Filed 9/22/10 In re Chavez CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In Re CESAR CHAVEZ, On Habeas Corpus	B221656 (Los Angeles County Super. Ct. No. BH006029)

APPEAL from a grant of petition for writ of habeas corpus of the Superior Court of Los Angeles County. Peter P. Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Jennifer A. Neill, Supervising Attorney General, and Gregory J. Marcot, Deputy Attorney General, for Appellant.

Marilee Marshall & Associates and Marilee Marshall, under appointment by the Court of Appeal, for Respondent.

INTRODUCTION

In 1992, Cesar Chavez pled guilty to one count of second degree murder and one count of attempted murder. On August 26, 2008, the Board of Parole Hearings found Chavez suitable for parole. The Governor subsequently reversed the Board's decision, concluding that Chavez's "release from prison . . . would pose an unreasonable risk to public safety." In support, the Governor cited the circumstances surrounding the commitment offense and various statements in a 2006 psychological report regarding Chavez's alcohol dependence.

Chavez thereafter filed a petition for writ of habeas corpus challenging the Governor's decision. The trial court granted the writ, finding that the record "did not contain 'some evidence' to support the determination that [Chavez] currently presents an unreasonable risk of danger to society and is not suitable for release on parole." We conclude that the Governor's reversal is not supported by any evidence indicating Chavez currently poses an unreasonable risk of danger to society. Accordingly, we affirm the grant of the petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Commitment Offense

On August 6, 1992, Chavez and other members of the "Lunatics party gang" traveled to a movie theater.[1] Shortly after they arrived, Chavez became involved in an altercation with Humberto Duran, a member of a rival "party gang" known as "the Crew." Chavez felt that he was being surrounded by "Crew" members and brandished a pistol. Duran slapped the pistol away and Chavez then fired the weapon toward Duran. While turning to run, Chavez continued to fire the weapon toward other "Crew" members. Officers of the Los Angeles Police Department arrived at the theater and found Alejandro Zumudio, who was a close friend of Chavez and a member of the

[1] The factual summary of the commitment offense is taken from Chavez's probation report, which was incorporated into the record of the parole board hearing held on August 26, 2008.

Lunatics, dead at the scene. Duran had also been shot and injured. Chavez, who had fled with other members of the Lunatics, was eventually apprehended. At the time of the incident, Chavez was extremely intoxicated; he alleges that the death of his friend was an accident.

Chavez pled guilty to the second degree murder of Zumudio and the attempted murder of Duran. Although Chavez was only 17 at the time of the offense, he was tried as an adult. The probation officer's evaluation report concluded that Chavez is "extremely intelligent, speaks very well and was very pleasant to interview. . . . There is no question the defendant was doing well in school at the time of the present offense though not as well as he had been doing in prior years. Defendant apparently has tested at the gifted level of intelligence and appears to have ambitions . . ." Although the probation officer stated that he had difficulty "understand[ing] the circumstances which brought the defendant to his present plight," he recommended that Chavez be placed in state prison due to "the severity of the present offense and the thoughtless violence engendered by gang affiliation as well as alcohol."

Chavez was sentenced to imprisonment for a term of 15 years to life, with a minimum eligible parole date of September 4, 2002. He is currently 35 years old.

B. Chavez' s Personal History and Conduct During his Incarceration

1. *Personal history and prior criminal record*

Chavez was born in the Boyle Heights area of Los Angeles, where he was raised by his mother and father. Chavez's parents immigrated to the United States from Mexico and spoke limited English. During his childhood, Chavez's father worked in a factory and his mother was a garment maker. They eventually opened a small clothing store, where his mother now works. Chavez has two sisters, who are currently employed, and a brother who lives with his parents and attends computer repair classes. Chavez has a good relationship with his family and remained in close contact with them throughout his incarceration.

Chavez reported that he had a "normal" childhood and described his parents as "nurturing but strict." In junior high, Chavez was placed in the "gifted program" and, for

a portion of high school he participated in a college bound program. His grades later fell, however, which Chavez attributes to drinking alcohol and participating in gang activity. Prior to his conviction, Chavez remained in high school with no behavioral problems, suspensions, or expulsions.

At the time of his commitment offense, Chavez had no prior convictions or criminal record. Chavez informed a psychological evaluator that, as a teenager, he had been arrested for joyriding and shoplifting but, in each case he was counseled and released without formal charges or probation.

2. *Conduct in prison*

During his 16 years of incarceration, Chavez did not receive a single "CDC 128A."[2] His only reported instance of misconduct occurred in October of 2000, when Chavez received a "CDC 115"[3] for possession of an inmate-manufactured tattoo gun. At his parole hearing, Chavez explained that his cell mate owned the tattoo gun, but Chavez was occupying his cell mate's bunk when prison officials located the contraband. As a result, Chavez was deemed to possess the item. Chavez's mental evaluations indicate that he made a "positive adaptation to prison" and developed good relationships with inmates and the staff. Since 2002, Chavez has maintained the lowest possible classification score and custody level for his offense. (See Cal. Code Regs., tit. 15, § 3375, subd. (d) ["A lower placement score indicates lesser security control needs and a higher placement score indicates greater security control needs."].)

