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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re LENNIE PARKER, On Habeas Corpus.	C054210 (Super. Ct. No. SC041511A)

The Attorney General of the State of California appeals from a superior court order granting a petition for writ of habeas corpus filed by Lennie Parker. (Pen. Code, § 1506 [an appeal may be taken by the People from a trial court order granting a petition for habeas corpus]; undesignated statutory references are to the Penal Code.) The superior court determined the evidence did not support the decision of the Board of Parole Hearings (Board) denying Parker parole (Cal. Code Regs., tit. 15, § 2402, (regulation 2402)). The court directed the Board to grant parole. The Attorney General argues the trial court erred in failing to defer to the Board's decision and in ordering the Board to grant parole. We shall conclude (as did the trial court) that the Board's stated reasons for denying parole (gravity of commitment offense, prior

criminality, and unstable social history) did not provide evidence that Parker's release would pose a present risk to public safety under section 3041. However, we shall conclude the trial court erred in directing the Board to grant parole rather than allowing the Board to exercise its discretion in reconsidering the matter. On remand, the Board retains its discretion to grant or deny parole.

FACTUAL AND PROCEDURAL BACKGROUND

On January 1, 1987, Parker (who was 24 years old at the time) participated in the murder of his friend, Robert William Lang, and left him lying dead or dying in an irrigation ditch in a remote area. The victim sustained two gunshot wounds, which did not kill him immediately. He died from shock and hemorrhage from a gunshot wound to the chest.

The police arrested Parker on August 6, 1987, and he has been in continuous custody since then.

Parker entered a plea bargain pursuant to which (1) he pled guilty to second degree murder; (2) he twice testified against the shooter, Tab Lee (Herky) Bennett (the first trial having ended in a mistrial); (3) the People dropped other charges against Parker -- kidnapping, vehicle theft, and robbery; and (4) the District Attorney and the court would (and did) support Parker's release on parole at the earliest possible date.

In January 1991, the trial court accepted Parker's guilty plea to second degree murder and sentenced him to prison for 15 years to life.

Despite the recommendations of the District Attorney and the superior court, Parker has been denied parole several times. The subject of this appeal is Parker's fifth parole hearing (fourth subsequent hearing), which took place on June 28, 2004. Evidence adduced at the hearing included the following:

The probation report set forth two versions of the crime -- one by Parker and the other by witness Neil Herr. Herr testified at the preliminary hearing that he and Bennett met up with Parker and the victim on the night in question. They all drank wine and were driving to a party, with Bennett driving Parker's Grand Prix. They made a stop at a repair garage, where Parker and the victim began arguing. The victim walked away. The other three followed in the car. Parker apologized, and the victim got back in the car. Bennett drove out into the country, stopped the car, and told the victim to get out. Herr, who remained in the car, saw Parker and Bennett "roughing up" the victim, slapping him and kicking him when he was on the ground. They then placed the victim in the trunk of the car. Bennett drove while Parker, who was then holding a shotgun, said the victim had "snitched off" somebody's uncle. Bennett stopped the car near a vineyard and told Herr to stay in the car. Bennett removed the victim from the trunk and walked him to the top of a

canal bank. Parker handed Bennett the shotgun. The victim was told to walk down into the canal. Herr then heard Bennett fire two shots, 10 to 20 seconds apart. Bennett and Parker then returned to the car. Bennett placed the shotgun in the trunk. Parker had the victim's wallet and car keys. They drove to Parker's residence, where Parker got into the victim's MG and drove into the countryside. Bennett followed and repeatedly rammed the MG, which was then dumped.

The probation report also sets forth the differing version of Parker, who says he and the victim were at a pizza place when Bennett got into an argument with the victim and slapped the victim. Parker and the victim remained for a while, drinking beer and eating pizza, and then left to go to a bar. When they stopped to buy gas and beer, Bennett and Herr drove up. Bennett told Parker to meet him at a repair garage, where Bennett and the victim got into an argument. The victim walked away. Bennett got into the driver's seat of Parker's car, Herr got in the front passenger seat, Parker got in the back seat, and they drove to the victim. Parker asked the victim to get in the car, and he did. Bennett then drove the car to a remote area where he showed a shotgun, ordered the victim out of the car, shoved the victim, and made him get into the trunk. Bennett drove to a canal. Herr asked what was going on. Bennett said he had to take care of something. At the canal, Bennett ordered the victim out of the trunk, pointed the shotgun at him, ordered him

to give up his keys and wallet, which he did. Bennett then stuck the end of the shotgun in the victim's mouth, marched him up the canal embankment, and shot him twice.

Evidence at the parole hearing also showed that, at the time of the murder on January 1, 1987, Parker abused alcohol,[1] had a pattern of anti-social conduct, and was on probation for misdemeanor driving under the influence (DUI). His criminal record also showed several misdemeanor convictions for driving under the influence (DUI) or reckless driving between 1982 and 1985, as well as a 1983 battery conviction, and a 1984 conviction for obstructing a peace officer.

