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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re	
LEE STABEN,	E041712
On Habeas Corpus.	(Super.Ct.No. RIC454914)
	OPINION

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Petition granted.

Marc Elliott Grossman and Richard Pfeiffer for Petitioner.

Edmund G. Brown, Jr., Attorney General, and Amanda Lloyd, Deputy Attorney General, for Respondent.

In this matter petitioner Lee Staben challenges a decision by the Board of Parole Hearings (Board) finding him unsuitable for parole.[1] We resolve the case on the

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[1] Following a hearing before the Board on December 20, 2002, petitioner was found *suitable* for parole. However, this was reversed by the Governor under the authority granted by Penal Code section 3041.2. The instant petition involves the Board's decision following a hearing held on August 8, 2005.

simple basis that no evidence supports the Board's stated reasons for this finding. Accordingly, we will direct the Board to vacate its decision and conduct a new parole hearing for petitioner, following the guidance provided in this opinion. (Pen. Code, § 3041, subd. (b).)[2]

FACTS OF THE OFFENSE

In 1991, petitioner was convicted of two counts of second degree murder (§ 187), and the jury also found true a "personal use" enhancement under section 12022.5. He received concurrent terms of 15 years to life for the murders and a three-year enhancement for the firearm use.[3] With one significant exception, which we will discuss below, the circumstances surrounding the killing are not in dispute. We take our primary recitation of facts from that given by the Board, which in turn derived from a correctional counselor's report, which is not itself part of the record. Elements added by petitioner at the hearing are so noted.

In May 1990, petitioner and his girlfriend had moved into a residence that was to be shared with Wayne Goodhue and his girlfriend, Donya Boyd. According to petitioner, Goodhue was twice his age (43 years of age as against petitioner's 19). Goodhue, however, did not pay his portion of the rent, and after an argument with petitioner,

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

[3] This represented the *low*, or mitigated, term for the enhancement. (§ 12022.5, subd. (a).)

Goodhue and Boyd moved out.[4] Petitioner was evidently concerned, because on July 12, 1990, he contacted the Riverside County Sheriff's Department concerning the argument and apparently stated that Goodhue had threatened him with a stick or club.[5] He also told the Board that Goodhue had threatened to harm him or his family after that altercation. He also borrowed a shotgun from his brother-in-law.

Goodhue and Boyd moved into a small trailer. On July 15, 1990, petitioner and his girlfriend were away from home on a "family outing." When they returned, they found that their home had been burglarized and vandalized; petitioner testified that "unmentionables" had been done to the house. Among the items stolen was a television set.

Petitioner suspected Goodhue and drove angrily to Goodhue's trailer with the shotgun. It was well after dark, but before 10:30 p.m. Petitioner's testimony was (and has consistently been) that he banged on the door of the trailer and shouted but received no response. When he saw what he believed to be his stolen television set against a window, he pulled the extruding cord until it crashed to the floor. He still heard nothing.

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[4] At the previous hearing, petitioner explained that the older Goodhue was named on the lease because petitioner had no credit history. Petitioner gave his share of the rent money to Goodhue, but Goodhue never gave it to the landlord.

[5] At the hearing, petitioner described the weapon as a pickaxe handle. Our opinion on appeal (*People v. Staben* (Mar. 10, 1993, E010375) [nonpub. opn.]) also contains the details corroborating petitioner's anxiety. Petitioner seemed frightened of Goodhue after the argument; he changed the locks, boarded up and covered the windows, and would not let his girlfriend go outside.

Petitioner then went to his truck and drove off, but almost immediately returned to the trailer and fired one blast from his shotgun through a window.[6] He told the Board that his intention was simply to cause damage to Goodhue's home in retaliation for the damage he believed Goodhue had caused to his home, and to warn Goodhue not to trifle with him. Tragically, however, both Goodhue and Donya Boyd *were* in the trailer; Boyd was fatally wounded and her eight-month fetus also died. Goodhue suffered minor injuries.

According to petitioner's version, he was unaware that Goodhue and Boyd were in the trailer. The only "evidence" to the contrary was a statement by a neighbor, Carrie McClearan, who had recognized petitioner and heard him yelling obscenities and profanities at the trailer.[7] According to the deputy district attorney who attended the parole hearing, Ms. McClearan's statement also indicated that she believed that petitioner was "getting some response" to his shouts. This statement is not in the record before us, although it may have been presented to the Board.

It is, however, reasonably clear that there was no testimony at trial that suggested that petitioner knew that the trailer was occupied.[8] The deputy district attorney who

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[6] The window was boarded up on the inside, so petitioner could not have seen into the trailer. However, he also stated that he did not realize it was boarded up.

[7] Petitioner did not deny the use of vulgar language.

