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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

JOHNNIE PORTIS

on Habeas Corpus.

B218425

(Los Angeles County
Super. Ct. Nos. BH005959, A299992)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Peter P. Espinoza, Judge. Petition granted.

Rowan K. Klein, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Julie A. Malone, Supervising Deputy Attorney General, and Ryan K. Schneider, Deputy Attorney General, for Respondent.

On July 17, 1974, petitioner Johnnie Portis pleaded guilty to first degree murder and was sentenced to an indeterminate life term, with a minimum of six months. At Portis's 22nd parole hearing, conducted on June 4, 2008, the Board of Parole Hearings (Board) again denied parole. Portis filed a petition for a writ of habeas corpus contending that the Board's decision violated due process because it was not supported by evidence demonstrating that he would currently be a danger to the public if released on parole. We agree and grant the petition.

BACKGROUND

A. Commitment Offense

On December 22, 1972, Portis beat Chester Phillips to death with a wooden board. Portis was 17. The record before us contains a reporter's transcript of Portis's guilty plea, his pre-plea probation report, and his written confession. According to the probation report, a witness testified at the preliminary hearing that he saw Portis walk up behind Phillips, place his arm around Phillips's neck, and pull Phillips into a vacant lot. The witness next saw Portis run across the street with a board. The police officer who found Phillips's body testified that two chairs were atop the body. Phillips's pockets were turned out and his wallet and watch were missing. The wallet was found in a trash can along the street. Portis was not arrested until July of 1973. After Portis was advised of his rights, he confessed. He told the interrogating officer that he had taken LSD the day before the murder. On the night of the crime, he was drinking alcohol and having LSD flashbacks. He saw Phillips walking down the street and began fighting with him. Another person kicked Phillips a couple of times. Portis picked up a board and struck Phillips two or three times, then he and the other person ran from the scene. Portis drank a beer, then returned to the crime scene and found that Phillips was not moving. Portis dragged Phillips's body farther back into the vacant lot and placed chairs on top of the body so that passersby would not notice it. When Portis pleaded guilty, he testified that as he repeatedly struck Phillips with the board, he knew that Phillips would die from the

beating. Portis was sentenced to an indefinite life term with a minimum of six months with credit for 332 days served.

Several of Portis's psychological evaluations, including the report prepared for the 2008 parole hearing, reflect that Portis, who was underage, had asked Phillips to purchase alcohol for him. Phillips refused to do so, and an ensuing argument culminated in the murder.

B. Social History

Portis was the third of seven children in his family. He was born on January 23, 1955, in Louisiana, but his family moved to Los Angeles soon after his birth. His parents separated in 1965 and his father, who was an alcoholic, moved to Sacramento. Portis's father drowned while fishing in 1972. Portis's mother and all but two of his siblings are still alive. One of Portis's brothers had been shot to death while driving to a store. A half brother had been convicted of voluntary manslaughter, but was out of prison. Portis's mother and sisters visited him often in prison. Portis told the Board that his family was loving and supportive, he had a "great relationship" with them, and they were eager for his release.

Portis dropped out of school during the 10th grade. A 1991 psychological evaluation reported that Portis's "cognitive abilities were at the third grade equivalency level" when he entered prison. Portis explained to the Board that he was not doing well in school. He began doing odd jobs, helping with refrigeration and air conditioning, and selling drugs "off and on." He blamed low self-esteem for his failure to pursue an opportunity to continue learning the refrigeration and air conditioning business.

Portis started drinking at around age 16 to fit in socially. He also began using marijuana, LSD, and barbiturates, amphetamines, and PCP.

In November of 1971, when Portis was 16, he was arrested for possessing dangerous drugs for sale. He told the Board the drugs were sleeping pills. The case was dismissed without prejudice when Portis moved to Sacramento. In November of 1972—about a month before the commitment offense—Portis was arrested for assault with a

deadly weapon and assault with intent to murder based upon an incident in which Portis shot a man in the leg after the man attempted to break up a fight between Portis and a third man. When Portis was arrested, he reportedly admitted, "I shot the dude." Portis told the Board that a man who had come to Portis's assistance actually shot the victim, but Portis wanted to take responsibility for the act because he would "get less time" and he owed the man a favor. A police report of this incident indicates that Portis was punching a man named Stewart with his fists when a man named Broussard intervened. Portis's adult companion then pulled a gun and fired at Broussard as he attempted to run away, striking Broussard in the leg. Portis was found unfit for juvenile court. The case was ultimately dismissed because the victims could not be found. In 1973, Portis was again charged as an adult with assault with a deadly weapon for a February 20, 1973 incident in which he either fired a gun, or handed his girlfriend a gun that she fired, at a woman who asked Portis and his girlfriend to leave her house. In May of 1973, Portis pleaded guilty to exhibiting a deadly weapon in a rude and threatening manner, a misdemeanor, and was placed on probation.

