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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re NAM VAN HUYNH, on Habeas Corpus.	H031395 (Santa Clara County Super.Ct.No. 127919)

In 1989, Nam Van Huynh was convicted of second degree murder and given an indeterminate term of 15 years to life in prison, plus two years for the use of a firearm, for the 1988 killing of his estranged wife.[1] In 2002, the Board of Prison Terms, now the Board of Parole Hearings,[2] determined that Huynh was suitable for parole but Governor Davis reversed that decision, citing various grounds. The trial court granted Huynh's petition for habeas relief, and we affirmed, finding no evidence in the record to support most grounds relied on by Governor Davis in reversing the Board's decision. But we

[1] Holding that Huynh's waiver of preliminary examination, and his submission to a court trial based on police reports, taped statements, and his own testimony in exchange for the elimination of special circumstances and exposure to first degree murder were not tantamount to a plea of guilt, and that the absence of a waiver of the right to self-incrimination, though error, was not prejudicial, we affirmed the judgment of conviction on direct appeal in *People v. Huynh* (1991) 229 Cal.App.3d 1067, 1076-1080 (*Huynh I*). There was also a related habeas proceeding addressed in that published opinion in which we granted relief and remanded for further proceedings. (*Id.* at pp. 1080-1084.)

[2] The Board of Prison Terms was abolished as of July 1, 2005, and replaced by the Board of Parole Hearings (Board). (See Pen. Code, § 5075, subd. (a) [further statutory references are to the Pen. Code unless otherwise specified].)

remanded the matter to Governor Schwarzenegger to reconsider the Board's 2002 decision to grant parole because it was equivocal whether the Governor would reverse that decision based solely on the gravity of the commitment offense—the only factor for which we found there could be said to be some evidence in the record[3]—and in light of other factors favoring suitability that Governor Davis had failed to consider. In 2006, on remand, Governor Schwarzenegger again reversed the Board's 2002 grant of parole.[4]

Meanwhile, in 2005, the Board again determined that Huynh was suitable for parole. In the same 2006 decision reversing the 2002 grant on remand, the Governor also reversed the 2005 grant, citing only the gravity of the commitment offense as favoring unsuitability for parole while acknowledging that all other factors favored suitability. The trial court again granted habeas corpus relief and directed that Huynh be immediately released. Warden Ben Curry appeals, contending that the trial court erred in granting relief.[5] We conclude that the Governor's reversal of the 2005 grant of parole on the basis that Huynh remains a danger to society is not supported by some evidence in the record. We accordingly affirm the trial court's order reinstating the Board's 2005 grant of parole and direct Huynh's release from prison on the conditions as stated in that grant.

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[3] (*In re Huynh* (Feb. 3, 2006, H028888) [nonpub. opn.] (*Huynh II*).)

[4] Reversing the trial court, we so concluded in *In re Huynh* (Dec. 20, 2007, H030670) [nonpub. opn.] (*Huynh III*). That opinion is now final.

[5] The Warden is the proper respondent in the habeas proceeding below. (§ 1477.) Upon the Warden's petition, we granted a writ of supersedeas staying the trial court's order pending the outcome of this appeal.

STATEMENT OF THE CASE[6]

I. *Huynh's Background*

Huynh was born in Vietnam in 1938. He completed high school in 1956 and later earned a Bachelor of Arts degree in French Literature. He then joined the Vietnamese army, in which he served for 11 years, attaining the rank of captain. He fought in combat alongside American troops for the South Vietnamese army and was seriously wounded in action in 1968, requiring hospitalization.

Huynh met his wife, Lan Ngoc Nguyen,[7] the victim in this case, in Vietnam. They married in 1973, when he was 35 and she was 17, and they later had a son. They were evacuated from Saigon when that city fell in 1975. They arrived in Guam and later joined relatives in France, where Huynh became a citizen. After living and working in France for five years, Huynh and his family relocated to San Jose, joining other relatives living in the area. Within four years after his arrival in the United States, Huynh had developed a successful fish market business and he and his wife had purchased a home and had had two more children.

While Huynh has characterized the early years of his marriage as good, around 1986, Lan began seeing another man. She took more than $100,000 from a joint bank account she held with Huynh and gave it to or spent it with this man. She traveled to Texas with the man, leaving Huynh and their children behind. After three months or so, the money was apparently gone, and Lan called Huynh to request that he come to Texas to pick her up. He did so and they resumed living together, though none too happily.

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[6] Except where indicated, we take the underlying facts and procedure through sentencing for the life crime, which are the same as what was before the 2005 Board, from our prior opinion in *Huynh II*.

[7] We hereafter refer to the victim as "Lan" for ease of reference and not out of disrespect.

During the next two years, Huynh and Lan had marital problems and they argued frequently, sometimes resulting in physical altercations during which Huynh hit Lan and pulled her hair. At one point, Lan went to a battered women's shelter. In 1988, Lan again began seeing another man, and she again took money ($7,000) out of the joint bank account and gave it to this man. This resulted in an argument between Lan and Huynh during which he hit her. Lan called the police and got a restraining order against Huynh, after which he moved out. During their two years of marital strife and altercations following Lan's return from Texas, she mentioned a gun several times and once, she showed Huynh a bullet and told him that she would kill him with it. (*Huynh I*, *supra*, 229 Cal.App.3d at p. 1072.)

At some point, Lan initiated divorce proceedings. By the time they had separated, Huynh had also lost his fish market business due to the financial losses, and he had begun working as a manager for a similar business owned by someone else. When he left the family home, Huynh moved into a warehouse owned by his employer. Lan also moved and did not reveal her address to Huynh. She obtained an order "restraining him from asking their children for her address and telephone number and from following anyone to her residence." (*Huynh I*, *supra*, 229 Cal.App.3d at p. 1073.)

According to Huynh, he was not an "angry person," but because of everything that was happening to him with the loss of his business, his finances, and his marriage, he could not control his behavior towards his wife. Against his wishes and as a result of their domestic problems, they continued to live apart, she with their three children at an address unknown to Huynh and he in the warehouse.

Huynh had previously owned a shotgun, but in September 1988, he exchanged it and acquired a new handgun. He kept the gun for security reasons associated with his work. Huynh had acquired the new gun legally but he did not have a permit to carry a concealed weapon. When he began living at the warehouse after his separation from his

wife, Huynh would usually carry the loaded gun on his person rather than leaving it somewhere in the building where it might be stolen or get lost.

