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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JAVIER O. CORTINAS, on Habeas Corpus.	H025526 (Santa Clara County Super. Ct. No. 106160)

STATEMENT OF THE CASE

The Board of Prison Terms (the Board) appeals from an order directing it to schedule a parole release date for defendant Javier O. Cortinas. (See Pen. Code, § 1506.)[1] The procedural history of the case is as follows.

In 1986, defendant pleaded guilty to second degree murder with a knife and was sentenced to a term of 17 years to life. The California Department of Corrections set his minimum and maximum eligibility parole dates, respectively, at August 3, 1995, and December 6, 2000. In 1995 and in 1997, the Board conducted parole hearings and denied parole both times. On September 13, 2000, the Board conducted a third hearing and again found defendant unsuitable for parole. (See § 3041.) Defendant filed an administrative appeal, which was denied on June 12, 2001. Thereafter, on January 14, 2002, defendant sought a writ of habeas corpus from the superior court, challenging the Board's decision. On January 24, 2003, the court granted the writ, reversing the Board's decision.

In particular, the trial court found that there was no evidence to support the Board's decision. Moreover, it found that the decision was actually based on a no-parole

[1] All further statutory references are to the Penal Code unless otherwise specified.

policy for convicted murderers, and, in applying it, the Board violated the terms of defendant's plea bargain. Under the circumstances, the court independently reviewed the record and found that defendant was entitled to parole. As noted, the court ordered the Board to set an immediate parole release date.

On appeal from the order, the Board claims the court erred in finding that there was no evidence to support its decision and that it was based on a no-parole policy. The Board further claims the trial court lacked the authority to order a parole release date.

We reverse the trial court's order.

BACKGROUND

I. *The Commitment Offense and Other Criminal History*

In 1985, defendant, then 19, and David Herena, then 17, were neighborhood friends. According to defendant, he tried to help guide Herena away from criminal and local gang influences. Over time, however, he felt that Herena was resisting his efforts, and, becoming discouraged, he started to shun Herena. Herena then became upset over the loss of friendship and support.

At some point during this time, defendant had an argument with one of Herena's friends. As a result, he believed that this person might attack him. Then, on August 9, 1985, Herena came by defendant's residence at around 11:00 or 11:30 p.m. and called for defendant. Defendant, who had been drinking earlier that afternoon, thought Herena might be setting him up to be attacked. When defendant came outside, Herena challenged him to a fight. They went into the front yard together, and then defendant went back inside the house, where he got a kitchen knife. He then returned to Herena and repeatedly stabbed him, at times in the back. Before fleeing the area, defendant stripped Herena, threw his clothes around, covered the body with a sheet, stuck a cross in the ground, and placed some pots around him. Defendant returned several hours later and was arrested.

At his parole hearing, defendant explained that he feared for his life that night because Herena often carried a weapon, and had his hands in his pocket. Defendant admitted that in addition to drinking that day, he was in a bad mood, he had had personal problems at home, and he was frustrated. He said he "overreacted" and took his rage out on Herena. He denied intending to kill Herena, saying he only wanted to hurt him.

Prior to the killing, defendant had no history of violence, and his criminal record comprised prior convictions for possession of alcohol and driving under the influence.

II. ***Additional Evidence Adduced at the Parole Hearing***

In addition to defendant's commitment offense and criminal history, the Board considered defendant's history of substance abuse. Defendant explained that he started drinking at age 16. When asked about other drugs, defendant said he experienced marijuana and cocaine. He later admitted that he regularly used marijuana and snorted cocaine whenever it was available. (See fn. 16, *post*.)

The Board also considered defendant's overall programming and reviewed his file and prior transcripts. Defendant's record includes a 1989 psychological evaluation, which attributed Herena's murder to defendant's "long history of polysubstance abuse." The report opined, however, that defendant was motivated to explore in-depth "the psychogenesis of his commitment offense," commended him for his participation in group therapy and substance abuse programs, and predicted that he would become "conversant with those subconscious forces which culminated in the murder of his best friend."

In a 1994 psychological report, the staff psychologist opined that defendant had insight into the factors that caused the killing. He noted that in 1992, defendant received a disciplinary notation, "CDC 115 for fighting," but has remained discipline free since then. He further noted that defendant has been "very active" in Alcoholics Anonymous (AA) and had profited from extensive therapy. He opined that "[defendant's] potential for violence in this controlled setting, particularly as he matures, is average to less than

average. If he continues to remain abstinent of alcohol and drugs, I feel that this would continue after he paroles." Nevertheless, he believed defendant needed more education concerning his substance abuse and more understanding of the AA process. He recommended continued participation in an AA program and monitoring if and when he is granted parole. However, he found that overall, defendant's prognosis was "very good."

The Board expressly noted subsequent evaluations. In particular, it noted a "Life Prisoner Evaluation" by Richard Hawkins, a prison counselor, prepared in November 1999. Among other things, Hawkins opined that the murder was aggravated by the fact that defendant could have stopped after his initial confrontation with Herena and was on probation at the time of the offense. He reported that defendant had remained discipline free since his last hearing and had maintained his commitment to AA, for which he received a certificate of participation. Hawkins reported that defendant's job supervisor rated his performance as " 'exceptional' " and lauded his professionalism and personal appearance. However, Hawkins pointed out that defendant did not "upgrade his Academic or Vocational skills since his last Board appearance." Given "the commitment offense, prior criminal behavior, adjustment to prison, the amount of time spent in preparation for the future release," Hawkins opined that "the prisoner represents an unpredictable degree of threat to the community, if release at this time." He recommended that defendant remain discipline free, expand his vocational and educational skills, and continue his participation in therapy and AA.

The record contains a "CDC-128-G" classification memorandum dated March 23, 2000, and signed by Hawkins, that reveals discipline notations for fighting in 1990, conduct that could lead to violence in 1991, fighting in 1992, and disrespectful conduct in 1997.

