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COURT OF APPEAL - FOURTH APPELLATE DISTRICT
DIVISION ONE

STATE OF CALIFORNIA

In re RICHARD SHAPUTIS on Habeas Corpus.	D049895 (San Diego County Super. Ct. No. HC18007)

Petition for Writ of Habeas Corpus. Kerry Wells, Judge. Petition granted.

Petitioner Richard Shaputis was sentenced to a prison term of 15 years to life following his 1987 conviction for second degree murder. Shaputis, now nearly 71 years old, has been in prison for the past 20 years. Although Shaputis first became eligible for parole in 1998, the former Board of Prison Terms (now Board of Parole Hearings, hereafter BPH)--despite Shaputis's exemplary conduct in prison and his unblemished record of rehabilitative progress--found him unsuitable for parole at hearings conducted in 1997, in 2002, and finally in 2004. After the 2004 denial of parole by the BPH, this court granted Shaputis's petition for writ of habeas corpus because we found no evidence to support the BPH's conclusion that Shaputis would pose an unreasonable risk of danger to public safety were he released. (*In re Shaputis* (Dec. 28, 2005) D046356, opn. ordered

nonpub. May 17, 2006 (*Shaputis I*).) However, this court did not order the BPH to set a parole date. Instead, we remanded the matter to the BPH with directions to hold a new parole suitability hearing and consider whether there was any new evidence, apart from the evidence available to it at the 2004 hearing, which might support a finding that Shaputis would pose an unreasonable risk of danger to public safety were he released from prison. (*Id* at pp. 19-21.)

The BPH held a new suitability hearing and, operating under the guidelines of *Shaputis I*, concluded he was suitable for parole because there was no new evidence supporting a conclusion he would pose an unreasonable risk of danger to society if released. However, Governor Arnold Schwarzenegger found Shaputis did pose an unreasonable risk of danger to society if released and reversed the BPH's decision. Shaputis filed a petition for writ of habeas corpus in the trial court, which was denied, and Shaputis now petitions this court for a writ of habeas corpus, challenging the Governor's decision.

I

FACTS[1]

A. The Offense

In 1987, a jury convicted Shaputis of the second degree murder of his wife, Erma, and found true that he used a firearm in connection with the offense. He was sentenced

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1 The background recited in sections I and II are derived from *Shaputis I*.

to 15 years to life with the possibility of parole, plus a determinate two-year sentence for the firearm use.

Shaputis and Erma were married for 23 years and their relationship was marked by domestic violence. Two years earlier, Erma complained that Shaputis had beaten her and cracked her ribs, and approximately 18 months earlier Shaputis had shot at her when they had been drinking and arguing. Shaputis apparently beat Erma at least two or three times per year and had threatened her with a knife. However, none of these alleged events resulted in criminal charges.

On the night of the murder, Shaputis called 911 around 10:00 p.m. and stated he had fought with his wife and killed her, but claimed it was an accident.[2] When police arrived at Shaputis's home, he surrendered without incident. When police entered, they found Erma's body in the living room with a handgun lying nearby. The autopsy report concluded Erma had been killed sometime between 8:30 p.m. and 12:30 p.m. and death had been caused by a single gunshot wound to the neck. The shot had been fired from close range, possibly as close as two feet, and entered the neck between the junction of the neck and jaw. Death was apparently instantaneous. Shaputis was a heavy drinker who became violent when intoxicated, and he had been drinking the night of the murder.

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[2] The gun apparently could not have been fired accidentally because the hammer must be pulled back manually to a cocked position before pulling the trigger, and there was a "transfer bar" to prevent accidental discharges. Although this information is recited in the "Life Prisoner Evaluation Report" (LPER), prepared for the 2004 Parole hearing by correctional department counselors, the factual basis for the conclusions in the LPER does not appear in the probation report filed in connection with the 1987 conviction, and the genesis of this information is unclear.

B. Shaputis's Performance in Prison

Shaputis's record during his incarceration has been impeccable. He has been discipline free during his entire term, his work record is unblemished, he has fully participated in all available AA and NA programs since 1991, and he has completed all applicable therapy programs. For several years, Shaputis has had the lowest classification score possible for a life-term inmate, and has numerous commendations from prison staff for his work, conduct and reform efforts.

