Filed 10/1/09 In re Henderson CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re CARL HENDERSON, on Habeas Corpus.	B208829 (Los Angeles County Super. Ct. No. BH04363

APPEAL from an order granting a petition for a writ of habeas corpus of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Heather Bushman, Jennifer A. Neill and Gregory J. Marcot, Deputy Attorneys General, for Appellant D.K. Sisto, as Wardon, etc.

A. William Bartz, Jr., for Respondent Carl Henderson.

INTRODUCTION

The Board of Parole Hearings (Board) granted respondent Carl Henderson parole. Governor Arnold Schwarzenegger, however, reversed the Board's decision. Henderson then filed a petition for a writ of habeas corpus, which was granted by the superior court. Appellant D.K. Sisto (Warden Sisto or Sisto), the Warden of California State Prison, Solano, where Henderson is incarcerated, appeals the order granting Henderson's petition. We affirm the superior court's order and reinstate the Board's order granting Henderson parole.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Pre-Conviction Personal History*

Henderson was born in 1953. After graduating from high school and completing one year of college, Henderson served in the United States Navy for two years. Henderson received a medical discharge from the Navy in 1974. From 1974 until his incarceration in 1981, Henderson maintained steady employment working as a machine operator and janitor.

Henderson was married in 1973. Although he separated from his wife in 1976, it is unclear from the record whether he obtained a divorce. Henderson has one daughter, with whom he has maintained a relationship.

2. *Previous Record of Crime*

As a juvenile, Henderson was charged with burglary and released to his parents. He was also charged with unlawful solicitation in connection with the sale of candy without a license.

In 1976, Henderson was convicted for driving under the influence of alcohol. In 1981, he was convicted for being drunk in public. Henderson was never a member of a gang and, except for the commitment offense, was never charged with a crime involving violence.

3. *Commitment Offense*

Henderson's life was forever changed by the events that occurred in the evening hours of August 25, 1981. About two weeks before the incident, Henderson temporarily

moved in with his aunt and cousin in Compton. Henderson's cousin was a member of the Piru gang. On the night before the incident, a member of the Santana Crips gang had been killed, allegedly by Henderson's cousin. In anticipation of a confrontation with the Santana Crips gang, members of the Piru gang gathered firearms and went to Oak Park in Compton.

At the park, a confrontation between the rival gangs ensued. Witnesses testified that they saw Henderson fire a shotgun at 17-year-old Kennedy Johnson. Johnson was then shot and killed by a Piru gang member.

Although Henderson admitted taking a shotgun into his aunt's house and laying it on the table, he denied being at the park and denied shooting at Johnson. The jury, however, found Henderson guilty of murder (Pen. Code, § 187, subd. (a)) and the use of a firearm in the commission of a felony (Pen. Code, § 12022.5).

Henderson moved for a new trial on the ground that he was wrongfully identified as the man who fired a shotgun at Johnson. The trial court, however, denied the motion. In so doing, the trial court stated: "Well, I don't think that the evidence established beyond a reasonable doubt that Mr. Henderson personally fired any shot that killed the man, and I don't think that the jury's verdict was based on a finding that Mr. Henderson personally fired the shot that killed the deceased. What the evidence did establish was that Mr. Henderson was with a group, a gang . . . and that this was a gang confrontation, that Mr. Henderson fired the first shot at the first member of the other gang to come into the area, this young fellow, Kennedy, who was riding a bicycle. That when Mr. Henderson fired that shot, Kennedy was either knocked off of the bicycle . . . and the evidence was not clear on that point as to whether or not Kennedy actually was hit by that first shot fired by Mr. Henderson, but it is clear that after Kennedy crawled over and attempted to hide between two cars, that another person, who was identified as Velasquez, the codefendant, went over to him, stood over him, and fired the shotgun point blank into his body, killing him."