Since 1997, Parker has been classified as Medium A custody with zero classification points and 19 placement points, reflecting the lowest security risk. He is housed in the Level II facility, the lowest allowable level for a term-to-life inmate, which would not be allowed if his crime involved unusual violence or an execution-style killing. (Cal. Code Regs., tit. 15, § 3375.2, subd. (a)(7)(A).) In prison, Parker has pursued work, vocational, and self-help activities. He has been active for years in recovery programs including AA and NA. Psychiatric

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[1] The Attorney General says Parker also abused cocaine, methamphetamine, and marijuana. The cited portion of the record shows Parker admitted "recreational" use of marijuana and methamphetamine before the killing and abuse of those drugs (plus cocaine) after the killing--which he attributed to severe depression stemming from the killing.

reports indicate (1) he poses less potential for violence in the community than other inmates; (2) if released, his potential for violence would be no more than that of the average citizen; and (3) he has an excellent prognosis for successful parole adjustment.

The probation report also contained Parker's 1989 statement that he is not one to cause harm to anyone, and "he [Parker] was a victim of unfortunate circumstances on the evening of the murder, 'but I now realized that I was wrong not to go to the police immediately after it happened.'" Parker attributed his failure to do so to his fear of Bennett, who had made threats against Parker and his girlfriend. Parker said he felt considerable remorse about the incident and felt despair over the loss of his best friend (the victim).

The probation report's evaluation stated, "While Mr. Parker's involvement in the instant offense appears minimal, his decision to plead guilty to second degree murder was no doubt based on his many conflicting statements to the police and their availability for use at trial by the district attorney as impeachment. Even though Mr. Parker gave various accounts including various degrees of culpability, it should be noted that the district attorney has presented Mr. Parker's version, basically as stated [in the probation report] as the truth. Mr. Parker has consistently expressed remorse for the death of his friend Robert William Lang and has cooperated in the

investigation into that death. Attached are letters[2] from the District Attorney of San Joaquin County, John Phillips, Prosecuting District Attorney, Charles Convis and sentencing Superior Court Judge Frank Grande, all of which acknowledge Mr. Parker's cooperation and recommend release for Mr. Parker at his minimum eligible release date."

The probation report cited as the only aggravating factor that Parker was on misdemeanor probation when the murder was committed. The probation report cited several mitigating factors, i.e., (1) Parker voluntarily provided testimony leading to the murder conviction of Bennett; (2) Parker played a minor role in the crime; (3) Parker, with no apparent predisposition to do so, was induced by others to participate in the crime; (4) Parker had no prior felony record; (5) Parker voluntarily acknowledged wrongdoing at an early stage of the proceedings; and (6) Parker has shown remorse and has voluntarily cooperated with authorities.

At the parole hearing, Parker made a statement reiterating his version of the crime, in which he was assertedly an unwitting bystander who did not know what was going on and whose primary culpability was in failing to report the crime to police, a failure which Parker attributed to his fear of the shooter. Parker said he hid the victim's car in a barn because

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[2] Only some of the letters are included in the record on appeal.

he was frightened. The next day, Parker helped Bennett dump the victim's car after Bennett threatened to kill Parker and his girlfriend.

When asked at the parole hearing about his prior criminal record, Parker said, "I have a -- a little lengthy record there due to the fact that I was dating a [police] dispatcher's daughter . . . . Every time we would get in an argument she would call her mom up, and a few things got more blown out of probation [*sic*] . . . ." He also said, however, that he was an alcoholic at the time, and "it's my fault. I take responsibility for it."

Parker got married one year before the June 2004 parole hearing, to a women he met two years before the marriage, through correspondence while he was in prison. The wife supports Parker's release, and Parker's brother stands ready to give him a job when he is paroled.

At the parole hearing, the presiding commissioner noted that Parker heard the gunshots, had to know that the victim was at least hurt, yet left the victim there and did not go back to check on him. The presiding commissioner asked what Parker would do differently now, to which Parker responded, "Well, that's a tough question because Mr. Lang was my friend. At the time I did not know that he was shot, killed. And when [Bennett] would have started up the car at [the garage], I would

have just let him take the car. The car was not worth Billy's life."