C. Prison Record

The California Department of Corrections and Rehabilitation (formerly the Department of Corrections) received Portis on July 26, 1974, when he was 19. Prison authorities disciplined Portis for misconduct on a total of six occasions: in April of 1977 for possession of contraband (a one-half pound piece of metal inside a sock); in July of 1981 for possession of a \$20 bill; in August of 1981 for possession of "stimulants and sedatives," which Portis told the Board was actually marijuana; again in August of 1981 for refusing to work; in July of 1984 for assaulting an inmate; and in February of 1990 for fighting. The 1981 marijuana possession also resulted in a conviction, for which Portis received a two-year concurrent sentence. Portis told the Board that he was present during the 1984 assault but was "not directly involved." Portis also received ten "counseling chronos" (file notations without disciplinary consequences) between January of 1980 and July of 1992 for less serious rule violations such as failing to stand for a count, absence

from classes, unsatisfactory progress in classes, and possession of items such as sugar, paint, a paint brush, paint thinner, sandpaper, a ruler, ear protectors, and a baseball glove.

Portis obtained his GED in 1982 and had completed 66 units of college course work through correspondence courses offered by Chapman College. One of the Board members noted that Portis was “doing very well until they closed the program.”

Portis completed vocational training in refrigeration and air conditioning, appliance repair, and electronics. He has worked in the prison industries program since 1988 and has had “a long career in Textiles.” At the time of the 2008 hearing, he was a “lead man” in shirt production. This meant he trained new workers, assigned work to inmates, and motivated them to work and meet quotas. He generally worked four days a week, at least ten hours per day, and often worked overtime. The deputy commissioner on the Board noted that Portis had received “all great performance appraisals.” She further noted that “they don’t keep you that long unless you’re doing great. And they don’t make you a lead person unless you have some very special abilities, because you have to direct an operation with no authority.” In 2002, 2005, and 2008, Portis received laudatory “chrono” reports for his work in the prison industry textile program. The 2008 “chrono” commended Portis for his “attitude, work ethic, demeanor and performance.” It further stated that his “efforts have made him an asset to the PIA Textiles work program. Through his efforts he helped to maintain deadlines and meet the customer’s needs. Portis would be a benefit to any factory setting whether in or outside an institutional setting.” Portis had previously worked in the prison kitchen, where he also received “above average” performance ratings.

Portis has completed numerous self-help and therapeutic courses on topics including anger management, self-esteem, the “negative impact of crime on its victims,” “successfully re-engaging into society,” impulse control, problem-solving skills, listening skills, dealing with difficult people, proper expression of emotion, and “strategies for controlling and replacing negative self-defeating emotions.” He also completed a variety of courses in subjects including science, health, and Bible study.

Portis has consistently participated in Alcoholics Anonymous, Narcotics Anonymous, and other addiction recovery programs since 1986. A March 2008 laudatory “chrono” report from Narcotics Anonymous stated, “He continues to show a positive attitude and interest in this organization. [Portis] is a willing participant in its functions and his motivation inspires other members to interact within the group. He is to be commended for his participation.” Portis received a virtually identical report from Alcoholics Anonymous in March 2007.

D. Prior parole dates and grants of parole

In 1975, Portis was given a parole date of August 15, 1983. That date was rescinded in 1981 due to the marijuana possession conviction. The Board at the 2008 hearing asked Portis why he “relaps[ed] into drugs” after he obtained his first parole date. He explained that he had not yet begun participating in Narcotics Anonymous or Alcoholics Anonymous and did not understand that he had a problem. He also knew that other inmates had been caught with greater quantities of contraband than he had and not lost their parole dates, so at the time he did not understand he was jeopardizing his parole.

Portis was granted parole in June of 2002. The Board’s decision noted Portis’s stable social history; his enhancement of his “ability to function within the law upon release, through participation in education, self-help and therapy, vocational programs and institutional job assignments”; his college-level course work nearing completion of an Associate of Arts degree; his marketable skills in electronics and appliance repair; his realistic parole plans; his recent maintenance of positive institutional behavior; his remorse for his crime; a psychological evaluation supporting release; and a “reduced” probability of recidivism due to his maturation, growth, advanced age and “greater understanding.” Governor Gray Davis reversed the Board’s decision.

E. Mental Health Evaluations and Insight Into Offense

1. 2008 evaluation

The June 2008 psychological evaluation was prepared by a contract forensic psychologist, Dr. Richard Starrett. The report indicates it is merely an addendum to the

2005 psychological evaluation intended to address the certain questions raised by the Board at Portis's 2007 parole hearing.

Starrett reported that Portis met "the diagnostic criteria for Polysubstance Dependence, in a controlled environment remission," and "Antisocial Personality Disorder by history," based on the history of "getting into trouble and using drugs at a young age," "multiple arrests as an adolescent and adult, culminating in the controlling case," "a record of failed efforts on supervised release as both a juvenile and as an adult," and his history of prison discipline and "counseling chronos." (Although Portis was charged as an adult in the murder and prior 1972 assault case, he was a minor at the time he committed these offenses. The only offense he committed when he was an adult was exhibiting a deadly weapon in a rude and threatening manner, a misdemeanor, committed about two months after he turned 18. Portis was 19 when sent to prison in 1974.)

To assess Portis's potential for violence if released on parole, Starrett used "an empirically based approach" consisting of "two separate assessment guides" (the "Psychopathy Check List Revised" and the "History-Clinical-Risk Management-20") and "an objective, actuarial assessment" regarding the risk of recidivism (the "Level of Service/Case Management Inventory"). In setting forth his analysis, Starrett noted that Portis "accepts responsibility for the crime as stated. His insight seems appropriate to his cognitive functioning and age. The inmate has had a positive response to treatment. He does not have a negative attitude, he does not have any active mental health symptoms and he is no longer impulsive." Based upon his use of the assessment "instruments," Starrett found Portis's "overall propensity for violence is in the **low moderate** range" and his "general recidivism risk is rated in the **medium** range." Starrett specifically noted that "the scores on these instruments can be limited in range for someone who has an extensive history of early antisocial behavior. The static or historical factors cannot be lessened in determining the overall score no matter how the person's values have changed or how much time has taken place since these early factors occurred. Based on early history, some individuals will never obtain a risk estimate of 'low.' While static factors

are included in tests because they are among the strongest predictors relative to the other factors, the score must be interpreted with the understanding of these limitations. Since it may not be possible to change these particular scores in a more positive direction, it is important to consider other sources of information, such as assessment of current functioning in determining a violence potential.”