On January 6, 1982, the trial court sentenced Henderson to 25 years to life for the murder charge, plus two years for use of the shotgun, for a total of 27 years to life. Henderson's minimum eligible parole date was set at November 2, 1999.[1]

4. *Henderson's Behavior in Prison*

In 1983, Henderson was disciplined for possessing marijuana, a hypodermic needle and currency. After that incident, however, Henderson never again received a citation by prison officials for a serious violation of prison rules.[2]

Henderson worked at various jobs while incarcerated. He worked in a furniture shop, in a kitchen, and as a sewing machine operator. From 1993 to 2006 Henderson worked in the prison laundry facility and received satisfactory to above average work reports.

From 1996 to 2006 Henderson participated in Narcotics Anonymous and Alcoholics Anonymous programs.

5. *Henderson's Psychological Evaluations*

The record contains Henderson's last three psychological evaluations prior to the Board's decision to grant Henderson parole. All three evaluations conclude that Henderson did not have any psychological problems that make him a danger to society if he is released on parole.

In a September 1998 evaluation, clinical psychologist Robert Wagner, Ph.D., opined: "Mr. Henderson has no evident psychological difficulties at this time which would have affected his behavior at the time of the crime nor which affect considerations for parole. At the time of the crime he did not have a predictable pattern of escalating

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[1] Before Henderson was sentenced, a probation officer submitted a report regarding Henderson that stated, in part: "It does seem strange that a young man such as defendant with no known gang affiliation became involved in this offense. The fact that his cousin, codefendant Richard Thomas, had been threatened by the rival gang played a strong part in defendant's activity in this case. Whatever his motivation, defendant became involved in a shoot out resulting in murder and he must now suffer the consequences."

[2] In 1994, Henderson was given a citation for "manipulation of staff." In 2000, Henderson was given a citation for evading work (he went to the bathroom without permission).

crimes and the present crime appears to be an anomaly in his history. Gains made in the institution are likely to hold if released. . . . He would not likely pose a threat to the community if paroled."

In a November 2001 evaluation, forensic psychologist John T. Rouse, Ph.D., stated: "During [Henderson's 20 years of incarceration] he has been relatively free of disciplinary action and seems to have endeavored to make the appropriate social, personal and behavioral adjustments in this controlled setting. Mr. Henderson has not demonstrated any acts of physical violence towards staff or other inmates since his incarceration. Giv[en] these circumstances, there is a high medical probability that his potentiality for violence is no greater than that of the average inmate incarcerated here at CSP-Solano."

Dr. Rouse further stated: "Mr. Henderson appeared to have some insight into his behavior in relationship to the commitment offense. He did express a denial that he either shot or was involved in the gang confrontation leading to the death of the victim. Other than his denial, he did not display any behaviors or symptoms which would suggest a diagnosable psychiatric or mental disorder nor did he manifest any behaviors which would suggest a high potential for violence or dangerousness to the community. Thus, further parole considerations should be based on factors other than psychiatric issues."

In an August 2004 evaluation, clinical and forensic psychologist Preston Davis, Psy.D., stated: "His [Henderson's] insight into his crime involvement, lack of mental symptoms, and his overall situation appears intact. His conviction of murder happened approximately 22 years ago. He does not appear to utilize the psychological defense mechanisms of denial or rationalization concerning his crime commitment or situation. He takes blame for his role and sees his prior judgment as poor. Current judgment seems sound."

Dr. Davis further noted that Henderson "maintains a healthy attitude about his future" and that Henderson "maintains contacts with his support system outside of prison." Dr. Davis also opined: "He [Henderson] acknowledges his involvement in the crime of murder he committed in 1981. He feels sorrow, empathy, and regret for his

involvement. . . . [¶] Given his recorded history in the files reviewed and from interview and psychological evaluation of this inmate on August 18, 2004, he does not seem to pose a significant danger to society if released from prison."~ Dr. Davis concluded: "If he [Henderson] maintains a structured life, with a place to live, employment or his inheritance, and has a positive social support system, he should do well [outside of prison], given the rehabilitation he took advantage of in [state prison.]"

