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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DAVID VASQUEZ on Habeas Corpus.	D051015 (San Diego County Super. Ct. No. CR126443)

Petition for Writ of Habeas Corpus. George W. Clarke, Judge. Relief granted.

David Vasquez challenges Governor Arnold Schwarzenegger's reversal of a decision by the Board of Parole Hearings (the Board) finding him suitable for release on parole. We conclude there was no evidence to support the Governor's ultimate conclusion that Vasquez was unsuitable for parole because he currently posed an unreasonable risk to public safety and therefore grant the requested relief.

I. FACTS

A. The Offense

The facts of Vasquez's offense, as derived from our earlier appellate decision (*People v. Vasquez* (D016853), filed May 12, 1994 [unpub. opn.]), are as follows:

Maria Roth and the victim, Miguel Alarcon, were involved in a volatile romantic relationship and lived together for nine years. In September 1990, the couple had a fight and Alarcon eventually moved out of Roth's apartment two months later. Meanwhile, Roth started seeing Vasquez and agreed to become his girlfriend.

In November 1990, Alarcon became angry after discovering that Roth was Vasquez's girlfriend and told Roth he would "take a bat and beat the fuck out of [Vasquez]." Alarcon later confronted Vasquez and beat him up, causing Vasquez two black eyes and a swollen nose as well as a broken right wrist. Vasquez tried to avoid Alarcon by staying at his brother's house, but his car was broken into, rigged so that it would not start and items (later found in Alarcon's garage) were taken. Vasquez and Roth then moved to his sister's house, which Vasquez believed Alarcon would not be able to find.

Roth warned Vasquez that Alarcon was crazy enough to go after him and that he tended to get violent when he was drunk or on drugs. Roth related one incident in which Alarcon had been caught by the police with a rifle when he had been getting ready to hurt someone because of jealousy. The warnings scared Vasquez, who obtained a .22 derringer from a friend, but later returned it. During December 1990, Roth met with Alarcon and had sex with him twice, but by New Year's Eve, she was back with Vasquez. On January 1, 1991, Alarcon stole Roth's car and later agreed to return it after Roth again stated she would not see Vasquez any more.

Five days later, Alarcon confronted Roth about her relationship with Vasquez and told her he would see her and Vasquez later that night and shoot them. After Roth told

Vasquez what Alarcon had said about shooting them, they drove to a friend's house and borrowed a two-shot derringer. When Alarcon later found the couple, Vasquez had Roth get out of the car to hide and then drove off.

Alarcon drove after Vasquez and rear-ended Vasquez's car. Vasquez stopped, got out and started pacing in front of his car. Alarcon also stopped and Vasquez went to the driver's side door of his car. As Alarcon opened the door and started to get out, Vasquez fired his gun. A few seconds after Alarcon got out of the car, Vasquez fired a second shot and the men immediately started fighting. At some point, Alarcon stopped fighting, but Vasquez continued to hit and kick him.

Alarcon died from a gunshot wound to his chest and suffered another wound from a bullet that was fired into his side at a downward 40-degree angle. Alarcon's blood and urine had traces of methamphetamine and a 0.20 blood alcohol content at the time of his death.

After the shooting, Vasquez left town, but returned a few days later and voluntarily went to the police station, waived his *Miranda* rights and gave a tape-recorded interview. (*Miranda v. Arizona* (1966) 384 U.S. 436.) During the interview, Vasquez recounted his fight with Alarcon in November and the ensuing harassment. As to the fatal confrontation, Vasquez claimed that Alarcon was holding a gun as Alarcon got out of the car and that he knocked it out of Alarcon's hand. Vasquez then picked up the gun and pointed it at Alarcon as Alarcon advanced towards him. Vasquez told Alarcon to stop, but Alarcon continued to advance. Vasquez said he fired one shot as he backed away but Alarcon was still moving toward him. Vasquez then fired the second

shot. Vasquez claimed that Alarcon knocked the gun out of his hand and they fought until Alarcon slumped down. The police did not arrest Vasquez.