The Board also expressly noted a "Life-Term Mental Health Evaluation" prepared in March 2000, by O.S. Glover, Ph.D., a clinical psychologist at Folsom Prison. Glover

reviewed defendant's developmental, educational, and family history, finding no abnormal experiences, intellectual deficiencies, or problematic relationships that might indicate abnormal behavioral responses. Concerning the killing, Glover opined that defendant was "genuinely remorseful" and noted that after it happened, defendant was so bothered, he started to hallucinate in jail and had to be medicated. Moreover, before entering his plea, defendant was diagnosed with schizophrenia and was later treated for psychosis and took anti-psychotic medication for 10 years. However, prison psychologists later rejected this diagnosis, and Glover believed the psychotic episode in jail was a manifestation of posttraumatic stress. Glover noted that defendant said he had been depressed as a teenager because his father was so strict, but he opined that defendant's depressive and paranoid ideations while related to his difficult relationship with his father were primarily the result of his use of drugs, which can cause those types of symptoms.

Concerning defendant's current dangerousness, Glover believed defendant "has a violence potential lower than that of the average inmate in similar institutional settings," and "[h]is violence potential is expected to remain lower than the average person in the free society. His prognosis is good." Moreover, because defendant "has gained a fair amount of insight into his development and subsequent crime," Glover doubted "rather seriously that [defendant] will ever perpetrate such a crime again. His guilt is likely to control him in this regard."

Concerning defendant's prospects and plans, Glover noted that he graduated from high school and then worked for an electronics company. When released, defendant planned to join his family in Texas and work on a ranch they were starting. He also wanted to pursue a career as a barber.

At the hearing, the Board acknowledged that defendant had remained discipline free since 1997 and received laudatory reports for personal behavior and grooming and participation in AA. However, the Board found that he had not expanded his vocational

training. Defendant explained that he had been working as a barber since 1997 and so enjoyed it that he wanted to go to barber school, obtain his license, and open a shop. Defense counsel asserted that while incarcerated, defendant had received some training in auto mechanics, dry cleaning, printing, and as an electrician, teacher, and recreational aide.

At the hearing, defendant elaborated on his employment prospects. He said he was confident he would find work and was willing to "flip burgers" if he had to just to get started. However, he admitted that he had not sent out any letters or resumes and had only looked in newspapers for job openings. Defense counsel explained, "I think it might be a little bit of my fault because I promised [defendant] that I would help him with letter writing and resumes when he got out, but I told him I don't really think anybody's going to give you a job while you're incarcerated." Counsel represented that defendant's family offered to help him develop contacts for employment.

The Board discussed several letters submitted on defendant's behalf. His parents wrote that they supported his release, would make their home available to him, and offered to move from Texas back to California to help him adjust. Defendant's aunt, a licensed social worker and professor of psychiatric social work at San Jose State University, also supported his release. She felt uniquely qualified to help him and indicated to defense counsel that defendant could live with her. Defendant's aunt and uncle wrote to say that the family supported defendant's release and that they could offer him a place to stay in San Jose or Texas, where they were in the process of buying a 100-acre ranch. Defendant's cousin wrote to say she had visited defendant during his 16 years in prison and supported his release. Likewise, defendant's sister and other relatives urged defendant's release and offered their homes to him.

When asked why he was a good candidate for parole, defendant said he planned to continue with AA for life and never drink again and was willing to have alcohol and drug

testing as a condition of parole. He also said that he wanted to be available to help his nephew.

In opposition to parole, the Board heard from the deputy district attorney. He noted that defendant had been involved in fights in prison and argued that defendant's crime was "truly bizarre." He cited a police report, which he said contained statements by defendant, in which he said he got the knife so he could kill David and did so because he hated him. He further asserted that there were six stab wounds in David's back, and defendant placed a broken piece of pottery over David's genitals. He described Glover's psychiatric report as "worthless" because it failed to explain why defendant committed such a killing and argued that defendant should not be released because whatever caused him to kill had not yet been diagnosed or treated.

In response, defense counsel asserted that defendant suffered from a "substance abuse organic mental disorder" and had had a psychotic, paranoid schizophrenic episode brought on by drinking. He believed that the disorder was cured and in remission, noting that defendant had been off medication and placed in the general prison population long ago. Nevertheless, he represented that defendant understands that if he ever drinks or takes drugs again, his disorder could resurface. However, defendant has vowed to abstain from drinking and agreed to testing as a condition of parole. In addition, counsel emphasized that defendant has a variety of job skills, a desire to work, and abundant support from his family, who will help him in any way they can.

III. *The Board's Determination*

Under section 3041, subdivision (b), the Board is required to set a parole release date unless it determines that "consideration of the public safety requires a more lengthy period of incarceration . . . ." In making this determination, the Board is guided by the criteria set forth in title 15, division 2, chapter 3, article 11 of the California Code of

Regulations.[2] (Regs., § 2400.) Section 2401 of the Regulations requires the Board to set a release date if the prisoner is found suitable for parole under section 2402, subdivision (d), which enumerates circumstances tending to show suitability; conversely, the Board must deny a parole date if the prisoner is found unsuitable under section 2402, subdivision (c), which enumerates circumstances tending to show unsuitability.[3] Section 2402, subdivision (a) of the Regulations generally provides, in relevant part, "Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." Section 2402, subdivision (b) of the

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[2] We refer to the California Code of Regulations as the "Regulations" or "Regs." All further references to the Regulations are to title 15, unless otherwise specified.

[3] Circumstances showing suitability are that (1) the prisoner has no record of assaultive conduct as a juvenile; (2) the prisoner has a stable social history; (3) the prisoner by word and/or deed has shown remorse for the commitment crime; (4) the prisoner committed the crime as the result of significant stress in his life, especially if the stress has built over a long period of time; (5) the prisoner committed the offense as a result of battered woman syndrome; (6) the prisoner lacks any significant history of violent crime; (7) the prisoner is of an age that reduces the probability of recidivism; (8) the prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) the prisoner has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (Regs., § 2402, subd. (d)(1)-(9).)