6. *Parole Proceedings*

Between 1998 and 2004 the Board held numerous proceedings in order to determine whether Henderson should be granted parole. At each of those proceedings a panel of the Board denied Henderson parole. On April 27, 2006, however, after considering Henderson's testimony and documents filed by Henderson and the Los Angeles County District Attorney[3], a panel of the Board determined that Henderson was suitable for parole.

At the April 27, 2006, hearing, Henderson again denied that he fired a shotgun at the victim Johnson. Henderson, however, stated that with respect to his responsibility for Johnson's death, it did not make a difference whether or not he shot at Johnson. When asked why he was responsible for Johnson's death, Henderson responded: "Because I am guilty for the simple fact for being there in the location. And regardless if I pulled the trigger or not, someone's life was taken. So I carry the blame for that. Someone's life has been taken and the hurt and the pain it caused his family. . . . Regardless the jury convicted me of murder. So if I was never there in the residence with my cousin then I could have made a better situation, a better approach. I might not be in here today."

In explaining to Henderson why the panel of the Board found Henderson suitable for parole, the presiding commissioner stated: "Even though you have disputed some of the facts underlying the offense you have done so in the context of accepting your

[3] The Los Angeles County District Attorney did not support or oppose granting Henderson parole.

responsibility in the broader sense." The panel ruled that Henderson would be released after a 120-day review period.[4]

On September 22, 2006, however, the Governor reversed the Board's decision to grant Henderson parole. In his letter explaining his decision, the Governor stated that "although Mr. Henderson has marketable skills, he has not yet secured a job offer. Having a legitimate way to financially support himself immediately upon release is essential to Mr. Henderson's success on parole."

The Governor further stated that "[t]he nature and circumstances of the first-degree murder perpetrated by Mr. Henderson are alone sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety risk." The murder, the Governor stated, "was especially aggravated considering the gang-related nature of the offense."

Finally, the Governor stated that while Henderson claimed to be remorseful about Johnson's death, Henderson continued to deny actually shooting a weapon at Johnson. The Governor, however, declined to accept Henderson's version of events.

7. *Habeas Corpus Proceedings*

In November 2006, Henderson filed a petition for a writ of habeas corpus. On June 9, 2008, the superior court granted Henderson's petition, finding that the record did not contain "some evidence" to support the Governor's finding that Henderson presented an unreasonable risk of danger to society and was not suitable for parole. The superior court vacated the Governor's decision to reverse the Board and reinstated the Board's order releasing Henderson.

Warden Sisto timely appealed the superior court's order granting Henderson's petition. On July 29, 2008, we granted Sisto's petition for a writ of supersedeas staying the trial court's order releasing Henderson pending the adjudication of this appeal.

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[4] Upon the granting of parole by a panel of the Board, the full Board sitting en banc may review and reverse the panel's decision. (Pen. Code, § 3041, subd. (b).) If the panel's decision is not reviewed or acted upon by the full Board, the panel's decision "shall become final within 120 days of the date of the hearing." (*Ibid.*)

CONTENTIONS

Warden Sisto argues that the superior court erroneously granted Henderson's petition for a writ of habeas corpus because there was some evidence supporting the Governor's finding that Henderson was not suitable for parole. Alternatively, Sisto argues that if the superior court correctly granted Henderson's petition, the proper remedy was limited to remanding the matter back to the Governor to proceed in accordance with due process.