Four months later, Roth contacted the police after quarreling with Vasquez and told a detective that she learned Vasquez had not shot Alarcon in self-defense, but had murdered him. The police arrested Vasquez in September 1991.

B. The Trial and Appeal

At trial, Vasquez claimed he was attempting to leave the area to avoid Alarcon when Alarcon rear-ended Roth's car. Vasquez parked the car and got out to look at the damage when Alarcon pulled up behind him. Vasquez claimed that after Alarcon opened the door and put his left foot out, Vasquez took the gun out of his pocket, pointed it at Alarcon through the window and told Alarcon to stay in his car and leave him alone. Alarcon then swung the car door open and the gun "just went off." Vasquez claimed that he reflexively fired a second shot as Alarcon rushed towards him, but that the second shot had no apparent effect on Alarcon. The men fought until Alarcon slumped down.

A jury convicted Vasquez of second-degree murder and found that he had personally used a firearm. The probation report noted that the crime may have been committed out of great provocation because Alarcon had continually forced confrontations with Vasquez and that Alarcon's family had forgiven Vasquez and did not believe he should go to prison. The probation officer indicated he had no alternative but to recommend a 15 years to life prison term for the murder, plus an additional three years for the firearm use. The trial court followed this recommendation and we affirmed the judgment on appeal.

C. Vasquez's Performance in Prison

Since entering prison in 1992, Vasquez was disciplined four times in 1998 for violating grooming standards and counseled two times that year for less serious misconduct. Vasquez attended adult literacy classes, worked to obtain his GED and availed himself of an array of self-help and therapy. Vasquez also received vocational training in auto painting, received a certificate in food service and held eleven different institutional jobs. A prison staff member noted that Vasquez was an "exceptional worker" and "would be a productive member of society if given a second chance." Another staff member indicated that Vasquez was "competent and eager to take on new tasks" and demonstrated maturity. Vasquez has maintained contact with his mother and others over the years and made post-release plans to live with this mother and work nearby.

D. The Present Proceedings

The present parole hearing was conducted in 2006 and the Board concluded that Vasquez was suitable for parole and would not pose an unreasonable risk of danger to society if released from prison. After citing Vasquez's positive prison behavior, the Board noted that Vasquez had committed the offense as a result of "significant stress" in his life after suffering from the victim's harassment, intimidation and assault. The Board believed that Vasquez was more mature now that he was 43-years old and that his prison misconduct related to a ponytail he wore as a Native American and that such behavior was no longer considered a disciplinary matter.

On August 3, 2006, the Governor reversed the Board's parole grant because he believed that Vasquez posed an unreasonable risk of danger to society and that the gravity of the murder outweighed any positive factors supporting parole suitability. The Governor concluded that the murder involved some level of premeditation, that Vasquez demonstrated exceptionally callous disregard for human suffering when he continued to hit and kick Alarcon after Alarcon stopped fighting and that any stress he was under, given the nature and circumstances of the murder, did not tip the scales in favor of parole suitability.

Vasquez petitioned the San Diego County Superior Court for a writ of habeas corpus, alleging that the Governor's decision was arbitrary and capricious. The court denied the writ, concluding the Governor's decision was supported by some evidence. Vasquez filed a writ petition in this court and we issued an order to show cause why the relief requested should not be granted.

II. DISCUSSION

A. The Statutory Framework and Judicial Review

The purpose of parole is to "help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477.) Although parolees are no longer in physical custody, they remain under the legal custody of the Department of Corrections and Rehabilitation and can be returned to prison at any time. (Pen. Code, § 3056; *People v. Denne* (1956) 141 Cal.App.2d 499, 508 [parolees are permitted to serve the remainder of their term outside rather than within prison walls].)

Parolees are also subject to conditions that govern their residence, associates, ability to travel, use of intoxicants and other aspects of their lives. (Cal. Code Regs., tit. 15, §§ 2512-2513.)

The granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals *as soon as possible* and alleviate the cost of maintaining them in custodial facilities. (*Morrissey v. Brewer, supra*, 408 U.S. at p. 477; *People v. Vickers* (1972) 8 Cal.3d 451, 455, 458.) Release on parole is said to be the rule, rather than the exception (*In re Smith* (2003) 114 Cal.App.4th 343, 351, citing Pen. Code, § 3041 subd. (a)) and the Board is required to set a release date unless it determines that "the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration . . . ." (Pen. Code, § 3041 subd. (b).)

In determining whether an inmate is suitable for parole, the Board and the Governor must consider certain factors tending to show suitability and unsuitability for parole. (Cal. Const., art. V, § 8(b); Pen. Code, § 3041.2.) The specified factors are "general guidelines" (Cal. Code Regs., tit. 15, § 2402, subds. (c), (d)) and the Board is expected to consider "[a]ll relevant, reliable information available" because circumstances taken alone, while not establishing unsuitability for parole, may contribute to a pattern which results in 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. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

A prisoner may be considered unsuitable for parole based on six nonexclusive factors, including: (1) the nature of the commitment offense; (2) a previous record of violence; (3) an unstable social history; (4) a record of sadistic sexual offenses; (5) psychological factors; and (6) serious prison misconduct. (Cal. Code Regs., tit. 15, § 2402, subd. (c).) The only factor at issue in this case is the nature of Vasquez's offense, specifically, whether it was committed in an "especially heinous, atrocious or cruel manner." (*Id*. at subd. (c)(1).) Some aspects of the crime to consider in deciding this particular factor include whether: (1) there were multiple victims; (2) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (3) he abused, defiled or mutilated the victim during or after the offense; (4) he carried out the offense in a manner demonstrating an exceptionally callous disregard for human suffering; and (5) the motive for the crime was inexplicable or very trivial in relation to the offense. (*Ibid*.)

The Governor has the authority to review the Board's decision to parole an inmate convicted of murder. (Cal. Const., art. V, § 8(b); Pen. Code, § 3041.2.) The Governor's

decision to reverse a grant of parole by the Board is governed by the same factors that guide the Board's decision (Cal. Const., art. V, § 8(b)), and is based on "materials provided by the parole authority." (Pen. Code, § 3041.2, subd. (a).) The judicial branch is authorized to review the factual basis of the Governor's decision. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 667 (*Rosenkrantz*).) Although due process requires that the Governor's decision be supported by "some evidence" in the record, only a modicum of evidence is required and the Governor has the authority to resolve any conflicts in the evidence and to decide the weight to be given the evidence. (*Id*. at p. 677.)

"[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

Although the nature of the prisoner's offense, standing alone, may be a sufficient basis to deny parole, "[i]n 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." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 683, italics added.) Accordingly, a life term offense must be "'particularly egregious to justify the denial of a parole date.'" [Citation.] (*Ibid*.)

In *In re Dannenberg* (2005) 34 Cal.4th 1061, 1071 (*Dannenberg*), our high court explained that its "use of the phrase 'particularly egregious,' conveyed only that the violence or viciousness of the inmate's crime must be more than minimally necessary to convict him of the offense for which he is confined. [Citation.]" (*Id*. at p. 1095, italics omitted.) The *Dannenberg* court also emphasized that "the determination of suitability for parole involves a paramount assessment of the public safety risk posed by the particular offender, without regard to a comparative analysis of similar offenses committed by other persons." (*Id*. at p. 1084.) Stated differently, "the Board must point to factors beyond the minimum elements of the crime for which the inmate was committed, [but] it need engage in no further comparative analysis before concluding that the particular facts of the offense make it unsafe, at that time, to fix a date for the prisoner's release." (*Id*. at p. 1071.) In the case before it, the *Dannenberg* court concluded that the Board had proceeded lawfully when it found the inmate unsuitable for release because it had pointed to some evidence that the particular circumstances of the crime, circumstances beyond the minimum elements of the conviction, indicated exceptional callousness and cruelty with trivial provocation and suggested the inmate remained a danger to public safety. (*Id*. at p. 1098.)