During his time in prison, Chavez consistently engaged in positive "institutional behavior." In 1994 Chavez obtained a high school diploma and, in 1996, he received a strong reading score in the Test of Adult Basic Education. Chavez also obtained a GED

---

[2] "A 'Custodial Counseling Chrono' (CDC-Form 128-A) documenting minor misconduct and counseling provided for it. [Citations.]" (*In re Rico* (2009) 171 Cal.App.4th 659, 666, fn. 4 (*Rico*), [disapproved on other grounds in *In re Prather* (2010) 50 Cal.4th 238].)

[3] "A 'CDC 115' refers to a rules violation report that documents misconduct that is believed to be a violation of law or is not minor in nature. [Citations.]" (*Rico*, *supra*, 171 Cal.App.4th at p. 666, fn. 2.)

in 2003, completed the "Valley Adult School" program and, prior to his release from prison, he had completed 21 units of courses at Coastline College, where he was pursuing an Associates of the Arts degree.

In addition to seeking out educational opportunities, Chavez "consistently [did] well at self-help," participating in a wide range of classes intended to help inmates communicate and prepare for life after prison. Chavez attended Bible studies, anger management and parenting courses. His record also contains numerous chronos for attending Alcoholics Anonymous (AA) and indicates that he worked through the AA 12-step program on multiple occasions. Finally, Chavez held many different jobs during his incarceration, including positions with the yard crew, upholstery department, kitchen, textiles division and janitorial services. He also worked as a library clerk and building porter. Supervisory reports state that Chavez was a "reliable" and "excellent" worker with "marketable skills."

3. *Psychological evaluations*

a. Evaluations prior to parole eligibility

The record contains three psychological evaluations that were conducted before Chavez became eligible for parole in 2002. These early evaluations found that Chavez "does not have any significant psychiatric problems or impairment of mental functioning." The reports further noted, however, that Chavez described himself as a recovering alcoholic and had a significant history of alcohol abuse. According to Chavez, he began drinking when he was 13 years of age and, by his late teens, was frequently consuming eight to twelve beers a day. The psychological reports stated that Chavez's alcoholism was in "institutional remission," but emphasized that he should avoid alcohol in the future and continue to attend AA meetings and alcohol treatment rehabilitation programs.

The early reports also found that Chavez consistently expressed regret for his crimes and, on at least on one occasion, cried while discussing the commitment offense. Overall, the reports concluded that Chavez was "using the resources available to him . . . in a positive manner . . . [and] appears to have some insight and remorse regarding his

criminal history." The examinations further concluded that Chavez's potential for violence "is below the average inmate population at the present time" and, "[p]roviding he totally avoids alcohol, he should be able to be a good citizen," "do well while living with his parents" and "have a good record upon his release."

b. Chavez's 2006 psychological evaluation

The record contains two additional psychological evaluations conducted after Chavez became eligible for parole. The first of these reports, dated February 2006, found that Chavez exhibited "alcohol abuse/dependence in institutional remission," but did not have any significant mental or personality disorders. The evaluation stated that Chavez was amenable to treatment for his substance abuse, had participated in self-help groups and attended Alcoholics Anonymous meetings to address his issues. However, it also noted that his "participation in AA . . . ha[d] been inconsistent" and stated that, when asked "for certain that he would not resort to drinking alcohol again . . . Chavez commented, 'I can't promise that. From what I know now it would certainly be a very destructive thing to do.'" The report indicated that Chavez also reported using marijuana prior to his conviction, but stated that he had not used any drugs or alcohol since the commitment offense. The report concluded that Chavez would "benefit from continual ongoing AA meetings, and additional techniques and insight into how to handle stress and difficulties in life, particularly when confrontation between individuals might exist."

The 2006 report provided a positive evaluation of Chavez's parole plans. It rated Chavez's "financial vocational" plans as "good," noting that his file included multiple letters extending offers of employment upon his release. The report also concluded that Chavez had excellent support from his family, as well as "good support in the community where he paroles and also church support."

The report included an additional section assessing Chavez's potential dangerousness, which describes various "low risk factors" and "high risk factors." Under the low risk factors, the report identified the facts that Chavez had no prior criminal record and no record of aggression or violence in prison. It also stated that Chavez

> fully acknowledged the wrongfulness of [his actions]. The inmate appears to take full responsibility for the offense and does not appear to rationalize or minimize his role. When asked he shared moderate expressions of guilt or remorse. The inmate appears to feel guilty from his action and can empathize at an emotional level with the harm done to the victim and the victim's family.

The evaluator believed that Chavez "appeared moderately motivated to make constructive changes to his life" and that "criminal mindedness and criminality did not appear to be primary elements in the inmate's offenses." In describing high risk factors, the report indicated that Chavez "has a history of alcohol abuse," and demonstrated a "marginal awareness of the circumstances that resulted in his committing a serious offense."