Circumstances showing unsuitability are that that (1) the prisoner committed the offense "in an especially heinous, atrocious, or cruel manner"—i.e., multiple people were attacked, injured, or killed; the offense was committed in a dispassionate and calculated manner, such as execution-style; victim was abused, defiled or mutilated; the offense was committed with an exceptionally callous disregard for human suffering; the motive was trivial relative to the offense; (2) the prisoner has a previous record of violence; (3) the prisoner has an unstable social history; (4) the prisoner previously has sexually assaulted another individual in a sadistic manner; (5) the prisoner has a lengthy history of severe mental problems related to the offense; and (6) the prisoner has engaged in serious misconduct while in prison. (Regs., § 2402, subd. (c)(1)-(6).)

Regulations requires the Board to consider "[a]ll relevant, reliable information available" in determining suitability.

Here, after deliberating, the Board concluded that defendant was unsuitable for parole because he currently posed an unreasonable risk of danger to the public if released. In support of its conclusion, the Board found that the murder was carried out in an "especially cruel manner,"—i.e., one that demonstrated "exceptionally callous disregard for human suffering." The Board also considered the motive for the crime to be "trivial" in relation to the offense. The Board noted that defendant did not have a prior record of violent behavior but observed that he had an "unstable social history," he had abused alcohol and used marijuana and cocaine, and had prior convictions involving possession or use of alcohol. The Board further found that although defendant had viable *residential* plans if released, he "does not yet have acceptable employment plans."

The Board acknowledged that defendant had done well in the institutional setting, remaining free of discipline reports since 1997, but noted the district attorney's opposition to defendant's release and Hawkins's view that defendant would pose an "unpredictable degree of threat if released to the public." The Board also believed that defendant had not yet "sufficiently participated in beneficial self-help and therapy programming." In particular, the Board found that defendant "does need therapy in order to face, and discuss, and understand the causative factors which led to his life crime, and until progress is made the prisoner continues to be unpredictable and a threat to others. The prisoner's gains are relatively recent and he must demonstrate an ability to maintain gains over an extended period of time."

The Board commended defendant for remaining discipline free since 1997, completing vocational training, receiving outstanding work reports as a barber, and participating in AA. Nevertheless, the Board opined that "these positive aspects of his behavior do not yet outweigh the factors of unsuitability."

IV. *The Habeas Proceedings*

On January 14, 2002, defendant filed a petition for a writ of habeas corpus. In it he claimed, among other things, that there is no evidence to support the Board's finding of unsuitability. Indeed, he asserted that none of the unsuitability factors were applicable, and most of the suitability factors were. He further asserted that the Board and then Governor Gray Davis used unconstitutionally vague language to implement a no-parole policy.

On February 26, 2002, the court issued an order to show case (OSC). It noted a recent case that supported defendant's claim of a no-parole policy.[4] The court opined that the application of this policy would have an impermissible retroactive effect on his plea and permitted the court to exercise independent judgment concerning defendant's suitability for parole. The court directed the People to address these two issues in its return as well as the claims raised by defendant in the petition.

On May 20, 2002, the People filed a return. In it, they asserted that the Board had denied parole based on an individualized determination of his suitability, and the record supported its decision. The People denied all other claims by defendant, including, implicitly, claims that the Governor and Board base their decisions on a no-parole policy.

On August 16, 2002, defendant filed a traverse. In it, defendant argued that the People had failed to respond to issues related to the alleged no-parole policy, as directed by the court. Petitioner also submitted additional exhibits to show that both the Board and the Governor applied such a policy.

On October 15, 2002, the trial court filed an *interim* order. The court cited recent newspaper articles indicating that after Governor Davis took office, there had been

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[4] The court cited *In re Rosenkrantz* (2002) 95 Cal.App.4th 358. However, the California Supreme Court granted review in that case and later reversed it in *In re Rosenkrantz* (2002) 29 Cal.4th 616 (*Rosenkrantz*).

12,000 parole hearings, the Board granted parole in 140 cases, but the Governor has let only two stand, both of which involved prisoners whose victims had battered them.[5] The court requested that the parties submit additional or contrary statistical evidence. Defendant submitted statistical information from the Board concerning parole hearings from 1999 through September 2002. The People asserted that since parole decisions must be made on an individualized basis, the statistical information was irrelevant.

On January 24, 2003, the court, proceeding without an evidentiary hearing, filed its order granting defendant's writ petition. The court first concluded that the Board's decision was not supported by—indeed was contrary to—the evidence. Next, based on statements by the Governor and statistics showing that he usually reverses the Board when it grants parole, the court found that the Governor has instituted a no-parole policy for convicted murderers. In addition, because the members of the Board have a pecuniary interest in being reappointed by the Governor and because the statistical evidence shows that they too usually deny parole, the court further found that the Board implements the Governor's no-parole policy and applied it to deny defendant parole. The court opined that the People's failure to respond to the no-parole allegations constituted a concession that it existed. The court further concluded that the application of the policy to deny defendant parole violated his plea bargain. Moreover, because the Board applied a policy to reach a predetermined result, rather than considering defendant's individual suitability for parole, the court found the generally applicable standard for reviewing parole decisions inapplicable and instead independently reviewed the evidence to determine whether defendant was suitable for parole. Having done so, the court found defendant suitable for parole and ordered the Board to set an immediate release date.

[5] The order attached articles from the San Francisco Chronicle that appeared on September 29 and October 7, 2002.

STANDARD OF REVIEW

"The petitioner in a habeas corpus proceeding bears the ultimate burden of proving the factual allegations that serve as the basis for his or her request for habeas relief. [Citation.] Once the issues of fact have been joined by the respondent's filing of the return to the petition and the petitioner's filing of the traverse, the court may deny relief if it concludes that the petitioner has not alleged facts sufficient to warrant relief. [Citation.] If relief depends upon the resolution of disputed issues of fact, the court may order an evidentiary hearing and make findings of fact with regard to such issues. [Citation.] The various exhibits that may accompany the petition, return and traverse do not constitute evidence, but rather supplement the allegations to the extent they are incorporated by reference. [Citation.] At the evidentiary hearing, such exhibits are subject to admission into evidence in accordance with generally applicable rules of evidence. [Citation.]" (*Rosenkrantz, supra,* 29 Cal.4th at p. 675.)