At the end of the June 28, 2004, hearing, the panel deliberated and the presiding commissioner announced the decision, stating as follows:

"[T]he Panel reviewed all information received from the public and relied on the following circumstances in concluding that you're not yet suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. Obviously, we looked at the commitment offense, which was a really callous crime. This man, Mr. Lang, was taken out to an area out in the -- out away from town and was taken away from the car and was shot twice with a shotgun, and his body was left there. He -- The autopsy showed that the cause of death was shock and hemorrhage from the shotgun wound to the chest area. The inmate -- As you mentioned here, this was your friend and he was left there to die. He was essentially abandoned there, and no one went back to check to see if he was dead, if he was alive, if there was anything that could have been done to help him. The inmate has an escalating pattern of criminal conduct. He has failed previous grants of probation and, in fact, was on probation six times prior to this commitment offense, and was on probation at the time of this offense. He also has been in county jail, has an unstable social history that includes substance abuse and leading to DUIs

and reckless driving. The prisoner does have good parole plans. He has support in the community. He has a wife who is willing to support him financially and help him get on his feet, and certainly, he has a place to live. He has an offer of a job from his brother. And we do want to commend you for the work that you've done while you've been here. You've been involved in AA. Let me get your paper here that I put aside. I'm going to note some of the self-help that you've done from the report that you gave us. You've done NA and AA, seven years of NA, eight years of AA. You've been involved in Breaking Barriers. You've been involved in Life Plan for Recovery, and your -- you recently have been able to get back on the AA waiting list. Apparently you were out of it only because it wasn't available for a period of time. You had a work history that includes the bakery, textiles, landscaping is what you're currently doing. You've listed your job skills, which are numerous, and you do have letters of support. And I want to note again for the record that the District Attorney's Office is not in opposition to a finding of suitability, and ask[s] that the inmate be considered for a parole at the earliest possible date, as was noted before along with the judge in the case, and also, the probation officer -- the probation officer's report. The prisoner has participated well in self-help programs and vocational programs and work programs since his incarceration. However, at this time the positive aspects of his behavior do

not outweigh the factors of suitability [*sic*]. The Panel recommends that you remain disciplinary [*sic*] free and continue to upgrade vocationally whenever possible. Also, continue to participate in self-help, and in particular in the area of substance abuse, because, obviously, with the history -- with your history of arrests and convictions, and also the fact that there was drinking involved the night of the offense, that's going to be the thing that's going to be the most worrisome. And we also are going to order a new psych report, so I want to recommend that you cooperate in the completion of that report. That completes the reading of the decision."

The presiding commissioner asked if there were any additional comments, and the deputy commissioner said, "I think you're doing very well, Mr. Parker, and I think that -- I think there is a couple things I would, you know, like to hear from you. And, also, I think the psych needs to speak to you as to what's changed or why you're not easily influenced by other people. And this particular crime, reading the mitigating circumstances, it certainly appears that you were not the leader, and consequently, over the years that you've matured, you're your own person. And that's, in part, demonstrated by the fact that you got out of [one program] because you felt it was in your best interests, that you weren't just going along with the program. Now, the other things -- another thing that I was concerned about is, you know, those 12 steps, you need to

know them frontwards and backwards [*sic*]. And after all the time that you've been in here [eight years in AA], I was a little bit disappointed that you didn't know about a searching and fearless moral inventory because that's something you need to do, quite frankly.[3] So, anyway, that's all I have. Good luck to you."

The presiding commissioner concluded with the following:

"You're doing a good job, so just keep doing what you're doing. It's -- You know, there are areas that we know are going to be of concern, not only with -- not only with the Commissioners, but also with Decision Review and the Governor's Office. And that's one of the reasons that we're going to be ordering a new psych report before your next hearing so that any issues that were raised during our deliberation could also be addressed by the psych report before your next hearing."

Parker petitioned this court for a writ of habeas corpus. We summarily denied the petition on February 9, 2006. Upon Parker's petition for review, the California Supreme Court directed us to vacate our order and issue an order to show cause, returnable to the superior court, as to why the Board did not abuse its discretion in denying parole.

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[3] The transcript of the audiotaped Board hearing shows the deputy commissioner asked Parker, "What's the fourth step [of AA's 12-step program]? You don't need to respond unless (inaudible) think about toward the end of the hearing."

After further briefing and reconsideration, the trial court determined there were no factual disputes requiring an evidentiary hearing, and on October 19, 2006, issued an order, finding:

"1. That the Board, in relying on two factors (nature of the crime and unstable social history[4]) as the basis for a denial of parole, abused its discretion in finding Petitioner unsuitable for release on parol[e].

"2. Further, Respondent has failed to adequately establish that the finding of unsuitability and a denial of a release date during the June 2004 hearing is supported by the requisite 'some evidence.' Specifically, the court finds no evidence in the record to support the rational conclusion that Petitioner, if released on parole would currently present an unreasonable risk of danger to public safety. [Citations.]

"3. Further, based on the record the court finds it is unreasonable for the Board not to find Petitioner suitable for release on parole and set a release date."

The trial court ordered that (1) the Board decision be vacated, and (2) a writ issue directing the Board to hold a hearing for the purpose of preparing a new decision finding Parker suitable for release on parole.

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[4] The panel's citation of unstable social history encompassed two factors -- the escalating pattern of criminal conduct, and the substance abuse problem that led to the criminal conduct.

The Attorney General appeals from the trial court's order.[5]

DISCUSSION

I. Applicable Statutes/Regulation

Section 3041, subdivision (b), requires the Board to 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 . . . ."

