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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RODERICK MATHEWSON

on

Habeas Corpus.

D055007

(San Diego County
Super. Ct. No. CR86404)

Petition for writ of habeas corpus, Francis Devaney, Judge. Relief granted.

In 1987 a jury convicted Roderick Mathewson of second degree murder with the personal use of a firearm and the trial court sentenced him to prison for 17 years to life. Mathewson, now 41 years old, has remained in prison for the past 21 years and for the last 12 years has been an exemplary inmate. He became eligible for parole in 1998. After three unsuccessful parole hearings, the Board of Parole Hearings (the Board) again found him unsuitable for parole at his 2008 suitability hearing. After the trial court denied a request for habeas relief, Mathewson filed the present petition for writ of habeas corpus. Mathewson essentially asserts the Board's conclusion violates his due process to parole because it is without evidentiary support; it was improperly based primarily upon

the circumstances of his commitment offense and there is no evidence he poses a *current* risk of danger to public safety. We conclude the record does not contain "some evidence" to support the Board's ultimate conclusion that Mathewson was unsuitable for parole because he currently posed an unreasonable risk to public safety. Accordingly, we grant Mathewson habeas relief.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Commitment Offense*

The pertinent facts of Mathewson's offense are derived from our earlier appellate decision in *People v. Mathewson* (May 22, 1989, D007115 [nonpub. opn.]).

"Nineteen-year-old Mathewson and eighteen-year-old Cyrus Lam, the victim, were friends and former fellow employees of the Warehouse entertainment store chain in Thousand Oaks, California, where they met in the summer of 1986. Mathewson was an assistant manager of one store and Lam was a clerk at another until they both resigned. Lam's reason for resigning was that he began to attend college at the University of California, San Diego, beginning in August or September 1986. He took with him the 1984 black Corvette he had received from his parents for his high school graduation. On his part, Mathewson resigned in January 1987 because he knew he was under suspicion of theft of Warehouse store property and funds. He estimated the value of the stolen videotapes, compact disks, and tapes at \$7,000 or \$8,000, and testified he stole at times \$200-\$300 cash daily. Shortly before Mathewson resigned, Lam joined him in making some of these merchandise thefts.

"In March 1986 Mathewson stole a .45 handgun from his stepfather. It was a vintage model with distinctive ammunition. . . .

"[¶] . . . [¶]

"Mathewson and his girlfriend, Jill Bourgeois, had been going together for about a year before he met Lam. They broke up in November 1986 at Mathewson's initiative. She then started going out with Lam, but from her point of view they were just good friends.[¶] Lam told her a number of things about their mutual friend Mathewson, including that he and Lam stole merchandise from the Warehouse, that Mathewson carried around a .45 handgun and also had an automatic rifle,[¶] that Mathewson was involved in an illegal scheme which put Bourgeois's life in danger, and that Mathewson had dated other women while going with Bourgeois.

"Bourgeois visited Lam at his college dormitory apartment in mid-January 1987, and he later wrote her a romantic letter signed, 'Love, Cyrus.' On January 24, 1987, she called Lam to remind him they were just friends. She also talked to Mathewson that day and they agreed to get together the following Saturday. When they did, Mathewson said that Lam didn't know what he was talking about, and he and Bourgeois decided to resume their relationship. Mathewson told Bourgeois he had to work at his new job the next day, at a movie theater, and they each went home.

"Without telling Bourgeois about his plans, Mathewson arranged to go to San Diego to visit Lam. Lam told a friend the purpose of the trip was to dump some of the stolen Warehouse merchandise, as Mathewson was in trouble in Los Angeles and wanted to stay out of town for a while. . . .

"Mathewson flew to San Diego on Sunday, February 1, 1987, checking one piece of luggage with the airline. Lam picked him up at the airport. While socializing at Lam's student apartment, Mathewson told some of the people present and also typed into a computer bulletin board system that he had a .45 gun in his bag, and that 'a .45 is my type of weapon.' During the evening, Bourgeois called Lam and was surprised and angry to learn that Mathewson was there, as she had been told he was going to work that day. She spoke to Mathewson, asking him if he had told Lam she and Mathewson were back together again. Mathewson said no, and she asked to speak to Lam, and told him about the reconciliation. Lam seemed sad and told her it would not work out. [A friend of Lam's] called Lam later that night around 11 p.m. and asked if everything was all right. Lam said everything was okay and that he and Mathewson were about to go to Coronado or Carlsbad to get rid of some videotapes.