Starrett described his assessment of Portis’s propensity for future violence: “Portis is not a psychopath, which research indicates decreases his violence potential and chance of recidivism. The inmate’s elevations on this scale were due to the inmate’s prior arrest history, controlling case and antisocial traits around the time of the crime. [¶] The inmate’s overall propensity for future violence is in the low-moderate [range] when compared to similar inmates. The inmate’s elevations due to his past history are his prior arrests as a juvenile and adult, his age when first getting into trouble, his relationship instabilities, substance abuse problems, early maladjustment, being on probation and having failures there, antisocial personality disorder and, to a lesser extent, not establishing a solid career. These factors increase his violence. The factors that decrease his violence are that the inmate is not a true psychopath, he did not have a major mental illness at the time and he was struggling with employment. The variables that decrease his risk for future violence (Current Clinical Insight factor) are: The inmate accepts the responsibility for his crime, his insight seems appropriate, he has had a good response to treatment, he does not have a negative attitude, he has no active mental health symptoms and he is not impulsive. This individual should not be a risk management problem in the community. His parole plans seem feasible and appropriate. He has handled destabilizers, stress and compliance well. He appears to still have support in the community.”

Starrett then set forth his assessment of Portis’s recidivism risk: “The inmate’s likelihood to violate parole is in the medium range. Elevations on this scale have to do with his prior arrest, his controlling case, [prison disciplinary and counseling] history, low educational level in the community, family arrest history, and substance abuse history.

The variables that decrease his risk include the fact that the inmate has not had any violent offenses since 1990 or any substance abuse since 1991. He has upgraded himself educationally and vocationally. His work performance record has been outstanding. He has 20 years of treatment in substance abuse and has been very active in self-help. He continues to be active in his religion and Bible study. Additional factors to consider are the inmate's age and evolving prosocial values. [¶] These results are qualified with the caveat that we have no experience with this individual outside a controlled setting (other than failed efforts while on juvenile and adult probation). If he would return to use of alcohol or drugs or prior lifestyle issues, his risk of recidivism and re-offending would considerably increase.” (We note that because Portis's only grant of probation occurred in May of 1973, five months after the commission of the murder, and the record does not indicate he committed any offense while on probation, he cannot accurately be said to have failed at probation.) Starrett recommended that “the inmate be involved continuously in substance abuse treatment while incarcerated and that it be a part of his parole plans.”

With respect to Portis's insight into the murder, Starrett wrote, “The inmate acknowledges the role that alcohol played in the crime and its impact on his judgment. The inmate identifies his anger, low self-esteem, sense of failure and poor judgment as all contributing to the controlling case. The inmate appears to have spent a considerable amount of time attempting to understand his background and other influences in the controlling case. It is unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate.”

2. Portis's statements to the 2008 Board regarding his insight and progress

The deputy commissioner asked Portis about references in his psychological evaluations to his anger at the time of the offense. Portis responded that he was angry at himself and frustrated and dissatisfied with his life, but he had no insight into how he

could change his life. The commissioner asked Portis how he handled anger now. He responded that he talked through situations with support groups or supportive persons and viewed situations through the perspectives he had learned in Rational Behavior Training. Portis described his structured thought processes in detail to the Board. In essence, he stated he always took the time to consider various possibilities about what had happened and various responses before reacting.

Portis also told the Board that he participated in Narcotics Anonymous and Alcoholics Anonymous because he wanted “to be a productive person in society” and knew that he must continue to participate in these programs upon parole.

3. 2005 evaluation

The 2005 psychological evaluation was prepared by staff psychologist Dr. Joe Reed. Reed characterized his evaluation as an addendum to the 2002 evaluation. Reed diagnosed Portis as having “[p]olysubstance abuse, in sustained full remission in a controlled environment.” Reed expressly agreed with the conclusion in the 2002 report that “previous clinical diagnoses of antisocial personality disorder were incorrect” given the absence of sufficient “evidence indicating conduct problems prior to age 15, and insufficient evidence of a sustained pattern of antisocial behavior in adulthood.”

Reed reported that Portis “accepted responsibility for the death of the victim. He expressed empathy and concern, both for the damage done to the victim and the victim’s family. He insightfully observed how being under the influence of LSD and other drugs and his lifestyle contributed significantly towards the death of the victim. Inmate Portis has demonstrated adequate insight, remorse, and empathy towards the damage done to the victims, and appears to understand the causative factors leading to the instant offense. He seems genuinely penitent for his crime.” Reed also noted that Portis maintained “good family support from his mother and sisters” and “appear[ed] well positioned for employment upon parole.”