Section 3041.5, subdivision (b)(2), requires the Board to provide a statement "setting forth the reason or reasons for refusal to set a parole date, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated."[6] (But see *In re Van Houten* (2004) 116 Cal.App.4th 339, 360, which, in reviewing the decision of the Governor rather than the Board, said that the superior court did not have the authority to require a statement of reasons or evidence as to why the Board found the negative factors outweighed the positive factors.)

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[5] In his respondent's brief on appeal, Parker argues the issue is not ripe for appeal for reasons set forth in his separate motion to dismiss (accusing the Board of defying the trial court's order in the subsequent 2007 parole hearing). We denied the motion to dismiss and need not consider the matter further.

[6] The statute requires a written statement. We presume this requirement was satisfied by the written transcript of the commissioner's verbal pronouncement of the decision.

Regulation 2402 states:

"(a) General. The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

"(b) Information Considered. All relevant, reliable information available to the panel 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.

"(c) Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general

guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include: [¶] (1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include: [¶] (A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense. [¶] (2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age. [¶] (3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others. [¶] (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim. [¶] (5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related

to the offense. [¶] (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.

"(d) Circumstances Tending to Show Suitability. The following circumstances each tend to show that the prisoner is suitable for release. The circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate suitability include: [¶] (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 has built over a long period of time. [¶] (5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization. [¶] (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."[7] (Underlining added.)

II. Standard of Review

Where, as here, there was no evidentiary hearing in the trial court, we independently review the record of the Board proceedings. (*In re Lowe* (2005) 130 Cal.App.4th 1405, 1420; *In re Van Houten, supra*, 116 Cal.App.4th at pp. 413-414.)

We are cognizant that some of the appellate cases cited in this opinion involved review of *the Governor*'s decision to affirm or reverse a Board decision. Review of the Governor's decision adds a layer of complexity due to the constitutional source of the Governor's power. (Cal. Const., art. V, § 8, subd. (b).) Here, no decision by the Governor is at issue. Nevertheless, the cited cases are useful in the discussion of the scope of the Board's powers.

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[7] Although the state expects prisoners to behave well in prison, the absence of serious misconduct in prison and participation in institutional activities that indicated an enhanced ability to function within the law upon release are factors to be considered on an individual basis. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 682.)

"[T]he judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law. [Citations and fn. omitted.]" (*In re Rosenkrantz, supra,* 29 Cal.4th 616, 658.)

Rosenkrantz extended to parole decisions under state due process the principle applied by the United States Supreme Court to good time credits: "'Requiring a modicum of evidence to support a decision [to deny parole] [brackets in *Rosenkrantz*] will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens. In a variety of contexts, the [United States Supreme] Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. [Citations.]' . . . 'Ascertaining whether this standard is satisfied does not

require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is *any* evidence in the record that could support the conclusion reached . . . .'" (*Rosenkrantz, supra*, 29 Cal.4th at pp. 664-665, citing *Superintendent v. Hill* (1985) 472 U.S. 445, 455-456 [86 L.Ed.2d 356, 365]; see also *Sass v. Cal. Bd. of Prison Terms* (9th Cir. 2006) 461 F.3d 1123, 1128 [extending *Hill* to parole decisions].)

The question is whether there must be some evidence of current dangerousness of the prisoner if released, or merely some evidence of factors tending to show unsuitability for release.

The California Supreme Court has suggested, though it has not held, that there must be "some evidence" tending to prove the existence of some factor which is relevant to the ultimate finding the statute requires before parole can be denied--release of the prisoner on parole would create an unreasonable risk to public safety. Citing to section 3041, subdivision (b), *Rosenkrantz* held, "the governing statute provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the

conviction."[8] (*Rosenkrantz, supra*, 29 Cal.4th at p. 654.) Additionally, *In re Dannenberg* (2005) 34 Cal.4th 1061, held, "the Board may decline to [set fixed release dates] 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." (*Id*. at p. 1071.) *Dannenberg* also said, "if the circumstances of a particular murder persuade the Board that the prisoner . . . is presently too dangerous to grant a fixed parole release date, the Board may deny parole without deciding when the inmate will be released . . . ." (*Id*. at p. 1080.) The Legislature left a "'"consideration of the public safety" as the fundamental criterion in assessing suitability.'" (*Ibid*.)

When evaluating whether a commitment offense alone can support such a finding, *Rosenkrantz, supra,* 29 Cal.4th 616, explained, "a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation--for example 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.

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[8] On the other hand, *Rosenkrantz, supra*, 29 Cal.4th 616, said that if the Board's consideration "of the specified factors" was not supported by some evidence, the court should order the Board to vacate its decision. (*Id*. at p. 658.)

. . . ‘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.]” (*Id*. at p. 683.) The four justice majority in *Dannenberg* took the position the *Rosenkrantz* formulation, including the use of the phrase “particularly egregious,” conveyed only that the violence or viciousness of the inmate’s crime must be more than minimally necessary to convict him of the offense for which he is confined. (*Dannenberg, supra*, 34 Cal.4th at p. 1095.)