"Two residents of the Scripps Ranch area testified they heard shots, four together and one about two minutes later, around 1:38 a.m. the night of February 2, 1987. Lam's body was discovered later that day down an embankment next to Pomerado Road in the Scripps Ranch area. He had been shot in the jaw, head, wrist, and chest. Expert testimony showed the character of the shot to the chest was consistent with the shot having been fired into the body as it lay on the ground. The shot to the wrist could have also caused the wound to the head, assuming Lam had been holding his hand in front of his face in a defensive gesture. Several spent .45 caliber bullets were found at the scene, one under the victim's back. They were consistent with the type of ammunition used for the vintage gun Mathewson stole from his stepfather, and consistent with ammunition

found in Mathewson's room after Lam's death. Lam's body also had an injury to the palm of the hand which appeared to be an abrasion wound possibly caused by the recoil of a gun. The ground around the body showed some signs of a struggle, such as flattened grass and partial shoe prints. In Lam's pocket, investigating officers found an American Airlines baggage tag with Mathewson's name, address, and phone number on it.

"Although Mathewson bought a ticket to return to Los Angeles on an American airline flight departing at 8:40 a.m. on February 2, he did not use it. A motorist saw a black Corvette with Lam's personalized plates going north on Interstate 5 around 10:30 a.m. that day. . . .

"[¶] . . . [¶]

"Police officers interviewed Mathewson about the murder around 5:30 p.m. February 3. He told them Lam had asked him to leave upon learning Mathewson and Bourgeois were getting back together; Lam then drove him to the airport where he slept until catching a plane home. At the officer's request, Mathewson gave them the clothing he had been wearing in San Diego, [including] the pair of gray slacks he wore. Lam's blood type was later found on the slacks. Mathewson told officers he did not have a gun. His stepfather mentioned to the police his .45 handgun had been stolen in March 1986, although he still had some of its distinctive ammunition.

"The next day, Mathewson called [an] investigator . . . and revealed he had stolen his stepfather's gun. He said he and Lam had dumped the gun and some of the stolen Warehouse merchandise in a dumpster during the first week of January. He said he thought Lam must have returned to the dumpster later to get the gun.

"Arrest and search warrants were obtained and executed February 10. The officers found more distinctive ammunition and a pair of shoes which were damp and seemed to have just been scrubbed. Mathewson agreed to talk to investigators and continued to deny any involvement in the killing. He briefly claimed he and Lam had picked up a Mexican guy. In a telephone conversation with Mathewson from the jail, Bourgeois asked, 'You did it, didn't you?' Mathewson answered yes.

"Mathewson was charged with first degree murder with a firearm use enhancement, and proceeded to jury trial. (Pen. Code, §§ 187, 12022.5.) He testified in his own defense, claiming Lam, who was driving the Corvette and had decided to stop the car in order to urinate, had then produced the gun, which Mathewson could see with Lam's flashlight. Lam said, referring to the Mathewson-Bourgeois reconciliation: 'It's not fair. I thought I had something going here and you step in and take it away from me. [¶] . . . [¶] . . . I just won't let you do it.'

"A struggle then ensued on the dark hillside and Lam said he was going to kill him. They wrestled on the ground and Mathewson got the gun away.¹ He then stumbled backward and 'felt him coming at me again,' so he shot him. He denied that one shot came two minutes after the others. After the shooting, Mathewson was scared. He got the car keys out of Lam's pocket, although he wasn't sure if Lam was dead or alive, and drove away. The next day, he called Lam's roommate, asked him if Lam was there, and said Lam had dropped him off at the airport the night before.

¹ Mathewson was 6'1" in height and weighed 165 pounds. Lam was 5'3" and weighed 146 pounds.

"Mathewson testified [he] just couldn't believe it when he realized the gun he shot Lam with was the same gun he had earlier stolen from his stepfather, since he had dumped it in the early part of January. He hypothesized Lam must have gone back to get the gun. Mathewson denied he intended to steal Lam's car or kill Lam."

Based on the above evidence, the jury convicted Mathewson of second degree murder with use of a firearm. The trial court imposed an indeterminate term of 15 years to life for the second degree murder offense and a two-year enhancement for the firearm use.

B. Mathewson's Criminal History and Postconviction Conduct

When Mathewson entered prison, he had no prior criminal record and was a high school graduate. During his approximately 21 years in prison, Mathewson's disciplinary record was nearly flawless. He had a single "115" in 1993 for "conspiracy to escape," and a "128," or minor incident of misconduct, in 1988.²

Mathewson also has participated in numerous self-help and therapy programs, including Alcoholics Anonymous (even though he never had an alcohol or drug problem), Anger Management (where he was a facilitator), Creative Conflict Resolution, Cognitive Behavior Therapy, Crime Impact Program, Peer Education Program, Crime Impact Group, Incarcerated Father's Awareness Program, Veterans' Fundraiser Group, the Lifer Group and the Personal Integrity Course. He has received glowing work reports, numerous

² A CDC Form "115" documents misconduct believed to be a violation of law that is not minor in nature, while a CDC Form "128" documents incidents of minor misconduct. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

commendations from custodial staff and released inmates, favorable mental health evaluations and has developed supportive relationships with family and others.