A number of appellate courts have discussed the standard for reviewing the Governor's reversal of a Board decision and our high court is currently considering the

question of the extent that the Board and the Governor should consider an inmate's current dangerousness in making a parole suitability determination, and at what point, if ever, the gravity of the commitment offense and prior criminality are insufficient to deny parole when an inmate otherwise appears rehabilitated. (See *In re Lawrence* (2007) 150 Cal.App.4th 1511, review granted Sept. 19, 2007, S154018 (*Lawrence*); *In re Shaputis* 2007 WL 2372405, review granted Oct. 24, 2007, S155872 (*Shaputis*); *In re Cooper* (2007) 153 Cal.App.4th 1043, review granted Oct. 24, 2007, S155130 (*Cooper*); *In re Jacobson* (2007) 154 Cal.App.4th 849 review granted Dec. 12, 2007, S156416 (*Jacobson*); *In re Dannenberg* (2007) 156 Cal.App.4th 1387, review granted Feb. 13, 2008, S158880; *In re Montgomery* (2007) 156 Cal.App.4th 930, review granted Feb. 20, 2008, S159141 (*Montgomery*); *In re Staben* 2007 WL 3257191, review granted Feb. 27, 2008, S159042.)

Some appellate courts have held that "[t]he 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. . . . [In other words,] [s]ome evidence of the existence of a particular factor does not necessarily equate to some evidence the parolee's release unreasonably endangers public safety." (*In re Lee* (2006) 143 Cal.App.4th 1400, 1408-1409, fns. omitted, italics omitted (*Lee*); followed by *Lawrence, supra,* 150 Cal.App.4th at p. 1544; *Shaputis, supra,* at p. 6; *Cooper, supra,* 153 Cal.App.4th at p. 1060; *Montgomery, supra,* 156 Cal.App.4th at p. 947; *Dannenberg, supra,* 156 Cal.App.4th at p. 1398.) Other courts or dissenting justices have rejected this standard, concluding that a parole unsuitability decision must be upheld if the offense

was particularly heinous in that the violence or viciousness of the crime was more than minimally necessary to convict the inmate of the offense without regard to whether there is a connection between this finding and the conclusion that the inmate currently poses an unreasonable risk of danger to society if released. (See e.g., *Jacobson, supra*, 154 Cal.App.4th at pp. 853, 860-861.) We question whether such a standard amounts to meaningful judicial review as the facts of the crime will never change and second degree murder convictions will almost always involve some facts showing violence or callousness that can be considered out of proportion to any provocation.

Until our high court resolves this uncertainty, we believe the appropriate inquiry is not whether there is some evidence to support the individual suitability or unsuitability factors, but whether there is some evidence supporting the ultimate decision that the prisoner will pose an unreasonable risk of danger to society if released from prison. (See *Rosenkrantz*, *supra*, 29 Cal.4th at p. 664 [the Governor's decision is subject to judicial review to ensure due process compliance]; Cal. Code Regs., tit. 15, § 2402, subd. (a) [an unsuitability decision is a conclusion that "the prisoner will pose an unreasonable risk of danger to society if released from prison"].) We agree that it is appropriate to consider the nature of the crime as this has a bearing on whether the individual is likely to reoffend and thereby pose a risk to society of released. However, it is not helpful for courts to simply review the crime to ascertain whether the facts were more than minimally necessary to convict the inmate of the offense as the facts are subject to differing interpretations and it diverts attention from whether the crime was more than a typical second degree murder. Accordingly, we independently review the record (*Rosenkrantz*,

supra, 29 Cal.4th at p. 677) to determine whether some evidence supported the Governor's decision that Vasquez's release currently posed an unreasonable risk of danger to the public. (We note that in *In re Singler* (March 26, 2008, C054634) --- Cal.Rptr.3d --- [2008 WL 788471] which is not yet final, the Third Appellate District somewhat similarly interpreted the current standard as requiring a showing that the crime was so heinous, atrocious or cruel so as to undermine the inmate's rehabilitative efforts demonstrating that he is no longer a danger to society if released on parole.)