California courts applying *Rosenkrantz* have indicated there must be some evidence of current dangerousness in order to deny parole. For example, *In re Lee* (2006) 143 Cal.App.4th 1400, said: “The test 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. (Cal. Code Regs., tit. 15, § 2402, subd. (a) [parole denied if prisoner ‘will pose an unreasonable risk of danger to society if released from prison’]; see, e.g., *In re Scott* (2005) 133 Cal.App.4th 573, 595 [‘The commitment offense can negate suitability [for parole] only if circumstances of the crime . . . rationally indicate that the offender will present an unreasonable public safety risk if released from prison’]; but see *In re Lowe* (2005) 130 Cal.App.4th 1405 [suggested ‘some evidence’ applies to the factors, not dangerousness].) 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 pp. 1408-1409, italics and fn. omitted [appellate court vacated the Governor's decision to deny parole and reinstated the Board's decision to grant parole to an 82-year-old prisoner after almost 20 years in prison].) Since *Lee* reversed a decision by the Governor rather than the Board, a question may arise as to whether this test improperly reweighs the evidence in contravention of the Governor's *constitutional* authority to review the Board's decision, but such an objection would not apply to the Board's authority, which is founded in statutory rather than constitutional law. The test as described in *Lee* was arguably dictum with respect to one of the Governor's reasons for denying parole, in that *Lee* concluded there was no evidence to support the Governor's characterization of the crime as atrocious or especially heinous. (*Id*. at pp. 1409-1412.) However, *Lee* did apply the test to the other factor relied upon by the Governor, i.e., that the prisoner's acceptance of responsibility was too recent. *Lee* said this reason did not provide some evidence to deny parole, because, "[t]o deny parole, the reason must relate to a defendant's continued unreasonable risk to public safety. So long as Lee genuinely

accepts responsibility, it does not matter how longstanding or recent it is." (*Id*. at p. 1414.)

We conclude that, to satisfy California due process principles, the test is not whether some evidence supports the Board's cited reasons for denying parole, but whether some evidence supports the Board's determination that the prisoner's release would unreasonably endanger public safety (which of course will necessarily incorporate the need for evidence of unsuitability factors relied upon by the Board).

As we shall explain in a moment, we conclude the denial of parole to Parker violates due process under the California Constitution, and we therefore need not decide whether it also violates federal due process (a point expressly left undecided in *Rosenkrantz, supra*, 29 Cal.4th at p. 658, fn. 12.) We nevertheless make note of *In re Roderick* (2007) 154 Cal.App.4th 242, which discussed federal case law in affirming a trial court's order directing the Board to vacate its denial of parole, where only one of five unsuitability factors cited by the Board constituted some evidence to deny parole, and that one factor--the prisoner's past criminal history--had diminishing predictive value due to its immutable nature, and the appellate court could not conclude the Board would have denied parole based on that one factor alone. *Roderick* said, "'the parole board's sole supportable reliance on the gravity of the offense

and conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. Over time, however, should [the inmate] continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of [the commitment] offense and prior conduct would raise serious questions involving his liberty interest in parole. [¶] . . . A continued reliance in the future on an unchanging factor, . . . conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation.'" (*Id*. at p. 276, citing *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910.) "'"[T]he 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 . . . past offenses should not operate so as to swallow the rule that parole is 'normally' to be granted. Otherwise, the Board's case-by-case rulings would destroy the proportionality contemplated by . . . section 3041, subdivision (a), and also by the murder statutes, which provide distinct terms of life without possibility of parole, 25 years to life, and 15 years to life for various degrees and kinds of murder. [Citation.]"'"[9] (*Roderick, supra*, 154 Cal.App.4th at p. 276,

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[9] Regarding this reference to proportionality in *Rosenkrantz, supra*, 29 Cal.4th at p. 683, the California Supreme Court later

citing *Rosenkrantz, supra*, 29 Cal.4th at p. 683.) A dissenting justice in *Roderick* believed *Biggs* had been abrogated by *Sass v. California Bd. of Prison Terms* (9th Cir. 2006) 461 F.3d 1123, but the *Roderick* majority disagreed, stating the message of *Biggs*, *Sass*, and other cases, was that the Board "'can look at immutable events, such as the nature of the conviction offense and pre-conviction criminality, to predict that the prisoner is not currently suitable for parole even after the initial denial [citation], but the weight to be attributed to those immutable events should decrease over time as a predictor of future dangerousness as the years pass and the prisoner demonstrates favorable behavior [citations]. . . . Not only does the passage of time in prison count for something, exemplary behavior and rehabilitation in prison count for something . . . . [The standard for denying parole] might be quite low, but it does require that the decision *not* be arbitrary.'" (*Roderick, supra*, 154 Cal.App.4th at p. 277.)