DISCUSSION

1. *No Evidence Supports the Governor's Finding That Henderson Poses a Current Threat to Public Safety*

A. *Applicable Legal Principles Regarding Granting an Inmate Parole*

"Pursuant to statute, the Board 'shall normally set a parole release date' one year prior to the inmate's minimum eligible parole release date, and shall set the date 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public . . . .' (Pen. Code, § 3041, subd. (a).)" (*In re Roderick* (2007) 154 Cal.App.4th 242, 262.) Release on parole is thus "the rule, rather than the exception." (*In re Smith* (2003) 114 Cal.App.4th 343, 351.) A parole release date must be set unless the Board determines that public safety requires a lengthier period of incarceration. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1202 (*Lawrence*); § 3041, subd. (b).) "Every inmate has a constitutionally protected liberty interest in parole decisions ordered by the Board and reviewed by the Governor." (*In re Aguilar* (2008) 168 Cal.App.4th 1479, 1486 (*Aguilar*); see also *In re Rosenkrantz* (2002) 29 Cal.4th 616, 661.)

"In determining suitability for parole, the Board must consider certain factors specified by regulation. Circumstances tending to establish unsuitability for parole are that the inmate (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct

while in prison. (*Aguilar*, *supra*, 168 Cal.App.4th at pp. 1486-1487; see also Cal. Code Regs., tit. 15, § 2402, subd. (c).)

"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 or her life, especially if the stress had built over a long period of time; (5) committed the crime as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that suggest an enhanced ability to function within the law upon release." (*Aguilar, supra,* 168 Cal.App.4th at p. 1487; see also Cal. Code Regs., tit. 15, § 2402, subd. (d).)

"The foregoing factors are general guidelines, and the Board must consider all relevant information."[5] (*Aguilar, supra*, 168 Cal.App.4th at p. 1487; see also Cal. Code Regs., tit. 15, § 2402, subd. (b).) "The fundamental consideration is public safety." (*Aguilar*, at p. 1487; see also *Lawrence, supra,* 44 Cal.4th at p. 1205.)

"The Governor's power to review a decision of the Board is set forth in article V, section 8, subdivision (b) of the California Constitution."[6] (*Aguilar*, *supra*, 168

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[5] "Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

[6] "No decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The

Cal.App.4th at p. 1487.) "Article V, section 8(b), requires that a parole decision by the Governor pursuant to that provision be based upon the same factors the Board is required to consider." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 676.)

B. *Standard of Review*

We must affirm the Governor's decision that an inmate is unsuitable for parole if "some evidence" supports the conclusion that the inmate remains a threat to public safety. (*Lawrence*, *supra*, 44 Cal.4th at p. 1191.) This same standard applies whether we are adjudicating a petition for a writ of habeas corpus (*Aguilar*, *supra*, 168 Cal.App.4th at p. 1488) or, as in this case, reviewing a trial court's order granting a petition that reverses the Governor's decision (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 625, 676-677). "Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious." (*Id.* at p. 677.)

C. *Application of Law to This Case*

Overwhelming evidence supports the Board's conclusion that Henderson is suitable for parole and does not pose a current danger to society. Prior to the commitment offense, Henderson did not have a record of violence, either as a juvenile or as an adult. Further, Henderson did not have an unstable social history. Prior to his incarceration, Henderson graduated from high school, served in the military, and maintained a steady job.

In addition, there is no evidence that Henderson sexually assaulted another individual or engaged in sadistic behavior at any time in his life. Henderson also does not have a history of mental health problems. Three different psychologists who

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Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. . . ." (Cal. Const., art. V, § 8, subd. (b).)

evaluated Henderson in 1998, 2001, and 2004, each concluded that Henderson was not a current threat to public safety and that Henderson did not have mental health problems. While in prison, moreover, Henderson participated in self-help programs, worked at various positions, stayed away from gangs, and in the last two decades received only two minor reprimands for violations of prison rules.

Henderson is a 56-year-old man. He has spent most of his adult life in prison for the crime he committed in 1981. According to the psychologists who examined him, Henderson has expressed remorse for his crime, empathy for the victims of his crime, and a positive attitude towards his own future.