As noted, the court below did not conduct an evidentiary hearing but reached its decision based on the exhibits attached to the petition and return and response to the court's interim order. Under the circumstances, we shall independently review the record. (See *In re Serrano* (1995) 10 Cal.4th 447, 457; e.g., *Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

In *Rosenkrantz, supra*, 29 Cal.4th 616, the California Supreme Court addressed the judicial review standard that applies to parole decisions by the Board and the Governor. The court first held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole, based on the factors specified by statute and regulation." (*Id.,* at p. 658, italics added.) The court further held that "courts properly can review a Governor's decisions whether to affirm, modify, or reverse parole decisions

by the Board 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 Board." (*Id.,* at p. 667, italics added.)

Concerning the "some evidence" standard, the court explained, "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. As with the discretion exercised by the Board in making its decision, the 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.)

THE ALLEGED NO-PAROLE POLICY

We first address the trial court's finding that to protect their pecuniary interests, the members of the Board adopted and applied the Governor's no-parole policy for convicted murderers, denying parole without a bona fide individual consideration of the evidence in light of the criteria governing suitability.

Concerning the Governor's alleged policy, we are guided by *Rosenkrantz.* There, the Board found the defendant suitable for parole. The Governor reversed the Board's decision, and the defendant sought habeas relief. After an evidentiary hearing, the trial court found that the Governor applied a no-parole policy. The court based its finding on an article in the Los Angeles Times by David Lesher, quoting public statements by the

Governor to the effect that convicted murderers should serve life terms without exception.[6] The trial court also based its finding on statistical evidence, which revealed that from January 1999 through April 2001, the Board held 4800 parole hearings and granted parole to 48 prisoners, but the Governor had reversed the Board in 47 of these cases. (*Rosenkrantz, supra*, 29 Cal.4th at pp. 684-685.)

The California Supreme Court found the statistical evidence concerning the number of times the Governor reversed the Board's grant of parole insufficient to show a no-parole policy. (*Rosenkrantz, supra*, 29 Cal.4th at p. 685.) Indeed, as defendant points out, the court acknowledged evidence that as of September 24, 2002, the Governor had reversed the Board an additional 70 times. (*Id*. at p. 638, fn. 5.) In rejecting the inference of a no-parole policy from the statistical information and comments by the Governor, the court stated, "Even if the quotations in the above newspaper article accurately reflected the views the Governor held at the time the statements were made, the Governor's subsequent actions, both in granting parole in some instances and in providing individualized analyses for each of his parole decisions in the cases that have come before him, belie the claim that the Governor has adopted a blanket policy of denying parole without regard to the circumstances of the particular case." (*Id.* at p. 685.) The court further explained that the evidence did not indicate that "the Governor's actual decisions reversing grants of parole by the Board failed to engage in an individualized consideration of the factors concerning parole suitability, or that the decisions themselves reflected or relied upon any blanket policy of denying parole to all murderers. *The circumstance that the Governor has reversed most of the Board's decisions granting parole does not establish that he follows a blanket policy of denying parole or that his decision in the present case was based upon such a policy, rather than upon a consideration of the factors and evidence discussed in the Governor's lengthy*

[6] Defendant submitted the Lesher article in this case as well.

written decision denying petitioner parole. Such reversals simply may indicate that the Governor is more stringent or cautious than the Board in evaluating the circumstances of a particular offense and the relative risk to public safety that may be posed by the release of a particular individual." (*Id*. at pp. 685-686, italics added.)

More recently, in *In re Smith* (2003) 114 Cal.App.4th 343 (*Smith*), this court dealt with the identical claim concerning the Governor's alleged no-parole policy. There too, the Board granted parole, the Governor reversed, and the trial court then granted habeas relief, concluding, among other things, that the Governor's decision was based on his no-parole policy. (*Id.,* at p. 349.) The trial court relied on the same newspaper article and statistical evidence rejected by the Supreme Court in *Rosenkrantz*. (*Id.,* at p. 362.) In addition, the trial court relied on the same two newspaper articles from the San Francisco Chronicle considered by the court in this case and updated statistical information, showing few grants of parole by the Board and fewer, if any, affirmances by the Governor. The court also relied on a list of alleged tactics and procedures that, according to the defendant, the Board and Governor regularly employed to deny parole, including the use of a generic boilerplate in their decisions to find all convicted murderers unsuitable for parole regardless of how compelling the evidence of suitability was. The court relied on a declaration by Albert M. Leddy, the former chairman of the Board from 1982 to 1992, stating that then Governor Pete Wilson had a no-parole policy and as a result the number of parole grants declined due to political pressure and the appointment of new members who disfavored parole.[7] The court also relied on an excerpt from a 2000-2001 report from the Legislative Analyst's Office, which infers a no-parole policy from the Governor's public statements and failure to explain statistical information showing a reduction in parole releases from 1989-1999. (*Id.* at p. 363)

[7] Defendant here submitted a declaration from Mr. Leddy, in which he makes the same assertions.