Roderick, supra, 154 Cal.App.4th 242, held that, of five factors relied upon by the panel in denying parole, only one -- the prisoner's past criminal history -- constituted some evidence to conclude that he would pose an unreasonable risk of

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held the Board is not required to engage in a comparative analysis of the prisoner's case with other cases. (*Dannenberg, supra*, 34 Cal.4th at p. 1098.) We do not and need not engage in such an analysis.

danger if released. (*Id*. at p. 278.) The court could not say the Board would have denied parole based on that one factor alone, given his exemplary behavior during 20 years of incarceration. Accordingly, *Roderick* ordered the Board to vacate the denial of parole and to conduct a new parole suitability hearing, at which the Board must consider whether denial of parole based upon the immutable factor of past criminal history would be a denial of due process. (*Ibid*.)

We agree with *Roderick, supra,* 154 Cal.App.4th 242. The test is whether there is some evidence of current dangerousness, not merely whether there is some evidence of factors tending to show unsuitability for parole. We disagree with the Attorney General's characterization of this result as an impermissible reweighing of the Board's decision.

Accordingly, we conclude that, to satisfy due process, the test is not whether some evidence supports the Board's finding of factors tending to show unsuitability for parole, but whether some evidence supports the Board's determination that the prisoner's release would unreasonably endanger public safety (which of course will necessarily incorporate the need for evidence of unsuitability factors relied upon by the Board).

III. Application to This Case

The Attorney General's appeal contends the trial court erred in failing to defer to the Board's decision and in

concluding the Board may not base its decision on the commitment offense and pre-conviction misconduct. We shall conclude the trial court correctly found a due process violation.

First, we disregard the Attorney General's argument that this was an "execution-style" killing, a factor which would support denial of parole. Parker notes this factor was not established at the parole hearing or relied upon by the Board. Parker also notes the regulations prohibit housing execution-style murderers in Level II housing (Cal. Code Regs., tit. 15, § 3375.2, subd. (a)(7)(A)), which is where Parker is housed. We accordingly disregard the Attorney General's argument about an execution-style killing.

The parole panel relied on three factors in denying parole: (1) The callousness of the commitment offense, in which the victim was shot and left to die of shock and hemorrhage in a remote area; (2) Parker's escalating pattern of criminal conduct before the commitment offense; and (3) Parker's unstable social history of substance abuse (which led to the criminal history). The panel described the alcohol problem as "the most worrisome." The parole panel balanced these negative factors against the factors favoring parole, i.e., family support, a job offer, good work in prison including AA and vocational programs, and support from the District Attorney, the judge, and the probation officer.

Some evidence supports each of the negative factors cited by the Board for denying parole. Parker disputes this point, arguing his passive participation in the killing was not especially heinous. He also argues the commitment offense should not be considered as an escalation of criminal history, and without the murder there was no escalation of his crimes, which were mostly DUIs. We reject Parker's view, which discounts the evidence of his active participation in the crime and which fails to persuade us that the murder cannot be considered part of the escalating pattern of criminal behavior.

Parker says the Board was required to accept his version of events (portraying himself as an unwitting bystander), because that is the version the prosecutor presented as truth at the two trials of codefendant Bennett. Parker cites a letter submitted by the District Attorney's investigator, stating that Parker's testimony in Bennett's two trials was "honest, forthright and was corroborated by testimony of other witnesses and physical evidence." Parker argues this shows the state has always accepted Parker's version of the homicide. However, although Parker's credibility as a witness would have been at issue in Bennett's trials, Parker's own level of culpability was not directly at issue in Bennett's trials, where the issue was Bennett's guilt. Therefore, the Board is not bound by the

prosecution’s presentation of Parker’s version at Bennett’s trial.

Parker notes the state’s own Life Prisoner Evaluation Report found as mitigating factors that Parker was “a passive participant or played a minor role in the commission of the crime” and “with no apparent predisposition to do so, was induced by other’s [*sic*] to participate in the crime.” However, both quotations still characterize Parker as a participant in the killing.

Parker cites *In re Scott* (2005) 133 Cal.App.4th 573, which noted the Governor, in reviewing the parole decision, said that although the prisoner (who was found guilty of first-degree felony-murder but was allowed to be convicted upon a plea of guilty to second degree murder in exchange for waiver of his right to appeal) did not need to recant his self-defense-like claim to be found suitable for parole, the Governor did not need to accept Scott’s version of events. (*Id*. at pp. 580, 599.) The appellate court said the trouble with the Governor’s rationale was that there was no evidence in the record justifying the rejection of Scott’s self-defense-like claim. (*Ibid*.)

Here, however, there is evidence supporting rejection of Parker’s version of events. Thus, the probation report recites the preliminary hearing testimony of witness Neal Herr, who

testified Parker argued with the victim; Parker and Bennett both slapped and kicked the victim before placing him in the trunk of the car; Parker held the shotgun as they drove to the scene of the shooting and said the victim "snitched off somebody's uncle"; Parker handed the shotgun to Bennett at the killing site; and Parker returned to the car with the victim's wallet and car keys.