II. *The Life Crime*

Huynh had no criminal or violent history to speak of before the commitment offense.[8]

On November 8, 1988, after having lived in the warehouse for about three months, Huynh was extremely angry with Lan for not letting him see their children and that morning, he had thoughts of shooting her and himself.[9] During that time he was depressed and often thought of suicide, but he did not kill himself because of his children. (*Huynh I*, *supra*, 229 Cal.App.3d at p. 1073.) Huynh saw his son walking to school that day and he picked him up to give him a ride and some money. Huynh wanted to reconcile with Lan, mostly for the sake of their children. He had already spoken to her on the phone several times about reconciling, and she had rejected him, causing him great stress. The day before, he had gone to the Department of Motor Vehicles and had been able to obtain Lan's address since she was driving a car that he had purchased. (*Ibid.*) After dropping off his son on November 8, 1988, Huynh went to Lan's house to talk to her about getting back together. Because of the restraining order precluding his presence there, he asked her to follow him to another place in her car and she agreed.

They each separately drove to a public street near Lan's house and parked. There were other people in the general vicinity.[10] Lan remained in her car, only opening her

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[8] The 1989 probation report states that Huynh had one prior misdemeanor conviction for "Failing to Log a Fish Catch."

[9] The 1989 probation report states that when Huynh left home that morning, he "wanted to shoot [Lan] and himself." Our prior opinion in *Huynh I*, *supra*, 229 Cal.App.3d at page 1073, states both that Huynh had brought the gun to the encounter to shoot Lan and himself and that he had frequently dreamt of them shooting each other.

[10] But there are no facts in the record to suggest that anyone other than Lan was so near to Huynh as to be in danger as a result of his criminal conduct.

window by a crack. Huynh approached her car to talk to her and they began to argue about reconciliation, their children, money, and Lan's affairs. Lan told Huynh that she had a gun in her car but Huynh did not see it. (*Huynh I, supra*, 229 Cal.App.3d at p. 1073.) He became increasingly aggressive and patted his hip area to let Lan know that he had a gun, which he then pulled out and pointed at her. At one point, Lan told Huynh that she didn't care about anything anymore, including him or their children, and she rolled up the car window. Huynh began yelling and stepped in front of her car. She began to honk the horn. He then began to strike his gun against her driver's side window, wanting to break the window so that "he could slap her for saying she didn't care."

When the window did not break, he shot through it once, hitting Lan. Then he shot four more times, which required reloading the gun once. At one point during the shooting, Lan's car drifted across the street. Huynh followed the car and continued shooting. All five shots hit Lan, two passing through her brain, one piercing her chest and left lung finally lodging in her neck, and one entering her abdomen "piercing the cecum and perforating the right pelvis, exiting the right buttocks." She was later pronounced dead on arrival at the hospital. The cause of death was "attributed to the [gunshot] wounds and massive destruction of brain substance."

After the shooting, Huynh placed the gun on the trunk of Lan's car, sat down on the curb, and waited for police to arrive. When they came, they saw Lan "[lying] over the passenger's seat [of her car] bleeding profusely and not moving." Huynh remained on the curb and stated to the officers that "the gun [was] on the car." When police frisked Huynh, they found additional cartridges in his pocket.

While Huynh admitted having shot Lan, he later stated that he did not remember the details of the incident after the first shot. He said that he was "angry," was "crazy,"

had "lost control," and "did not even know what [he] was doing."[11] He specifically did not remember reloading the gun. (*Huynh I, supra*, 229 Cal.App.3d at p. 1074.) When asked if he had known what he was doing, Huynh replied, " 'No. I was kind of crazy that moment, so depressed after three month, after I shot her, and I felt some kind of headache and so tired, and I sit down. I had some kind of a no thinking during that moment.' " (*Ibid*.) He also explained, " 'After I heard the first shot, I became some kind of unconscious. I only remember that I put the gun . . . in the top of it.' " When asked if he had known whether his actions were right or wrong, he had replied, " 'I had some kind of mental crisis. I knew nothing. I knew nothing wrong or right.' " (*Ibid*.) Huynh was not under the influence of alcohol or drugs at the time of the crime, as he did not use these substances. The probation report said that Huynh had been "obviously unable to control his frustration over his failed marriage. This frustration led to an uncontrollable rage resulting in the shooting death of his ex-wife."

III. *Huynh's Conviction and Sentencing*

In exchange for eliminating his exposure to special circumstances and first degree murder, Huynh waived preliminary examination and submitted to a court trial to determine—based on police reports, Huynh's taped statements, and his testimony—whether he was guilty of manslaughter or second degree murder. At the conclusion of trial, Huynh was convicted of second degree murder with use of a firearm. (§§ 187, 12022.5, subd. (a).) He received an indeterminate sentence of 15 years to life, plus two

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[11] Referring to the crime, a 1989 psychological evaluation noted a diagnosis of "Major Depressive Disorder[,] Dissociative Disorder (Single Episode)." This prior diagnosis was also noted in a 1999 psychological evaluation. A 2004 psychological evaluation confirmed that there was a "dissociative period during this inmate's life" and that "he was suffering from depression at the time of the commitment offense" but that "those conditions have changed considerably" and "[a]t present, the inmate is not suffering from depression or any dissociative disorder" such that his "prognosis is excellent for being able to maintain his current mental state in the community upon parole."

years for the firearm enhancement, to be served consecutively, for a total term of 17 years to life. He began service of the life term on April 4, 1990.

IV. *The December 2005 Parole Board Hearing*

Huynh was first eligible for parole in 2000 and his initial parole hearing took place the year before, resulting in a two-year denial. His second hearing was in October 2001, which resulted in a one-year denial with recommendations to "remain disciplinary free and to participate in self-help programs." His third hearing took place in November 2002, and the Board granted parole and set a release date, which was reversed by Governor Davis in 2003 and again on remand by Governor Schwarzenegger in 2006. Huynh's fourth hearing took place in June 2004 while habeas corpus proceedings from the 2002 grant were pending and the Board then issued a one-year denial.[12] His fifth hearing took place on December 7, 2005.[13]

The hearing began with a discussion about Huynh having submitted new support letters from family and signatures from approximately 100 members of the community in support of the grant of parole and about the Board having received letters from the Chief of the San Jose Police Department and from the Office of the District Attorney recommending against parole based essentially on the gravity of the crime. The Presiding Commissioner then read a 2002 summary of the life crime, including Huynh's version of it. Huynh also pointed out that the 1989 psychological evaluation that discussed his single episode dissociative state at the time of the crime was the most accurate description of what had happened. The Board discussed that Huynh had no prior criminal record; that he is a French citizen; that he had a successful fish business in

[12] In denying parole in 2004, the Board expressed concerns about Huynh not having sufficiently involved himself in self-help programming, such as for anger management, and about the need for him to develop concrete parole plans in both France and California.