In addition, Mathewson completed numerous college courses including real estate appraisal, obtained certificates in bookkeeping, accounting, and office services with related technology, and earned state certifications in Mill and Cabinet, as well as completed training in several construction trades. He has further worked as a facilitator and peer counselor in various self-help programs at the institution.

As for parole plans, before his 2008 review hearing, Mathewson had arranged, if released from prison, to live with his mother in Big Bear, California at her bed and breakfast business and work as an office manager there for "room and board plus \$10.00 an hour." He also was currently studying for his contractor's license so he could do some cabinet making and woodworking when he got out as secondary employment.

C. The Present Proceedings

1. Suitability Hearing

At Mathewson's September 23, 2008 suitability hearing before the Board, it was noted that his minimum parole eligibility date was June 1, 1998, and that his last hearing before the Board had been in 2005. It was further noted that Mathewson's life crime was his only crime of record and that he had no juvenile offenses. Additionally, the Board stated it was relying on Mathewson's version of the commitment offense in the August 7, 1987 probationary report as well as the 2008 Life Prisoner Evaluation, which was

represented to be consistent with our earlier appellate opinion in this case.³ The Board noted it had opposition to Mathewson's parole release that was filed by the San Diego Police Department based on the circumstances of the commitment offense being "a vicious homicide," but there was no opposition or appearance by the San Diego County District Attorney.

During the hearing, Mathewson, who had been working as an usher at a theater in Thousand Oaks, California before the life crime, basically described his childhood in southern California and "all over the country" as "tumultuous" to him, because he was continuously uprooted between his two adoptive parents who divorced when he was five years old. He and his sister and brother lived with their mother during the school year and with their father during the summers. Mathewson explained that because of the emotion caused by the separation and moving around, as a young boy he acted out, threw temper tantrums and later stole from his employer and family as a way of getting attention and taking more than he deserved. Through his self-help programs and therapy, especially anger management, Mathewson had become a better person, had learned to deal with his emotional problems, and had reconciled with his family so that he now maintained good relationships with them.

³ Although the 2008 Life Prisoner Evaluation version of facts is not included in the record before us, the probation report is included and one of the psychological evaluations completed for the hearing that recites the facts of the commitment offense provided by Mathewson in the Life Prisoner Evaluation is included. Mathewson's counsel registered no objection to the Board incorporating the statement of facts in these various documents.

In addition to discussing his participation in the various self-help and therapy groups, letters from his family and others offering him assistance with clothing, food, shelter and employment when he is released, his 1993 disciplinary violation, the Board considered Mathewson's two latest psychological evaluations, one done in March 2008 and the other in July 2008, pointing out that the most recent report was extremely positive and placed him in the low risk category for violent recidivism. It was noted that in the March 2008 report, which was prepared by the psychologist who had prepared a report for his prior parole hearing in 2005, stated that "Mathewson has gained a better understanding of the emotional factors that resulted in the murder of his friend. He is now a strong candidate for consideration for release back into society [because he] did not evidence any risk for violence greater than the average person in a free society. His commitment offense was an event, but not an indication of a pattern of violence. [He] has proved his willingness to accept and seek out self-help programs to better himself." The report also noted that Mathewson "takes full responsibility for his actions [regarding the commitment offense]" and that since the 2004 evaluation for the prior parole hearing, "supported by increased maturity, family support and availability of psycho-logical intervention, Mr. Mathewson began a remarkable metamorphosis that has solidly prepared him for a successful release."

When questioned about his parole plans, Mathewson said he would live with his mother in Big Bear, work in her bed and breakfast business and as a back up would go live with his father in Idaho. The Board had letters from both parents supporting Mathewson's living arrangements if released on parole, as well as numerous other

supportive letters concerning his release. He had sponsors and church leaders willing to assist him outside of prison.

Although Mathewson originally elected not to speak with the commissioners on the Board about the "life crime" during the hearing, he waived that right and openly answered questions regarding his commitment offense. Mathewson said he had initially admitted to committing the crime when he testified at trial, but that he had not admitted to the entirety of the crime at that time. After group therapy in prison, he had "admitted to every bit of the crime, every facet of it, taken 100% responsibility for what [he had] done." Mathewson explained that he had "turned the corner" about 12 years earlier after he decided to stop being a child and "step forward and take responsibility for [his] actions and for [his] life and attempt to make [himself] a better person." Then after the last parole hearing, he worked closely in therapy with the psychologist, Dr. Smith, who helped him "get out of [himself]" and to begin to help others. Mathewson valued life now. Although he had always been sorry for what he had done and had always attempted to atone for it "to everyone involved," he had finally become more aware of everything and could not "conceive of hurting another human being."