Overall, the 2006 report concluded that, "within a controlled setting it appears that his inmate's propensity for violence is less than that of the average Level I inmate and within the community it would be slightly higher than that of the average citizen contributed by a need for further AA and self help groups and courses to gain insights into triggers and patterns that can build and contribute to destructive behaviors."

c. Chavez's 2008 psychological report

In his most recent psychological evaluation, which occurred in 2008, the evaluator again concluded that Chavez "has never had a major psychiatric/psychological condition," but stated that his history of alcohol use "appears to meet the criteria for dependence." During his psychological evaluation interview, Chavez acknowledged that alcoholism was one of his "main failures" and contributed to the commission of his crimes. When asked whether substance abuse treatment would be necessary upon his release, Chavez stated that "AA is going to be a part of my life for a long time." He also described himself as an addict, explaining that "according to AA you will always be an addict, I put that in God's hands." Although Chavez admitted that he had used marijuana prior to his conviction, the report stated that there was insufficient evidence to opine on whether "he meets the criteria for [cannabis] dependence."

The 2008 examiner concluded that Chavez "appears to have fair insight into the significant nature of his past substance abuse" and "continues to address his substance abuse issues," adding that Chavez's "commitment to self-help groups demonstrates a willingness to gain insight into the problems he has experienced in the past." The examiner also stated that Chavez had not displayed any "negative attitudes" or "impulsivity since his incarceration and has generally been responsive to treatment. . . . [¶] . . . [¶] [He] possesses several factors, which indicate a willingness to change his behavior," including his "disciplinary record in prison and his participation in substance abuse treatment."

The 2008 report also assessed Chavez's "violence potential in the free community." The evaluator rated Chavez on the Hare Psychopathy Checklist (PCL), which is a "20-item instrument designed to measure . . . risk factors for future violence." According to the report, Chavez's PCL score placed him in the "very low range when compared to other inmates." The report noted that Chavez was likely to face "destabilizing factors" if released into the community, including "difficulty adjusting to his neighborhood environment, peer pressure from the gang culture, substance abuse issues," as well as "inherent stress in transitioning from a lengthy prison sentence into the community." However, the evaluation further commented that "Chavez appears to have developed some viable coping strategies that he has used effectively in recent years, which may help him manage the stress and frustration he will experience if granted parole." The report concluded that the "the inmate's overall risk for future violence is in the low range," but noted that his "risk of recidivism would increase if he were to abuse drugs/alcohol."

The 2008 report also acknowledged that the 2006 psychological evaluation had stated that Chavez would have a slightly elevated risk of violence compared to the general community. However, the author of the 2008 report explained that it was usually not possible to compare an inmate's violence potential to the average citizen, explaining that "the lowest risk life term inmate in [California Department of Corrections and

Rehabilitation] will, given his/her violent behavioral conviction history, invariably be judged higher than the 'average citizen' when it comes to risk for future violence."

The 2008 evaluation concluded Chavez had "programmed in an appropriate fashion over the course of this review period. The inmate's overall risk to violently recidivate in the community is in the low range. Mr. Chavez appears to continue to comply with the recommendation of the BPH Panel. The inmate's strengths continue to be his responsiveness to treatment, lack of current impulsivity, low score on the PCL[], and having no major mental illness. If the inmate were to stop attending substance abuse treatment or to begin abusing illicit substances, it is likely that his risk to recidivate would increase."

C. Parole decisions and Chavez's petition for writ of habeas corpus

1. Chavez's2008 parole hearing

The transcript from the August 26, 2008 parole hearing indicates that, prior to 2008, Chavez had been before the Board of Parole Hearings ("Board" or "BPH") on June 28, 2007, and parole was denied for a one year period. At that time, the Board recommended that Chavez "continue with your collegial pursuits, upgrade your vocational skills, continue to participate in self help."

At the 2008 hearing, the Board concluded that, since 2007, Chavez had remained discipline free, continued to engage in his collegial study, and participated in numerous self-help classes and attended AA and bible study. The Board also noted Chavez's detailed parole plans. Chavez submitted letters of support indicating that he had several job opportunities upon his release, including offers to work at his mother's clothing store, his sister's business and his cousin's company, Falcon Trading, which packages organic foods. The BPH described the employment offers as "pretty specific in terms of how much they're going to pay you and what kind of duties you're going to have." Chavez further indicated that, to supplement his regular employment, he intended to engage in independent upholstery work. He also submitted materials demonstrating offers of residency from his parents, his sister and a group called Families of the Incarcerated,

which provides transitioning housing to parolees. In total, Chavez introduced five letters supporting his release, many of which were from family members.

During the hearing, the Board asked Chavez to discuss his problems with alcohol. Chavez explained that he began drinking when he was 13 years old to impress his friends and that it later became a regular habit. Chavez commented that "of course, now that I'm older and unfortunately all this happened, I see that that was one of the first mistakes I made as far as what led to this incident. The beginning of my alcohol consumption was also the beginning of me slipping up in my school grades, become more of a selfish person as far as only caring about what pertained to me in the home with my family, just becoming - going out of character." He continued: "I didn't know that the person that they raised, the person that I was, was not who I really was at the time of the incident, this offense. I was blinded, if could say that word, I'd just become a whole different person because of the alcohol, all the bad choices I'd made, my negative friendships, the list goes on and on as far as bad choices I've made."