[13] Huynh was 70 on March 8, 2008, having been born on March 8, 1938.

San Jose; that Lan had left Huynh with boyfriends on two occasions, taking their money each time, which resulted in great stress and the loss of his business, his marriage and his home; that Huynh had positive relationships with his family members, including Lan's sisters, and he had developed good adult relationships with his two children after his oldest son committed suicide in 1990; that upon parole, Huynh would likely be deported to France, where he had housing plans and where he is entitled to retirement benefits; that Huynh had alternate parole plans in San Jose were he not to be deported; and that in 2004, Huynh, who also now requires a hearing aid, had emergency "6-way" heart bypass surgery.

The Board then reviewed "post-conviction progress information," including a 2005 progress report, 2002 and 2003 life prisoner evaluations, and a 2004 psychological evaluation, all of which generally favored the granting of parole and stated that Huynh would pose a low degree of threat if released. The 2004 evaluation, in express disagreement with Governor Davis's prior assessment, put Huynh's risk of threat if released at no " 'higher than the average citizen' " and perhaps even lower due to Huynh's long incarceration and resulting understanding of the consequences and costs of his prior criminal action, and expressed that it would be unlikely for Huynh to find himself again in the criminal justice system if released. The Board then noted that Huynh had, since being incarcerated, completed numerous self-help programs, and since his 2004 parole denial, had completed programs for anger management, as per the Board's recommendation, and Buddhist meditation. The Board then noted that Huynh had done as well as possible "as far as classification and custody" scores; that he had no enemies in prison or gang affiliations; that he had completed his college education in Vietnam but obtained his GED while in prison; that he worked while in prison until his heart surgery and would not work if released but would be eligible for retirement benefits; and that he had never been written up for a rule or disciplinary violation while in prison.

The district attorney present at the hearing then asked Huynh if he remembered how many times he had shot his wife. Huynh reiterated what is consistent throughout the record—that he did not remember anything after the first shot. The district attorney asked Huynh about why he killed his wife and the effect of his crime on others. Huynh reiterated his remorse and tried to explain that he doesn't know why he killed his wife but that he was "crazy" and had acted out of anger at his wife's behavior. The district attorney then suggested that Huynh's crime had caused his eldest son's suicide two years after the killing but Huynh maintained that the cause was his son's drug use. The district attorney argued in closing that Huynh should be found unsuitable for parole based generally on the life crime and its effects and what the district attorney termed Huynh's lack of insight into why he had committed the crime.

Those remarks were rebutted by Huynh's attorney, who emphasized all the positive factors favoring suitability, including the psychological reports assessing Huynh's risk of danger to society if released as low, the great stress that led to Huynh's commission of the crime, his lack of criminal history, and positive behavior while incarcerated. Huynh then personally expressed his remorse for what he called a "crime of passion" and asked the Board to find him suitable for parole.

At the conclusion of the hearing, the Board announced its finding that Huynh was suitable for parole and would not pose an unreasonable risk of danger or threat to public safety if released from prison. The Board cited the following facts in support of its decision: (1) Huynh's lack of a juvenile record or criminal history; (2) his enhanced ability to function within the law upon release through extensive programming; (3) his college education and obtaining of a GED while in prison; (4) Huynh's commission of the crime as a result of significant stress in his life; (5) his reduced probability of recidivism due to maturation, growth, greater understanding, and advanced age; (6) his realistic parole plans in both France and California; (7) Huynh having developed a tremendous amount of support and close family ties; (8) his lack of disciplinary

violations while in prison and his positive institutional behavior, signifying improvement in self-control; (9) and the 2004 psychological report that confirmed Huynh's dissociated state while committing the crime and its conclusions that the risk of Huynh resorting to violence in the future was significantly below average relative to the inmate Level II population, that his potential for violence if released to the community was no higher than the average citizen, that there were no risk factors such as substance abuse that would be considered precursors to violence, and that he should once again be given a parole date with the full expectation that he would not return to the criminal justice system.

The Board then proceeded to set the total term of imprisonment. In aggravation, the Board recognized that the victim had experienced severe trauma inflicted with deadly intensity and that she had had a prior relationship with her attacker. The Board also noted that Huynh had had the opportunity to cease his attack but instead continued it and that "[t]he manner in which the crime was committed created potential for serious injury to other people." For all these reasons, the Board assessed the aggravated term for second degree murder of 240 months as derived from the Board's matrix used to set terms for life prisoners, less 60 months credit for good behavior. (Cal. Code of Regs., tit. 15, §§ 2282-2284 (hereafter "Regulations" or "Regs.").)

V. *The Governor's Reversal*

Governor Schwarzenegger exercised his authority under article V, section 8, subdivision (b), of the California Constitution and section 3041.2 to reverse the Board's decision to grant Huynh parole. In his written review, the Governor first detailed the factual events surrounding the life crime, emphasizing facts of which we had previously found some evidence in the record in *Huynh II*—that Huynh had come armed to the encounter with his wife, that he had blocked her car from being able to leave, that he had struck his gun against her window and when that did not work to break it, he used his gun

to shoot through the window.[14] As her car drifted across the street after the first shot, Huynh followed, shooting his wife four more times, which involved reloading the gun

[14] We concluded in *Huynh II* that some facts cited by Governor Davis regarding the gravity of the commitment offense were not supported by the record or were taken out of context. Specifically, we observed that the assertion that Huynh had lured his wife to a more vulnerable location or that she herself was more vulnerable on a public street rather than in her private home was unsupported. In fact, we found the record to support the opposite conclusion—that his wife was less vulnerable where there were other people around to witness the shooting and call for aid. We concluded similarly regarding Governor Davis's statements that Huynh had first purchased a gun two months before the shooting as if in preparation for it, finding that the record instead supported that he had previously owned a gun but had exchanged it in the months before the shooting for the smaller one he ended up using to kill his wife, a less intentioned scenario. We likewise concluded that the Governor's statements to the effect that Huynh had surreptitiously obtained his wife's address from the Department of Motor Vehicles in violation of a court order were without factual support, as was his implication that Huynh's wife had not died instantly from her wounds and instead lay there, alive but bleeding profusely, while Huynh sat emotionless, failing to take action that might have saved her life.