B. Analysis

1. The Governor's Decision

In reversing the grant of parole, the Governor stated that "[t]he gravity of the second-degree murder perpetrated by Mr. Vasquez alone provides a sufficient basis on which to conclude presently that his release from prison would pose an unreasonable public-safety risk." Specifically, the Governor referred to evidence suggesting an exceptionally callous disregard for human suffering. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(D).) The Governor also found that the evidence "involved some level of premeditation," suggesting that Vasquez's conduct was more than necessary to commit his crime and that he was actually guilty of first degree murder. (*Dannenberg*, *supra*, 34 Cal.4th at p. 1098.)

We must determine whether these two reasons, both based on the nature of the commitment offense, support the Governor's unsuitability determination. The Attorney General argues that the Governor did not rely solely on the commitment offense to reverse the grant of parole and suggests he also relied on Vasquez's "evasive conduct"

after the crime and a "pattern" of circumstances establishing Vasquez's unsuitability for parole. We reject this assertion as unsupported by the Governor's reversal. (Cf. *In re DeLuna* (2005) 126 Cal.App.4th 585, 593-594 ["we must confine our review to the stated factors found by the Board . . . not to findings that the Attorney General now suggests the Board might have made"].)

2. Exceptionally Callous Disregard for Human Suffering

"Second degree murder is defined as the unlawful killing of a human being with malice aforethought, but without the additional elements -- i.e., willfulness, premeditation, and deliberation -- that would support a conviction of first degree murder. [Citations.]" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) All second degree murders, by definition, involve callousness or an indifference to the feelings and suffering of others. (*In re Smith*, *supra*, 114 Cal.App.4th at p. 366.) Because parole is the rule, rather than the exception (*id*. at p. 351), the inquiry must be whether the particular crime was "exceptionally callous," so as to be described as "especially heinous, atrocious or cruel." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

Here, the Governor found that Vasquez demonstrated an exceptionally callous disregard for human suffering when he continued to hit and kick Alarcon after Alarcon had stopped fighting. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(D).) Although not expressly stated, we presume the Governor concluded that this conduct rendered the crime especially heinous, atrocious or cruel. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

Any murder is atrocious and hitting and kicking an unconscious opponent shows a callous disregard for human suffering, but the regulation requires some evidence of exceptional callousness. Here, there is no evidence showing how long or vigorously Vasquez beat Alarcon after Alarcon stopped fighting. Standing alone, the evidence cited by the Governor does not show *exceptional* callousness and was insufficient to show that this particular crime was *especially* heinous, atrocious or cruel. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).) (Compare, *Rosenkrantz, supra*, 29 Cal.4th at p. 678 [after a week of planning and rehearsal, defendant killed the victim by firing ten shots at close range and at least three or four shots into the victim's head as he lay on the pavement]; *In re Van Houten* (2004) 116 Cal.App.4th 339, 346, 351, 366 [defendant participated in the premeditated and "gratuitous mutilation" of a married couple in which the wife was stabbed 42 times while hearing her husband meet a similar fate].)

3. Premeditation

The Governor found that the evidence in the record revealed that Vasquez's offense "involved some level of premeditation." The Governor may permissively conclude that Vasquez was guilty of a more serious offense (*Rosenkrantz, supra*, 29 Cal.4th at pp. 678-679) and we must uphold that decision as long as he considered all relevant circumstances and factors. (*Id*. at p. 626.) In concluding that Vasquez had committed premeditated murder, the Governor noted that on the evening of the murder, Vasquez borrowed a gun and had Roth leave the car when Alarcon drove up. After Alarcon crashed into the rear of Vasquez's car, Vasquez pulled over and paced in front of the car. When Alarcon pulled over, Vasquez approached, pointed the gun and told

Alarcon to stay in the car. Vasquez shot as Alarcon was getting out of the car and shot Alarcon again after Alarcon got out of the car. Standing alone, these facts are suggestive of premeditated first degree murder because Vasquez had motive for the killing, obtaining the gun could be interpreted as planning activity and Vasquez's pacing could be interpreted as reflection on a course of action. (*People v. Jurado* (2006) 38 Cal.4th 72, 118-119 [reviewing court considers evidence of preexisting motive, planning activity and manner of killing to determine if finding of premeditation and deliberation is adequately supported].)