The Board noted that Chavez had continued to attend AA meetings throughout his incarceration and was on the waiting list to attend AA in his current prison facility. Chavez informed the Board that he had worked through the 12 step program various times and described the steps that he found most helpful. The Board also noted that Chavez had submitted detailed "AA plans" upon release from prison, which included information about AA meetings held near his mother's home and maps showing their specific location. In the Board's view, Chavez's plans demonstrated that "[he had] done [his] homework on that, [he] know[s] where [the meetings] are and know[s] what time they meet and on which days."

The panel also asked Chavez to describe how he felt about his commitment offense. In response, Chavez stated that "I feel terrible about the fact that I ended up in this situation, that a friend of mine died, that a lot of people got hurt, not only physically, but the terrible emotional damage that I've caused many people. . . . Whenever I see my family at visit and I see the pain in their eyes, I can't help but imagine the same pain that Alex [Zumudio]'s family and Mr. Duran, and, you know, all these people I've caused

harm to. I'd like to state for the families and everybody that I've hurt, to state that I would like to apologize, And I know that might not be much . . . ."

The Board discussed at length Chavez's most recent psychological evaluation, observing that the report concluded that the inmate's overall risk for future violence was low and that he had insight into the nature of his past substance abuse.

The only party that objected to Chavez's release at the hearing was the District Attorney of Los Angeles. Although the District Attorney's representative conceded that Chavez was a "very impressive inmate," he argued that Chavez needed more time to "develop." Specifically, he stated that "he's on the right track, he's doing well. I think he could do better. I think he could do better because . . . he's a good student with a high IQ. He's done well, but he could even do better. Maybe with his intelligence he could even aspire to more than upholstering. Perhaps he could work with his mother's business and expand it." The District Attorney's representative also expressed dissatisfaction that, in describing his remorse, Chavez first mentioned that "he ended up in this situation and his friend died," and only then went on to describe the regret for the emotional damage caused to his family and the victims. In his view, Chavez should have expressed "more concern about the other people and the other damage, rather than putting himself first and his friend Alex first. I'm wondering if that might be misconstrued as just being a little bit selfish about it, and his main number one comment was about himself."

The Board, however, concluded that Chavez was "suitable for parole and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." While the circumstances of Chavez's commitment offense to were deemed to be "disturbing and reckless," the Board found Chavez "suitable for parole because . . . the positive aspects of [his] case heavily outweigh the [circumstances of the crime]." The panel based its decision "on the following considerations:"

> The commitment offense: The prisoner committed this crime as a result of youth and stupidity. Remorse: the prisoner exhibits genuine remorse . . . Institutional behavior: The prisoner has upgraded educationally by finishing high school and 21 units of college and obtained certification in Upholstery. The prison has consistently done well at self-help while

> incarcerated . . . and [his] parole plans are realistic and viable with offers of employment . . . and [numerous] residences. And then, with very advanced AA plans after release, with three locations, meeting dates, times and maps . . .
>
> [T]he Panel strongly considered the following additional circumstances that weigh in [Chavez's] favor. First, there is a lack of criminal history at all. Next, a stable social history with a family that is very supportive. And last, the lack of violent disciplinary problems in custody and not a single 128A in all those years in service, and [the Board has] never seen that before. And we note that the hearing Panel viewed responses to the PC 3042 notices[4] and indicated that the only reply was from the [District Attorney]. There are no other current letters in opposition.

The Board granted Chavez parole, imposing various special conditions on his release, including random drug testing, no consumption or possession of alcohol and attendance at a parole outpatient clinic.

2. The Governor's reversal of the Board's parole decision

On January 22, 2009, the Governor issued a letter reversing the Board's decision, which was accompanied by a statement of reasons. The Governor recognized numerous various positive factors that weighed in Chavez's favor, including: (1) his "efforts in prison to enhance his ability to function within the law," (2) "positive remarks from various mental-health professional over the years," and (3) "solid post parole plans."

Despite those factors, the Governor concluded that parole was inappropriate based on two factors. First, the Governor explained that Chavez's crime was "especially atrocious because the crime involved multiple victims" and occurred in "a public place where innocent bystanders could have been victimized. Moreover, the motive for the

---

[4] Penal Code section 3042, subdivision (a) states, in relevant part, that "At least 30 days before the Board of Prison Terms meets to review or consider the parole suitability or the setting of a parole date for any prisoner sentenced to a life sentence, the board shall send written notice thereof to each of the following persons: the judge of the superior court before whom the prisoner was tried and convicted, the attorney who represented the defendant at trial, the district attorney of the county in which the offense was committed [and] the law enforcement agency that investigated the case . . ."

murder – an effort to confront rival group members was extremely trivial in relation to the magnitude of the crime Mr. Chavez committed."