But we also concluded in *Huynh II* that there could be said to be some evidence in the record that was indicative of the gravity of the life crime and that "some of these facts may have aggravated the crime beyond what was minimally necessary to sustain a conviction for second degree murder." (*Huynh II*, *supra*, [nonpub.] [2006 WL 280900 at p. *18].) Specifically, we found that it was a "fair reading of the record to say that Huynh had had thoughts of shooting [his wife], and that he brought the loaded gun to their emotionally charged encounter, along with extra ammunition. There was a restraining order in effect as a result of previous domestic violence. When the discussion turned heated, Huynh blocked [his wife's] car from being able to leave and then he hit his gun against her window in an attempt to break it so that he could hit her. It is also true that after the first shot, he reloaded the gun and shot four more times, following her car across the street in order to do so." (*Ibid.*) Based on these facts, we concluded that "[r]easonable minds may differ regarding whether these facts, or any other relating to the commitment offense, aggravate the crime beyond second degree murder." (*Ibid.*)

We also observed with respect to the gravity of the commitment offense that Governor Davis had failed to consider "the undisputed evidence of Huynh's motivation for the crime—that he committed it as the result of significant stress in his life, which had built up over two years as a result of his wife's infidelities and emptying of their bank account of significant amount of money on two occasions, as well as the losses of his business, his marriage, and his home." (*Huynh II*, *supra*, [nonpub.] [2006 WL 280900 at p. *19, fn. omitted].) This was a factor that the Governor was required to consider under section 2402, subdivision (d)(4), of the Regulations and, we concluded, his failure to

once. The Governor also noted that Huynh had admitted having once hit his wife several times in the months preceding the murder, though he concluded that it was unclear whether that prior domestic incident had resulted in Huynh's wife obtaining a restraining order.

Further with regard to the commitment offense, the Governor concluded that its gravity outweighed the factors supporting parole suitability in that Huynh's actions before the crime "demonstrated some level of premeditation," rendering this an "especially heinous second-degree murder." In support of this conclusion, the Governor cited Huynh's "plan on the day of the murder" to shoot his wife and then himself, as "stated" in "both the probation report and the 2002 Life Prisoner Evaluation." He further cited that after the first shot, Huynh's wife's car began coasting across the street, providing him a "clear opportunity to discontinue his conduct," but he instead shot four more times, reloading his gun in the process. The Governor also cited as support for the heinous nature of the crime that Huynh had committed the shooting in a public place, thus endangering other people.

Further with respect to the gravity of the commitment offense, the Governor specifically considered that Huynh had committed the crime as a result of experiencing significant stress in his life. Indeed the Governor cited all the underlying facts contributing to that significant stress as we had previously outlined in *Huynh II*—the loss

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have done so rendered his "decision on this point 'arbitrary and capricious in the sense that he failed to apply the controlling legal principles to the facts before him. [Citation.]' [Citation.]" (*Huynh II*, *supra*, [nonpub.] [2006 WL 280900 at p. *19.)

We further found that the other five factors cited by Governor Davis in reversing the 2002 grant of parole were also lacking evidentiary support in the record.

Finally, in addition to our concluding with respect to the gravity of the commitment offense that Governor Davis had failed to consider that Huynh had committed the crime as a result of significant stress in his life, we also found that the Governor had failed to consider Huynh's advanced age (64 at the time of the 2002 grant of parole), which is a separate factor favoring suitability under section 2402, subdivision (d)(4), of the Regulations.

of Huynh's marriage, his family, his finances, his home, and his business. Having considered this factor, which also relates to the gravity of the commitment offense and which favors suitability for parole, the Governor nevertheless concluded that the "gravity of the murder [Huynh] committed presently outweighs the positive factors tending to support his parole suitability."

In terms of other factors favoring suitability, Governor Schwarzenegger correctly noted that Huynh had "managed to maintain a discipline-free conduct record;" that he had made efforts to "enhance his ability to function within the law upon release;" that he had "availed himself of available self-help and therapy," including substance-abuse related programming even though he had no history of such problems; that he had accepted responsibility for the crime and felt remorse; that mental health professionals had assessed his risk of danger as low; that he had solid parole plans, whether he were to be deported to France where he is a citizen or to remain in California; and that his advanced age reduced the probability of his recidivism. In spite of all these factors favoring suitability, the Governor still concluded in reversing the Board's decision that "[t]he gravity alone of the second-degree murder . . . is sufficient for me to conclude presently that [Huynh's] release from prison would pose an unreasonable public-safety risk."

VI. *Proceedings in the Trial Court*

Huynh initially filed his petition for writ of habeas corpus in pro per. Through counsel, he later filed an amended petition, as to which the court issued an order to show cause. The Warden filed a return, and Huynh a traverse. Without holding a hearing, the trial court granted the writ by written order, concluding that there was not some evidence in the record to support the ultimate conclusion that Huynh remains a danger to public safety if released. Specifically, the court found: (1) that there was no evidence to support the Governor's conclusion that other people were in fact endangered by Huynh having committed the crime in a public place; (2) that Huynh's missed opportunity to have

ceased firing amidst shots does not support that the crime was more egregious or especially heinous, especially since there is no evidence in the record of which shot actually killed his wife; (3) that whatever evidence there is of premeditation and deliberation is inconsequential to the grant of parole now that Huynh has served enough prison time to be eligible for parole as if he had been convicted for first degree murder and had received a sentence of 25 years to life in prison; (4) that the Governor had only paid "lip service" to the many factors favoring suitability; and (5) that there was an absence of evidentiary support that Huynh was unsuitable for parole or was presently a risk to the public. The court ordered that Huynh be "released under the terms of the Board's parole grant within five days of the Attorney General's receipt" of the decision. We granted a stay of this order on the Warden's petition for writ of supersedeas.

DISCUSSION

I. *Appealability and Contentions on Appeal*

The Warden properly appeals from a final order of the superior court made upon the return of a writ of habeas corpus under section 1507. He contends (1) that the superior court erred by improperly reweighing evidence and substituting its own judgment for that of the Governor in concluding that Huynh is suitable for parole, and (2) that the court erred by assessing the egregiousness of the crime against the minimum requirements for first degree murder rather than for the second degree murder charge of which Huynh was convicted. But as we see the overarching issue on appeal, it is whether the Governor's decision to reverse the Board's grant of parole based on the conclusion that Huynh remains a risk or danger to public safety is supported by some evidence in the record. The trial court not having conducted an evidentiary hearing and instead basing its decision on filed pleadings and exhibits, in performing our appellate function we conduct an independent review of the record. (*In re Smith* (2003) 114 Cal.App.4th 343, 360-361 (*Smith*).)