C. The 1997 and 2002 BPH Proceedings

Shaputis's minimum eligible parole date was in September 1998. At his first parole hearing in 1997, the LPER prepared by his prison counselor for submission to the 1997 hearing stated his "progress in state prison could best be described as exemplary" and concluded Shaputis "would probably pose a low degree of threat to the public at this time, if released from prison." The BPH denied parole, apparently based on an unsuitability determination, and recommended he remain discipline free and participate in self-help and therapy groups. At Shaputis's second parole hearing in 2002, the LPER confirmed Shaputis had remained discipline free and participated in self-help groups, and again concluded (based on his commitment offense, his prior record, and his prison adjustment) that he "would probably pose a low degree of threat to the public at this time if released from prison." The BPH again denied parole, apparently based on an unsuitability determination, and again recommended he remain discipline free and participate in self-help and therapy groups.

II

SHAPUTIS I

A. The 2004 BPH Hearing

Dr. Mura, a forensic psychologist, evaluated Shaputis's psychological condition and submitted her report to the BPH in connection with the 2004 parole hearing. Dr. Mura's report stated Shaputis had feasible and appropriate plans for his life if granted parole, and appeared committed to maintaining his sobriety through continued involvement with AA. When assessing Shaputis's risk for violence if paroled, Dr. Mura concluded he presented a low risk for violence absent a relapse into alcoholism.[3]

The LPER, prepared by Shaputis's prison counselor for submission to the 2004 BPH hearing, again noted his exemplary prison record and that he had "fully adhered" to the BPH's prior recommendations. The report again concluded, considering the commitment offense, his prior criminal record, and his adjustment in prison, Shaputis would "probably pose a low degree of threat to the public at this time if released from prison."

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[3] Mura's risk of violence assessment evaluated three elements: Shaputis's history and background, his clinical presentation, and "management of future risk." Because his history of violence appeared intertwined with his alcoholism, Mura concluded the risk based on this history was low as long as he did not relapse into alcoholism. Shaputis's clinical presentation showed some growth in insight and Mura believed that this factor presented a low risk for violence as long as he remained sober and involved in activities that held his interest. Finally, Mura concluded Shaputis's ability to handle future stress in a nonviolent manner was also largely rooted in his ability to remain sober; Mura believed that Shaputis's prison record (e.g. his commitment to his AA program and his demonstrated ability to comply with rules) and his current physical condition (a senior citizen with chronic health problems that would limit concerns about his acting out in inappropriate ways) made Shaputis a low risk for future violence.

The BPH considered the materials presented, including the forensic evaluations, and concluded Shaputis was not suitable for parole because he posed "an unreasonable risk of danger to society or a threat to public safety if released from prison." The BPH cited two findings for this conclusion. First, the BPH found the commitment offense was "carried out in an especially cruel and/or callous manner" and was "carried out in a dispassionate and/or calculated manner" because the murder was committed at close range with a single shot. Second, the BPH found Shaputis had a "history of unstable and tremulous [sic] relationships with others" and had assaulted his wife.

B. The Habeas Corpus Proceeding

Shaputis petitioned the San Diego County Superior Court for a writ of habeas corpus alleging the BPH violated his due process rights because its unsuitability determination was not supported by the evidence and was therefore arbitrary and capricious. The court denied the writ, concluding the BPH's decision was supported by some evidence. Shaputis then petitioned this court for a writ of habeas corpus. We concluded the BPH's decision to deny parole violated due process because its finding that he posed an unreasonable danger if released was contrary to the only reliable evidence of his current dangerousness and relied on findings unsupported by any evidence. Accordingly, we ordered the BPH to vacate its denial of parole and to conduct a new parole suitability hearing for Shaputis.

However, because this court could not predict whether new evidence might be available when the BPH conducted the new parole suitability hearing, we recognized we could not evaluate the BPH's consideration of evidence that had yet to be presented. We

therefore concluded that, although the BPH was barred from finding Shaputis unsuitable for parole based on the same findings articulated at the 2004 hearing (absent evidence new or different from that presented at the 2004 hearing), the BPH could consider Shaputis's suitability de novo insofar as new or different evidence was presented at the new hearing.

III

THE CURRENT PROCEEDING

The BPH conducted the most recent parole hearing in March 2006. The only information not previously available to the BPH was the psychological assessment, conducted in April 2005 by Dr. Silverstein, which concluded Shaputis "would appear to be a low risk of future violence if release[d], as long as he maintains sobriety and involvement in an active relapse prevention program." However, Dr. Silverstein (echoing Dr. Mura's previous observations) noted Shaputis seemed to have "limited . . . insight" regarding his alleged antisocial behavior and his history of alcohol abuse was closely associated with his history of domestic violence. Dr. Silverstein concluded that, if Shaputis remained sober, his risk for violence was close to that of the "average unconfined citizen," but if he relapsed "the risk would likely rise considerably and he would present as an unpredictable risk for future domestic violence." Dr. Silverstein's "only concern" was that Shaputis planned to move in with his new wife (with whom he had never lived) and his violence tended to be "confined to his family systems [and it] is difficult to assess how well extinguished his pattern of domestic violence is given that he has been confined for more than 18 years. If he abstains from alcohol, the risk is

probably low." Dr. Silverstein concluded alcohol relapse prevention and domestic violence treatment programming would "likely adequately manage these risks," and recommended Shaputis's conditions of parole include random alcohol testing and mandatory participation in a relapse prevention program and community-based domestic violence program.