[8] Our opinion indicates that eyewitness testimony was provided by a neighbor named Robin Farrington, but there is no reference to Ms. McClearan. Farrington testified only that petitioner appeared to be "listening" at the windows. Evidence tending to show

[footnote continued on next page]

prosecuted petitioner, E. Michael Soccio, in 1993 wrote a letter, which wound up in petitioner's file.[9] While acknowledging that petitioner's actions were "inappropriate and deadly," Soccio expressed the belief that "he did not know he would injure anyone when he fired his shotgun . . . there was no evidence to indicate that he probably did not know that anyone was in there."[10] Soccio at that time recommended leniency and confirmed this position in a later letter submitted in approximately 2000.[11]

FACTORS PERTINENT TO PETITIONER

At the time of the killings, petitioner was 19 years old and had no prior criminal or

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[footnote continued from previous page]
that petitioner was aware that someone was inside the trailer would have been extremely relevant and critical to the prosecution's attempt to prove first degree murder.

[9] The letter was addressed to "Mr. Zarate" at a post office box in Calipatria. The letter states that Soccio was "writing to provide you with information regarding my impression of Mr. Staben," but it is not clear who Zarate is or was.

[10] Goodhue apparently also did not testify. The probation report indicates that he could not be located at the time the report was prepared.

[11] Although a detailed legal analysis is unnecessary, if he were to be retried today, petitioner would be entitled to instructions on manslaughter. It appears that such instructions were refused at the time because it was believed that *intent to kill* was an element of voluntary manslaughter; we now know that this is not the case. (See e.g., *People v. Lasko* (2000) 23 Cal.4th 101, 110.) On appeal, we commented that because the prosecutor obtained instructions on *first degree* murder, it was reasonable to suppose that there was sufficient evidence of intent to support voluntary manslaughter. However, we found any error harmless because the evidence of "heat of passion" was inadequate. Absent the "intent" issue, the trial court might well have instructed on manslaughter; and trial counsel's conversations with a number of the jurors strongly suggests that the jury might well have been eager for the opportunity to convict of a lesser charge. As it was, the only options were acquittal or a murder conviction.

juvenile record. After graduating from high school, he became employed in a cabinet shop but was terminated for taking excess time off after the birth of his son.[12] He then began to support himself trading motor vehicles, at which time he became acquainted with Goodhue. He had no history of substance abuse although he had experimented with marijuana and alcohol while in high school.

While incarcerated, petitioner has been virtually discipline free. In 1993 he received a "115" for pilferage.[13] On the other side, he has consistently received good work reports; particularly, a laudatory "chrono" for his accomplishments in vocational welding, which he hopes to pursue on release. The most recent document in the file, covering an unspecified period beginning sometime in 2004, notes that he had acquired two new certificates (plumber and electrician) and had received numerous "laudatory chronos" relating to his "positive, respectful attitude, cooperation with staff and excellent work performance." He also received a total of 10 favorable reports relating to work performance. At the hearing, the Board quoted briefly from several of his supervisors, who consistently used terms such as "self-motivated," "hard worker," "positive attitude," "non-aggressive," and "mature and calm."

Petitioner has also participated in a number of "self-help" programs, primarily religiously oriented. Among his support letters submitted to the Board were two

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[12] His son was borne by his then girlfriend, to whom he later had a brief marriage.

[13] The 2002 panel evidently examined the record in detail and learned that it involved the theft of cans of soda from the canteen; the prison authorities could not determine who was responsible, but gave "115's" to everyone working in the canteen.

commending him for his efforts to reach at-risk youth as part of Convicts Reaching Out to People (CROP). He also participated regularly—three to four times a week—in "church programs."

If released, petitioner intended to live with his parents in Orange County, joined by his wife.[14] He had offers of employment in both plumbing and welding; he indicated that although he considers welding to be his primary trade, he would be inclined to accept the plumbing job because he viewed the employer as better-established.[15] He had letters of support from his sister-in-law, aunts, stepdaughter, niece, and cousins. One cousin represented that petitioner "comes from a large family of productive and responsible members of society. He has a huge support network waiting for him."

THE HEARING

After the presentation of general information, the Board read into the record portions of a letter from the district attorney's office in Riverside County opposing petitioner's release on parole. The only stated reason was "evidence of premeditation and deliberation." The Board referred to the Governor's denial letter of 2002, which expressed concern that petitioner's record did not exhibit substantial self-help efforts between 2002 and 2005; petitioner's response was that he had for some time been compelled to choose, time wise, between AA/NA and his church meetings, and that he

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[14] After his marriage to the mother of his child dissolved, petitioner married his current wife in 2001.

[15] He had an additional job offer from a cousin in Washington who operates a sign graphics business. However, this out-of-state offer was deemed secondary.

had felt that the latter better served his needs. Nevertheless, and despite a letter from the prison pastor, the Board expressed concern that there was no specific "proof" of his participation.[16]

The Board also referred to the Governor's concerns that petitioner needed "anger management." Petitioner responded that he had participated in a Hands of Peace program, which the Board noted was "some time ago." Petitioner then explained that no such program was currently available to him, and cogently pointed out, that in over 15 years of incarceration, he had not been cited for a single violent or impulsive act. The Board then asked if he read any books on such topics, and petitioner answered that he read several self-help books each year. When asked, he was able to name the last two books he had read.[17] The Board then suggested that he should prepare "book reports" in the future.