On appeal, we rejected the court's reliance on the same evidence that had been rejected in *Rosenkrantz*. (*Smith, supra*, 114 Cal.App.4th at pp. 362-363.) Moreover, based on the reasoning in *Rosenkrantz*, we further rejected the court's reliance on the later statements by the Governor in the other newspaper articles and the other evidence outlined above that allegedly revealed a no-parole policy. (*Ibid.*) We stated, "The procedures [the defendant] outlined in his memorandum, former Governor Wilson's record, and the speculative inference by the Legislative Analyst's Office have little, if any, probative value concerning whether in this case, the Governor automatically reversed the Board and thus did not give [the defendant] individualized consideration. This is especially true, given the Governor's written decision which does not mention or refer to a no-parole policy but which discusses [defendant's] commitment offense, social history, and background of drug abuse, all of which are factors that are relevant in determining suitability. Moreover, where, as here, the Governor generally and specifically denied the factual allegations implicit in material submitted with [defendant's] petition, we question whether it was proper or appropriate for the trial court to rely on [defendant's] exhibits in the absence of an evidentiary hearing and a determination of their admissibility." (*Id.* at p. 363.)

Here too, the court did not conduct an evidentiary hearing and therefore the admissibility of much of the evidence it relied on has never been determined. Moreover, this case, unlike *Rosenkrantz* and *Smith*, did not involve a determination by the Governor to reverse the Board. Thus, we also question the relevance of statistical information about the Governor's actions in cases, where, unlike here, the Board has *granted* parole. Indeed, such evidence is inconsistent with a finding that the Board has adopted and applies the Governor's policy. In any event, the evidence presented below is essentially the same as that rejected in *Rosenkrantz* and *Smith.* Again, we do not find it sufficient to establish that the Governor has and enforces a no-parole policy. (See *In re Capistran* (2003) 107 Cal.App.4th 1299, 1307 [following *Rosenkrantz* and rejecting claim of no-

parole policy]; *In re Morrall* (2002) 102 Cal.App.4th 280, 291-296 [rejecting claim that Governor has no-parole policy based on his public statements and repeated reversal of Board when it has granted parole].)

In its order, the trial court here acknowledged *Rosenkrantz* but opined that the evidence, especially the updated statistical evidence, now establishes that the Governor has a no-parole policy, applies it, and then, in a " 'continuing charade,' " goes through the motions of an individualized consideration to produce " 'a post hoc rationalization' " for his predetermined result.

As noted, however, the Supreme Court in *Rosenkrantz* was aware of statistical information through September 2002, which shows that the Governor had reversed the Board in virtually all of the cases since April 2001. Nevertheless, the Supreme Court concluded that the evidence did not indicate a no-parole policy. Here, the additional statistical information did not reflect the Governor's actions after September 2002. Thus, we do not agree that the evidence here had significantly greater probative value than that rejected in *Rosenkrantz* and *Smith*. Although it may support speculation that the Governor's decisions, though expressly based on an individualized determination, were really based on a no-parole policy, the evidence does not reasonably support such a finding. This is especially so, in our view, because there is no evidence that in a statistically significant number of cases, the Governor's individualized reasons for reversing the Board are not sufficiently supported by the record. In other words, where the Governor's written decisions reflect individualized determinations, and where the record supports these decisions, the fact that the Governor took the same action in virtually all cases does not reasonably establish that any one decision is a sham or that the Governor did not consider the defendant's individual circumstances in reaching his decision. As our Supreme Court observed, it may well mean only that the Governor continues to take a very cautious approach to the release of convicted murderers.

In sum, therefore, we conclude that the record does not support the trial court's finding that the Governor has a no-parole policy. Accordingly, the court's further findings that the Board implements the Governor's policy and that doing so in this case violated the terms of defendant's plea bargain and permitted the court to independently determine defendant's suitability for parole must also fail for lack of support. Indeed, as noted, the evidence presented below that in over 100 cases, the Board has granted parole to convicted murderers and been reversed by the Governor is inconsistent with and tends to contradict the court's finding that the Board members apply the Governor's alleged no-parole policy in order to ensure their reappointment.

EVIDENCE TO SUPPORT THE BOARD'S DECISION

Given our analysis and conclusion, we proceed to the Board's primary contention that the court erred in finding that there was no evidence to support its conclusion that defendant was unsuitable for parole. As outlined above, we resolve this claim by determining whether there was *some* evidence before the Board to support this conclusion.

In pronouncing its decision, the Board listed the following reasons for finding defendant unsuitable: (1) the murder was carried out in an "especially . . . cruel manner," demonstrating "exceptionally callous disregard for human suffering" (see Regs., § 2402, subds. (c)(1) [especially cruel] & (c)(1)(D) [exceptionally callous disregard]); (2) defendant's motive was "trivial" in relation to the offense (see § 2402, subd. (c)(1)(E) ["trivial" or "inexplicable" motive]); (3) defendant had an unstable social history and criminal history involving substance abuse (see § 2402, subd. (c)(3)); (4) he does not have "acceptable" employment plans; and (5) he currently poses an "unpredictable degree of threat" because (a) his therapeutic progress is "relatively recent," (b) he requires additional therapy "to face, and discuss, and understand the causative factors which led to his life crime," and (c) he needs to demonstrate an ability to maintain his therapeutic gains over a more extended period of time.

The Board's first finding focuses on the circumstances of the offense. Defendant initially claims that in determining whether the circumstances of an offense tend to show unsuitability and justify an extended prison term, the Board must first make a proportionality analysis, comparing the commitment offense against similar offenses, in order to ensure uniformity of punishment for similar offenses.[8] We disagree. We conclude that under section 3041, subdivisions (a) and (b), the Board determines a defendant's suitability first, without considering the proportionality of his or her sentence in relation to other prisoners' sentences. Proportionality becomes a consideration only after the suitability determination is made. Once the Board determines that a prisoner is suitable for parole, based on "consideration of the public safety," it "shall set a release date."[9] (§ 3041, subd. (b).) At that point, when the Board has found an inmate suitable for parole and is determining an appropriate release date, the Board must consider the proportionality of the prisoner's sentence: "The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates." (§ 3041, subd. (a).) The statute separates the determination of suitability

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[8] The issue is currently before the California Supreme Court in *In re Dannenberg* (2002) 102 Cal.App.4th 95, review granted January 15, 2003, S111029.