Reed assessed Portis’s dangerousness: “His risk for violent behavior within a controlled setting is considered to be below that of the average inmate.” Using one of the

assessment guides used by Starrett in 2008, Reed concluded Portis presented “a low risk of violence relative to this inmate population in a controlled setting” and “a low prediction of violence in the community setting.” “If released to the community, clinically assessed, his violence potential is considered to be no more than the average citizen in the community.” Reed further concluded that Portis had “no significant risk factors which may be precursors to violence”

In conclusion, Reed made the following observations and recommendations:

“A. This inmate is competent and responsible for his behavior. He has the capacity to abide by institutional standards, and has largely done so during his incarceration. [¶]

B. This inmate does not have a mental health disorder which would necessitate treatment either during his incarceration period or following upon parole. [¶]

C. This inmate does have a significant drug abuse history. However, his regular attendance at AA and NA groups for over 20 years suggests no further need for continued attendance in these groups. However, if granted parole, abstinence from substance abuse should be made a contingency for parole.”

4. 2002 evaluation

Staff psychologist Dr. Jeff Howlin prepared the 2002 psychological evaluation. It is apparently the most recent complete evaluation in the record and was the current report when the Board granted Portis parole in 2002. Dr. Howlin’s sole diagnosis of Portis was “Alcohol Abuse, in institutional remission.” Howlin noted that Portis “has had several clinicians diagnose a personality disorder of antisocial personality, but it is not the opinion of this clinician that this inmate meets the criteria for this disorder, and specifically there is no evidence of conduct problems prior to age 15, which is a requirement for this diagnosis.” Howlin believed Portis’s “prognosis is positive for being able to maintain his current mental status in the community upon parole.”

Regarding Portis’s attitude toward the commitment offense, Howlin wrote, “Inmate Portis accepted responsibility for the commitment offense. This has been a consistent pattern for this inmate based on past reports. He admitted being under the

influence of both alcohol and LSD prior to the crime. It is likely then that the crime was indirectly related to the abuse of these substances and the above-diagnosed pathology. [¶] In regard to his commitment offense, inmate Portis stated, ‘It was something of anger and stupidity—a senseless death. I think of the suffering I have caused people.’ He demonstrated what appeared to be genuine remorse for the victim.”

Howlin asked Portis to describe his 1990 prison disciplinary violation. Portis responded by going “into great detail about what happened, and how he would have handled it differently knowing what he does now.”

Howlin assessed Portis’s current dangerousness as follows: “A. Due to this inmate’s limited disciplinary actions in a lengthy incarceration term of about 29 years, it is felt that he would pose a less than average risk for violence when compared to this Level II inmate population. Despite the nature of his commitment offense, he lacks the extensive history or frequency of violent behavior either prior to or since his incarceration. [¶] B. If released to the community, and based on gains made psychologically, as well as increased maturity, his violence potential is estimated to be no more than the average citizen in the community. [¶] C. The most significant risk factor for this inmate which could be a precursor to violence would be continued abuse of alcohol or any other drugs. Should this man abuse these substances again, his violence potential would be considered significantly higher.”

In conclusion, Howlin made the following observations and recommendations: “A. This inmate is competent and responsible for his behavior. He has the capacity to abide by institutional standards and has generally done so during his incarceration period. [¶] B. This inmate does not have a mental health disorder which would necessitate treatment, either during his incarceration period or following parole. [¶] C. As inmate Portis has acknowledged a significant problem with alcohol and other drugs, I would recommend upon parole: [¶] 1) Continued abstinence from all alcohol and all illicit drugs. [¶] 2) Monitoring for substance abuse. [¶] 3) Mandatory attendance at self-help groups that address substance abuse problems, such as Alcoholics Anonymous or

Narcotics Anonymous. [¶] 4) Continue with current programming and positive prosocial behavior.”

5. 1999 evaluation

The 1999 evaluation was prepared by staff psychologist Dr. Steven J. Terrini. It was highly similar to the 2002 report, except that Terrini diagnosed Portis with “Personality Disorder, NOS, with antisocial and passive-aggressive features,” in addition to “Alcohol Abuse, in institutional remission.”

Terrini’s assessment of Portis’s dangerousness was essentially identical to Howlin’s assessment in the 2002 report: within a controlled setting, his potential was “significantly below average relative to this Level II inmate population”; if “released to the community, his violence potential is estimated to be no more than the average citizen in the community”; and the most significant risk factor would be abuse of drugs or alcohol, in which case, “his violence potential would be considered much higher than the average citizen in the community.”

Terrini’s concluding observations and recommendations were essentially identical to those made by Howlin in the 2002 report.

6. 1985 through 1998 evaluations

Senior psychologist Dr. Bruce M. Bakeman evaluated Portis in 1998. His diagnosis was “Polysubstance abuse, in institutional remission,” and “Personality disorder, NOS.” Bakeman opined that Portis’s “level of dangerousness is likely to be less now than for the average inmate.”

Clinical psychologist Dr. Ronald H. Kitt evaluated Portis in 1995. His diagnosis of Portis was “Polysubstance Abuse, in remission,” and “Antisocial Personality Disorder, resolved.” Kitt observed that Portis “is emotionally stable at this time. His judgment for hypothetical situations indicates that his problem-solving ability is effective and prosocial. His ethical reasoning for a moral dilemma is considerably above average and demonstrates that he has the potential for a well-functioning conscience. Overall, he is functioning well psychologically and has made considerable progress during his

incarceration.” Kitt believed that Portis was “likely to maintain his present gains” if returned to the community and assessed Portis’s potential for violence as below average.