The Board then reviewed petitioner's 2001 psychological report—the most recent available. Salient points noted were the absence of any significant drug or alcohol history; no mental disorder; and his lack of the typical "risk factors" such as gang affiliation, substance abuse, lack of support, and chronic aggression. However, the Board also noted that the report listed petitioner's insight as "fair" and that no opinion was

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[16] It did note a certificate of completion for a religiously-based correspondence course in 2005 and petitioner's participation in Feed the Children, also in that year. There was also corroborating evidence of his participation in the CROP program.

[17] Harris, I'm O.K, You're O.K. (1969) and Warren, The Purpose-Driven Life (2002).

given as to petitioner's risk of violence in society.[18] Petitioner commented that he had requested a current evaluation but that this had been refused because only the Board could order this, which it had not done. Interestingly, at petitioner's 2002 hearing, the Board quoted from a 1998 evaluation, which *did* specifically state that "[petitioner's] potential for violence within the community, as well as the free community, are considered to be less than average at this time and to remain so in the future." There was no reference to such an evaluation at the current hearing.

After reading a letter from Donya Boyd's sister opposing parole, the Board allowed a representative from the district attorney to question petitioner about the statement by Carrie McClearan; petitioner continued to deny the accuracy of any suggestion that he heard responses. The district attorney also suggested that shooting into the trailer was somehow inconsistent with an intent to do vandalism. He also insinuated that petitioner might have intended his shot to ignite a propane tank at the front of the trailer; petitioner denied knowing that a tank was there.

Finally, the Board asked petitioner to explain what insights he had acquired that would prevent him from offending again. Petitioner attempted to express how his responsibility for Donya Boyd's death had motivated him to "become a better person . . . to take a good honest look at myself. I think that the only way that I could make amends for what I did is by . . . developing changes in myself, mentally, physically, spiritually, educationally, vocationally." Told that he was not answering the question,

[18] The evaluator considered him a *low* risk in a controlled setting.

petitioner indicated that he was reluctant to "throw[ ] the religious card out there," but asserted that his spiritual experiences had resulted in positive changes. Earlier in the hearing, when asked about his feelings about the crime, petitioner had stated, "I feel horrible about it . . . Donya was my friend . . . her death has been a motivation for me to better myself and to change my life, not because of what your expectations might be of me, but because of being able to look at myself in the mirror . . . it disturbs me as much today as it did then. And I don't think I'll ever get beyond that."

In a final statement, the district attorney continued to assert that petitioner "probably did know that there was somebody inside that trailer sleeping,"[19] referring again to the McClearan report.

In finding petitioner unsuitable for parole, the Board relied "primarily" upon the "gravity of the offense," which it found to be "especially calculated" and "especially cruel and callous." It also expressed the view that petitioner had not "sufficiently participated in beneficial and self-help programs, specifically in the area of anger management and other self-help programs that would focus on the development of insight and remorse." It found that the most recent psychological report "does not appear to be totally supportive of release" and was critical of parole plans. It ruled that no further hearing would be held for two years.

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[19] The prosecutor's attempt to paint a picture of a sleeping victim is unpersuasive. Not only had petitioner spent 10-20 minutes banging on the door and yelling; he had also pushed a television set onto the floor.

DISCUSSION

Although petitioner devotes a substantial amount of his brief to arguments generally criticizing the continued use of an invariable factor such as the nature of the crime to deny parole, we need not address the significant legal issues he raises. We find that, even under the deferential review we give to parole decisions, there is *no* evidence supporting a finding of unsuitability under the applicable criteria.

As is true for most decisions involving the confinement of inmates, a decision granting or refusing parole must be upheld if it is supported by "some evidence" and as long as the Board considers all relevant circumstances and factors. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 626; see also *Superintendent v. Hill* (1985) 472 U.S. 445, 455-456**.**) "Consideration of public safety" is the primary statutory issue to be determined by the Board in determining whether to set a parole date. (§ 3041, subd. (b).) However, the Legislature also instructs the Board to follow guidelines set out in the Code of Regulations.[20]

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[20] The "suitability/unsuitability" factors are set out in California Code of Regulations, title 15, section 2402. Several of the "unsuitability" factors relate to the commitment offense and the ultimate finding that it was "especially heinous, atrocious, or cruel"; multiple victims; commission of the offense in a dispassionate and calculated manner; abuse, defilement, or mutilation of the victim; commission of the offense in a manner demonstrating "exceptionally" callous disregard for human suffering; and triviality of motive. Others relate to the inmate: previous record of violence; unstable social history; sexual sadism; mental problems; and institutional misconduct. On the "suitability" side, the regulation lists lack of juvenile record, stable social history, remorse, significant stress as a motivation, battered woman syndrome, lack of criminal history, current age, plans for the future, and institutional behavior.

Although our review is deferential, as the court aptly commented in *In re Scott* (2004) 119 Cal.App.4th 871, 898, this "does not convert a court reviewing the denial of parole into a potted plant." Not only must there be "some evidence" supporting the decision; that evidence must have """some indicia of reliability.""" (*Id.* at p. 899, quoting *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 915.) Thus, we proceed to examine the factors of unsuitability upon which the Board relied.