The BPH considered the new evidence and, operating under the constraints of this court's instructions on remand, reluctantly found Shaputis suitable for parole. The BPH, although convinced their prior decision finding him unsuitable was correct because they believed Shaputis still needed "more time to . . . come to grips with the crime and show that you know the reasons why you committed the crime," concluded this court's opinion barred them from finding Shaputis unsuitable on the same grounds and evidence previously considered and therefore found Shaputis suitable for parole. The BPH set his maximum term (after deducting credits) at 151 months, and because this term lapsed in November 1999, the BPH granted Shaputis parole subject to the special parole conditions that Shaputis submit to alcohol testing, participate in a substance abuse program and a domestic violence program, and ordered Shaputis paroled to San Diego County.

However, in August 2006, Governor Arnold Schwarzenegger reversed the BPH's decision because he concluded Shaputis posed an unreasonable risk of danger to society if released. The principal reasons given for this conclusion were (1) the crime was especially aggravated because it involved some premeditation and (2) Shaputis had not

fully accepted responsibility for and lacked sufficient insight about his conduct toward the victim.[4]

Shaputis petitioned the San Diego County Superior Court for a writ of habeas corpus, alleging the Governor's decision violated his due process rights because the unsuitability determination was not supported by the evidence and was therefore arbitrary and capricious. The court denied the writ. Shaputis then petitioned this court for a writ of habeas corpus.

IV

LEGAL STANDARDS

A. The Parole Decision

The decision whether to grant parole is an inherently subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 [*Rosenkrantz*]) that should be guided by a number of factors, some objective, identified in Penal Code section 3041 and the BPH's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The Governor's decision to affirm, modify, or reverse the decision of the BPH is governed by the same factors that

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4 The Governor's decision also referred to passages from the evaluators' reports noting Shaputis's low risk for future domestic violence was intertwined with his ability to remain sober. However, the Governor's decision did not find (much less cite an evidentiary basis for finding) Shaputis's commitment to sobriety was ephemeral or contrived, and the Governor did not question the effectiveness of the parole conditions to monitor and enforce Shaputis's sobriety. Accordingly, we do not construe the decision as finding Shaputis was a risk to the community based on the Governor's prognostication that he was likely to regress into alcohol or substance abuse if released on parole. We instead confine our review to the evidence of unsuitability credited by the Governor and do not consider unsuitability factors apparently discounted by the Governor. (*In re Elkins* (2006) 144 Cal.App.4th 475, 493; *In re DeLuna* (2005) 126 Cal.App.4th 585, 593-594.)

guide the BPH's decision (Cal. Const., art. V, § 8(b)), and is based on "materials provided by the parole authority." (Pen. Code, § 3041.2, subd. (a).) "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the Board's decision." (*Rosenkrantz*, at pp. 660-661.)

In making the suitability determination, the BPH and Governor must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, reference to section 2402 refers to the California Code of Regulations), including the nature of the commitment offense; behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude towards the crime; and parole plans. (§ 2402, subd. (b).) The circumstances that tend to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel manner;[5] (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (§ 2402, subd. (c).)

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5 Factors supporting the finding that the crime was committed "in an especially heinous, atrocious or cruel manner" (§ 2402, subd. (c)(1)), include the following: "(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 that demonstrates an exceptionally callous disregard for human suffering[; and] [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense."

A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (*Id.* at subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that suggest an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)

These criteria are "general guidelines," illustrative rather than exclusive, and "the importance attached to [any] circumstance [or combination of circumstances in a particular case] is left to the judgment of the [BPH]." (*Rosenkrantz, supra,* 29 Cal.4th at p. 679; § 2402, subds. (c) & (d).) Thus, the endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz,* at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the Governor may consider facts apart from those found true by a jury or judge beyond a reasonable doubt. (*Id*. at p. 679.)

B. Standard for Judicial Review of Parole Decisions

In *Rosenkrantz,* the California Supreme Court addressed the standard the court must apply when reviewing parole decisions by the executive branch. The court first

held "the judicial branch is authorized to review the factual basis of a decision of the [BPH] denying parole in order to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra,* 29 Cal.4th at p. 658.) *Rosenkrantz* further held "courts properly can review a Governor's decisions whether to affirm, modify, or reverse parole decisions by the [BPH] to determine whether they comply with due process of law, and that such review properly can include a determination of whether the factual basis of such a decision is supported by some evidence in the record that was before the [BPH]." (*Id.* at p. 667.)