II. *The Legal Framework of Parole Decisions and Judicial Review Thereof*

The California Constitution places the "supreme executive power" with the Governor. Inherent in this authority are purely executive functions that include the powers of reprieve, pardon, and commutation. (Cal. Const., art. V, §§ 1, 8, subd. (a).) In 1988, the electorate broadened these powers by amending article V, section 8 of the State Constitution to vest the Governor with the final authority to "affirm, modify, or reverse" a Board decision concerning parole of a prisoner convicted of murder. (Cal. Const., art. V, § 8, subd. (b); § 3041.2; *In re Dannenberg* (2005) 34 Cal.4th 1061, 1086 (*Dannenberg*).)

This affected a fundamental change in California's parole system, as prior to the amendment, the Board was the sole agency authorized to grant parole and fix release dates. (*In re Powell* (1988) 45 Cal.3d 894, 901.) The Board is still generally authorized to perform these functions, but it is now the Governor, and not the Board, who has the final authority in setting parole release dates for prisoners convicted of murder. (Cal. Const. art. V, § 8, subd. (b); §§ 3040, 3041.2; 5075 et seq.) In performing his review, the Governor has broad discretion, but he is bound to consider the same parole suitability factors that restrict the Board's parole decisions. He is also constrained by the same procedures specified by statute and regulation that define the parameters of the Board's exercise of discretion in parole suitability matters. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 660-661 (*Rosenkrantz*); *In re Lowe* (2005) 130 Cal.App.4th 1405, 1424.)

The specified factors applicable to the Board's parole decisions, and the Governor's review of those decisions, are stated in section 3041 and the Regulations setting forth very specific considerations that must be taken into account in determining whether a life prisoner is suitable for parole. (Regs., §§ 2401-2402.) Under section 3041, subdivision (a), "[o]ne year prior to the inmate's minimum eligible parole release date a panel . . . shall . . . meet with the inmate and shall normally set a parole release

date . . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime."

As stated in section 3041, subdivision (b), the Board "shall set a release date *unless* it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, . . ." (Italics added.) Accordingly, the overarching consideration in the suitability determination, and the one that is prescribed by statute, is *whether the inmate is currently a threat to public safety*. (*Dannenberg, supra*, 34 Cal.4th at pp. 1071, 1083, 1085-1086; *In re Scott* (2005) 133 Cal.App.4th 573, 591 (*Scott II*).)

That said, "[o]f course, no inmate may be imprisoned beyond a period that is *constitutionally proportionate* to the commitment offense or offenses." (*Dannenberg, supra*, 34 Cal.4th at p. 1071.) But, this "limitation will rarely apply to those serious offenses and offenders currently subject by statute to life-maximum imprisonment. Its potential application in occasional individual cases does not require the [Board], under the current statutory scheme, to set fixed release dates for all life prisoners except those whose crimes are most 'egregious' compared to others of the same class. Instead, the Board may decline to do so in an individual case if it concludes, on relevant grounds with support in the evidence, *that the grant of a parole date is premature for reasons of public safety*. Life inmates who believe that such Board decisions have kept them confined beyond the time the Constitution allows for their particular criminal conduct may take their claims to court." (*Ibid.*, italics added.)

The determination in the particular case "should focus upon the public safety risk posed by 'this individual.' " (*Id.* at p. 1083.) Still, "even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement . . . violates the cruel or unusual punishment clause (art. I., § 17) of the California Constitution. [Citations.] Thus, . . . section 3041, subdivision (b)[,] cannot authorize such an inmate's retention, even for reasons of public safety, beyond this constitutional maximum period of confinement." (*Dannenberg, supra*, 34 Cal.4th at p. 1096.) These constitutional and due process considerations apply with equal force to the Governor's review of the Board's parole decisions.

In the suitability determination, the factors that both the Board and the Governor are required to consider and balance are specified in section 2402 of the Regulations, which consists of four subdivisions. (*Rosenkrantz, supra*, 29 Cal.4th at p. 667.) Subdivision (a) reiterates the statutory public safety factor by stating that "[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole *if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison*." (Regs., § 2402, subd. (a), italics added).)

Subdivision (b) provides that "[a]ll relevant, reliable information . . . shall be considered in determining suitability for parole. 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." (Regs., § 2402, subd. (b).)

Subdivision (c) specifies six nonexclusive circumstances, which are set forth as "guidelines," tending to show unsuitability. The importance of these circumstances, or combination thereof, is left to the judgment of the panel, or the Governor, in the particular case. These circumstances include, as relevant here, the "Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include: . . . [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. . . . [¶] (D) The offense was carried out in a manner [that] demonstrates an exceptionally callous disregard for human suffering. . . ." (Regs., § 2402, subd. (c)(1).)

Subdivision (d) is the converse of subdivision (c). It specifies nine circumstances, likewise set forth as "guidelines," tending to show suitability for release, and the importance attached to any circumstance or combination of circumstances is again left to the judgment of the panel, or the Governor, in the particular case. These circumstances include, as relevant here: "(1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims. [¶] (2) Stable Social History. The prisoner has experienced reasonably stable relationships with others. [¶] (3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense. [¶] (4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress had built over a long period of time. . . . [¶] (6) Lack of Criminal History. The prisoner lacks any significant history of violent crime. [¶] (7) Age. The prisoner's present age reduces the probability of recidivism. [¶] (8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use

upon release. [¶] (9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release."[15] (Regs., § 2402, subd. (d).)

While the Governor's discretion in his review of parole suitability determinations is very broad, it is not complete or absolute. His discretion, like that of the Board, includes the power to "identify and weigh the factors relevant to predicting 'by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.' [Citation.] However, 'the requirement of procedural due process embodied in the California Constitution (Cal. Const., art. I, § 7, subd. (a)) places some limitations upon the broad discretionary authority of the [Governor].' [Citation.]" (*In re DeLuna* (2005) 126 Cal.App.4th 585, 591 (*DeLuna*).) In exercising his discretion, the Governor, like the Board, is constrained by the procedures specified by statute. The precise manner in which the specified factors relevant to parole suitability are considered and balanced is within the Governor's discretion, but his decision must reflect an individualized consideration of all the specified criteria and it cannot be arbitrary or capricious. (*Scott II*, *supra*, 133 Cal.App.4th at pp. 590-591; citing *Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.) " 'Although a prisoner is not entitled to have his term fixed at less than maximum or to receive parole, he is entitled to have his application for these benefits "duly considered" ' based upon an individualized consideration of *all* relevant factors. [Citations.]" (*Rosenkrantz*, *supra*, at p. 655, italics added.)