When one commissioner suggested that Mathewson was reluctant to approach the actual crime itself because he did not discuss the thefts from Warehouse Records where he and Lam had both worked, that Lam's knowledge of the theft coupled with the fact that they ended up in a canyon on the way to the airport where Lam was shot four times indicated Mathewson had a premeditated intent to kill Lam, and that Mathewson's version of the life crime given in an interview with one of the psychologist's was

essentially "trivializing the whole event[, which was] a failure to accept responsibility for what occurred," Mathewson respectfully disagreed. Mathewson maintained that the theft of a couple thousand dollars from Warehouse Records, that was known to many people, was not relevant to what was happening that night. Mathewson explained that although he had not initially been truthful about what he had done, he had consistently for many years told "the Panel and the people that were involved in the process that, yes, I know that I was shooting at [Lam]. As to whether or not I was going to hit him, I did not know. I only say that because it was dark. I don't say that as a means to trivialize or to say, look, I was just waiving the gun around and shooting off or whatever, and he happened to get hit. I knew at the time what I was doing. I have accepted 100% responsibility for pulling that gun out and shooting Cyrus Lam and killing him. I have never, ever waived from that, and I don't ever attempt to trivialize or lessen the severity of what I have done. There is no way for me to do that. I have no right to do that. I took another person's life."

In closing, Mathewson's attorney and Mathewson both stressed the changes Mathewson had made in prison and since his last parole hearing concerning his insight into his life crime for which he took full responsibility. Mathewson's attorney also pointed out that both psychologists had come to the same conclusion about Mathewson's acceptance of responsibility, his level of remorse, and his insight into the crime. Counsel further noted Mathewson's version of the facts were consistent with the facts in the appellate opinion and those "immutable" facts never change even though Mathewson had changed and had become a completely different, better person.

2. The Board's Decision

Based on the totality of the record, the Board concluded that Mathewson was "not suitable for parole, and would pose an unreasonable risk of danger to society and a threat to public safety if released from prison," for at least one year. The Board based its decision on two unsuitability considerations: (1) the gravity of the commitment offense, which it found Mathewson had "committed . . . in an especially heinous, atrocious, cruel manner and it was carried out in a dispassionate and calculated, and in an execution style [manner]," and (2) the fact that Mathewson's "explanation of the crime essentially minimize[d]" his culpability for the offense. As to this latter belief, the Board expressed concern that Mathewson had avoided mentioning he had stolen money from the Warehouse and that Lam knew about the thefts, that Mathewson had made comments to the two psychologists concerning the offense, which were contrary to statements in the coroner's report and the probation report regarding the gun shots and Lam's wounds that suggested a final execution shot,⁴ and the psychologists considered Mathewson's statements, which omitted both the information regarding the shots and the Warehouse thefts, when they concluded he posed a negligible parole risk concerning the life offense.

⁴ The Board specifically pointed out that Mathewson had told one psychologist that "he knew he shot, he found him lying on the ground, he thought that he would die and he panicked and ran," while he told Dr. Smith, "[t]his sounds trivial to the occurrence. I knew what I was doing. I didn't care. I remember pulling the gun out and aiming in the darkness and shooting. I don't know if my intent was to -- I knew my gun was pointed in his direction. The situation was 'if I hit him, and I hit him, but I don't care.'" The Board implied that Mathewson's version of the crime as reported by the two psychologists did not comport with the coroner's report and evidenced Mathewson's minimization of the heinous nature of the crime he had committed.

The Board also noted that "there were problematic relationships in [Mathewson's] unstable social history, particularly at home, whereupon, he had a period of time stealing from family and others and using temper tantrums as a behavioral style."

In addition, the Board acknowledged that Mathewson's current age reduced his recidivism risk, he lacked any assaultive history as a juvenile, had only one disciplinary violation in prison, which although serious, was "a long time ago," had only one "128," and had "very, very satisfactory" parole plans with "tremendous family support and good preparation for fallback, once outside." The Board commended Mathewson on his "excellent programming . . . while . . . in prison," exceptional to above average work reports, completion of numerous classes including college courses, and impressive participation in self-help programs and efforts to help others in need. Nonetheless, the Board found the nature of the commitment offense and the disparity between Mathewson's statements about that offense and the facts concerning the location and number of gunshots minimized the crime and outweighed the positive circumstances in favor of a finding of suitability for parole at that time.