Among the various factors specified in the governing regulations (see fn. 20), the Board may properly rely solely on the aggravated nature of the offense. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1071.) However, "a life term offense . . . must be particularly egregious to justify the denial of a parole date." (*In re Ramirez* (2001) 94 Cal.App.4th 549, 570 (*Ramirez*) [disapproved on another ground by *In re Dannenberg, supra,* 34 Cal.4th 1061, 1082-1083, 1100].) The offense must reflect circumstances that "reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 683.) As the court pointed out in *Ramirez*, section 3041, subdivision (a), provides that on its *initial* review conducted one year before a life inmate's minimum eligible parole release date, a panel "shall *normally* set a parole release date." (Italics added.) *All* life crimes, and especially all murders, are grave and highly reprehensible offenses. But, unless the panel is required to specify some *unusually* cruel, violent, or depraved circumstances, reliance on the "gravity of the offense" alone would "swallow" the "normally" rule, and would also destroy the proportionality structure enacted by the Legislature in imposing terms of (for example) straight life (aggravated kidnapping, § 209), 15 to life (most

second degree murders, § 190, subd. (a)), and 25 to life (noncapital first degree murders and some second degree murders; § 190, subds. (a) & (b).)

Second degree murder is a killing committed *with* malice, express or implied, but *without* the mental state of willful, deliberate premeditation. (§§ 188, 189.) Malice is implied if "no considerable provocation appears" (§ 188; cf. § 192, subd. (a)—voluntary manslaughter) or the circumstances of the killing "show an abandoned and malignant heart."[21] (§ 188.) The latter, in turn, requires """an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."' [Citation.]" (*People v. Robertson* (2004) 34 Cal.4th 156, 164.)

Petitioner was convicted of two counts of second degree murder. Was it "especially heinous, atrocious, or cruel?" The record indicates that it was not.

First, in our view, the fact that two lives were taken does not, in the unique circumstances of this case, bring this case under the "multiple victims" guideline or make this an unusually atrocious killing. While we by no means intend to minimize the death of a fetus, petitioner, as we explain below, can have had no knowledge that his shot was

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[21] In this case, the jury was instructed on theories of express malice or implied malice arising from the commission of an act inherently dangerous to human life. (*People v. Staben*, *supra,* E010375.) The jury was not instructed on second degree felony murder based on shooting at an occupied residence (§ 246) because the trial court believed that that offense "merged" in the killing. (See *People v. Ireland* (1969) 70 Cal.2d 522.) This view was later proved to be erroneous. (See *People v. Hansen* (1994) 9 Cal.4th 300, 316.)

likely to take a single life, let alone two. The fact that Donya Boyd not only suffered fatal injuries, but that those injuries also proved fatal to her child, is tragic, but it does not increase petitioner's moral culpability.

Next, the Board found the offense to be both "calculated" and "cruel and callous." According to section 2402, subdivision (c) of title 15 of the California Code of Regulations, this is an appropriate factor to consider in evaluating the gravity of the specific offense. As we suggested above, "[t]he measure of atrociousness is not general notions of common decency or social norms, for by that yardstick all murders are atrocious." (*In re Lee* (2006) 143 Cal.App.4th 1400, 1409.) Similarly, "'all second degree murders by definition involve callousness-i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and sufferings of others.' [Citation.]" (*In re Scott, supra,* 119 Cal.App.4th at p. 891.) As for the supposed factor of "calculation," it is true that petitioner armed himself before going to Goodhue's trailer. However, this would be equally true of many second degree murders. The guidelines make clear that far more is necessary to make a killing "calculated" by giving as an example an "execution-style murder." Nor was the killing especially cruel or callous. There is no evidence that petitioner intended to, was aware that he did, or even *did* inflict cruelly extreme pain, and none that he was indifferent to the victims' sufferings. He did not taunt the victims, gloat over their distress, or refuse to allow others to help them. (Cf. *People v. Misa* (2006) 140 Cal.App.4th 837, 842-843 [a torture case under § 206].) Viewed under the appropriate guidelines, petitioner's crime simply does not qualify as

unusually calculated, cruel, or callous. He blindly fired a single shot into the trailer and left.[22] That is all.

Nor is there any evidence that would support a positive finding based on any other circumstance set out in the guidelines as tending to show that the offense was exceptionally bad. The victims were not "abused, defiled, or mutilated"; petitioner's motive—to protect himself and his family—was not "inexplicable or very trivial." Finally, we have explained above why the "multiple victims" element is inadequate in this case to elevate the offense to a level justifying denial of parole.

Although we have not ourselves compiled statistics, and are unaware of any such compilation, our review of published cases and the regular stream of petitions for habeas corpus complaining about parole denial makes it clear that the Board almost always relies on the "exceptional" nature of the offense as a basis—often the only basis—for denying parole. And we are not the first court to criticize an overly broad reliance on this factor.