[9] Section 3041, subdivision (a) provides, in relevant part, that the Board "shall normally set a parole release date" at a prisoner's first parole hearing, and it requires that "[t]he release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, . . ." Section 3041, subdivision (b) states, in relevant part, that the Board "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting."

from the determination of a release date, and makes it clear that only the determination of an appropriate release date involves a proportionality analysis.

Not surprisingly, we note that in *Rosenkrantz, supra*, 29 Cal.4th at page 638, the court upheld the Governor's determination of unsuitability due to the gravity of the defendant's crime without considering the length of sentence in comparison to the sentences for other similar offenses.

Turning now to the Board's finding of cruelty and callousness, we reiterate our observation in *Smith* that since second degree murder requires express or implied malice, *all* second degree murders by definition involve some degree of cruelty and callousness. (*Smith, supra*, 114 Cal.App.4th at p. 366.) Thus, because such a conviction does not automatically render one unsuitable for parole, a determination that a second-degree murder was cruel and/or callous must be supported by some evidence that it was perpetrated in an *especially* cruel manner or with *exceptionally* callous disregard for suffering. (*Id.* at pp. 366-367) In *Smith*, the Governor did not cite any facts that reflected exceptionally callous disregard for the victim's suffering. There was no evidence that the defendant acted with cold, calculated, dispassion; or that he tormented, terrorized, or injured his victim before shooting her; or that he gratuitously increased or unnecessarily prolonged her pain and suffering. Rather, the defendant, a drug abuser plagued by jealously, became enraged at his wife because she refused to accompany him and told him she no longer wanted to see him. He grabbed a gun and immediately shot her three times in the head. (*Ibid.*) Although the evidence reflected a callous crime, it did not, in our view, support the Governor's finding that defendant acted with callous disregard for the victim's suffering. (*Ibid.*)

Here, the record contains *some* evidence to support the Board's finding. After being summoned outside and challenged by his friend Herena, defendant returned to his house to get a kitchen knife, came back out, and started stabbing Herena. According to

the deputy district attorney, he stabbed Herena six times.[10] Defendant admitted that he intended to "hurt" Herena. The Board could reasonably conclude that such repeated stabbing caused Herena to suffer a substantial, gratuitous amount of pain, and defendant's expressed intent reflected exceptionally callous disregard Herena's suffering.

Concerning the Board's finding that defendant's motive was trivial, the Board reasonably could have discounted defendant's story that he stabbed Herena because he honestly feared for his life. Indeed, if defendant had truly been afraid, he could have decided stay inside his house. In this regard, defendant offered no explanation for coming outside when he saw Herena with his hands in his pocket. Furthermore, even if defendant thought Herena had a weapon, there is no evidence that he had one that night. Nevertheless, defendant repeatedly stabbed him, sometimes in the back.

The Board also could have discounted defendant's alleged intoxication. Although defendant said he drank a pint of Southern Comfort around 4:00 p.m. that afternoon, the encounter took place sometime after 11:00 or 11:30 p.m., seven hours later.

The only other possible motivation for the killing was that defendant was angry at Herena for not following his advice, he had had some unspecified problem at home that day, he was frustrated and in a bad mood, and he simply "overreacted" to Herena's challenge.

Given defendant's explanations for the murder, the Board could have considered defendant's view that he *overreacted* to be an accurate understatement and, more specifically, found that (1) his apparent reasons for repeatedly stabbing Herena were insignificant in relation to their fatal result, (2) the link between those reasons and the magnitude of his violence was inexplicable, and (3) Herena's death was not a reasonably

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[10] Defendant asserts that there is no evidentiary basis for the deputy district attorney's statements. We note, however, that defendant did not dispute these statements or otherwise suggest that they were unfounded. Under the circumstances, the Board could rely on the statements.

foreseeable or predictable reaction to Herena's challenge or consequence of his alleged reasons.[11] Under the circumstances, therefore, we disagree with defendant's view that his motivation was no more trivial than that behind any other second degree murder and conclude that the record supports the Board's finding of triviality.

Next, we focus on the finding that defendant had an unstable social history and a criminal history involving substance abuse. Section 2402, subdivision (c)(3), of the Regulations lists "Unstable Social History" as a factor tending to show unsuitability and explains that this means "[t]he prisoner has a history of unstable or tumultuous relationships with others."

In his evaluation, Glover reported that during defendant's adolescence, he had a "tremendous amount" of conflict with his father because he was very strict and wanted defendant to be a leader, not a follower. However, there is no evidence that defendant had another relationship that could be called "unstable" or "tumultuous." Thus, although defendant had one such relationship, that one does not reasonably constitute *some* evidence of "a *history* of unstable or tumultuous *relationships* with others." (Regs., § 2402, subd. (c)(3), italics added.)

Section 2402, subdivision (c)(2) of the Regulations makes a defendant's criminal history a factor showing unsuitability insofar as it reveals that "on previous occasions [he or she] inflicted or attempted to inflict serious injury on a victim, particularly if [he or she] demonstrated serious assaultive behavior at an early age."[12] Thus, although the

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[11] The record contains no evidence that defendant was in a gang or that Herena's challenge to defendant was part of a struggle between rival gangs, evidence that might reasonably raise the possibility of a violent, if not fatal, reaction.

