently outweigh the positive ones tending to support it. Accordingly, because I believe his release would pose an unreasonable risk of danger to society at this time, I REVERSE the Board's 2006 decision to grant parole to Mr. Avalos."

E. The Habeas Corpus Proceedings

In February 2007, Avalos filed a petition for a writ of habeas corpus in which he challenged the Governor's reversal of the Board's decision. The trial court denied the petition on the ground that "some evidence" (Avalos's inability to explain why he killed Cisneros) supported the Governor's decision.

In September, Avalos filed the *pro se* habeas corpus petition that is before us today. We issued an order to show cause and appointed counsel to represent Avalos in these proceedings.

DISCUSSION

Avalos contends the Governor's decision is not supported by "some evidence" that Avalos poses a current threat to public safety. We agree.

A.

Although a prisoner has no constitutional or inherent right to be conditionally released before the expiration of his sentence (*Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, 7), Penal Code section 3041 creates in every inmate a cognizable liberty interest in parole, and that interest is protected by the procedural safeguards of the due process clause (*Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 914-915).⁶ Because section 3041, subdivision

⁶ All references to section 3041 are to that section of the Penal Code. Section 3041, subdivision (a), provides as relevant: "One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date 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, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of

(b), uses mandatory language -- the Board "shall set a release date unless it determines that the gravity of the current convicted offense . . . 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" -- it creates a presumption that parole will be granted when or unless certain designated findings are made. (See *Board of Pardons v. Allen* (1987) 482 U.S. 369, 377-378.) In short, section 3041 vests "California prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." (*Irons v. Carey* (9th Cir. 2007) 479 F.3d 658, 662; *Sass v. California Bd. of Prison Terms* (9th Cir. 2006) 461 F.3d 1123, 1128; *Biggs v. Terhune*, *supra*, 334 F.3d at p. 914; *McQuillion v. Duncan* (9th Cir. 2002) 306 F.3d 895, 903.)

The Supreme Court recognized these concepts in *In re Rosenkrantz* (2002) 29 Cal.4th 616, 625-626, explaining there that "a Governor's decision granting or denying parole is subject to a limited judicial review to determine only whether the decision is supported by 'some evidence.' [A]rticle V, section 8(b) [of the California Constitution], does not grant a Governor unfettered discretion over parole matters, but rather explicitly requires his or her parole decision to be based upon the same factors that the Board is required to consider.⁷ At the

parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime."

⁷ Article V, section 8(b), provides in full: "No decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the

time article V, section 8(b), was adopted, it was established under California law that although the Board exercises broad discretion in determining whether to rescind parole, such decisions are subject to a form of limited judicial review to ensure that they are supported by at least ‘some evidence.’ [Citation.] We conclude that a Governor’s decisions under article V, section 8(b), are subject to this same type of limited judicial review, and that under this standard a court is authorized to review the factual basis of the Governor’s decision only to determine whether it is supported by *some evidence relevant to the factors the Governor is required to consider under article V, section 8(b)*. . . .” (Emphasis added.)

Accordingly, California’s courts are empowered to review the factual basis of the Governor’s decision reversing the Board’s decision to grant parole to determine whether it is supported by some evidence of the factors specified by statute and regulation. (*In re Rosenkrantz, supra*, 29 Cal.4th at pp. 658, 661; *In re Dannenberg* (2005) 34 Cal.4th 1061.)

B.

Section 3041 addresses the Board’s obligation to make parole decisions for indeterminate life inmates, and regulations adopted by the Board cover the various categories of such inmates. More specifically, subdivision (b) of section 3041 specifies the circumstances under which a date for an indeterminate life inmate’s release on parole need *not* be fixed, by providing that a parole release date “shall be set ‘*unless* [the Board] determines’ that the inmate is presently

basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action.”

unsuitable for the fixing of a parole date, i.e., that ‘the gravity of the current convicted offense . . . 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.’ (Italics added.) . . . *Regardless of the length of time served*, a life prisoner shall be found unsuitable for and denied parole if in the *judgment of the panel* the prisoner will pose an unreasonable risk of danger to society if released from prison.” (*In re Dannenberg, supra*, 34 Cal.4th at pp. 1079-1080, italics in original; see also Cal. Code Regs., tit. 15, § 2402, subd. (a).)⁸

Thus, “if the circumstances of a particular murder persuade the Board that the prisoner who committed it is ***presently too dangerous*** to grant a fixed parole release date, the Board may deny parole” (*In re Dannenberg, supra*, 34 Cal.4th at p. 1080, emphasis added.) The same standard applies to the Governor’s decision to reverse the Board’s decision. (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 661.) Accordingly, the question before us now is whether some evidence supports the Governor’s decision that the circumstances of Avalos’s murder mean he is presently too dangerous to be suitable for parole.

C.

To assess whether a life prisoner will pose an unreasonable risk of danger to society if released from prison, the Board and the Governor consider lists of suitability and unsuitability factors. Positive suitability factors include (1) the absence of a juvenile record, (2) a stable social history, (3) signs of remorse, (4) the motivation for the crime was significant life stress, (5) battered woman

⁸ All references to section 2402 are to that section of title 15 of the California Code of Regulations.

syndrome, (6) no history of violent crime, (7) age, (8) realistic plans for the future, and (9) institutional behavior. (§ 2402, subd. (d).) Negative unsuitability factors include (1) the commitment offense and whether it was committed “in an especially heinous, atrocious or cruel manner,” (2) a previous record of violence, (3) an unstable social history, (4) sadistic sexual offenses, (5) psychological factors, and (6) serious misconduct while incarcerated. (§ 2402, subd. (c).)