With that said, we note that the Governor's recitation of the crime omitted undisputed facts that he previously acknowledged – that on the day of the murder Alarcon struck Roth and threatened to shoot her and Vasquez later that evening. His recitation of the evidence also took the crime out of context and completely ignored the significant events leading to the deadly confrontation. Vasquez committed the crime as a result of significant stress building over a two-month period. Alarcon assaulted Vasquez, giving him two black eyes, a swollen nose as well as a broken arm. Despite Alarcon's continued acts of intimidation and harassment, Vasquez moved twice to avoid further conflict. Roth warned Vasquez that Alarcon was crazy enough to go after him and related an incident in which Alarcon had been caught by the police with a rifle when he had been getting ready to hurt someone because of jealousy. Scared by these warnings, Vasquez earlier armed himself with a gun, but later returned it. We believe these facts are significant and that the evidence is more indicative of a fearful person planning to defend himself against a threatened shooting.

Nonetheless, the Governor's decision shows an understanding of Vasquez's circumstances because he later mentioned the Board's findings that Vasquez committed the crime as a result of significant stress, noting that Alarcon harassed, intimidated and used physical threats and force against Vasquez. The Governor concluded: "Regardless of whether and to what [extent] he may have been under stress, given the nature and circumstances of the murder he committed, the existence of this factor does not now tip the scales in favor of Mr. Vasquez's parole suitability." Accordingly, the Governor appears to have taken into account the extenuating circumstances leading to the shooting before concluding that Vasquez posed an unreasonable risk to public safety. (Evid. Code, § 664 [it is presumed that official duty has been regularly performed].)

While we do not agree with the Governor's assessment that this crime amounts to a first degree murder, we cannot reweigh the evidence (*Rosenkrantz, supra*, 29 Cal.4th at p. 679) and are forced to concede that there is some evidence, albeit tiny, that the circumstances of this crime went beyond the minimum necessary to sustain a second degree murder conviction; however, there is no evidence indicating that Vasquez's release would unreasonably endanger public safety. (Cal. Code Regs., tit. 15, § 2402, subd. (a).)

But for the nature of the crime, all the applicable regulatory criteria indicate that Vasquez is suitable for parole. (Cal. Code Regs., tit. 15, § 2402, subd. (d).) Vasquez lacked a juvenile record and his two adult convictions did not involve violence. Vasquez has reasonably stable relationships as demonstrated by support letters from several relatives and frequent contact with his parents during his incarceration. He has very marketable job skills and post-release plans to live with this mother and work nearby.

Vasquez has performed well in prison and received accolades for his work ethic. He has never refused a drug test and has been clean from illegal drugs for 14 years and from alcohol for 11 years. A psychological evaluator described Vasquez as "bright, courteous and high functioning" with no apparent mental health deficits or emotional problems and concluded that Vasquez felt a tremendous amount of regret for his actions and posed little risk to society. Vasquez's probation report indicated that he asked the victim's family for forgiveness and that the family forgave him and blamed the crime on Vasquez's and Alarcon's relationship with Roth. Additionally, Vasquez committed the crime as a result of significant stress.