Staff psychiatrist Dr. John Hirschberg evaluated Portis in 1993 and 1994. Hirschberg also assessed Portis’s potential for violence as below average. In his 1993 report, he wrote that Portis’s “violence potential on the outside is undoubtedly below average and probably nil if he stays away from alcohol and drugs.”

In 1992 Portis was evaluated by the Psychiatric Council, composed of senior psychiatrist Dr. Sherman Butler, staff psychiatrist Dr. John Hirschberg, and three staff psychologists. The council concluded Portis’s only disorder was alcohol abuse. It noted, “He does not meet the criteria for antisocial personality disorder in the opinion of the Council, primarily because of lack of pre-15 conduct disorder. In addition, he has not been involved in organized criminal activity since his incarceration.” The council estimated Portis’s potential for violence as “average to low-average in the absence of alcohol/drug intoxication.”

The 1991 evaluation was conducted by staff psychologist Dr. Ronald Hall, who stated, “[Portis] has made good progress during his period of incarceration and his potential for violence in the free community appears to be less than that of the average inmate. Therefore, I believe he would probably pose a low degree of threat to the public safety if paroled at this time as he would have support from his family and make use of his vocational skills and has gained some self-worth and self-image.”

Senior psychiatrist Dr. Sherman Butler evaluated Portis in 1989. He found no applicable psychological disorders and stated that Portis’s prior alcohol and drug use “did not constitute abuse as defined in the diagnostic manual.” Butler noted that Portis’s “attitude is good and he appears motivated to conform his behavior to the expectations of society. He is emotionally stable.” Butler later noted that Portis “may be expected to remain stable so long as he does not again use alcohol or other drugs. Violence potential outside a controlled setting in the past is considered to have been greater than average but

at present is estimated to be less than average so long as he does not abuse alcohol or other drugs.”

Senior psychiatrist Dr. Ralph B. Allison evaluated Portis in November 1985 for a March 1986 hearing. He diagnosed alcohol and barbiturate abuse, in institutional remission; hallucinogen abuse, “episodic”; and “Passive-Aggressive Personality Disorder.” Allison wrote, “His dangerousness at the present time in the prison environment is definitely below average. His dangerousness potential on the outside would be equally below average if he stays sober and does not live in any violence prone neighborhood. Since he does have training in a trade that he likes to do and does have family ties with his mother and sister, he should be able to make an adequate adjustment to the outside world as long as he can identify with the law-abiding elements in the community.”

Staff psychiatrist Dr. M. E. Roudebush evaluated Portis in 1984. Roudebush also diagnosed a passive-aggressive personality disorder, but noted it was improving. Roudebush concluded, “Violence potential is seen as no greater than average for this institution. It is believed he has a good chance of making a constructive adjustment in the free world.”

F. Parole Plans

Dr. Starrett’s report noted that Portis planned “to parole to his sister in L.A. He noted that he has multiple job offers. He has community support through AA, and the church through his sister. Mr. Portis’ parole plans seem feasible and well developed, if verified.”

At the hearing, Portis confirmed that his sister and brother-in-law, who had no children and lived in Hollywood, would let him live with them and would provide him with clothing. Portis did not plan to live with them “too long.” His brother-in-law, who was a branch manager for Labor Ready, already had parolees working for him and would give Portis work until he could find work in one of his trades. In addition, Portis’s brother-in-law was starting a catering business and said he would give Portis work in that,

as well. Portis's mother had also offered to let him live at her house and told the Board in a letter that the entire family would provide Portis with love and support.

Although no new letters of support had been submitted for the 2008 hearing, a letter Portis's sister submitted to the Board in 2002 confirmed that she and her husband would provide Portis with a place to live, financial assistance, love, support, and work in her husband's business.

Dr. Howlin's 2002 psychological evaluation stated that "Portis described in detail his plan to live with a sister and her husband in Los Angeles. Apparently, they have agreed to provide transition assistance, including housing and financial assistance if needed until inmate Portis is able to find employment. He explained that, initially, he will accept any kin[d] of work, but hopes to be able to eventually work in his trade of refrigeration and air conditioning. [¶] Based on what was discussed with this clinician, it would appear that his parole plans are viable, and his prognosis for community living is positive. He appears to have a good support system in place."

G. District Attorney's Position on Parole

Los Angeles County Deputy District Attorney Lawrence Morrison informed the Board that his office and the Los Angeles Police Department opposed parole. He cited Portis's prior criminal record; the "unprovoked, vicious and incredibly brutal" nature of the murder; Portis's probationary status at the time of the murder; his record of discipline in prison; and the "unfavorable" psychological evaluation as factors showing that Portis "remains a danger until he cleans up his act and shows greater understanding." (As previously noted, the murder was committed five months before Portis was placed on probation.)

H. Board's Decision

The Board denied Portis parole for one year after concluding that he was "not suitable for parole and would pose an unreasonable risk of danger or threat to public safety if released from prison." The Board acknowledged that the murder occurred "some time ago," and stated it would not "put a lot of reliance on the crime itself." The Board

also noted that Portis had done “some things that weren’t helpful” while in prison, citing the drug offense. The Board then stated that Portis received “a couple of dates and right after one of the dates you got into trouble again. So those are kind of this rollercoaster that we see in Mr. Portis’s life.” (In actuality, the drug offense occurred about six years after Portis’s initial parole date was set and about two years before that date arrived. Portis did not receive another parole date until 2002 and the record does not reflect any trouble at or after that time.)