In *In re Scott, supra*, 119 Cal.App.4th 871, the victim was not only having an affair with defendant's wife, but was also supplying her with drugs. The victim had also threatened defendant with a gun. On the night of the killing, defendant's wife indicated she wished to reconcile with him but then left. Defendant went to the victim's home, believing that his wife was there. Indeed, she and the victim were "hugging affectionately" on the lawn, and defendant drew a pistol, told the victim he was going to

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[22] The shooting occurred at about 10:30 p.m.—an hour when the victims would not necessarily have been home.

kill him, and did so.[23] Rejecting the Board's findings, the Court of Appeal held that the crime was *not* committed in a "dispassionate and calculated" manner (citing the emotional stress Scott was under); his motive—not just jealousy, but concern that the victim was supplying his wife with drugs—was *not* trivial; and it did not involve the kind of "gratuitous cruelty" (cf. *In re Van Houten* (2004) 116 Cal.App.4th 339, 351) or massive trauma that would show "exceptional" callousness. (*In re Scott, supra*, 119 Cal.App.4th at pp. 889-895.)

The defendant in *In re Lee, supra*, 143 Cal.App.4th 1400 was a middle-aged businessman who was facing financial difficulties because one of the victims was not making payments for a business he had purchased from defendant. Heated exchanges had ensued; and defendant finally decided that if the intended victim continued to refuse to pay, defendant would kill him and himself. At the fatal meeting, the victim refused and defendant fired several shots. The intended victim survived but his wife, tragically, was killed. Defendant was convicted of second degree murder and first degree attempted murder. Rejecting the Governor's characterization, the court held that Lee's crimes were *not* "more atrocious than whenever one human being kills another. . . ." (*Id.* at p. 1409.) Rather, it found that the crimes were "more commonplace than egregious."[24] (*Ibid.*)

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[23] Scott was originally convicted of first degree felony murder; but when he moved for a new trial, the prosecutor offered to stipulate to the relief sought if Scott would enter a plea of guilty to second degree murder, which he did. The jury's verdicts also *rejected* first degree murder based on premeditation.

[24] *In re Lee* also contains a useful summary of cases in which a killing *was* found to be *exceptionally* atrocious. One is *In re Van Houten*, *supra*, 116 Cal.App.4th 339,

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More recently, in *In re Elkins* (2006) 144 Cal.App.4th 475 (*Elkins*), the defendant was heavily indebted to his drug dealer, who had introduced him to cocaine. While intoxicated, he decided to rob the dealer as he slept. To make sure the victim did not wake, he struck him with a baseball bat. When the victim nevertheless roused, defendant hit him several more times. He then disposed of the body and robbed the victim's storage facility. Agreeing that repeatedly bludgeoning a robbery victim would establish an exceptionally callous *robbery,* the court explained that where the intent was to quiet the victim to facilitate the robbery, the fact that repeated blows were necessary did not make the *murder* unusually heinous. Also agreeing that the *robbery* was "calculated," the court found no evidence that the *killing* was anything but "an afterthought, if thought about at all." (*Id.* at p. 497.)[25] Finally, in *In re Weider* (2006) 145 Cal.App.4th 570, the court applied a "not unusually heinous" analysis to reverse a finding of unsuitability

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which involved the notorious Charles Manson murders. In *In re Dannenberg*, *supra*, 34 Cal.4th 1061, defendant, during a domestic argument, beat his wife with a pipe and then drowned her in the bathtub. The defendant in *In re Burns* (2006) 136 Cal.App.4th 1318 lured his victim to an isolated spot and shot her, then went to watch football with his roommate. When the victim was found around two hours later, she was still alive and moaning, and appeared to have been trying to move; thus, defendant simply left her to suffer and die.

[25] *Elkins* may implicitly concede that defendant's actions *after* the murder—dumping the body and then stealing from the victim's storage unit and the residence of his girlfriend—might make the offense unusually callous; to the extent that they do so, *Elkins* held that after 26 years and "exemplary rehabilitative gains," these factors simply did not retain any predictive value as to the defendant's future dangerousness. We might well conclude similarly in this case if required to reach the point, but as petitioner's offense was in no way exceptional, as we have explained, we do not need to consider when, or whether, the gravity of an offense alone ceases to justify a denial of parole.

where the killing occurred during a scuffle between the distraught defendant and the current boyfriend of his estranged wife.

In light of these cases—and as contrasted with those represented by the citations in footnote 25—we have no hesitation in finding that nothing in petitioner's offense was "exceptionally atrocious, heinous, or cruel." Hence, the Board could not rely on this factor in denying parole.