Second, the Governor stated that Chavez's 2006 psychological report "raises additional concerns":

> The 2006 mental health evaluator noted that Mr. Chavez's risk within the community "would be slightly higher than the average citizen, contributed to by a need for further AA and self- help groups and courses to gain insight into triggers and patterns that can build and contribute to destructive behaviors." Although Mr. Chavez has a significant history of substance abuse, when asked by his 2006 mental-health evaluator if he would not resort to drinking alcohol again, Mr. Chavez responded, "I can't promise that." The evaluator opined that Mr. Chavez "would benefit from continual ongoing AA meetings, and additional techniques and insight into how to handles stress and difficulties in life, particularly when confrontation between individuals might exist." The evaluator also noted the Mr. Chavez appeared only "moderately motivated to make constructive changes in his life."

In closing, the Governor noted that "The gravity of the crime supports my decision, but I am particularly concerned by the 2006 mental health evaluation report," further noting that "the Los Angeles County District Attorneys Office agrees, registering opposition to Mr. Chavez's parole."

3. Chavez's petition for writ of habeas corpus

On May 14, 2009, Chavez filed a petition for writ of habeas corpus arguing that the Governor's decision to reverse the Board's grant of parole was not supported by "some evidence." The trial court applied the standard of review applicable to parole decisions and concluded that "the commitment offense alone does not continue to indicate a current risk of violence, after 16 years of violence-free rehabilitation." The court also rejected the Governor's reliance on the 2006 psychological report, holding that "past reports that are not supportive of release or indicate a lack of insight do not constitute some evidence upon which a denial of parole may be based, when more recent reports are supportive of release." Ultimately, the court granted the petition, ruling that no evidence supported the Governor's reversal.

Shortly thereafter, James D. Hartely, Warden of Avenal State Prison, filed a notice of appeal and an emergency petition to stay enforcement of the trial court's ruling. The emergency petition was denied without comment and Chavez was released from prison.

DISCUSSION

A. Legal Principles Governing Parole Suitability Determinations

1. Statutory framework governing determination of parole suitability

Pursuant to Penal Code section 3041, subdivision (b), the BPH "must set a release date at a parole suitability hearing unless it determines that 'consideration of the public safety requires a more lengthy period of incarceration for this individual.' Generally, '"parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation."' [Citation.]" (*In re Gaul* (2009) 170 Cal.App.4th 20, 31 (*Gaul*) [disapproved on other grounds in *In re Prather* (2010) 50 Cal.4th 238].)

"Under the Board's regulations it may properly deny parole to a life prisoner, regardless of the length of time served, 'if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.' (Cal. Code Regs., tit. 15, § 2402, subd. (a).) In making its decision the Board is directed to consider '[a]ll relevant, reliable information" available to it, including "the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; . . and any other information which bears on the prisoner's suitability for release.' (Cal. Code Regs., tit. 15, § 2402, subd. (b).)" (*Gaul, supra,* 170 Cal.App.4th at pp. 31-32.) The parole regulations also list numerous factors "tending to indicate" whether an inmate is suitable or unsuitable for parole.[5] (Cal. Code

[5] The regulations state that circumstances "tending to indicate" unsuitability for parole include: (1) the commitment offense was carried out in an "especially heinous, atrocious or cruel manner"; (2) a "[p]revious [r]ecord of [v]iolence"; (3) "a history of

Regs., tit. 15, § 2402, subds. (c), (d).) These suitability factors are only intended to provide "general guidelines . . . [and] the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." (*Ibid*.)

2. Standard of review

The Governor is entitled to "conduct a de novo review of the Board's decisions on the basis of the same factors the Board is required to consider," (*In re Calderon* (2010) 184 Cal.App.4th 670, 683 (*Calderon*)), and "has discretion to be 'more stringent or cautious' in determining whether a defendant poses an unreasonable risk to public safety. [Citation.]" (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258 (*Shaputis*).)

Our review of the Governor's parole decision is limited and because "the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety, and because the inmate's due process interest in parole mandates a meaningful review of a denial-of-parole decision, the proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor." ([*In re*] *Lawrence* [(2008)] 44 Cal.4th [1181,] 1191." (*In re Shaputis*, *supra*, 44 Cal.4th at p. 1254 (*Shaputis*).) Thus, "when a court reviews a decision of the Board or the Governor, the

---

unstable or tumultuous relationships with others"; (4) "[s]adistic [s]exual [o]ffenses"; (5) "a lengthy history of severe mental problems related to the offense"; and (6) "[t]he prisoner has engaged in serious misconduct in prison or jail." (Cal. Code Regs., tit. 15, § 2281, subd. (c).)