Lee, supra, 143 Cal.App.4th at page 1414, said the prisoner initially tried to justify his shooting of the victims on the ground one of them had victimized him earlier. By pleading guilty to second degree murder, he necessarily acknowledged his guilt. His disclaimer of responsibility in the ensuing years "makes sense only as his trying to emphasize [the] death was accidental, not intentional--a distinction the record supports and the People do not dispute." (*Ibid*.) Here, the Board could take a similar charitable approach to Parker's disclaimers. However, in *Lee*, "by the time of his last parole hearing, [the prisoner's] acceptance of responsibility for his crimes was complete." (*Ibid*.) Here, in contrast, at the parole hearing which is the subject of this appeal, Parker continued to minimize his participation in the killing to such an extent that he would not be guilty of murder at all.

Parker argues we must compare the callousness of this crime to other crimes documented in case law. We decline to consider this argument, since we rule in Parker's favor on other grounds.

Parker argues there is no evidence supporting the Board's finding of an "unstable social history," because regulation 2402, subdivision (c), defines that term as "a history of unstable or tumultuous relationships 'with others.'" However, regulation 2402, subdivision (b), states the listed factors are not exclusive. Whether Parker's alcoholism is labeled as an unstable social history or something else, the result is the same. Parker cites *Thompson v. Davis* (9th Cir. 2002) 282 F.3d 780, for the proposition that his alcoholism triggers the protections of the Americans with Disabilities Act (42 U.S.C. § 12132 (ADA)), which prevents discrimination against addicts in recovery. However, *Thompson* merely held a trial court erred in determining the ADA could not apply to parole decisions and therefore erred in dismissing an action for injunctive relief by prisoners who claimed the Board had an unwritten policy of automatically denying parole to prisoners with substance abuse histories. (*Id*. at pp. 782-782, 786-787.) *Thompson* expressly stated it expressed no opinion on the merits. (*Id*. at p. 787.) We conclude the Board was entitled to consider Parker's alcoholism as a factor, and Parker fails to show an ADA violation.

Some evidence supports the specific unsuitability factors cited by the Board.

However, the fact that there is some evidence supporting the negative factors does not end the inquiry. As we have concluded, due process dictates that we go further, because the commitment offense and prior criminal history are immutable events that lose their predictive value over time. We shall conclude the reasons cited by the Board do not provide some evidence that Parker would pose an unreasonable public safety risk if released.

Although the commitment offense was callous (leaving the victim to die from gunshot wounds in a remote area), the passage of 17 years[10] since the crime has diminished the value of this factor as a predictor of current dangerousness, particularly

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[10] Parker has been incarcerated since August 1987 for the commitment offense, but the judgment of his conviction was entered in 1991. It appears the delay was because his plea bargain was dependent on his testifying in Bennett's trial, and Bennett's first trial ended in a mistrial. Parker counts the full 20 years he has been incarcerated for the 1987 murder (17 years as of the date of the parole hearing which is the subject of this appeal). The Attorney General, without argument or analysis, counts only from the 1991 date of conviction to the 2004 parole hearing, a calculation of 13 years, which is less than the 15 year minimum sentence. We believe it is appropriate to count the full 17 years of incarceration for the commitment offense as of the date the Board made its decision, since the abstract of judgment reflects credit for Parker's preconviction jail custody.

since (1) the correctional counselor in the 2004 Life Prisoner Evaluation Report recommended release and assessed Parker as a low threat to the public; (2) Parker was not the shooter and apparently participated in the crime due, at least in part, to his fear of the shooter; and (3) Parker's exemplary behavior in prison reflects rehabilitation.

Similarly, the prior criminal history, mostly misdemeanor DUIs, has lost its predictive value, particularly in light of the foregoing points plus his exemplary participation in AA and strong family support upon his release.

The problem for Parker is the concern that he may revert to his criminal behavior if he succumbs to alcohol upon his release from prison. Thus, Parker cites the 2000 psychological report assessing his violence potential as no more than that of the average citizen, but the report qualified that assessment "as long as he remains alcohol-free." Although Parker has participated in AA for several years, his incarceration has prevented a test of his resolve to stay away from alcohol. Of course, this too is an immutable factor which Parker is powerless to change until he is given an opportunity to live outside prison. However, even if the alcohol problem provided some evidence supporting denial of parole, we would still remand to the Board. Thus, an appellate court may uphold a Board's decision if the court finds evidence supporting some but not all

of the factors relied upon by the Board, and the court can conclude the Board would have reached the same decision based on the supported factors alone, and the supported factors justify the determination of current dangerousness. (*In re DeLuna* (2005) 126 Cal.App.4th 585, 598.) However, if it is not clear that the Board would have reached the same decision, the appropriate remedy is to direct the Board to reconsider the matter. (*Ibid*.) Here, it is not clear the Board would have denied parole based on Parker's potential for alcohol abuse alone.