[12] Conversely, section 2402, subdivision (d)(1) and (6) of the Regulations make the lack of a juvenile or adult criminal history involving assaultive or violent conduct or crimes a factor tending to show suitability.

record supports the Board's finding that defendant had prior criminal record involving substance abuse—i.e., convictions as a teenager for unlawful possession of alcohol and driving under the influence, and use of marijuana and cocaine—this finding does not correlate with the enumerated factors showing unsuitability or, standing alone, reasonably indicate that defendant may currently be unsuitable for parole.[13]

Next, we look to see if there is some support for the Board's conclusion that defendant does not have "acceptable employment plans." This finding implicitly relates to section 2402, subdivision (d)(8) of the Regulations, which lists as a factor showing suitability "Understanding and Plans for Future," and provides, "The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release." Comments by Board members shed some light on the meaning of the Board's finding. Commissioner Pliler observed that defendant "has, you know, employable skills in several different areas when he is released. And he has a high school diploma. . . . So you've done basically what's been asked of you at prior hearings. So it would appear that you would not have difficulty in maintaining some type of employment when you're released." However, Commissioner Lawin asked what defendant was going to do for work. As noted, defendant responded generally that finding work would not be a problem, even if he had to "flip burgers." Commissioner Lawin continued, "It's nice that you're that confident in your abilities, but we need to see that you're out looking for

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[13] The People suggest that defendant's criminal record and history of substance abuse support a finding that he had an unstable social history. However, in the absence of evidence that prior nonviolent, nonassaultive conduct and crimes involving substance abuse were accompanied by, involved, or caused difficulty with other people or conflict in social situations, we fail to see how substance abuse, standing alone, reflects an unstable *social* history.

However, we do not intend to suggest that defendant's convictions and history of alcohol and drug abuse were irrelevant in determining his suitability for parole. On the contrary, such evidence can be relevant in understanding the underlying causes for a commitment offense, the reasons for therapy, and the merits of subsequent psychiatric evaluations.

something. You can't rely on your parents or your aunt or uncle or anyone else to find a job for you. Have you sent out any letters or resumes or do you have any sort of listings of people that might—" Defendant said he had only looked in newspapers. The member said that "what we would like to see is that you're looking for work, that you're trying to find someone who at least says yes, you're qualified. When you get out, come see me and I'll interview you. Or, you know, yes, you're qualified. If we have a spot open I'd be happy to talk to you about it. If you can get anything that shows us that you're actively looking for someone to hire you it would be very helpful because what we have to see is that you're going to be able to support yourself. We can't let you out with no financial support. You have skills. You've acquired skills in here. Use those skills to try and find something. You know, even if you just send out letters and you don't' get any responses, keep a list of those places you've sent the letter or resumes to and show us." The member further suggested that if defendant's family intended to help him make contacts for work and provide financial support and transportation, then they needed to put that commitment in writing and submit it to the Board along with their general letters of support.

Given these comments, we understand the Board's finding to mean that in addition to developing marketable skills, the Board wanted to see some evidence that he knew how to prepare a resume and write letters to prospective employers or had shown some initiative in seeking help to do so and then taken practical and realistic steps toward soliciting potential employers about a job, potential openings, or his qualifications.[14] The Board also wanted some more specific and explicit assurance from defendant's family members that they were going to assume responsibility for helping defendant find

[14] Apparently, the Board did not accept defense counsel's effort to take "a little bit" of the blame for defendant's failure to send resumes or letters as an indication that defendant had shown some initiative in looking for a job other than to look in the newspaper.

employment and provide the necessary practical and financial support during his transition to a productive life outside of prison.

With this understanding of the Board's finding in mind, we cannot say there is no evidence to support it. Rather, there is some evidence that defendant had not done anything more than look in the newspapers listings for job opportunities. He had not sent out resumes or otherwise reached out to prospective employers. (Cf. with *Smith, supra*, 114 Cal.App.4th at p. 355 [defendant presented written evidence of two job offers].) Moreover, in their letters of support, defendant's family members and friends simply offer generally to help with employment and housing.[15]

We now review the Board's conclusion that because defendant's therapeutic progress is "relatively recent," he needs additional therapy "to face, and discuss, and understand the causative factors which led to his life crime," and therefore, until further progress is made and he demonstrates "an ability to maintain gains over an extended period of time," he "continues to be unpredictable and a threat to others" if released at this time.

As noted, a 1989 evaluation noted that defendant had a prior history of "polysubstance abuse" and concluded that because defendant was motivated to explore and learn the "psychogenisis" of his crime, he would probably become conversant with the subconscious forces that caused it. Thereafter, defendant was written up for misconduct in 1990, 1991, and 1992. The 1994 psychiatric evaluation noted that defendant had remained discipline free since 1992. It also noted defendant's history of alcohol and "polydrug" abuse and stated that he had been active in AA and appeared to have profited from therapy when he was first incarcerated. However, the report

[15] Although defendant's aunt and uncle offered him a job at their ranch in Texas, they had not as yet acquired it.

concluded that defendant needed more education and understanding of his alcoholism, recovery and the AA process.

In 1997, he received a discipline write-up but thereafter remained discipline free. In the May 2000 evaluation, Glover noted that defendant believed his depression as a teenager and young adult was caused by his strict father. However, Glover disagreed, stating a few times that defendant's history of depression was more likely the result of his use of marijuana and cocaine, which can produce the sort of depressive and paranoid symptoms and ideations that contributed to his offense. Nevertheless, Glover opined that defendant "has gained a fair amount of insight into his development and subsequent crime."

Next, we observe that in explaining the murder to the Board, defendant focused on what he considered to be the immediate causal circumstances: his general fear of Herena's friend, his drinking in general and earlier that day, his frustration, his bad mood, and his belief that Herena might be armed and want to kill him. As noted, defendant believed he overreacted to Herena's challenge. Other than admitting he had been in denial "that alcohol created all this to happen," defendant revealed no understanding of his drug abuse or awareness of how it may also have affected his psycho-emotional state and contributed to his crime. He did not discuss how or why he started using drugs other than to suggest that it was youthful experimentation; nor did he demonstrate an awareness of a possible connection between his chronic use of drugs and his experience of depression and paranoia, both of which, according to Glover, manifested themselves on the day of the killing. On the contrary, defendant showed no recognition that drug use might have magnified his fear of Herena before and at the time of the incident and distorted his perception of danger. Indeed, at the parole hearing, defendant did not

discuss his depression or paranoia and tended to minimized the extent of his drug use.[16] The Board could have reasonably found this particularly troubling in light of counsel's closing statements concerning what could happened if defendant started drinking or taking drugs again. Despite Glover's strong opinion about the connection between defendant's drug use and the murder, defendant focused only on his problem with alcohol. Moreover, he explained that "since my last hearing they really nailed me on that and I really got interested in going to these programs and really paying attention and understanding the whole meaning of all these steps."