The other grounds cited by the Board are even less substantial. As described above, petitioner has excellent parole plans with firm job offers, and there was no evidence to refute the showing that he has a "huge support system" waiting for him comprised primarily of "his large family of productive and responsible members of society." The Board's only criticism was that his plans involved Orange County rather than Riverside County, his last legal residence. But while it is true that an inmate's last county of legal residence is the presumptive county for parole, the Board has authority to approve parole to *any* county. (§ 3003, subds. (a), (b).) Under subdivision (b), parole to another county is appropriate if the inmate has a "(3) . . . verified . . . work offer" and "(4) . . . family in another county with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed." That is exactly this case, and the Board's reluctance to accept this option appears to have been completely arbitrary.[26]

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[26] Parole to a different county is also appropriate where the inmate's last county of legal residence presents negative issues, such as public hostility (the statute says "concern") or danger to the victim, the parolee, a witness, or anyone else. (§ 3003, subd.

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The Board also criticized petitioner for not participating in an "anger management" program. Leaving aside the fact that no such program has been available to him, there is absolutely no evidence that going through such a program would reduce his dangerousness.[27] Although it is, of course, true that the life offense was committed in anger—as petitioner admits—it was also prompted by unique stresses and even fear. Nothing in petitioner's pre-offense history suggests that he had difficulty managing his temper, and the descriptions of him while incarcerated consistently refute the need for further treatment in this respect: Petitioner is "non-aggressive" and "mature and calm." It is also to be noted that petitioner's psychiatric reports have consistently concluded that he has *no* mental health issues requiring treatment or supervision.

The Board also mentioned that petitioner had not demonstrated sufficient "insight or remorse" and that the most recent psychological report was "not totally favorable." On the first point, if this kind of "quantity" analysis were permitted to stand, no decision could ever be challenged. How much remorse is "enough?" By any standard, we think the Board's concerns were unjustified.

Petitioner has never denied responsibility for the crime. In his 2001 psychological evaluation his remorse is described as "appear[ing] genuine." Although it is difficult to

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(b)(1), (2).) Nothing in the record suggests that Orange County would be inappropriate under these standards.

[27] Recall that petitioner *did* participate in a program called "Hands of Peace," which apparently encourages nonviolent methods of conflict resolution; the Board simply
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analyze a cold record, his statements at the hearing read as sincere expressions of regret and resolve to make “amends” by changing himself as a human being to ensure that nothing similar would ever happen again. The fact that an inmate may not express himself in the precise terms desired by the Board (which can never be known to the inmate) cannot be a basis for a finding of unsuitability.

As for petitioner’s “insight,” the 1998 psychiatric evaluation considered his insight to be “good.” The “downgrade” to “fair” in the 2001 report does not justify a finding of unsuitability, especially where it is unexplained. The fact is that petitioner has always shown ample insight into his particular offense. He was angry and frightened and wanted to teach Goodhue a lesson. This is not a situation, for example, in which an inmate has failed to make progress in understanding the social, economic, and psychological factors that led him into a life of gang violence. Petitioner was a law-abiding young family man who reacted foolishly and criminally to a perceived threat, and there is no indication that he does not understand this.

Finally, we deal with the Board’s concerns over the most recent psychiatric report. It is true that the evaluator does not expressly state an opinion on petitioner’s level of risk *outside* prison.[28] However, the Board overlooked the evaluator’s comment that petitioner’s “[p]rognosis for community living appears to be good.” As we noted above,

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commented that this was “some time ago.” However, nothing in petitioner’s prison record supports a concern that any lessons learned in “Hands of Peace” did not “take.”

[footnote continued on next page]

the 1998 evaluation *did* expressly rate petitioner as a less than average risk "in the free community," and the evaluator also commented that this was likely to hold true in the future. Leaving aside the issue of whether the Board can fairly rely on an incomplete psychiatric report when it has failed to authorize the preparation of a new one, there is simply no basis in the record to suppose that petitioner's level of risk has *increased* or that his "prognosis" has deteriorated. Again, where the clear tenor of an evaluation is favorable, it is unfair to penalize an inmate because the evaluator did not express his views in the precise language desired by the Board. We stress that the reports are consistent to the effect that petitioner has *no* mental health issues whatsoever that require treatment or supervision.

As a last point, the Board noted that the district attorney of the county in which petitioner was tried opposed release. The prosecutor is entitled by statute to represent the interests of the People at a parole hearing and the Board is entitled to consider his comments. (§§ 3041.7, 3042, 3046, subd. (c).) However, where the district attorney is represented by a deputy with no personal knowledge of the case, and where the actual prosecuting attorney has recommended leniency, the formal opposition by the office is entitled to little weight. Somewhat similarly, although the Board could properly consider

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[footnote continued from previous page]

[28] The evaluator did consider him at a low risk of dangerousness "[w]ithin a controlled setting."

the opposition of the victim's family members (§ 3043, subd. (e)), where that opposition was not based on any facts unique to this case or outside the trial record, it could not have substantial weight.