The Board explained that it had two areas of difficulty: the current psychological evaluation and Portis’s parole plans. With respect to his parole plans, the Board was “not sure that it’s fair to your brother-in-law and sister for you to move in with them.” The Board suggested that Portis arrange for transitional housing. It explained, “[Y]ou’ve been down a long, long time. There’s enormous changes in the outside world. You’re coming out of a facility that from morning to night tells you when you can do what you can do. And it’s not like that out there. And in fact, the world has changed enormously. I think, particularly with a guy like you, it would do well to go into some transitional housing because they’ll . . . transition between this to them. They’ll provide you with some counseling. They’ll provide you with the kind of one-on-one dialog that sometimes guys need. We think you’re open to that now. I mean, your commentary on your character defects exemplifies an individual who is no longer afraid to discuss who he is with another human being. That’s a tough step to do in the 12-Steps and you did it. And we believe you did it thoroughly . . .” The Board told petitioner to select a facility and be prepared to tell the Board about its program at his next parole hearing.

The Board characterized the psychological evaluation as not “completely favorable for release,” but expressed doubt about the accuracy of the evaluation. The Board stated, “The man we saw today that spoke with us today and reviewing his records doesn’t appear to be the same man that we saw in the psych report.” The presiding commissioner stated, “I’m not sure that this psychiatrist/psychologist has got it right. I don’t see where you’re at the level of overall risk as he—as he’s rating you low moderate. I think based

upon my experience and [on the deputy commissioner's] experience you should be lower. But we're not sure what to do with this at this point. . . . This has been done. It's part of the record. And I believe one way of overcoming that is—is to continue keeping your nose clean, continue doing the kind of work that you're doing. Do the recommendations with regard to your parole plans that we're suggesting for you, make them as solid as you can. And I'm going to request that a supervisor review this based upon our concerns and see what they think about it. I'm not going to ask for another psychological evaluation, but I am going to request that a supervisor look at this and see what they have to say.” The deputy commissioner noted that she was on a prior parole panel for Portis and stated, “I think you've grown so much since that time. And clarifying the psych report and tightening up your parole plans, you must be so tired of hearing that you're doing a good job and you're still in here, but that's your reality. And you just need to keep doing a good job. And you will get out of here.”

In its concluding summary the Board also cited the “cruel” and dispassionate nature of the murder, “abuse” of the victim in the form of the head injuries, and “a criminal history that did spill over into prison after you came here.”

I. Habeas Corpus Proceedings

Portis filed a petition for a writ of habeas corpus challenging the Board's decision in Los Angeles Superior Court on April 14, 2009. The court denied that petition, stating that it found some evidence to support the Board's findings that the commitment offense was carried out in an especially heinous, atrocious, or cruel manner, the motive for the offense was “very trivial,” Portis had a prior record of violence, his institutional behavior did not entirely support release, and his 2008 psychological report also did not entirely support release because it rated Portis's propensity for violence as low to moderate and his risk of recidivism as moderate. The court concluded that these factors supported the Board's determination of Portis's current dangerousness. The court disagreed with the Board's conclusion regarding the adequacy of Portis's parole plans, which the court deemed “viable.”

Portis then filed a petition for a writ of habeas corpus in this court. We requested opposition, issued an order to show cause, and appointed counsel to represent Portis. Counsel for Portis filed an amended petition and a revised amended petition, each with exhibits. The Attorney General filed a return with exhibits, Portis filed a traverse, and the matter was argued on June 22, 2010.

DISCUSSION

Portis contends that the Board's finding violated his right to due process. Although the revised amended petition does not specifically articulate his contention, it is apparent from his arguments that he contends that the Board's finding of his current dangerousness is unsupported by the record.

Penal Code section 3041, subdivision (b) "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. [Citation.] And as set forth in the governing regulations, the Board must set a parole date for a prisoner unless it finds, in the exercise of its judgment after considering the circumstances enumerated in [California Code of Regulations, title 15,] section 2402 [or section 2281] of the regulations, that the prisoner is unsuitable for parole. [Citation.] Accordingly, parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654 (*Rosenkrantz*)). In short, "parole is the rule, rather than the exception" (*In re Smith* (2003) 114 Cal.App.4th 343, 366), and every inmate has a liberty interest in parole that is protected by California's due process clause (*Rosenkrantz*, at p. 660).

California Code of Regulations, title 15, section 2281 applies to inmates whose commitment offenses occurred prior to November 8, 1978. Subdivision (b) directs the Board to consider "[a]ll relevant, reliable information available to the panel" including "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." (Cal. Code Regs., tit. 15, § 2281, subd. (b).) Subdivision (c) sets forth a nonexclusive list of circumstances tending to show unsuitability for parole, including an especially heinous, atrocious or cruel manner of perpetrating the commitment offense; a previous record of violence; an unstable social history; commission of sadistic sexual offenses; a lengthy history of severe mental problems related to the offense; and serious misconduct while incarcerated. (*Id.*, § 2281, subd. (c).) Subdivision (d) sets forth a nonexclusive list of circumstances tending to show suitability for parole, including the absence of a juvenile record, a reasonably stable social history, signs of remorse, significant life stress as a cause of the commitment offense, battered woman syndrome, absence of a significant history of violent crime, the inmate's age, realistic plans for the future, and activities during incarceration indicating "an enhanced ability to function within the law upon release." (*Id.*, § 2281, subd. (d).) These factors govern both the Board's decision and the Governor's review of the Board's decision to grant parole. (*Rosenkrantz, supra*, 29 Cal.4th at p. 660.)