We conclude the record fails to show "some evidence" supporting the Board's denial of parole *based on the factors cited by the Board*. We reach our conclusion without engaging in a proportionality review and therefore need not address Parker's argument--disputed by the Attorney General--that a comparative analysis with other cases is required in order to prevent the regulatory language from being unconstitutionally vague. (But see, *Dannenberg, supra*, 34 Cal.4th at pp. 1077-1098, holding the Board need not engage in a comparative analysis.)

We do, however, see reasons *not cited by the Board* which might arguably support a denial of parole, raising the question whether we can affirm a denial of parole for reasons other than those cited by the Board. We shall conclude the answer is "no."

Thus, though not cited by the Board as a factor for denying parole and though not argued by the Attorney General, Parker continues to deny his own participation in the murder, despite having pled guilty to second degree murder. Regulation 2402 lists remorse as a factor tending to show suitability for parole (regulation 2402, subdivision (d)(3)) but does not expressly list lack of remorse as a factor tending to show unsuitability (regulation 2402, subdivision (c)). Nevertheless, the regulation expressly states the list is not exclusive (regulation 2402, subdivision (c)), and also expressly lists "past and present attitude toward the crime" as information to be considered in determining suitability for parole (regulation 2402, subdivision (b)). On the other hand, "The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed." (§ 5011.) There is conflicting evidence in the record as to whether Parker feels remorse for his role in the killing or merely feels regret for not calling 911. It appears from Parker's statement at the parole hearing that he does not feel culpable for the killing. Rather, he continues to portray himself as an unwitting bystander to the murder who had no idea what was happening until it was too late. He faults himself only for failing to protect his friend from the shooter and failing to call 911, and even that self-castigation is tempered

by his explanation that he was afraid of Bennett. We do not have before us the transcript of the court proceedings in which the court accepted Parker's guilty plea to second degree murder, but it is difficult to believe any trial court would have accepted a guilty plea to second degree murder had the court been told the factual basis for the plea was that Parker was an unwitting bystander who was too afraid of the shooter to stop him and who failed to call 911 to assist the victim.

An additional reason arguably supporting denial of parole is that Parker at the parole hearing in 2004 also sought to minimize his prior criminal history, blaming it on a disgruntled girlfriend whose mother worked as a police dispatcher.

In short, Parker has refused to accept responsibility for any of his criminal conduct. Nevertheless, the Board did not cite this reason in denying parole at the 2004 parole hearing which is the subject of this appeal.[11]

In the absence of argument and analysis by the Attorney General, we decline to affirm denial of parole based on reasons not cited by the Board. (See § 3041.5, subd. (b)(2) [in denying parole, Board must give prisoner "a written statement setting

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[11] The parole panel did cite Parker's lack of remorse at a January 2007 hearing, where the panel, pursuant to the trial court's order, gave Parker a parole date but declined to find him suitable for parole. The 2007 hearing is not the subject of this appeal.

forth the reason or reasons for refusal to set a parole date, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated"; *In re Van Houten, supra*, 116 Cal.App.4th at pp. 358, 360 [Board does not need to state reasons why it found negative factors outweighed positive factors].)

We conclude there is not "some evidence" of current dangerousness based on the reasons given by the Board for denying parole. Accordingly, the Board's decision violates due process as guaranteed by our state Constitution, and the trial court correctly ordered the Board to vacate its decision and reconsider the matter.

B. Discretion on Remand

We agree with the Attorney General, however, that the trial court erred in directing the Board to grant parole, rather than allowing the Board to exercise its discretion.

Thus, if the court concludes the Board's decision to deny parole is unsupported by some evidence, "the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law. [Citation.]" (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.)

Parker cites California and federal cases ordering immediate release of the prisoner, but in the distinguishable

circumstance where the appellate court was reinstating the Board's decision to grant parole after vacating the Governor's rejection of the Board's decision. (E.g., *In re Smith* (2003) 109 Cal.App.4th 489.) That circumstance is not present in this case.

Parker also cites *McQuillion v. Duncan* (9th Cir. 2002) 306 F.3d 895, and *McQuillion v. Duncan* (9th Cir. 2003) 342 F.3d 1012, which held the Board improperly rescinded its decision to grant parole. Thus, that case also reinstated the Board's decision to grant parole--a circumstance not present in the case before us.

Here, as we have noted, the record contains evidence which might support a denial of parole but which the Board did not cite as reasons for denying parole. We cannot determine from the 2004 hearing transcript whether the Board considered that evidence inconsequential, or whether the Board considered that evidence unnecessary in light of the Board's view that the reasons it gave were sufficient.

On remand, we leave it to the Board to exercise its discretion.

DISPOSITION

The trial court's order vacating the Board of Parole Hearings' decision and directing the Board to reconsider the matter is affirmed.

The trial court's order is reversed insofar as it directs the Board of Parole Hearings to grant parole to Parker.

SIMS, Acting P.J.

We concur:

RAYE, J.

BUTZ, J.