Once the Governor has exercised his authority concerning suitability for parole, judicial review of the Governor's decisions is quite circumscribed. First, "the court may inquire only whether some evidence in the record before the [Governor] supports the decision to deny parole, based upon the factors specified by statute and regulation."

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[15] Thus, the only listed factor favoring suitability for parole that is absent here is that the prisoner suffered from battered women's syndrome. (Regs., § 2402, subd. (d)(5).)

(*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) "Due process of law requires that this decision be supported by some evidence in the record. Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*Rosenkrantz, supra*, at pp. 676-677.)

As applied in *Rosenkrantz*, and given its historical roots as explained there, "the 'some evidence' test may be understood as meaning that suitability determinations must have some rational basis in fact." (*Scott II*, *supra*, 133 Cal.App.4th at p. 590, fn. 6.) "Because this requirement gives rise to a liberty interest protected by due process of law, and because due process of law requires that a decision considering such factors be supported by some evidence in the record, the Governor's decision is subject to judicial review to ensure compliance with this constitutional mandate." (*Rosenkrantz, supra*, 29 Cal.4th at p. 664.) Thus, while we do not reweigh the evidence or engage in our own balancing of the specified factors, the exceedingly deferential "nature of the 'some evidence' standard of judicial review set forth in [*Rosenkrantz*] does not convert a court reviewing the denial of parole into a potted plant." (*In re Scott* (2004) 119 Cal,App.4th 871, 898 (*Scott I*).) "[T]he evidence must substantiate the ultimate conclusion that the prisoner's release currently poses an unreasonable risk of danger to the public. ([*Rosenkrantz, supra*, 29 Cal.4th at p. 677]; *In re Lee* [(2006)] 143 Cal.App.4th [1400,] 1408 [(*Lee*)].) It violates a prisoner's right to due process when the Board or Governor [attach] significance to evidence that forewarns no danger to the public or relies on an

unsupported conclusion. [Citations.]" (*In re Tripp* (2007) 150 Cal.App.4th 306, 313 (*Tripp*).)

III. *The Governor's Decision That Huynh Still Poses a Threat to the Public if Released is Not Supported by Some Evidence*

As we have explained, the Governor rested his reversal of the Board's decision to grant parole on the gravity of the commitment offense alone while acknowledging that all other factors favored suitability for parole.[16] As support for his decision that Huynh remains an unreasonable public safety risk, the Governor specifically cited what, in his view, was evidence of Huynh's premeditation and deliberation, Huynh's failure to have discontinued shooting and even reloading during the course of the five shots, and the fact that others were put in danger because of the public location of the crime. These factors, the Governor said, made the crime "especially heinous" and "atrocious."

In *Huynh II*, we concluded that some of the facts surrounding the shooting "may have aggravated the crime beyond what was minimally necessary to sustain a conviction for second degree murder." (*Huynh II*, *supra*, [nonpub.] [2006 WL 280900 at p. *18].) These facts included that Huynh had previously contemplated shooting his wife (and himself), that he had brought the gun to his emotionally charged encounter with his wife along with extra ammunition, and that in the course of the crime, Huynh reloaded his gun and continued shooting for a total of five shots, all of which hit Lan, though it is not clear from the record whether any single shot, by itself, inflicted the fatal blow. We said that "[r]easonable minds may differ regarding whether these facts, or any other relating to the

[16] The Governor also cited the opposition to Huynh's parole by the San Jose Police Chief and the District Attorney but these views, like the Governor's, rested on the gravity of the commitment offense and they thus add no further unsuitability factor to the analysis. (*In re Weider* (2006) 145 Cal.App.4th 570, 590 ["the opposition cannot add weight where there is no evidence of unsuitability to place in the balance."].)

commitment offense, aggravate the crime beyond second degree murder." (*Ibid.*) We maintain this conclusion here.

But with respect to the Governor's newly cited fact that others were put in danger given the public location of the crime, we find no evidentiary support in the record other than the repetition of this same bare and speculative conclusion. There is simply no evidence in the record that anyone other than Lan was in fact placed at risk by Huynh's criminal conduct, whether through proximity to the gunfire or proximity to Lan's car as it drifted across the street after Huynh fired the first shots. Accordingly, we give no credit in our analysis to this cited "fact," which lacks evidentiary support, leaving the Governor's decision to rest entirely on what he considered to be evidence of premeditation and deliberation and Huynh's failure to have ceased firing in between shots.

As our Supreme Court has explained, the circumstances of the prisoner's offense alone may indeed support a finding of unsuitability for parole. (*Rosenkrantz, supra*, 29 Cal.4th at p. 682; *Dannenberg*, *supra*, 34 Cal.4th at p. 1097.) But in this context, "it is necessary to remember that denial of parole based upon the nature of the offense alone may rise to the level of a due process violation, as 'where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense.' (*Rosenkrantz, supra,* 29 Cal.4th at p. 683.) Therefore, an unsuitability determination must be predicated on 'some evidence that the particular circumstances of [the prisoner's] crime—circumstances beyond the minimum elements of his conviction—indicated exceptional callousness and cruelty with trivial provocation, and thus suggested he remains a danger to public safety.' ([*Dannenberg,*] *supra,* 34 Cal.4th at p. 1098.)" (*Scott II, supra*, 133 Cal.App.4th at p. 598.)

Moreover, the proposition that the commitment offense alone may establish unsuitability for release "must be properly understood. The commitment offense is one of only two factors indicative of unsuitability a prisoner cannot change (the other being

his 'Previous Record of Violence'). Reliance on such an immutable factor 'without regard to or consideration of subsequent circumstances' may be unfair ([*Smith, supra*,] 114 Cal.App.4th [at p. 372]), and 'runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation.' (*Biggs v. Terhune* [(9th Cir. 2003)] 334 F.3d [910,] 917.) The commitment offense can negate suitability only if circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison. Yet, the predictive value of the commitment offense may be very questionable after a long period of time. (*Irons v. Warden of California State Prison—Solano* (E.D.Cal.2005) 358 F.Supp.2d 936, 947, fn. 2.) Thus, denial of release solely on the basis of the gravity of the commitment offense warrants especially close scrutiny. . . . (*In re Ramirez* [(2001)] 94 Cal.App.4th [549,] 569; accord *Rosenkrantz, supra,* 29 Cal.4th at pp. [655], 660, 677 ['As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision']; *Scott I, supra,* 119 Cal.App.4th at p. 891.)" (*Scott II, supra*, 133 Cal.App.4th at pp. 594-595, fns. omitted; see also *Dannenberg, supra*, 34 Cal.4th at p. 1071 ["The [Board] acts properly in determining unsuitability, and the inmate receives all constitutional process due, if the Board provides the requisite procedural rights, *applies relevant standards*, and renders a decision supported by 'some evidence,' " italics added].)