The denial of parole based solely on the gravity of the commitment offense warrants especially close scrutiny as the nature of the offense is a factor that will never change. (*In re Scott* (2005) 133 Cal.App.4th 573, 595.) Over sixteen years have passed since Vasquez committed the crime and he has made commendable rehabilitative gains during that time showing that he is ready to be reintegrated into society and serve the remainder of his sentence outside prison walls. (*Morrissey v. Brewer, supra,* 408 U.S. at p. 477; *People v. Vickers, supra,* 8 Cal.3d at p. 458.) While we agree that there are certainly some crimes so heinous that the nature of the commitment offense may render the inmate unsuitable for parole (*Rosenkrantz, supra*, 29 Cal.4th at p. 682), this is *not* one of those crimes and the evidence suggestive of premeditation does not show that Vasquez currently poses an unreasonable risk to public safety. The record contains no evidence supporting the Governor's conclusion that, due to the nature of his commitment offense, Vasquez posed an unreasonable risk of danger to society if released and it serves no

purpose to remand this matter to the Governor to permit him to reconsider his decision. (*In re Scott*, *supra*, 133 Cal.App.4th at pp. 603-604.)

DISPOSITION

The Governor's decision to reverse the Board's order granting parole to Vasquez is vacated, and the Board's parole release order is reinstated.

McINTYRE, J.

I CONCUR:

McDONALD, J.

HALLER, Acting P. J.

Based on the current state of the law, I respectfully dissent.

In deciding whether to grant or deny parole, the primary consideration to be made is whether "the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a); see Pen. Code, § 3041, subd. (b).) A governor is entitled to base that decision solely on the circumstances of the crime. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 682-683.) In evaluating the crime, the Governor is not bound by the evidence credited by the fact finder at trial and may independently evaluate the evidence to determine whether, in his judgment, the circumstances of the crime dictate denial of parole. (*Id.* at p. 679.)

When the Governor's decision is based solely on the circumstances of the crime, the offense must be "particularly egregious." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 683.) In defining this phrase the Supreme Court has required that the "violence or viciousness of the inmate's crime must be more than minimally necessary to convict him of the offense for which he is confined." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1095, italics omitted.) It has also observed that "[i]n 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." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 683.)

Judicial review of the Governor's decision is "extremely deferential" and is limited to ascertaining whether "some evidence," also referred to as a "modicum of evidence,"

supports the Governor's conclusion. When the denial is based on the circumstances of the commitment offense, there must be some evidence supporting the Governor's conclusion that the crime was "particularly egregious." (*In re Rosenkrantz, supra*, 29 Cal.4th at pp. 677, 679, 683.)

The majority correctly sets forth these standards, but, in my view, departs from them. At page 17 of the opinion, the majority states that it disagrees with the Governor's "assessment that this crime amounts to a first degree murder," recognizes that it "cannot reweigh the evidence," and acknowledges that it is "forced to concede that there is some evidence, albeit tiny, that the circumstances of this crime went beyond the minimum necessary to sustain a second degree murder conviction. . . . " Despite these observations, it ultimately concludes the Governor erred in denying parole. In doing so, it takes umbrage with the Supreme Court's holding defining a crime as "particularly egregious" if the circumstances go "beyond the minimum necessary to sustain a conviction" of the underlying crime. (*Rosenkrantz, supra*, 29 Cal.4th at p. 683.) Although persuasive, the majority's criticism does not, at this point, conform with the current state of the law. Accordingly, because there is "some evidence" to support the Governor's decision, I decline to join the majority's opinion.

In dissenting, I also note that the majority proposes a new test by which to review the Governor's parole decisions. At page 12, it asserts that "the appropriate inquiry is not whether there is some evidence to support the individual suitability or unsuitability factors, but whether there is some evidence supporting the ultimate decision that the

prisoner will pose an unreasonable risk of danger to society if released from prison." (Maj. opn., p. 12.)

As commendable as this test may be, it implicitly rejects the high court's determination that "particularly egregious" crimes are a reliable predictor of whether a prisoner will pose an unreasonable risk of danger to society and its holding that the Governor can deny parole relying solely on the circumstances of the crime so long as there is "some evidence" supporting the finding of egregiousness. Until the Supreme Court holds otherwise, I will adhere to the directives set forth in *Rosenkrantz* and *Dannenberg*.

HALLER, Acting P. J.