The Governor provided three grounds for not finding Henderson suitable for parole. The first is that Henderson does not have a job yet. This ground is without merit. Although an inmate's realistic parole plans or marketable skills may be considered as a factor by the Governing in determining that an inmate is suitable for parole (*Aguilar*, *supra*, 168 Cal.App.4th at p. 1487), the Governor cannot bar an inmate from parole merely because he or she did not secure a job upon release. A lack of a job does not constitute "some evidence" of current dangerousness to society.

In determining whether an inmate's parole plans are realistic, the Governor must take into account the practical realities faced by an inmate with a life-sentence seeking a job. Until parole is actually granted, the inmate does not know when, if ever, he or she will be released from prison. Few employers will commit to granting a prospective employee a job if they do not know when, if ever, the prospective employee can start working. Further, an inmate obviously cannot attend an interview at a prospective employer's job site and has limited resources to search for prospective employment.

In this case, the Governor concedes that Henderson has marketable skills in the laundry trade. Henderson developed those skills by working in the prison laundry for more than two decades. The Governor further concedes that Henderson's uncle, a union leader, has promised to help Henderson obtain a job as a laborer upon his release. Henderson also has a potential job working for his daughter and his daughter has promised that he can live with her. In light of Henderson's incarceration, Henderson's

release plans are realistic. More important, there is nothing about Henderson's release plans that constitutes evidence of his current dangerousness to public safety.

The primary ground upon which the Governor denied Henderson parole was the nature of the commitment offense itself. "[A]lthough the Board and the Governor 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 post-incarceration 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 *Lawrence*, the inmate seeking parole had been convicted of murdering her lover's wife. Our Supreme Court found that there was some evidence supporting the Governor's conclusion that the commitment offense was carried out in an " 'especially heinous, atrocious or cruel manner.' " (*Lawrence, supra*, 44 Cal.4th at p. 1224.) The court, however, noted that "few murders do not involve attendant facts that support such a conclusion." (*Id.* at p. 1225.) The court further found that the inmate "committed this crime while she was experiencing an unusual amount of stress arising from circumstances not likely to recur, and that for this reason (as well as her prior crime-free life, her age, and her record of rehabilitation) there was a low risk she would commit another violent act if released." (*Id.* at p. 1226.) Accordingly, the court found that there was no evidence supporting the Governor's finding that the inmate posed a current danger to society, despite the egregious nature of the inmate's commitment offense. (*Id.* at p. 1227.)

In *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), the inmate seeking parole murdered his second wife after a night of heavy drinking. (*Id.* at p. 1247.) The inmate had a long history of abusive, violent, sadistic behavior toward his wives and daughters, especially after consuming alcohol, but he never developed an understanding of his alcoholism and had difficulty discussing his daughters' allegations of rape, incest and

domestic violence. (*Id.* at pp. 1249, 1251.) A psychological report indicated that the inmate had a " 'schizoid quality to interpersonal relationships,' " and that if he relapsed into drinking alcohol, he would present an " 'unpredictable risk' " of future domestic violence. (*Id.* at pp. 1251-1252.) Under these circumstances, the Supreme Court held that there was some evidence to support the Governor's finding that the inmate posed a current danger to public safety. (*Id.* at p. 1261.)

In *Aguilar*, we held that there was no evidence supporting the Governor's finding that an inmate, Aguilar, posed a current threat to public safety. We stated: "Like *In re Lawrence* but unlike *In re Shaputis*, the nature of the commitment offense here does not indicate that Aguilar is *currently* dangerous. Aguilar's commitment offense was not the culmination of ongoing criminal activity, domestic violence, substance abuse or mental illness. Although Aguilar had a turbulent and often acrimonious relationship with the victim, this relationship was apparently unique in Aguilar's life. The record contains no evidence that he had a similar relationship with any other individual, or that he engaged in a pattern of abusive, violent or sadistic behavior towards women, family members, or other people. The circumstances of Aguilar's crime thus are not likely to recur. For this reason (as well as Aguilar's pre- and [post-incarceration] history, realistic parole plans, health, mental stability, and age) there is a low risk that Aguilar will commit another violent act if released." (*Aguilar, supra,* 168 Cal.App.4th at p. 1489.)