Factors tending to show that an inmate is suitable for parole include: (1) the absence of a juvenile record; (2) "reasonably stable relationships with others"; (3) signs of remorse; (4) a crime committed "as the result of significant stress in [the prisoner's] life"; (5) battered woman syndrome; (6) the lack of "any significant history of violent crime"; (7) "[t]he prisoner's present age reduces the probability of recidivism"; (8) "[t]he prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release"; and (9) the inmate's "[i]nstitutional activities indicate an enhanced ability to function within the law upon release." (*Id*. at § 2281, subd. (d).)

relevant inquiry is whether some evidence supports the decision of the board or the Governor that the inmate constitutes a current threat of public safety, and not merely whether some evidence confirms the existence of certain findings." (*Lawrence, supra,* at p. 1212; see also *Shaputis, supra,* 44 Cal.4th at p. 1255 [court reviews whether "'some evidence' supports the Governor's determination that petitioner poses a current threat to public safety . . . [;] the aggravated circumstances of the commitment offense are relevant only insofar as they continue to demonstrate that an inmate currently is dangerous"].) "This standard is unquestionably deferential, but certainly is not toothless, and . . . requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision – the determination of current dangerousness. 'It is well established that a policy of rejecting parole solely upon the basis of the type of offense, without individualized treatment and due consideration, deprives an inmate of due process of law.' [Citation.]" (*Lawrence, supra,* 44 Cal.4th at p. 1210.)

B. The Record Contains No Evidence Supporting the Governor's Decision

The record before the Board at the August 26, 2008 parole suitability hearing does not contain any evidence to support the Governor's conclusion that Chavez's release would constitute a current threat to public safety. Prior to his commitment offense, Chavez had no criminal record or convictions of any kind nor did he have any history of violent behavior before or during his incarceration. Throughout his 16 years in custody, Chavez maintained a virtually discipline free record, having only one instance of misconduct that involved the possession of a tattoo gun. While in prison, Chavez obtained a high school diploma in 1994 and a GED in 2003, and took college-level courses. He also engaged in extensive vocational training, had an exemplary work history with strong recommendations from his supervisors and participated in an array of self-help and therapy, including Alcoholics Anonymous and Narcotics Anonymous. Chavez also demonstrated that he has a stable support network with family and friends and provided the Board detailed and realistic plans for his life after release that included various housing options, employment offers and arrangements to continue his substance

abuse treatment. Chavez does not suffer from any mental problems, has consistently expressed remorse for his crimes and has exhibited insight into the nature of the commitment offense. Finally, his most recent psychological evaluation concluded that Chavez had "programmed in an appropriate fashion" and that his risk of future dangerousness was low. It further concluded that Chavez, who has not had a drink or drug in over 16 years, had fair insight into the significant nature of his past substance abuse, responded positively to treatment, did not exhibit signs of impulsivity or negativity and had demonstrated a willingness to change his behavior.

This summary of Chavez's record indicates that he has satisfied almost every factor "tending to show suitability" for parole, including the absence of a juvenile record or history of violent crime; stable relationships with others; signs of remorse; realistic plans for release; and institutional activities that indicate an enhanced ability to function within the law upon release. (See Cal. Code Regs., tit. 15, § 2281, subd. (d).) Moreover, but for the nature of the commitment offense, there are no factors present "tending to show unsuitability" for parole. (See *id*., § 2281, subd. (c).)

The Governor, however, continues to believe that Chavez would pose an unreasonable risk to the community and cites two factors in support of his conclusion. First, he asserts that the circumstances of the commitment offense justify Chavez's continued incarceration. Specifically, the Governor notes that the crime involved multiple victims, it was committed in a public place and the motivation for his acts, which occurred during a gang altercation, was trivial. Second, the Governor contends that several statements in Chavez's 2006 psychological evaluation indicate that Chavez has "not developed adequate insight into the causative factors of his alcoholism and his commitment offense."

Although there is some evidence supporting the Governor's conclusion that the circumstances of Chavez's commitment offense were "especially atrocious,"[6] our

---

[6] The parole regulations state that, in determining whether the "prisoner committed the offense in an especially heinous, atrocious or cruel manner," the factors to be considered include, in relevant part, whether "Multiple victims were attacked, injured or

Supreme Court has explained that "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.) Other than the circumstances of the commitment offense, the only evidence the Governor cites in support of his decision are statements in Chavez's 2006 psychological evaluations that allegedly demonstrate a lack of insight into his substance abuse. As we explain below, however, these statements have been superseded by a more recent psychological evaluation, and therefore "do not supply some evidence justifying the Governor's conclusion that petitioner continues to pose a threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1224.)

The Governor's parole denial letter references four separate comments in Chavez's 2006 psychological evaluation: (1) Chavez's risk within the community "would be slightly higher than the average citizen, contributed to by a need for further AA and self- help groups and courses to gain insight into triggers and patterns that can build and contribute to destructive behaviors;" (2) when the evaluator "asked for certain that he would not resort to drinking alcohol again, . . . Mr. Chavez commented, 'I can't promise that. From what I know now, it would certainly be a very destructive thing to do.'" (3) Chavez "would benefit from continual ongoing AA meetings, and additional techniques and insight into how to handle stress and difficulties in life, particularly when confrontation between individuals might exist;" and (4) Chavez appeared only "moderately motivated to make constructive changes in his life." Although the

---

killed[;]" . . . "The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering[;] . . . "The motive for the crime is inexplicable or very trivial in relation to the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (c) (1).) The Governor noted that, in this case, the record demonstrated that multiple victims were injured in the incident, it was committed in a public atmosphere, thereby exposing innocent bystanders to danger, and the motive was trivial.