3. The Habeas Proceeding

Mathewson petitioned the San Diego County Superior Court for a writ of habeas corpus alleging the Board's decision finding him unsuitable for parole set forth " 'no evidence whatsoever suggesting that [his] parole poses an unreasonable risk of danger to public safety,' and thus 'fails the some evidence standard of review,' necessitating that the decision 'be set aside.' " Relying on *In re Rozzo* (2009) 172 Cal.App.4th 40, the court denied the petition, stating "[Mathewson] still lacks insight into his actions . . . by

refusing to recognize the heinous nature of his criminal actions as displayed by the disparity between [his] versions of the crime as reported by the psychologists . . . and the heinous, atrocious [and] cruel murder."

Mathewson then petitioned this court for a writ of habeas corpus challenging the Board's decision as unsupported by some evidence that his parole would unreasonably endanger the public, and was arbitrary, in violation of due process. We issued an order to show cause why the relief requested should not be granted.

The Attorney General subsequently filed a return, denying the Board's decision violated due process as it was supported by "some evidence" in the record due to Mathewson's lack of insight into his life crime, and alternatively suggesting that should this court grant the petition, the proper remedy would be to remand the matter to the Board with directions to proceed in accordance with due process. Mathewson filed a traverse, asserting the Board in its denial of parole failed to set forth some reliable evidence showing his release from prison *currently* poses "an unreasonable risk of danger" to public safety.

DISCUSSION

A. The Parole Suitability Framework

As this court recently recognized in *In Re Vasquez* (2009) 170 Cal.App.4th 370 (*Vasquez*), "[t]he granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals *as soon as possible* and alleviate the cost of maintaining them in custodial facilities. [Citations.] Release on parole is said to be the rule, rather than the exception

[citations] and the Board is required to 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' [Citation.]" (*Id.* at pp. 379-380.)

The decision whether to grant parole is an inherently subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that is guided by a number of factors, some objective, identified in Penal Code section 3041 and the Board's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) In making the suitability determination, the Board must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, § 2402), such as the nature of the commitment offense including behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude towards 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;⁵ (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

⁵ 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.

establish unsuitability for parole may still contribute to a finding of unsuitability.

(§ 2402, 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 upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon 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 particular case is left to the judgment of the [Board].' " (*Rosenkrantz, supra*, 29 Cal.4th at p. 654; § 2402, subs. (c), (d).) Thus, the endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz, supra*, at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the [Board] is free to consider facts apart from those found true by a jury or judge beyond a reasonable doubt. (*Id.* at p. 679.) Nonetheless, the Board's decision must comport with due process. (*Id.* at p. 660.)

B. Judicial Review

In *Rosenkrantz*, the California Supreme Court addressed the standard for a court to apply when reviewing a parole decision by the executive branch. The court held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole . . . 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 Board supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.)

In *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), our Supreme Court reaffirmed its analysis in *Rosenkrantz, supra*, 29 Cal.4th 616, that the decision of parole suitability is subject to the "some evidence" standard of review. (*Lawrence, supra*, at p. 1205.) However, in doing so it recognized that *Rosenkrantz's* characterization of that standard as extremely deferential and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra*, at p. 667), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra*, at p. 1206.) The court in *Lawrence*, recognizing that the legislative scheme contemplates "an assessment of an inmate's *current* dangerousness" (*id.* at p. 1205), clarified that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is "whether some evidence supports the *decision* of the Board that the inmate constitutes a current threat to public safety, and not merely

whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212.)

As to this standard, the court in *Lawrence* further explained that although it was "unquestionably deferential, [it was] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors *with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision*--the determination of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1210, italics added.) Because consideration of public safety is the primary statutory issue to be determined in deciding whether an inmate should be granted parole (Pen. Code, § 3041, subd. (b); *Lawrence, supra*, at p. 1205), "[t]his inquiry is, by necessity and by statutory mandate, an individualized one," and requires a court to consider the circumstances surrounding the commitment offense, along with the other facts in the record, to determine whether an inmate poses a current danger to public safety. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255 (*Shaputis*).

Regarding such consideration, "although the Board . . . may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the

statutory determination of a continuing threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1214.)

In this case, because the court below denied Mathewson's petition for a writ of habeas corpus, the current petition for habeas relief is an original proceeding that requires we independently review the record to determine whether there is some evidence to support the Board's decision in denying Mathewson parole. (*In re Scott* (2004) 119 Cal.App.4th 871, 884.) In other words, "we independently review the record [citation] to determine 'whether the identified facts [by the Board] are probative to the central issue of current dangerousness when considered in light of the full record before [the Board].' [Citation.]" (*Vasquez, supra*, 170 Cal.App.4th at pp. 382-383.)