The present case is similar to *Lawrence* and *Aguilar* but unlike *Shaputis* in that the nature of the commitment offense here does not indicate that Henderson is currently dangerous. Henderson's commitment offense was not the culmination of ongoing criminal activity, domestic violence, substance abuse, mental illness or some other pattern of behavior or trait that is difficult to alter. Rather, Henderson's commitment offense appears to be an aberration in his life. The record contains no evidence that, apart from the commitment offense, Henderson committed a violent crime or participated in gang activity. The circumstances of Henderson's crime are thus not likely to recur. Accordingly, Henderson's commitment offense, by itself, is not some evidence of Henderson's current dangerousness to public safety.

The Governor's final ground for reversing the Board's decision was that Henderson's statements about the facts of the commitment offense conflicted with the jury's findings and the Governor's view of the facts. Section 5011, subdivision (b), however, provides that the Board[7] "shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed." Warden Sisto contends that the Governor's decision reversing the Board does not require Henderson to admit his guilt. We find no meaningful distinction, however, between requiring an inmate to admit facts establishing guilt and requiring an inmate to admit guilt.

Warden Sisto further argues that Henderson's failure to admit the truth of the jury's factual findings shows that he lacks remorse for his crime. However, apart from the denial itself, there is no evidence in the record showing that Henderson lacks remorse. Indeed, in Henderson's most recent psychological evaluation, Dr. Davis stated that Henderson was not rationalizing his crime but was instead taking blame for it. Thus, Sisto's contention that Henderson lacks remorse is based *solely* on Henderson's refusal to admit guilt or the facts that establish guilt. That refusal cannot be the basis for denying an inmate parole. (See *Aguilar*, *supra*, 168 Cal.App.4th at p. 1491 [holding that inmate's refusal to admit he committed offense did not support Governor's denial of parole].)

2. *There is No Basis to Remand this Case to the Governor*

Warden Sisto contends that even if there was no evidence to support the Governor's decision, the proper remedy is to remand the matter to the Governor. Sisto does not contend that there is any new evidence or any additional basis upon which the Governor's decision to reverse the Board's decision could be upheld. Further, we have reviewed the materials that were before the Board and Governor and found no evidence to support a decision other than the one reached by the Board. Accordingly, a remand to the Governor would be an idle act, which we decline to order. (See *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256; *Aguilar, supra,* 168 Cal.App.4th at p. 1491.)

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[7] Section 5011, subdivision (b) refers to the "Board of Prison Terms." As of July 1, 2005, any reference to the "Board of Prison Terms" in the Penal Code refers to the Board of Parole Hearings. (§ 5075, subd. (a).)

DISPOSITION

The order of the superior court, dated June 9, 2008, granting Henderson's petition for a writ of habeas corpus is affirmed and our stay of that order is lifted. The Governor's decision to reverse the Board's grant of parole to Henderson is vacated.

We remand to the superior court. Within 30 days of the issuance of our remittitur, the superior court shall issue an order stating:

1. The Board shall conduct a new parole suitability hearing for Henderson within 30 days of the superior court's order;

2. At that hearing, the Board is directed to find Henderson suitable for parole unless either previously undiscovered evidence or new evidence subsequent to the Board's April 27, 2006, order supports a determination that he currently poses an unreasonable risk of danger to society if released on parole.

Considering that Henderson's release by the Board would have been final in August 2006, approximately three years ago, and in the interests of justice, this opinion shall be final as to this court within five days after it is filed. (Cal. Rules of Court, rule 8.264 (b)(3); *Aguilar, supra,* 168 Cal.App.4th at p. 1492.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J