The "some evidence" standard is "extremely deferential" and requires "[o]nly a modicum of evidence." (*Rosenkrantz, supra,* 29 Cal.4th at pp. 665, 677.) A court may not vacate the decision simply because it disagrees with the assessment of the BPH or Governor. (*Id.* at p. 677.) The decision must be "devoid of a factual basis" to be overturned. (*Id.* at p. 658.) Because judicial review of a parole denial is to ensure that a decision is not arbitrary and capricious, thereby depriving the prisoner of due process of law, "the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Id.* at p. 658.)

The discretion over parole suitability determinations, although broad, is not absolute. (*In re Scott* (2004) 119 Cal.App.4th 871, 884.) *Rosenkrantz* explained "that the judicial branch is authorized to review the factual basis of a decision of the [BPH]

denying parole in order to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPH] 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 [BPH] to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) Thus, the "extremely deferential" standard, although vesting in the Governor the power to resolve evidentiary conflicts and assign the weight to be given to the evidence (*id.* at pp. 665, 677), is not the equivalent of judicial abdication; the court must be satisfied the evidence substantiates the ultimate conclusion that the inmate's release currently poses an unreasonable risk of danger to the public. (*In re Lee* (2006) 143 Cal.App.4th 1400, 1408.) It violates an inmate's right to due process when the Governor attaches significance to evidence that forewarns no danger to the public or relies on an unsupported conclusion. (See, e.g., *In re DeLuna*, *supra*, 126 Cal.App.4th at p. 597 [[BPH] concluded, contrary to psychological evaluations, that inmate needed therapy, and faulted inmate facing deportation for failing to learn English]; *In re Scott* (2005) 133 Cal.App.4th 573, 597-603) [Governor misconceived inmate's history of violent crime and nature of the commitment offense]; *In re Lee*, at pp. 1411-1414 [Governor overstated seriousness of commitment offense and improperly faulted inmate for late acceptance of responsibility].)

V

EVALUATION

A. The Commitment Offense

The Governor's decision that Shaputis remained an unreasonable risk of danger to the public appears principally based on his conclusion that Shaputis's offense was "especially aggravated" because of his premeditation and intent to kill.[6]

The courts have concluded that the facts of the offense may alone support a finding of unsuitability for parole, but only when there is conduct above the minimum necessary to commit the offense. *Rosenkrantz*, explaining why the nature of the offense must "involve particularly egregious acts beyond the minimum necessary to sustain a conviction for second degree murder," stated that, "In some circumstances, 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*. Denial of parole under these circumstances would be inconsistent with the statutory requirement that a parole date normally shall be set 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public. . . .' [Citation.] 'The [BPH's] authority to make an

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6 The Governor's decision also referenced Shaputis's domestic violence toward the victim in the past. However, it appears the Governor's citation to Shaputis's conduct was the evidentiary background for his conclusion that Shaputis acted with the intent to kill and with premeditation, and is therefore subsumed within that reason rather than as an independent reason for his determination that Shaputis remained a current danger to the community.

exception [to the requirement of setting a parole date] based on the gravity of a life term inmate's current or past offenses should not operate so as to swallow the rule that parole is "normally" to be granted. . . . [¶] Therefore, a life term offense or any other offenses underlying an indeterminate sentence must be particularly egregious to justify the denial of a parole date.' [Quoting *In re Ramirez* (2001) 94 Cal.App.4th 549, 570.]" (*Rosenkrantz, supra*, 29 Cal.4th at p. 683, italics added.) Accordingly, the Governor may not rely on the bare conviction for second degree murder to deny parole absent some evidence Shaputis engaged in conduct, apart from and beyond the minimum necessary to convict him of second degree murder (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1098), that made the commitment offense especially aggravated for a second degree murder.[7]

The Governor found Shaputis's offense was a more aggravated offense than the minimum for second degree murder because "it involved some level of premeditation."[8]

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7 This court ruled in *Shaputis I* that the BPH's 2004 finding--the commitment offense was particularly egregious--lacked evidentiary support and barred the BPH from relying on that basis to deny parole absent new or different evidence. Although this ruling was binding on the BPH on remand, *Rosenkrantz*'s analysis raises questions on whether it would be binding on the Governor's review of the BPH's decision on remand. (*Rosenkrantz, supra*, 29 Cal.4th at pp. 667-670.) It appears anomalous that the BPH would be bound by our decision while the Governor, whose review is to be based on "materials provided by the parole authority" (Pen. Code, § 3041.2, subd. (a)) and is to be "limited to the same considerations that inform the [BPH's] decision" (*Rosenkrantz*, at p. 661), would be free from the constraints imposed on the BPH. We do not reach this anomaly because we conclude Shaputis is entitled to relief for the reasons stated below.