"[T]he Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 (*Lawrence*)). "[T]he core determination of 'public safety' under the statute and corresponding regulations involves an assessment of an inmate's *current* dangerousness. As noted above, a parole release decision authorizes the Board (and the Governor) to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.' [Citation.] These factors are designed to guide an assessment of the inmate's threat to

society, *if released*, and hence could not logically relate to anything but the threat *currently* posed by the inmate.” (*Id.* at pp. 1205–1206.)

The Board has broad discretion in deciding whether to grant parole. (*Rosenkrantz, supra*, 29 Cal.4th at p. 655.) “Resolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the Board.” (*Id.* at p. 656.) “But the statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.” (*Lawrence, supra*, 44 Cal.4th at p. 1211.) “[U]nder the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.” (*Id.* at p. 1212.) “[A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety.” (*Id.* at p. 1214.) “At some point, however, when there is affirmative evidence, based upon the prisoner’s subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically

constitute a reliable or accurate indicator of the prisoner’s current dangerousness.” (*Id.* at p. 1219.)

An inmate who is denied parole is entitled to judicial review of the decision to ensure that “the decision reflects ‘an individualized consideration of the specified criteria’ and is not ‘arbitrary and capricious.’” (*Lawrence, supra*, 44 Cal.4th at p. 1205.) “[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.” (*Id.* at p. 1212.) Although this standard is deferential, it is not toothless. (*Id.* at p. 1210.) “[D]ue consideration’ of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*Ibid.*)

One of the two primary reasons the Board cited as the basis for denying Portis parole was inadequacy of his parole plans. The pertinent regulation phrases the factor as follows: “The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.” (Cal. Code Regs., tit. 15, § 2281, subd. (d)(8).) An examination of the Board’s statements on this point reveals that it did not find Portis’s plans to be unrealistic, but simply felt that transitional housing would be a better plan. In contrast, the superior court found Portis’s post-parole plans, which included an offer of housing and employment, to be “viable.” Dr. Starrett considered Portis’s post-parole plans to be “feasible and well-developed, if verified.” The 2005 psychological evaluation set forth Portis’s post-parole plans, which appear to have been essentially the same as in 2008, and noted, “His financial and vocational plans appear to be viable, and his prognosis for community living appears to be very good.” The report later stated that Portis “appears well positioned for employment upon parole.” The 2002 psychological evaluation also set forth Portis’s plans, which were essentially the same as in 2008, and characterized them as “viable.” That evaluation also noted, with reference to Portis’s

plans, that “his prognosis for community living is positive. He appears to have a good support system in place.” The Board acknowledged that Portis had achieved vocations in refrigeration, air conditioning, and electronics, and that he had extensive successful experience in clothing manufacturing, as both a worker and a supervisor. Portis thus appears to have developed several marketable skills and the Board made no contrary finding. Thus, the Board’s better idea for post-parole living neither addressed the pertinent factor set forth in the regulation nor linked its critique to whether Portis would pose a danger to society if paroled. The Board’s criticism of Portis’s parole plans does not constitute “some evidence” supporting the denial of parole.

The other primary reason for the Board’s decision to deny parole was Dr. Starrett’s psychological evaluation. The Board expressly disagreed with Starrett’s conclusion that Portis’s “propensity for violence is in the low moderate range” and stated a belief that Portis’s risk rating “should be lower.” Nevertheless, the Board relied upon the not “completely favorable” nature of the evaluation to deny parole. It appears that the Board may have failed to consider the overall favorable nature of Starrett’s evaluation and his explanations of the risk ratings and the relative inflexibility of the “instruments” he used to arrive at them. Starrett expressly noted that the weight these “instruments” gave to “static or historical factors cannot be lessened in determining the overall score no matter how the person’s values have changed or how much time has taken place since these early factors occurred. Based on early history, some individuals will never obtain a risk estimate of ‘low.’ . . . [T]he score must be interpreted with the understanding of these limitations. Since it may not be possible to change these particular scores in a more positive direction, it is important to consider other sources of information, such as assessment of current functioning in determining a violence potential.” Starrett went on to explain that Portis’s “elevations due to his past history are his prior arrests as a juvenile and adult, his age when first getting into trouble, his relationship instabilities, substance abuse problems, early maladjustment, being on probation and having failures there, antisocial personality disorder and, to a lesser extent, not establishing a solid career.”

Starrett thus essentially admitted that no matter how well-rehabilitated and innocuous Portis had become, he would never achieve a rating lower than “low moderate” due to his “early history” and other immutable historical factors. The manner in which Starrett arrived at his “low moderate” rating of Portis’s propensity for violence was thus heavily skewed toward past dangerousness and did not provide an assessment of current dangerousness.