Last, we note that although Glover opined that defendant had a low potential for violence in prison that he expected it to remain low if and when defendant was released, Hawkins opined that the degree of threat defendant presented to the community remained "unpredictable."

In our view, the evidence that defendant had been discipline free only since his last hearing, his admission that only after his last parole hearing did he "really" get interested in and pay attention to the AA step process, his failure to articulate any awareness or understanding of his drug use as a contributing factor, and Hawkins's opinion concerning the unpredictable threat defendant would pose if released—these things together constitute *some* evidence reasonably supporting the Board's view that

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[16] At the hearing, when asked about drugs use, defendant said only that as a teenager, he "experienced [*sic*] marijuana and some cocaine." Later, the Board noted Glover's evaluation, which reported that defendant admitted that he used marijuana extensively, smoking numerous times per week, and "snorted cocaine two times a month or whenever it was available." Given Glover's report, one Board member observed, "I got the impression from your comments a while ago that you just did this very sporadically, but according to what you told Dr. Glover, you were a pretty regular user of drugs." In response, defendant said, "Well, of cocaine, like I said, I've tried it, I experimented. I wasn't an addict or nothing. It [was] just teenage years that I just tried it. But marijuana, I did use that, but that's the last thing on my mind. I doubt very seriously I well ever even touch drugs again. I'm more here focusing on the alcohol right now. And drugs is not even an issue for me no more. That's over with."

defendant's full comprehension of the step process has been recent; he needs additional therapy to recognize, understand, and learn how to better articulate his awareness concerning all the underlying causes of his offense, including his depression, paranoia, and chronic use of drugs as a teenager; and it is appropriate for him to show that he has integrated his therapeutic understanding for an additional period of time.

Defendant notes—and the trial court emphasized—that the record contains abundant evidence that is not only inconsistent with this finding but strongly indicative of his suitability for parole. For example, defendant argues that Hawkins' use of the word "unpredictable" to rate defendant's level of dangerousness is "meaningless"; the court below found that it is a "conclusory term used by a correctional counselor when he or she does not know enough about a prisoner to offer any insight or prediction." On the other hand, defendant and the court noted Glover's professional opinion that defendant's potential for violence was law.

In our view, however, this approach to Hawkins's and Glover's evaluations is inconsistent with the standard and scope of review of the Board's decision. As noted, the factual basis for the Board's decision is "is subject to a *limited* judicial review under the 'some evidence' standard of review." (*Rosenkrantz, supra,* 29 Cal.4th at p. 652, italics added.) Specifically, when reviewing a decision to deny parole, we merely inquire "whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Id.,* at p. 658.) Only a "modicum of evidence" is required, and, in determining whether the record contains such evidence, we may not independently resolve conflicts in the evidence, determine the weight to be given the evidence, or decide the manner in which the specified factors relevant to parole suitability are considered and balanced. Rather these are matters exclusively within the discretion of the Board or the Governor. Indeed, "[i]t 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." (*Rosenkrantz, supra,* 29 Cal.4th at p. 677.)

Here, faced with reports by Hawkins and Glover, the Board apparently accepted Hawkins's view and agreed with it. Both defendant and the court, however, substitute their own assessments of weight that should have been given these reports.

Defendant argues that the court properly deemed Hawkins's view meaningless in light of undisputed evidence submitted in support of his writ petition to the effect that Hawkins did not know defendant well enough to make an assessment of dangerousness.[17] First, we observe that at his parole hearing, defendant never challenged Hawkins's evaluation or assessment of dangerousness, even after the Board cited and relied on it. Second, defendant's opinion expressed in his declaration, whether undisputed or not, is insufficient by itself to discredit Hawkins's evaluation, which, the record reveals, was the result of "a personal interview, and incidental contact with [defendant], consisting of approximately 1.5 hours and a thorough review of his central file, consisting of 3.5 hours." Last, in the absence of evidence that Hawkins was professionally unqualified to evaluate defendant, we question whether it is appropriate in a habeas proceeding for the court to make factual determinations concerning the credibility evaluations made by Board members in the course of their duties or the reasonableness of the Board's reliance on a particular evaluation.

As our analysis and discussion reveal, we find some evidence to support all of the Board's findings of unsuitability except its finding that defendant had an unstable social history. Nevertheless, we do not find the Board's reliance on this one unsupported factor to be so essential or significant to its decision that without it, the Board would have found defendant suitable for parole. On the contrary, a fair reading of the Board's decision

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[17] In a declaration submitted with his petition, defendant asserted, that Hawkins rated his dangerousness level at "unpredictable based on the fact that he does not know me on a better level to rate me."

reveals that it placed primary emphasis and weight on the circumstances of the offense, defendant's lack of more concrete employment plans, and his need to demonstrate greater understanding of the causes for his offense over an additional period of time. Under the circumstances, therefore, it is sufficiently clear to us that the Board would have reached the same conclusion even without a finding of unstable social history. Moreover, "those portions of the decision that are supported by some evidence constitute a sufficient basis supporting the [Board's] discretionary decision to deny parole." (*Rosenkrantz, supra,* 29 Cal.4th at p. 677.)

In sum, given the number of factors showing unsuitability and the evidence to support them, we conclude that the Board did not abuse its discretion by denying defendant parole at the 2000 hearing, because there was " 'some evidence' " (*Rosenkrantz, supra,* 29 Cal.4th at p. 652) to support its conclusion that he would "pose an unreasonable risk of danger to society if released from prison." (Regs., § 2402, subd. (a).) Therefore, we hold that the trial court erred in reversing the Board and ordering it to schedule a parole release date.

DISPOSITION

The trial court's July 3, 2002 order granting defendant's release is reversed. The trial court is directed to enter a new and different order denying defendant's petition for a writ of habeas corpus.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

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Trial Judge:	The Honorable James C. Emerson
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