8 The Governor also seemed to suggest the evidence Shaputis intentionally killed the victim rendered the offense an aggravated second degree murder. However, the People make no effort to explain how evidence of intent to kill would provide a circumstance that "reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction" for second degree murder (*Rosenkrantz,*

The conclusion of premeditation, although "inconsistent with the jury's verdict acquitting [Shaputis] of first degree murder" (*Shaputis I, supra,* at p. 15), was one the Governor was free to make (*Rosenkrantz, supra*, 29 Cal.4th at pp. 678-679) and there is a modicum of evidence to support this conclusion.[9] However, the conclusion that Shaputis's offense involved conduct beyond the minimum required for conviction for second degree murder was unaccompanied by any explication of why his conduct 20 years ago convinced the Governor he would currently present a risk to public safety if granted parole. As the court explained in *In re Lee, supra,* 143 Cal.App.4th at pages 1408-1409:

> "The Attorney General argues that so long as 'some evidence,' which may be as little as a 'modicum,' supports the Governor, we must affirm. [Citations.] We conclude, however, that the . . . . test is not whether some evidence supports the *reasons* the Governor cites for denying parole, but whether some evidence indicates a parolee's release *unreasonably endangers public safety*. [§ 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*[*supra,* 133 Cal.App.4th at p. 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']; [citation].) Some evidence of the existence of a particular factor does not necessarily equate to some evidence the parolee's release unreasonably endangers public safety. [¶] We must therefore view the Governor's two reasons within the context of the other factors he must consider to see if some evidence shows Lee continues to pose an unreasonable risk to public safety. [Citation.] [Fn. omitted.]"

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supra, 29 Cal.4th at p. 683), and we do not further consider that finding as a basis for the Governor's decision.

9 The factual basis for this finding appears to be the presence of an open box of ammunition near the victim's body, and that Shaputis had told the victim's parents (when he was agitated with the victim) that he would "send her home in a box," although the parents thought Shaputis was "only joking" when he made those statements. This evidence, while gossamer, provides a modicum of evidence to support the finding.

Other courts have agreed the appropriate inquiry focuses not on whether a *reason* given by the Governor finds evidentiary support, but instead on whether the evidence supports the conclusion of dangerousness. (See *In re Tripp* (2007) 150 Cal.App.4th 306, 313 [" 'Only a modicum of evidence is required.' . . . On the other hand, the evidence must substantiate the ultimate conclusion that the prisoner's release currently poses an unreasonable risk of danger to the public. [Citations.] It violates a prisoner's right to due process when the [BPH] or Governor attaches significance to evidence that forewarns no danger to the public or relies on an unsupported conclusion."]; *In re Barker* (2007) 151 Cal.App.4th 346, 366 [same].)

Measured by this standard, the Governor's reliance on the minimal evidence of premeditation provides no evidence Shaputis's conduct in connection with the offense 20 years earlier would portend an unreasonable *current* risk of danger to the community were he released. He did not commit the offense in a heinous, atrocious, or cruel manner that might suggest an indelible psychopathy or criminal disposition that remains unabated after 20 years of incarceration. Even if the crime could be deemed aggravated, the courts have recognized the predictive value of an offense declines over time (*In re Elkins, supra*, 144 Cal.App.4th at p. 496), and although it is true, to a certain point, that "the circumstances of the crime and motivation for it may indicate a petitioner's instability, cruelty, impulsiveness, violent tendencies and the like[,] after fifteen or so years in the caldron of prison life, not exactly an ideal therapeutic environment to say the least, and after repeated demonstrations that despite the recognized hardships of prison, this petitioner does not possess those attributes, the predictive ability of the circumstances of

the crime is near zero." (*Irons v. Warden* (E.D. Ca. 2005) 358 F.Supp.2d 936, 947, fn. 2, revd. *Irons v. Carey* (9th Cir. 2007) 479 F.3d 658.)

Furthermore, there is no evidence the crime was attributable to environmental factors that remain operative in Shaputis's life. Instead, the circumstances of the offense (together with exemplary behavior exhibited by Shaputis for the last 20 years) suggest that his high level of intoxication was the critical accelerant for his violent behavior, and the only evidence before the Governor was that Shaputis had successfully controlled (and was committed to continued control over) his alcoholism.