C. Analysis

As noted above, the Board's decision in denying a grant of parole was expressly premised on two related factors, the circumstances of the commitment offense, which the Board found to be committed in "an especially heinous, atrocious, cruel manner" and Mathewson's "minimization" of the circumstances of that offense. Specifically, the Board referred to evidence regarding the number of shots and the location of the gunshot wounds on Lam's body that suggested the killing "was carried out in a dispassionate and calculated, and in an execution style. . . ." as well as Mathewson's failure to fully recognize such evidence because he had made statements to the psychologists for the parole hearing that the Board thought conflicted with the facts of the crime and thus minimized the offense. The Board also noted that "there were problematic relationships in [Mathewson's] unstable social history, particularly at home, whereupon, he had a

period of time stealing from family and others and using temper tantrums as a behavioral style," and that none of the facts in the original probation report about the thefts from the Warehouse Record's store "had been revealed to either of the psychologists in the making of their reports."

Although we generally confine our review to the factors actually articulated by the Board for its decision (*In re Burdan* (2008) 169 Cal.App.4th 18, 35; *In re DeLuna* (2005) 126 Cal.App.4th 585, 593-594), before considering the Board's reliance on those factors, we briefly dispose of the Board's mention of the latter two facts concerning Mathewson's social history and the revelation of facts to the psychologists for their reports. (See *Lawrence, supra*, 44 Cal.4th at p. 1222.)

1. Mention of Other Factors

A. History of Unstable or Tumultuous Relationships

Even though the Board may properly consider a defendant's history of unstable or tumultuous relationships with others as a factor for finding unsuitability for parole in a particular case (§ 2402, subd. (c)(3)), any such reliance here would be unpersuasive. Other than the precommitment evidence of unstable or tumultuous relationships with others, which stemmed from childhood emotional problems due to the divorce of his adoptive parents and his constant moves between households while growing up, and which were openly discussed by Mathewson with the Board as well as with the psychologists for the hearing, the evidence showed that Mathewson had treated such problems through extensive therapy and self-help programs in prison. The psychologists both noted that Mathewson had worked hard to understand his various childhood and

relationship problems and no longer suffered from any personality defects or instability in relationships. The evidence before the Board revealed that Mathewson's current relationships with others were stable, including having good relationships with fellow inmates and prison staff while incarcerated; and maintaining strong and ongoing ties with his family and other friends outside of prison.

More importantly, we perceive no conceivable, rational relationship between the long ago events described by the Board based on Mathewson's own statements and an assessment of Mathewson's *current* dangerousness, especially considering his productive and discipline-free years of stability in prison. (See *Lawrence, supra*, 44 Cal.4th at pp. 1205-1206.) Thus, to the extent the Board considered Mathewson's relationships, temper tantrums and stealing nearly 21 years ago as evidence of his current dangerousness, the Board appears to have relied on "immutable conduct" of ancient vintage to assess current dangerousness that *Lawrence* expressly cautioned was error absent some rational nexus suggesting those acts remain predictive of current dangerousness. Because Mathewson's postconviction history reflects an ability to maintain stable interpersonal relationships, the historical facts alluded to by the Board are not "probative of the determination that [Mathewson] remains a danger" if released on parole. (*Lawrence, supra*, 44 Cal.4th at p. 1212.)

B. The Facts in the Probation Report

Nor do we find persuasive the Board's point that the facts concerning the thefts from Warehouse Records in the original probation report were not "revealed to either of the psychologists in the making of their reports." Because Dr. Smith had completed the

2004 evaluation of Mathewson for the Board, her report to the Board for the 2008 hearing concentrated solely on updating the changes in Mathewson since that time, his stability and his rehabilitation, and did not discuss the commitment crime. Under such circumstances, it was irrelevant whether Dr. Smith was informed about and considered any information in the original probation report.

In addition, because the other psychologist, Dr. Stephen Jenkins, specifically mentioned the facts of the original probation report in setting out the facts of the life crime in his report for the 2008 parole hearing, we cannot find any evidence supports the Board's finding that information about the thefts in that report was not revealed to Jenkins.