In summary, we find that the Board's finding of unsuitability was unsupported by even a modicum of evidence. *None* of the factors of unsuitability can properly be applied to petitioner, and *all* of the applicable factors of suitability bear in his favor.[29] First, it should be noted that the panel completely ignored the mitigating factor that the offense was committed under circumstances of unusual stress. (Cal. Code Regs., tit. 15, § 2402, subd. (d)(4).) Petitioner had been threatened by Goodhue and believed that his home had been burglarized and vandalized by the latter; even before that incident, he had expressed concerns over his and his family's safety. Recall that he was himself the father of a young child. Significantly, this stress was not related to pressures that are endemic to modern life, such as economic or relationship issues; rather, it involved a perceived serious threat to the safety of petitioner and his family of the type unlikely to be repeated.[30] The Board clearly erred in failing to consider this evidence of a positive factor. Furthermore, petitioner had no previous criminal history; his social history (insofar as he had developed one at age 19) was reasonably stable; he is now middle-

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[29] Battered Woman's Syndrome is obviously inapplicable.

[30] Where an offense is committed in part due to stress experienced by the actor, the fact that the stress—or at least a similar trigger—is unlikely to recur is a valid consideration in evaluating the inmate's degree of dangerousness and suitability for parole. (*In re Scott* (2005) 133 Cal.App.4th 573, 601.)

aged; his institutional behavior has been excellent; and he has solid plans for success in the community. The Board's decision was unsupported by the record.

The only remaining question is that of remedy.

DISPOSITION

Petitioner requests that we reinstate the *2002* finding of suitability and direct the Board to calculate his release date pursuant to the term then set. But that decision was reversed by the Governor and is not now before us; absent any authority supporting our power to take such action, we decline to do so.

As a rule, courts must not only "refrain from reweighing the evidence, [but] should [also] be reluctant to direct a particular result." (*Ramirez*, *supra*, 94 Cal.App.4th at p. 572.) If the Board's findings are not supported by the required "modicum" of evidence, a writ of habeas corpus should issue directing the Board to vacate its decision and thereafter "to proceed in accordance with due process of law." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.)[31]

We may, however, direct the Board with respect to the conclusions that must be drawn from certain evidence where its contrary decision was arbitrary and unreasonable. (*In re Scott*, *supra*, 119 Cal.App.4th at p. 899 [Board directed to consider psychological reports as favoring petitioner's application for parole].) Accordingly, albeit with some

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[31] The procedure is different when the court is reviewing a decision of the *Governor* reversing the Board's *grant* of parole. In that case, the Governor's decision may be vacated, with the effect of reinstating the Board's decision. (*In re Lee*, *supra*, 143 Cal.App.4th at pp. 1414-1415.)

reluctance, we will remand the matter to the Board with directions to conduct a new hearing as soon as practicable upon the finality of this opinion, to evaluate the proportional gravity of petitioner's offense in accordance with the views expressed in this opinion; to consider the psychological reports of record as supporting release unless contradicted by information or opinions contained in a new report (see *Ramirez*, *supra,* 94 Cal.App.4th at p. 972); to consider petitioner's parole plans of record as satisfactory; to consider the factor of unusual stress; and otherwise to proceed in accordance with due process of law. The Board is further directed to schedule such a hearing within 30 days of the finality of this opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

I concur:

/s/ Gaut
Acting P.J.

Miller, J., Concurring and Dissenting.

I agree with the majority's determination that the Board improperly found petitioner was unsuited for failing to participate in self help and anger-management programs. As the majority noted, petitioner cannot be faulted for failing to participate in a program that did not exist.

I also agree with the majority's observation that the Board cannot find that the most recent psychiatric report "was not totally supportive of his release" when it failed to even authorize that a new report be prepared.

However, I respectfully disagree with the majority's finding that the petitioner's commission of the offense was not especially grave, calculated, cruel or callous.

The Board is the administrative agency within the executive branch that has jurisdiction to fix the length of sentence a prisoner must serve, to grant parole, and to set release dates. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 653, 665, 667 (*Rosenkrantz*); *In re Schoengarth* (1967) 66 Cal.2d 295, 302; *In re Dannenberg* (2005) 34 Cal.4th 1061, 1078.) Parole applicants have a procedural due process right to be free from an arbitrary decision and to have their applications """duly considered.""" (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.) In reviewing those applications, the Board must make its parole decisions on some factual basis: it must resolve any conflicts in the evidence and assign the weight to be given that evidence. Denying a prisoner a release date without "'some evidence'" would be arbitrary and capricious, thus requiring reversal so as to preserve a prisoner's due process rights. (*Id.* at p. 657.)

To remedy any abrogation of procedural due process rights, a prisoner may seek judicial review of the Board's decision by way of a petition for writ of habeas corpus. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 664; *In re Strum* (1974) 11 Cal.3d 258, 259-270; *Superintendent v. Hill* (1985) 472 U.S. 445, 451, 455.) The standard of review of a Board's decision denying parole is the "some evidence" standard. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.) That is, a reviewing court's inquiry is limited to determining whether there is "some evidence" in the record before the Board that supported its decision to deny parole, based upon the factors specified by statute and regulation. If the Board's consideration of the specified factors is not supported by "some evidence" in the record, it is devoid of a factual basis, and hence the petition for writ of habeas corpus should be granted. (*Ibid.*)

It is true, as the majority laudably noted, that reviewing courts do not become "potted plants," torpidly reviewing parole denials. However, our only role is to assiduously apply the correct standard of review—to decide if there is *some* evidence. "[T]he 'some evidence' standard is extremely deferential." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 665, 679.) We may neither reweigh facts nor substitute our discretion for the Board's.