Moreover, even if we fully credited the Governor's reliance on premeditation to elevate Shaputis's crime to an "aggravated" offense, the concurring opinion of Justice Moreno in *Rosenkrantz* cautioned that, " 'In some circumstances, 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.' . . . [¶] Although I agree that evidence of premeditation and deliberation supports the conclusion that petitioner's crime was particularly egregious for a *second degree* murder, it is another matter whether any evidence would support the same conclusion for a *first degree* murder. Other than felony murders, first degree murders by definition involve premeditation and deliberation. . . . Furthermore, petitioner's offense did not appear to partake of any of those characteristics that make an offense particularly egregious under the [BPH's] parole eligibility matrix for first degree murders . . . . [¶] The significance of the above observations is this: there will come a point, which already

may have arrived, when petitioner would have become eligible for parole if he had been convicted of first degree murder. Once petitioner reaches that point, it is appropriate to consider whether his offense would still be considered especially egregious for a *first degree* murder in order to promote the parole statute's goal of proportionality between the length of sentence and the seriousness of the offense. [Citation.] Under this circumstance, the justification for denying his parole would become less clear, even under the deferential 'some evidence' standard." (*Rosenkrantz, supra,* 29 Cal.4th at pp. 689-690, conc. opn. of Moreno, J.) It appears Shaputis, even if his conviction had been for first degree murder, would have become eligible for parole in December 2006, and thus his continued incarceration "based upon the nature of the offense alone might rise to the level of a due process violation" (*ibid.*), because there is no evidence his offense would qualify as an aggravated form of *first* degree murder.

There is nothing in the facts of the crime that makes the offense a particularly aggravated second degree murder offense that (quoting *In re Scott, supra,* 133 Cal.App.4th at p. 601) would indicate Shaputis "poses a continuing threat to the public safety if released. Indeed, the record contains abundant *uncontradicted* evidence to the contrary. *All* of the many psychological evaluations . . . emphasized that he committed his crime [due to alcohol abuse that is] not likely to recur, and for that reason (as well as his prior crime-free life) there was a low risk he would commit another violent act if released. The [LPER] prepared by the Department of Corrections reached the same conclusion, emphasizing that the fact that [he] committed his crime [due to alcohol abuse which] indicates he 'would pose a low degree of threat to the public at this time if

released from prison.' The Governor may believe [Shaputis] would pose an unreasonable risk of danger to society if now released from prison, but that opinion finds no factual support whatsoever in the record that was before him."

We conclude, for analogous reasons, the circumstances of the crime do not provide any evidence to support the conclusion that Shaputis would currently pose an unreasonable risk to public safety if released on parole.

B. Shaputis's Attitude About the Crime

The Governor is authorized to consider the inmate's "past and present attitude toward the crime," "signs of remorse," or "any other information" when considering the inmate's suitability for release. (§ 2402, subds. (b) & (d)(3).) Although the Governor's decision acknowledged Shaputis's numerous statements suggesting he was remorseful and accepted "full blame for the shooting," the Governor also cited snippets of various evaluations suggesting Shaputis had not accepted full responsibility for the crime and lacked insight into his behavior. The Attorney General argues these findings provide some evidence for the Governor's conclusion that Shaputis would currently pose an unreasonable danger if released on parole.

Even assuming the Governor intended to rely on Shaputis's psychological defense mechanisms for his decision,[10] the cited passages do not provide some evidence that he

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10 We should confine our review to the evidence of unsuitability credited by the Governor, and should not consider unsuitability factors apparently rejected by the Governor (see fn. 5), and the Governor's decision here appears rooted in his finding that the offense was especially aggravated. However, the Governor's decision also discusses Shaputis's lack of insight into the offense, although the significance of that discussion is oblique. That discussion may have been intended to explain why the Governor rejected

posed an unreasonable risk of danger to the community. Although there is evidence to support the factual findings, the inquiry is whether there is a modicum of evidence to support the conclusion Shaputis *posed an unreasonable risk of danger in light of those facts*. (*In re Lee, supra,* 143 Cal.App.4th at p. 1408.) Certainly, the 2004 LPER (prepared by Shaputis's prison counselor for submission to the 2004 BPH hearing) did note as a "concern" that Shaputis continued to believe the gun had been pointed at the fireplace "[e]ven though the evidence in detail shows otherwise" and therefore had not shown "acceptability for his crime." However, *the same counselor* nevertheless concluded that Shaputis's conduct during his (at that time) 17 years of incarceration demonstrated he would be a low risk of danger if released. Similarly, Dr. Mura's 2004 forensic psychological evaluation noted Shaputis has "yet to accept full responsibility for the controlling offense and still seems to rely on denial and rationalization to handle stress." However, *the same doctor*, after noting this psychological defense mechanism was operable, also reported (1) Shaputis admitted that "I know what I did was terribly wrong . . . I know what alcohol can do to a person," (2) stated Shaputis had "within his limits . . . developed some insight into his functioning," and (3) concluded Shaputis's demonstrable commitment to maintaining his sobriety (as well as his prison record and