2. The Commitment Offense and Related Reason of "Minimization"

Returning to the stated reasons for the Board's decision, we note that the circumstances of the commitment offense are despicable and fully justify Mathewson's conviction and sentence for second degree murder. However, even though there is some evidence to support the Board's finding that this second degree murder was committed in an "especially atrocious matter," i.e., by his own statements he aimed the gun at Lam, shot at him repeatedly, not knowing how many times and not caring, and left him on the ground knowing he would probably die, such would only provide "some evidence" to support the Board's ultimate conclusion and reversal of the parole grant here if there were other facts in the record, such as the inmate's history before and after the offense or the inmate's current demeanor and mental state, to provide a "rational nexus" for concluding Mathewson's offense of ancient vintage continues to be predictive of current

dangerousness. (*Lawrence, supra*, 44 Cal.4th at pp. 1210, 1213, 1221.) As the court in *Lawrence* stated, "the mere existence of a regulatory factor establishing unsuitability does not necessarily constitute 'some evidence' that the parolee's release unreasonably endangers public safety. [Citation.]" (*Id.* at p. 1225.)

The Attorney General argues that the Board's second express reason, that Mathewson's explanation of the crime "essentially minimizes [culpability]" was analogous to finding Mathewson lacked insight into the circumstances of the commitment offense and that such provides the "rational nexus" for concluding he still provides a danger to society. We disagree.

Although the Board acknowledged that Mathewson had spoken at the hearing about the commitment offense in a "forthright manner," it believed he had avoided the facts of the Warehouse Records store, also known to Lam, and had minimized his culpability for the life crime in his statements to the psychologists, which the Board quoted.⁶ The Board then commented that Mathewson's statements conflicted with statements in the coroner's report as to the location of the gunshot wounds on Lam and also with statements in the probation report about two women having heard a series of four shots and two minutes later hearing another shot which the Board characterized as "a final execution shot." Because Mathewson's statements did not acknowledge all the facts that the Board believed were true, it opined Mathewson was minimizing the crime and

⁶ As the Attorney General in his return points out, the Board incorrectly attributed some of Mathewson's statements as being made to Dr. Smith when in fact they were made to Jenkins.

not really taking responsibility for the offense. In essence, the Board was requiring Mathewson to admit to first degree premeditated murder based on its version of facts even though the evidence at trial could support Mathewson's version that the shooting was an intentional act that was not premeditated.

The Board "is precluded from conditioning a prisoner's parole on an admission of guilt. (Pen. Code, § 5011, subd. (b); Cal. Code. Regs, tit. 15, § 2236.)" (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1110.) Similar to the prisoner in *Palermo*, and unlike the inmates in *Shaputis, supra*, 44 Cal.4th 1241, *In re McClendon* (2003) 113 Cal.App.4th 315, and *In re Van Houten* (2004) 116 Cal.App.4th 339, Mathewson's "version of the shooting of the victim was not physically impossible and did not strain credulity such that his denial of a [premeditated] killing was delusional, dishonest, or irrational. And, [contrary to the Board's finding, and] unlike the defendants in *Van Houten, Shaputis*, and *McClendon*, [Mathewson] accepted 'full responsibility' for his crime and expressed complete remorse; he participated effectively in rehabilitative programs while in prison; and the psychologists who evaluated him opined that he did not represent a risk of danger to the public if released on parole. Under these circumstances, his . . . insistence [prior to the most recent suitability hearing] that the killing was the unintentional result of his . . . [intentional] conduct (a claim which is not necessarily inconsistent with the evidence) does not support the Board's finding that he remains a danger to public safety. [Citation.]" (*Palermo, supra*, 171 Cal.App.4th at p. 1112.)

During the 2008 hearing, Mathewson never claimed that he committed the life offense in self-defense as he had at trial and as he had maintained up until 1991 when he

finally admitted that he had intentionally shot at Lam. Since 1991, Mathewson had been consistent in his acceptance of 100 percent responsibility for killing Lam and expressed remorse for his horrible conduct in doing so. Since his 2004 psychological evaluation with Dr. Smith, Mathewson had also taken responsibility for his adolescent behaviors, especially those involving his childhood development and family dynamics, and had "gained a better understanding [of] the emotional factors that resulted in the murder of [Lam]." Dr. Jenkins noted that Mathewson had significant insight into the causal and contributing factors related to his life crime, specifically insecurity, jealousy and anger, and had worked to resolve those factors through therapy, group and participation in pertinent studies. Both Drs. Smith and Jenkins concluded that Mathewson showed signs of remorse, indicated an understanding of the nature and magnitude of the offense and accepted full responsibility for his behavior. Although the Board is not bound by the psychologist's findings, nothing in the record contradicts them. Accordingly, the Board's reliance on Mathewson's purported minimization of his offense is not supported by the record and does not constitute some evidence of current dangerousness.