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) The constitutional mandate is to protect one branch against overreaching from another branch. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 662.) This separation of powers doctrine prevents one branch from

materially impairing the functions so as to completely divest the other branch from power. (*Ibid.*)

It is a judicial function to try criminal cases. Once a verdict is rendered, the trial judge exercises his discretion in selecting a sentence within a range delineated by the Legislature. It is an executive function to execute the sentence imposed by the judiciary. For indeterminate life sentences, it is the function of the Board, an executive agency, to determine the length of the life sentence by balancing the safety of the public against the inmate's liberty interest.

An appellate court's function is to insure the Board has conducted its review of the prisoner's parole with "due consideration." The court's sole task to guarantee the prisoner has received procedural due process—that is, to make certain that the Board properly denied his parole request based on "some evidence."

In this instance, I believe the Board correctly denied petitioner's request for parole based on "some evidence" that the underlying offense was calculated, cruel and callous.

Petitioner and Goodhue had some "bad blood" between them as a result of a landlord/tenant dispute: Goodhue was angry that petitioner moved his belongings out of the residence. During that altercation, Goodhue said he was going to kill petitioner; he picked up a pickax, slammed it into the ground so the head of the axe came off, and then used the ax handle to swing at petitioner.

As a result of the clash, petitioner felt the need for protection, so he borrowed a shotgun.

Four or five days later, petitioner returned home on a Sunday from a weekend away and discovered his home had been burglarized. Petitioner suspected Goodhue was responsible for the break-in. He took the shotgun and five shells and loaded the weapon. At 10 o'clock at night, he drove to Goodhue's and Boyd's home and parked his truck in front of their trailer. Some time later he drove his truck away, but after either making a U-turn or driving around the block,[1] petitioner returned and again parked in front of their trailer. He exited the vehicle with the shotgun, walked towards the front of the trailer and stood next to a window as if he were listening or looking inside. He took a step toward the corner of the trailer and shot into the trailer from approximately 20 feet away.

Goodhue and Boyd were inside the trailer. Goodhue suffered three shotgun pellets in his back. Boyd, who was eight months pregnant, sustained shotgun wounds to her back. Boyd died as a result of her wounds one hour later. Physicians performed an emergency caesarian section to deliver the fetus, but the fetus had died from a lack of oxygen following Boyd's death.

Ten o'clock p.m. on a Sunday night is a time when people are commonly at home. Firing into an inhabited dwelling from 20 feet away is a cruel and callous act that shows a disregard for human life. Although petitioner may not have been certain that Boyd and Goodhue were within, firing into their home from close range resulted in a high probability of injuring someone.

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[1] There was a discrepancy between the defendant's and a prosecution witness's testimony.

Petitioner testified that he fired the shot because he wanted to make a statement that "he had been there, he was upset with Goodhue, and he wanted Goodhue to know he had protection."

If petitioner needed a shotgun for protection because he was so afraid of Goodhue, petitioner would never have driven to Goodhue's trailer in the first place. Petitioner's actions show he was calculating: he loaded the shotgun with a shell, drove in a truck with the loaded shotgun to the trailer, fired the gun into the trailer at night when it was more likely people would be in the trailer, and when it was dark enough so his actions would be undetected.

Petitioner had an opportunity to cease his criminal activity when he drove away from the trailer the first time. Returning to the trailer and then shooting into the dwelling further demonstrates petitioner actions were calculating.

Petitioner fired into Goodhue's trailer because he was angry that Goodhue burglarized his home in retaliation for the previous landlord/tenant dispute. Petitioner testified that he reported the burglary to the sheriff's department, but neglected to inform them of Goodhue's threat to kill him. Instead of allowing the wheels of justice to resolve the burglary and the threats, petitioner took the law into his own hands by going to Goodhue's home and shooting into it to "prove to Goodhue he had protection." Petitioner's action of recklessly firing into the trailer was cruel and callous. "The nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 682; see also *In re Ramirez* (2001) 94 Cal.App.4th

549, 569.) The parole authority "properly may weigh heavily the degree of violence used and the amount of viciousness shown by a defendant." (*Rosenkrantz*, at p. 683.)

The majority opinion accurately recites petitioner's exemplary record as support for its finding he is a strong candidate for release on parole. However, we are not authorized to reweigh the various factors for parole suitability. It is irrelevant that a court might determine that evidence in the record demonstrates the suitability factors outweigh unsuitability factors. Our review is limited to whether the Board accorded procedural due process to the petitioner by citing some evidence in support of its finding. (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.) I believe the Board has comported with due process as there is some evidence in the record to support its finding that the offense was calculated, cruel, and callous. It is violative of the separation of powers doctrine for the judicial branch to divest the executive branch (the Board) of its power to deny parole by impliedly stating it gave improper weight to facts and reached the wrong conclusion.

/s/ Miller

J.