In addition, Starrett either misunderstood or exaggerated several negative factors in Portis’s history. He referred to “multiple arrests as an adolescent and adult,” when Portis was actually 16 or 17 at the time of all of his offenses except the February 1973 misdemeanor, which he committed about two months after his 18th birthday. Starrett stated that Portis had suffered multiple failures “while on juvenile and adult probation,” when in fact Portis was on probation only once, for a crime committed after the murder. Starrett’s reference to Portis’s unstable relationships has no support in the record, unless it pertains to matters outside Portis’s control, such as the divorce of his parents or the arrest of his half-brother. Starrett also included Portis’s failure to establish “a solid career” as a factor that elevated the violence risk rating. But Portis was 17 when he committed the murder and 18 when he was arrested for it. It is unreasonable to expect that he would have established “a solid career” by age 17 or 18. If Starrett meant that Portis did not have a “solid career” at the time of the evaluation, the depiction ignored Portis’s vocations in refrigeration and air conditioning, appliance repair, and electronics, as well his extensive experience in clothing manufacture that the Board characterized as “a long career in Textiles.” Starrett also stated that Portis had been involved in substance abuse treatment for 20 years and had no record of substance abuse “since 1991.” A laudatory “chrono” indicates that Portis joined Alcoholics Anonymous in 1986, which meant he had been participating in substance abuse programs for about 22 years when Starrett evaluated him. Nothing in the record indicates Portis used alcohol or drugs in 1991. Starrett may have meant 1981, when Portis was found in possession of marijuana.

Apart from the results of the assessment “instruments,” Starrett’s overall evaluation of Portis was favorable. Starrett noted, “The inmate accepts the responsibility for his crime, his insight seems appropriate, he has had a good response to treatment, he does not have a negative attitude, he has no active mental health symptoms and he is not impulsive. This individual should not be a risk management problem in the community. His parole plans seem feasible and appropriate. He has handled destabilizers, stress and compliance well. He appears to still have support in the community.”

The 2008 psychological evaluation was merely “an addendum” to the 2005 evaluation, which was itself “an addendum” to the 2002 evaluation. Both the 2005 and the 2002 evaluations strongly supported parole. The 2005 evaluation concluded Portis’s risk of violence was low, and the 2002 report assessed Portis’s risk of violence if released on parole as “no more than the average citizen in the community.” The record does not indicate any changes in Portis’s conduct, attitude, or mental or emotional well-being between 2005 and 2008. The only difference appears to be that Starrett was a contractor, not a staff psychologist, and he used a different approach to evaluate Portis.

Given the focus on immutable historical factors and the limitations inherent in the “instruments” Starrett used, Starrett’s misstatements or exaggerations of negative aspects of Portis’s history; the overall positive, albeit cautious, tone of the 2008 evaluation; the Board’s doubt about the accuracy of the report and its disagreement with the severity of Starrett’s “low moderate” violence propensity rating; and the history of at least 13 prior psychological evaluations favorable to Portis, the 2008 psychological evaluation does not constitute “some evidence” supporting denial of parole. This is especially true in light of prior evaluations’ extensive descriptions of and findings regarding Portis’s personal growth and enhanced insight, with which the Board apparently agreed.

Although the Board stated that it placed little weight upon the commitment offense, it did cite the circumstances of that offense as a factor justifying its decision. But the Board did not articulate any “rational nexus between those facts and current dangerousness.” (*Lawrence, supra*, 44 Cal.4th at p. 1227.) In light of the overwhelming

and undisputed evidence in the postconviction record showing that Portis has been rehabilitated and poses little danger to the public, the Board's mere recitation of aspects of the murder fails to provide "some evidence" of Portis's unsuitability for parole. (*Ibid.*)

The Board also referred to Portis's criminal history prior to the murder and his disciplinary record in prison, but it again failed to articulate any rational nexus between those facts and current dangerousness. (*Lawrence, supra*, 44 Cal.4th at p. 1227.) Portis's criminal history prior to the commitment offense was not extensive and occurred within a period of just one year and three months. He essentially admitted at his 2008 parole hearing that he was selling sleeping pills in November of 1971, though he was not convicted of this offense. He may have committed, but was not convicted of, an aggravated assault in November of 1972, about a month before the murder. He was convicted of exhibiting a gun in a rude and threatening manner, a misdemeanor, in February of 1973, about two months after the murder. His only other conviction, apart from the murder, was the 1981 marijuana possession, which was not a violent crime. Each of these offenses was committed more than a quarter century ago, and their commission was at least partially attributable to Portis's immaturity and use of alcohol or drugs. All occurred before he began participating in substance abuse treatment and other self-help programs. As noted in the 2002 psychological evaluation, Portis's record of prison discipline was modest compared to the length of his incarceration. He had been discipline-free since 1990—18 years at the time of the 2008 parole hearing—notwithstanding the disappointments of numerous parole denials and the Governor's reversal of the 2002 grant of parole. As the 2002 and 2005 psychological evaluations observed, Portis "has the capacity to abide by institutional standards" and has generally done so during his lengthy incarceration, especially the last 18 years. Thus, neither Portis's criminal history from 1971–1973 and 1981 nor his prison disciplinary record ending in 1990 provide evidence that he is currently dangerous.

For all of these reasons, we conclude that the Board's reasons for finding that Portis remains a public safety risk at age 53, more than 35 years after the commitment

offense, lack any evidentiary support. Accordingly, we grant his petition for a writ of habeas corpus.

DISPOSITION

The petition for a writ of habeas corpus is granted, and the Board's decision is hereby vacated. The Board is directed to find Portis suitable for parole unless, within 30 days of the finality of this decision, the Board holds a parole suitability hearing and finds, based on new evidence, that he currently poses an unreasonable risk of danger to society if released on parole.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.