Further, denial of parole where there are no circumstances that could be considered more violent or aggravated than the minimum necessary to sustain a conviction for that offense "would be inconsistent with the statutory requirement that a parole date normally shall be set 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public. . . .' ([]§ 3041, subd. (a).) 'The Board's authority to make an exception [to the requirement of

setting a parole date] based on the gravity of a life term inmate's current or past offenses should not operate so as to swallow the rule that parole is "normally" to be granted. . . . Therefore, a life term offense or any other offenses underlying an indeterminate sentence must be particularly egregious to justify the denial of a parole date.' [Citation.]" (*Rosenkrantz, supra*, 29 Cal.4th at p. 683.) In this context, "particularly egregious" is understood to mean that there is violence or viciousness beyond what is "minimally necessary" for a conviction. (*Dannenberg, supra*, 34 Cal.4th at p. 1095.) Accordingly, when the Board or the Governor base "unsuitability on the circumstances of the commitment offense, [they] must cite 'some evidence' of aggravating facts *beyond the minimum elements of that offense*." (*Dannenberg, supra*, 34 Cal.4th at p. 1095, fn. 16, see also p. 1071.)

Moreover, "[e]stablishing that the commitment offense involved some elements more than minimally necessary to sustain a conviction is a step on the path of evaluating a prisoner's current dangerousness, but it is not the final step under the [R]egulations. Due process affords an inmate 'an individualized consideration of all relevant factors.' ([*Rosenkrantz, supra*,] 29 Cal.4th at p. 655.)" (*Tripp, supra*, 150 Cal.App.4th at p. 319.) "Under the [R]egulations applicable to evaluating an inmate's current dangerousness, the viciousness of the commitment offense must be balanced against the passage of time and any evidence of an inmate's rehabilitation." (*Id.* at p. 320.) Indeed, the Regulations that govern the Board's, and the Governor's, parole suitability decisions explicitly instruct that an unsuitability decision is a conclusion that "the prisoner will pose an unreasonable risk of danger to society if released from prison." (Regs., § 2402, subd. (a).)

The Governor's decision in this case was that Huynh "would pose an unreasonable risk of danger to society" if released from prison at this time because the crime was "especially heinous" and "atrocious." It is this decision that must be reviewed under the "some evidence" standard, and the decision must be supported by some evidence. Thus, in reviewing the sufficiency of the evidence to support the Governor's decision to deny

parole, there must be some evidence to support the Governor's *finding* that the inmate's offense was "especially heinous," *and* the heinousness of the offense must support the Governor's *conclusion* that the inmate currently poses an unreasonable risk of danger to society if released. (*In re Elkins* (2006) 144 Cal.App.4th 475, 495-502 (*Elkins*); *Lee, supra,* 143 Cal.App.4th at pp. 1407-1409.)[17]

Because the overarching consideration is public safety, the test in reviewing the Board's decision denying parole " 'is not whether some evidence supports the *reasons* [the Board] cites for denying parole, but whether some evidence indicates a parolee's release unreasonably endangers public safety.' " (*In re Barker* (2007) 151 Cal.App.4th 346, 366, second italics omitted.) "Some evidence of the existence of a particular factor does not necessarily equate to some evidence the parolee's release unreasonably endangers public safety." (*Lee, supra,* 143 Cal.App.4th at p. 1409, fn. omitted.) "[A] governor, in reviewing a suitability determination, must remain focused not on

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[17] The California Supreme Court currently has on review at least five cases that involve the proper scope of judicial review in parole cases. The first case is *In re Lawrence* [S154018, review granted September 19, 2007] in which the issue presented as reflected on the Court's website is "In making parole suitability determinations for life prisoners, to what extent should the Board of Parole Hearings, under Penal Code section 3041, and the Governor, under [a]rticle V, section 8(b) of the California Constitution and Penal Code section 3041.2, consider the prisoner's current dangerousness, and at what point, if ever, is the gravity of the commitment offense and prior criminality insufficient to deny parole when the prisoner otherwise appears rehabilitated?" Another case is *In re Shaputis* [S155872, review granted October 24, 2007] in which the issues presented include: "(1) In assessing whether 'some evidence' supports a decision by the Governor to deny parole, is the inquiry limited to whether the reasons stated have a factual basis or should a reviewing court also examine whether the evidence supports a finding that the inmate presents an unreasonable current risk of danger to the public? (2) When a reviewing court determines that a gubernatorial parole decision is not supported by sufficient evidence, should it remand the matter to the executive branch to proceed in accordance with due process, or should it order the inmate's immediate release?" See also *In re Cooper* [S155130, review granted October 24, 2007]; *In re Jacobson* [S156416, review granted December 12, 2007]; and *In re Dannenberg* [S158880, review granted February 13, 2008]. (See http://appellatecases.courtinfo.ca.gov.)

circumstances that may be aggravating in the abstract but, rather, on facts indicating that release currently poses 'an unreasonable risk of danger to society' [citations.]"[18] (*Elkins, supra,* 144 Cal.App.4th at p. 499.) It is clear from *Rosenkrantz,* which repeatedly emphasized that the due-process-based, some-evidence standard applies to the Governor's "decision," that there must be "some evidence" in the record to support "the decision to deny parole, based upon the factors" rather than merely "some evidence" to support a particular factor. (*Rosenkrantz, supra,* 29 Cal.4th at pp. 658, 664.)