The Governor concluded that one factor alone -- the “especially heinous, atrocious or cruel manner” of the commitment offense -- outweighs all the positive suitability factors found by the Board as well as the absence of any other unsuitability factor. Although the commitment offense alone *may* constitute a sufficient basis for denying parole (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 683; *In re Dannenberg, supra*, 34 Cal.4th at pp. 1094-1095), that is true only in a case where the particularly egregious nature of the commitment offense reasonably suggests that “the prisoner who committed it is *presently too dangerous*” to be released on parole. (*In re Danenberg, supra*, 34 Cal.4th at p. 1080, emphasis added.) This is just another way of saying that a 25-year-old commitment offense may not be a reliable predictor of an inmate’s current dangerousness, particularly where the prisoner has not engaged in any violence while incarcerated. (*Biggs v. Terhune, supra*, 334 F.3d 910, 916-917; *Irons v. Carey, supra*, 479 F.3d 658, 665; *Rosenkrantz v. Marshall* (C.D.Cal. 2006) 444 F.Supp.2d 1063, 1084-1085; *In re Lee* (2006) 143 Cal.App.4th 1400, 1412; *In re Elkins* (2006) 144 Cal.App.4th 475, 496.)

There is no evidence that this murder was committed in an especially heinous manner, and certainly no nexus between Avalos’s commitment offense and the Governor’s finding that he poses a current risk of danger to society. The

factors that typically support a finding that a murder was particularly heinous are not present here -- there was only one victim; the murder was not planned or calculated in the sense of an execution-style killing (Avalos had a gun because he was responsible for the bar's money); the victim was not abused, defiled, or mutilated; there is nothing to show "an exceptionally callous disregard for human suffering"; and the motive seems to have been fear, albeit an irrational fear. (§ 2402, subd. (c)(1).) Every murder is terrible in its own right, but not every murder is especially heinous, atrocious or cruel. (*In re Scott* (2005) 133 Cal.App.4th 573, 595-596; *In re Elkins, supra*, 144 Cal.App.4th at pp. 496-497 [every first degree murder is by definition a grave and atrocious offense, and striking the victim several times to ensure his death does not go beyond what is necessary to commit first degree murder].)⁹

But even assuming that the crime *was* to some degree heinous, it was not sufficiently so to establish, without more, that Avalos presently poses a threat to the public safety. Indeed, all of the evidence is to the contrary. At the time of his hearing before the Board, he had been a model prisoner for 23 years, and the prison officials as well as the Board found that he poses no risk at all to the public. He is 72 years old and sick. He wants to return to Mexico, where he has

⁹The Governor's finding that the murder was "exceptionally callous" because Avalos fled the murder scene ignores the fact that the vast majority of murderers flee the scene (which presumably explains why flight is not an unsuitability factor listed in section 2402, subdivision (c)). Although it would have been better to stay and it can arguably be said that leaving was "callous," there is no way to say it was "exceptionally callous." There is no evidence that Avalos "tormented, terrorized, or injured [Cisneros] before deciding to shoot [him]; or that he gratuitously increased or unnecessarily prolonged [his] pain and suffering. . . . Was the crime callous? Yes. However, are the facts of the crime some evidence that [Avalos] acted with exceptionally callous disregard for [Cisneros's] suffering; or do the facts distinguish this crime from other second degree murders as exceptionally callous? No." (*In re Smith* (2003) 114 Cal.App.4th 343, 367.)

work and a home waiting for him. (*In re Lee, supra*, 143 Cal.App.4th at p. 1409; *In re Scott, supra*, 133 Cal.App.4th at pp. 594-601; *In re Andrade* (2006) 141 Cal.App.4th 807, 817-818.) Because the facts of the commitment offense are immutable, reliance on that factor, without regard to subsequent considerations, runs contrary to the rehabilitative goals espoused by the prison system and results in a due process violation unless the circumstances of the crime reliably indicate that the offender will present an unreasonable public safety risk if released from prison. (*In re Elkins, supra*, 144 Cal.App.4th at p. 496.) So it is here -- because the circumstances of Avalos's commitment offense do not rationally indicate that Avalos will present an unreasonable public safety risk if released from prison. (*In re Scott, supra*, 133 Cal.App.4th at pp. 594-596.)¹⁰

¹⁰ The Governor's comments about Avalos's acceptance of responsibility for his actions are not supported by the record because it is clear that no consideration was given to Avalos's limited education and his difficulty expressing himself. The differences in his statements at prior parole board hearings do no more than highlight the problems inherent in the use of interpreters. Similarly, the Governor's statement that Avalos must "come to grips with why he shot" the victim "before [he] could be released" ignores the fact that Avalos has explained that, insofar as he can remember the events of that night, he acted out of fear (and ignores the fact that the man is 72 years old and ill).

DISPOSITION

The petition is granted, and a writ shall issue vacating the Governor's decision, reinstating the Board's decision, and ordering Avalos's immediate release.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.