Thus, although "we acknowledge that some evidence in the record supports the Board's conclusion regarding the gravity of the commitment offense, we conclude there does not exist some evidence supporting the conclusion that petitioner *continues* to pose a threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1225.) But for the immutable nature of his life crime, and the unsupported inference that he minimized that crime or did not have insight into its commission, all the applicable regulatory criteria indicate that Mathewson is suitable for parole. (§ 2402, subd. (d).) Mathewson has been a model

prisoner since 1993; he has addressed the immaturity, jealousy and anger that led to his life crime via formal self-help, vocational and educational programs, and therapy. He has no prior criminal record of violent crimes or assaultive behavior or any juvenile record, has no current mental health issues, and has remained discipline free in prison for over 15 years. The psychological evaluators have unanimously concluded that Mathewson is a very good candidate for parole and would unlikely reoffend, finding him to be in the very lowest risk group for violence if released. The evidence at the hearing showed that Mathewson was credible, remorseful and that he had insight into his crime for which he accepted full responsibility. Mathewson further has marketable skills, a supportive family, realistic parole plans, including a job offer, plus backup plans and a home with his mother.

Given the undisputed evidence of Mathewson's rehabilitation and the lack of some evidence of current dangerousness to support the Board's decision, we are compelled to conclude under the standards adopted by *Lawrence, supra*, 44 Cal.4th 1181, and applied in this case, that the Board's decision is not supported by some evidence and therefore violated Mathewson's due process rights. Accordingly, Mathewson is entitled to habeas relief. Because the Board's finding of no suitability for parole has no evidentiary support, it cannot stand.

3. The Appropriate Remedy

The Attorney General asserts that, even if the Board's decision lacks evidentiary support, the appropriate remedy is to order the Board's decision denying parole vacated and to remand for further proceedings in accordance with due process standards

(*Rosenkrantz, supra*, 29 Cal.4th at p. 658), rather than to order the Board to calculate Mathewson's parole release date as he requests. Although many factual situations may justify the remedy suggested by the Attorney General, those in this case do not.

Here, it appears from the record that the Board considered Mathewson's entire file, and fully articulated all of the reasons supporting its conclusion he was unsuitable for parole in compliance with Penal Code section 3041.5, subdivisions (a)(4) and (b)(2); reasons we have concluded do not support the ruling. Faced with an identical question of the appropriate remedy for such a situation, the court in *In re Gaul* (2009) 170 Cal.App.4th 20 (*Gaul*) noted, that when a reviewing court concludes no evidence supporting current dangerousness exists, "vacating the denial of parole and directing the Board to conduct a new hearing on the same record would be a meaningless exercise." (*Id.* at p. 39; accord, *In re Gray, supra*, 151 Cal.App.4th 379, 411; *In re Smith* (2003) 109 Cal.App.4th 489, 507.) Although the court in *Gaul* construed the analysis and disposition in *Lawrence, supra*, 44 Cal.4th 1181, as permitting an order requiring the Board to immediately grant parole to the prisoner there, it also "acknowledge[d] the theoretical possibility--however unlikely it may be--that Gaul has engaged in conduct since the [prior] parole hearing that would suggest he is no longer suitable for parole. Accordingly, rather than simply order Gaul released forthwith, . . . [the court directed] the Board to find Gaul suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new evidence of Gaul's conduct in prison subsequent to his [prior] parole hearing supports a determination he currently

poses an unreasonable risk of a danger to society if released on parole." (*Gaul, supra*, 170 Cal.App.4th at p. 40.)

We agree with the reasoning in *Gaul* that, because nearly a year and a half has elapsed since Mathewson was denied parole, it is theoretically possible some intervening event has transpired since the prior parole hearing that might support a finding he is no longer suitable for parole. (*Gaul, supra*, 170 Cal.App.4th at p. 40.) Accordingly, we remand for the limited purpose of providing the Board the opportunity to determine whether events since September 2008 support an unsuitability determination.⁷

DISPOSITION

The relief sought in the petition for writ of habeas corpus is granted. The Board is directed to find Mathewson suitable for parole unless, within 30 days of the finality of this decision, the Board schedules a hearing for a date not more than 120 days after the finality of this decision to permit compliance with Penal Code section 3043, subdivision (a), for the limited purpose of determining whether new evidence of Mathewson's conduct in prison subsequent to his September 2008 parole hearing supports a determination he currently poses an unreasonable risk of a danger to society if released on parole. In the interests of justice, this decision is made final as to this court seven days

⁷ To the extent the Attorney General suggests that a full remand is required to prevent a violation of due process or the separation of powers doctrine, such assertions have been rejected recently in *In re Masoner* (2009) 179 Cal.App.4th 1531, 1538-1539.

from the date of filing. (Cal. Rules of Court, rule 8.387(b)(3)(A); *Gaul, supra*, 170 Cal.App.4th at p. 41.)

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.