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Shaputis's belief (e.g., he had reduced culpability because shooting was unintentional) and instead found Shaputis was culpable of an intentional killing. If that was the focus of the Governor's "lack of insight" or "failure to accept responsibility" discussion, Shaputis's inability to accept his responsibility is not a separate ground for determining he poses an unreasonable risk, but instead was subsumed within the primary ground of the Governor's decision. However, because it is arguable the Governor's decision can be construed as citing Shaputis's lack of insight as a *separate* ground for deeming him to pose an unreasonable risk, we separately evaluate whether there is some evidence to support that conclusion.

his physical health) rendered him a low risk for violent behavior. Mura, after noting Shaputis's history of violence was intertwined with his alcoholism, concluded the risk was low as long as he did not relapse into alcoholism and was involved in activities that held his interest. Indeed, Mura concluded that, considering Shaputis's prison record (e.g. his commitment to his AA program and his demonstrated ability to comply with rules) and current physical condition (a senior citizen with chronic health problems that would limit concerns about his acting out in inappropriate ways), Shaputis was a low risk for future violence. (See fn. 3.)

The final person to comment on Shaputis's "limited . . . insight," Dr. Silverstein, noted his history of alcohol abuse was closely associated with his propensity to engage in domestic violence. *The same doctor* concluded that, if Shaputis remained sober, his risk for violence was close to that of the "average unconfined citizen," and that participation in an alcohol relapse prevention program and a domestic violence treatment program would "likely adequately manage these risks."

Although the Governor's decision embraced isolated comments from the experts' reports, he simultaneously eschewed the unanimous conclusions of the experts that Shaputis was not a danger to society notwithstanding his psychological defense mechanisms, and did so without identifying the factual basis for concluding these experts were both right and wrong. On this record, there is no evidence to support the conclusion that Shaputis posed an unreasonable risk of danger merely because of his method of coping with his guilt.

CONCLUSION AND DISPOSITION

We conclude that considering Shaputis's 20 years of uninterrupted model behavior in prison, his age of more than 70 years, his second degree murder conviction that did not involve elements beyond the minimum conduct required for that offense, his recognition of guilt by calling the police immediately after the incident, his subsequent acknowledgement of guilt, and the expert opinions of his minimal further risk of violence, there is no evidence to support a finding that he would currently pose an unreasonable risk of danger to society were he released on parole.

The Governor's decision reversing the 2006 BPH decision finding Shaputis suitable for parole and setting a parole date is vacated. As in *In re Smith* (2003) 109 Cal.App.4th 489, 507 and *Elkins, supra*, 144 Cal.App.4th at page 503, the BPH is ordered to release Shaputis forthwith pursuant to the conditions set forth in the March 7, 2006 decision by the BPH. Considering that Shaputis's release would have been final more than one year ago, and in the interests of justice, this opinion shall be final as to this court immediately. (Cal. Rules of Court, rule 8.264, subd. (b)(3).)

McDONALD, J.

I CONCUR:

McINTYRE, J.

BENKE, J., dissent.

In *In re Shaputis* (Dec. 28, 2005) D046356, opinion ordered nonpublished May 17, 2006 (*Shaputis I*), a majority over my dissent held that there was no evidence to support the reasons advanced for denying petitioner parole. I believed there was far more than "some" evidence from which the Board of Prison Terms (Board) could conclude petitioner had yet to understand why he was an alcoholic, why he engaged in serious domestic violence and why he murdered his wife. I also believed there was ample evidence the crime was aggravated. Central to my concerns was the belief this court had gone beyond its proper role as a reviewing authority and had improperly stepped into evaluation of petitioner's suitability for parole.

In response to our decision, a new parole hearing was held. At the hearing the parties stated their belief that this court precluded the Board from considering the same suitability factors used at the previous hearing. In addition, there was strong disagreement between the parties as to whether this court precluded consideration of the evidence *actually presented* at the prior hearing or whether *all evidence in existence* before the 2004 hearing was to be excluded from consideration. It is clear our decision confused all parties concerning the task left to the Board.