Governor's statement of decision does not articulate how or why these statements demonstrate that Chavez remains a current threat to the public, the Attorney General contends that the statements show petitioner has failed to display "a true understanding of his alcoholism and how it led to the commitment offense."

The Governor's reversal decision, however, ignores Chavez's most recent psychological evaluation, which was conducted in 2008 and which supersedes the 2006 evaluation. The 2008 report explains that, since 2006, Chavez had gained "insight into the significant nature of his past substance abuse" and "the nature of the controlling offense." It further concludes that Chavez has been "responsive to treatment," "demonstrate[d] a willingness to change his behavior" and "developed some viable coping strategies that he has used effectively in recent years, which may help him manage the stress and frustration he will experience if granted parole." As noted by the Board, the report further concludes that his overall risk to violently recidivate in the community is in the low range.

It is well-established that "where . . . a stale negative psychological evaluation is superseded by subsequent positive evaluations, the previous negative evaluation does not constitute evidence that the inmate poses a current danger to the public." (*In re Aguilar* (2008) 168 Cal.App.4th 1479, 1490; see also *Rico, supra*, 171 Cal.App.4th at p. 677 ["Current psychological evaluations are generally most relevant to an assessment of current dangerousness"].) For example, in *Lawrence*, the Supreme Court concluded that the Governor's "reliance upon outdated psychological reports – clearly contradicted by petitioner's successful participation in years of intensive therapy, a long series of reports declaring petitioner to be free of psychological problems and no longer a threat to public safety, . . . does not supply some evidence justifying the Governor's conclusion that petitioner continues to pose a threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1224.) Likewise, in *Gaul*, the appellate court concluded that the Board's assessment of the petitioner's mental state was "irretrievably flawed by its reliance on a dated . . . psychological report," whose conclusions had been superseded by two subsequent evaluations. (*Gaul, supra*, 170 Cal.App.4th at p. 37.)

The Attorney General attempts to differentiate this case law by arguing that, in this instance, "there is no evidence that the 2008 evaluation addressed the concerns raised in the 2006 evaluation." The Attorney General's characterization of the 2008 evaluation is not supported by the record. The 2008 report specifically noted that the 2006 evaluation had concluded that Chavez's risk within the community "would be slightly higher than the average citizen" due to his need for continuing AA treatment. The 2008 report, however, explained that comparing an inmate's risk of future violence against the "average citizen" was "not conceivably possible, given the relatively low incidence of violence in free society, and the fact that the 'average citizen' has not been convicted of a violent felony." The report further explained that even the "lowest risk life term inmate . . . will, given his/her violent behavioral conviction history, invariably be adjudged higher than the average citizen when it comes to risk for future violence." The report then concluded that "the inmate's overall risk for future violence is in the low range."

In regards to Chavez's relationship with alcohol, the 2008 report specifically concluded that Chavez recognized the role alcohol played in the offense and had gained "fair insight into the significant nature of his past substance abuse." It further stated that Chavez was responsive to treatment for his alcoholism and had demonstrated a willingness to change his behavior. Moreover, while discussing this issue with the psychological evaluator, Chavez cited his alcohol abuse as one of his greatest failures and noted that AA would be a part of his life for a long time in the future. At the parole board hearing Chavez presented detailed plans about attending AA classes upon his release and discussed how alcohol consumption had affected his life and the role it played in the commitment offense.

We recognize that there are likely to be instances in which an older psychological evaluation contains evidence and information that is relevant to assessing an inmate's current dangerousness. In this case, however, the conclusions in the 2008 psychological report regarding Chavez's relationship with alcohol and his current dangerousness directly address, and fully supersede, the conclusions within the 2006 report. As a result,

the Governor's finding that Chavez requires more therapy or time in prison to adequately gain insights into his alcoholism or the nature of his crime, which is based solely on the superseded 2006 psychological report, lack any evidentiary support.

This case is closely analogous to *In re Calderon, supra*, 184 Cal. App.4th 670, in which the appellate court reversed the Governor's decision to deny parole based on the petitioner's purported "lack of insight" into his prior substance abuse and the role it played in the commitment offense. Calderon was convicted of second degree murder in 1993 for shooting and killing a security guard while fleeing the scene of a robbery. In 2008, the BPH granted the petitioner parole, but the Governor reversed the decision, citing the circumstances of the commitment offense and the petitioner's "lack[of] . . . insight into the effect of his substance abuse."[7] (*Id*. at p. 682.) The petitioner's alleged "lack of insight" was predicated on contradicting statements he provided to prison officials regarding his substance abuse. Specifically, the Governor noted that Calderon had told the Board that he had experimented with alcohol and drugs, but had previously told his probation officer that he "abuses alcohol when he drinks." (*Ibid*.) The Governor also pointed out that Calderon told a psychological evaluator in 2008 that alcohol "has never caused problems for him at work, school or in his social life," thereby ignoring the fact that it was a factor in the commitment offense and a prior DUI conviction. (*Ibid*.)