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[18] We note that this analysis and standard of judicial review in parole board cases was also recently endorsed in *In re Singler* (Mar. 26, 2008, C054634) ___ Cal.App.4th ___ [2008 Cal.App. Lexis 408]. In that case, a panel of the Third District Court of Appeal first summarily denied Singler's petition for a writ of habeas corpus that challenged the Board's denial of parole. In doing so, the court "strictly construed the California Supreme Court's holding in [*Rosenkrantz, supra,*] as compelling [the court] to deny the petition." (*Id.* at p. ___ [2008 Cal.App. Lexis at p. *2].) The Supreme Court then granted Singler's petition for review and transferred the matter back to the court of appeal with directions to "vacate [the] denial of the petition and to order the Board to show cause why it 'did not abuse its discretion and violate due process in finding [Singler] unsuitable for parole in June 2006, and why [Singler] remains a danger to public safety. (See Pen. Code, § 3041; *In re Rosenkrantz*[, *supra,*] 29 Cal.4th [at p.] 683; [*Elkins, supra,*] 144 Cal.App.4th [at pp.] 496-498; *In re Lee* [, *supra,*] 143 Cal.App.4th [at p.] 1408; [*Scott II, supra,*] 133 Cal.App.4th [at pp.] 594-595.)' " (*Id.* at p. ___ [2008 Cal.App. Lexis at p. *5-6].) The court of appeal then concluded that because of its citation to *Elkins, Lee,* and *Scott II* in its directions on transfer and notwithstanding its holding in *Rosenkrantz,* the Supreme Court "has endorsed subsequent Court of Appeal decisions that give courts greater leeway in reviewing the Board's determination that an inmate remains a danger to public safety." (*In re Singler, supra,* ___ Cal.App.4th at p. ___ [2008 Cal.App. Lexis at p. *6].) Further concluding that the Supreme Court was of the view that the court of appeal's former construction of *Rosenkrantz* was too narrow and too deferential to the Board, and that *Elkins, Lee,* and *Scott II* are not inconsistent with *Rosenkrantz,* the court of appeal in *Singler* ultimately reversed the Board's decision denying parole, "applying the judicial gloss that *Scott [II], Elkins,* and *Lee* placed on the standard of review articulated in *Rosenkrantz,*" and finding that the Board's decision to deny parole was not supported by the evidence presented at the hearing. (*In re Singler, supra,* ___ Cal.App.4th at p. ___ [2008 Cal.App. Lexis, at pp. *38, *35-*39.)

Thus, our deferential standard of review, which requires us to credit the Governor's findings if they are supported by a modicum of evidence, does not mean that the fact that there is a modicum of evidence that a commitment offense was "especially heinous" will *eternally* provide adequate support for a decision that a prisoner is unsuitable for parole. Indeed, in the wake of the California Supreme Court's decision in *Dannenberg*, the courts of appeal have elaborated on the critical distinction between the *finding* that that the commitment offense was "especially heinous" and the *nexus* that links that *finding* to the Governor's *conclusion* that the prisoner currently poses an unreasonable risk of danger to society if released. (*Scott II, supra*, 133 Cal.App.4th at p. 595; *Elkins, supra,* 144 Cal.App.4th at p. 496.)

Here, although we have concluded that there can be said to be some facts as cited by the Governor that might go beyond what would be minimally necessary to sustain a conviction for second degree murder, there is utterly lacking in the record any evidence that connects these facts to any current risk of dangerousness posed by Huynh to society if he were now to be released. While the nature of Huynh's commitment offense was surely grave, the record before the Governor lacks any evidence that now, some 20 years after Huynh's offense, its nature alone continues to support a conclusion that Huynh poses an unreasonable risk to society. And it is not the mere passage of time that deprives the commitment offense of predictive value with respect to the risk Huynh may pose to society. The quantity and quality of his consistent and spotless record of upstanding conduct since being incarcerated, coupled with the absence of any negative factors and the presence of every conceivable favorable factor, combine to eliminate any modicum of predictive value that his commitment offense once had. The record before the Board, upon which the Governor's decision was required to be based, lacks any support for the Governor's conclusion that, due to the nature of his commitment offense, Huynh poses a current, unreasonable risk of danger to society if released.

Consequently, while there is some evidence that some facts surrounding Huynh's second-degree-murder offense may have provided more than what was minimally necessary to sustain a conviction for that offense, the Governor's decision violates due process because there is no longer any evidence that, due solely to the nature of Huynh's offense, he currently poses an unreasonable risk of danger to society. Indeed, all the evidence is to the contrary.

IV. *Conclusion*

The Governor's reversal of the Board's decision to grant parole is not supported by some evidence and cannot be upheld. Since no evidence supports any other basis for denying Huynh parole, it would be futile to return the matter to the Governor for further review, and we reject the Warden's contention that the proper remedy under these circumstances is a further remand to the Governor. (*In re Gray* (2007) 151 Cal.App.4th 379, 410-411; *Elkins, supra,* 144 Cal.App.4th at p. 503; *Scott II, supra,* 133 Cal.App.4th at p. 603; *In re Smith* (2003) 109 Cal.App.4th 489, 507.)

DISPOSITION

The trial court's order granting Huynh's petition for writ of habeas corpus is affirmed. The Governor's 2006 decision is vacated and the Board's 2005 decision granting Huynh parole is reinstated on the conditions stated therein.

Duffy, J.

I CONCUR:

McAdams, J.

BAMATTRE-MANOUKIAN, Acting P.J., CONCURRING

I concur based on the decision of the Third District Court of Appeal in *In re Singler* (Mar. 26, 2008, C054634) ___ Cal.App.4th ___ [2008 Cal.App. Lexis 408] (*Singler*)). In *Singler*, the California Supreme Court granted Singler's petition for review and transferred the matter to the Third District, with directions to vacate its denial of Singler's habeas corpus petition and to order the Board to show cause why "it 'did not abuse its discretion and violate due process in finding petitioner unsuitable for parole in June 2006, and why petitioner remains a danger to public safety. (See Pen. Code, § 3041; *In re Rosenkrantz* [2002] 29 Cal.4th [616,] 683; *In re Elkins* (2006) 144 Cal.App.4th 475, 496-498; *In re Lee* (2006) 143 Cal.App.4th 1400, 1408; *In re Scott* (2005) 133 Cal.App.4th 573, 594-595.)' " (*Singler*, *supra*, 2008 Cal.App. Lexis 408 at pp. *5-*6.) The *Singler* court concluded that "[t]he Supreme Court's order--signed by the author of *In re Rosenkrantz*, *supra*, 29 Cal.4th 616, and five other members of the court . . . indicates to us the Supreme Court has endorsed subsequent Court of Appeal decisions that give courts greater leeway in reviewing the Board's determination that an inmate remains a danger to public safety." (*Id*. at p. *6.)

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BAMATTRE-MANOUKIAN, ACTING P.J.