In the midst of this confusion, petitioner testified. Presiding Commissioner St. Julien asked him if he has a problem with the way he treats women. The dialogue proceeded as follows:

"Presiding Commissioner St. Julien: Do you think you have a problem in the way you treat women?

"[Petitioner]: Now?

"Presiding Commissioner St. Julien: Yeah, then and now.

"[Petitioner]: Well, no I don't. I don't know how to say that I don't have a problem now. I didn't have a -- I guess I had a problem then but I don't know how to put it into pictures or words. I just -- It was one of those things I didn't quite understand, I guess. Not having a thorough idea of how stupid I was being, how dumb I was being."

The deputy district attorney asked the commissioners to inquire further of petitioner as to his current understanding about why he committed the murder and why he would not commit it today. Petitioner's counsel would not permit him to answer the question, even though Deputy Commissioner Lushbough stated the question was an important one to her in terms of how petitioner was "different today."

The latest psychological report, dated April 1, 2005, and prepared by Dr. Charles Silverstein, was reviewed at the hearing. Deputy Commissioner Lushbough referred to the report in her inquiries of petitioner. She observed that the doctor's report noted petitioner found "inexplicable" his daughters' prior allegations of rape, incest and domestic violence. He noted petitioner had a flat affect when discussing these allegations. The doctor stated this could be a sign of the schizoid tendencies noted in some previous evaluations. He concluded "there appears little potential benefit at this point in his development to attempt to modify this characterological [*sic*] structure." The doctor further concluded petitioner's alcohol dependence is in "sustained *institutional* remission." (Italics added.) Significantly, his report concludes that while petitioner's risk of violence in comparison to other *inmates* is far below average, if he were to relapse into

alcoholism, "the risk would likely rise considerably and he would present as an unpredictable risk for future domestic violence."

The overarching question before the Board was whether petitioner now has enough insight into his prior acts of domestic violence and the alcoholism that played a part in it, such that if released, he would not present an unreasonable risk of danger to the public in general or the woman he married while he was in prison.

At the end of the hearing, speaking for herself, Presiding Commissioner St. Julien stated she believed petitioner was unsuitable for parole in 2004 and she believes he is still unsuitable for parole because he continues to lack understanding as to why he killed his wife and why he engaged for many years in domestic violence against his family members. She stated the Board believes he needs more time to think about and come to grips with the crime and show he understands the reasons why he committed it.

Remarkably, despite its conclusion that if released petitioner still presents an unreasonable risk of danger to public safety, the Board granted petitioner parole. In doing so it expressly stated that it was abandoning its better judgment on the issue because of the limitations placed on it by this court.

We find ourselves in an unfortunate position. By expressly precluding the Board from considering evidence and findings from prior hearings, we confused it and caused it to feel bootstrapped into granting parole. More significantly, we caused the Board to abandon performance of its proper function. These are not insignificant effects. (See *In re Dannenberg* (2005) 34 Cal.4th 1061, 1094.)

The Governor has now reversed the Board's ruling but the reversal is technical. Substantively, he has affirmed the Board's conclusion that if released, petitioner presents an unreasonable risk of danger to others. In essence he has reversed not the Board, but this court.

In doing so, the Governor did not feel constrained by the unreasonable and confusing restrictions our court placed on the Board. He considered the evidence surrounding the crime and concluded it was "especially aggravated" in that petitioner had thought about killing his wife and sending her "home in a box." He considered the serious ongoing violence petitioner exhibited toward his wife, including a beating so severe she needed plastic surgery. Echoing the concerns of the Board, he also based his decision on petitioner's failure to accept responsibility for the murder and his inability to understand the nature of his offense and the reasons for committing the murder.

I agree with the Governor and thus the substantive evaluation of the Board.

As my colleagues themselves note, our role in reviewing the Governor's decision is crystal clear. To reverse his parole decision, it must be *devoid* of a factual basis. We may not overturn a denial of parole unless *no evidence* supports the decision. If *some* evidence supports the decision, we may not contradict the result. (*In re Dannenberg, supra,* 34 Cal.4th at p. 1084; *In re Rosencrantz* (2002) 29 Cal.4th 616, 658.)

My colleagues disregard the evidence supporting the Governor's, and indirectly the Board's, concerns by explaining why they believe the evidence is, one way or another, not before us, incorrect or of no value. However, while reasonable minds might differ on the subject, the record of the March 7, 2006, hearing reveals petitioner has no insight *at*

all into why he physically abused and murdered his wife and why his family members allege other very serious acts of abuse directed at them. Nor does he understand the interplay between his alcoholism and his abusive and homicidal behavior.

In the face of such evidence, we are compelled to affirm the Governor's decision.

BENKE, Acting P. J.