The appellate court began its analysis by noting that, following *Lawrence* and *Shaputis*, the Governor and the Attorney General have increasingly relied on an inmate's "lack of insight" as a primary basis for denying parole. (*Calderon, supra*, at pp. 688-689.) *Calderon* attributed the "intensified interest in this very subjective factor" to *Shaputis*, which upheld the Governor's reversal of an award of parole based on the

---

[7] The Governor also referenced the fact that Calderon "continued his pattern of criminal conduct during incarceration," asserting that he "associated with Northern Structure prison gang after he entered prison." (*Calderon, supra*, 184 Cal.App.4th at p. 687.) The court, however, rejected this finding because the record demonstrated that, contrary to the Governor's allegations, Calderon had specifically disassociated himself from the gang while in prison, which was a decision the Board commended at the parole hearing. (*Id*. at p. 688.)

gravity of the commitment offense coupled with concern about the inmate's "lack of insight into the murder and into the years of domestic violence that preceded it." (*Shaputis, supra*, 44 Cal.4th at p. 1258.) *Calderon* noted, however, that "the incantation of 'lack of insight' . . . has no talismanic quality. Like all evidence relied upon to find an inmate unsuitable for release on parole, 'lack of insight' is probative of unsuitability only to the extent that it is both (1) demonstrably shown by the record and (2) rationally indicative of the inmate's current dangerousness." (*Calderon, supra,* at p. 690.) It further explained that both factors were present in *Shaputis,* where the Court concluded that petitioner's continued insistence that his crime was unintentional, "considered with evidence of petitioner's history of domestic abuse and recent psychological reports reflecting that his character remains unchanged and that he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming,'[] all provide some evidence in support of the Governor's conclusion that petitioner remains dangerous and is unsuitable for parole" (*Shaputis, supra,* at p. 1260.)

In Calderon's case, the court presumed that by stating the petitioner lacked "full insight" into the role substance abuse played in the commission of his crime, the Governor meant "that because the petitioner did not adequately understand the role substance abuse played in the commission of his crime, he fails to appreciate the need to address his substance abuse problem and therefore has not done so, and this failure renders him presently dangerous." (*Id*. at p. 690.) After reviewing the evidence, the court rejected the Governor's contention that Calderon's inconsistent statements regarding his alcohol use showed that he failed to appreciate or address his substance abuse problems. Rather, according to the court, the evidence clearly demonstrated that "Calderon fully acknowledged . . . the role alcohol played in the alcohol and drugs negatively affected his life at the time of his offense. The record shows that he has long been aware of this problem and diligently addressed it over a period of many years." (*Ibid*.)

It further concluded that:

> the record provides no reasonable grounds to believe he might start using drugs or alcohol if released. There is no evidence his former desire for drugs or alcohol might still be a motivating force. The record reveals he has been clean and sober for a substantial period of time relative to the duration of his abuse. There is no evidence Calderon denies he had a drug or alcohol problem or denied he had a problem for some period of his incarceration. There is no evidenced he refused, failed or did poorly in drug treatment programs. And there is no evidence that Calderon ever used any type of illicit substance during his incarceration.

(*Id*. at pp. 692-693.) In closing, the court stated that "if Calderon's insight into the effect of his past substance abuse is insufficient, it is difficult to imagine that many or indeed any inmates could demonstrate the epiphany the Governor seemingly requires." (*Id*. at p. 693.)

In this case, the Attorney General again contends that Chavez lacks insight into his substance abuse issues and, citing *Shaputis*, argues that "an inmate who has not gained insight into his past antisocial behavior presents a current risk to public safety." As in *Calderon*, however, we conclude that Chavez's purported "lack of insight" is not established by the record and, as a result, has no rational connection to his current dangerousness. Indeed, all of what was said in relation to the inmate in *Calderon* applies equally to Chavez. From the outset of his incarceration, Chavez has consistently admitted that he has an alcohol abuse problem and has worked diligently to address it. He has acknowledged the role alcohol played in the offense and how it has negatively affected his life. Moreover, Chavez has not had a drink in 16 years, which is a substantially longer period than the four years that he did drink, which occurred when he was a teenager. There is no reasonable ground to believe he will resume drinking alcohol or that he has any desire to do so. Indeed, the psychological evaluations indicate that Chavez has responded well to treatment, has showed no signs of impulsivity and demonstrated an understanding of his substance abuse problem and a willingness to change his behavior. Moreover, he has acknowledged that AA will continue to be a fixture in his life upon release and submitted detailed plans regarding the AA meetings he plans to attend. In sum, "the record provides no rational basis upon which to conclude

that [Chavez] is blind to the problem presented by his past substance abuse or has refused to confront the problem, nor reason to believe [Chavez] is likely to resume abusing alcohol after more than [16] years of active participation in AA and sobriety." (*Calderon, supra*, 184 Cal. App.4th at p. 693.)

In sum, the Governor has identified no evidence, other than the circumstances of the commitment offense itself, indicating that Chavez is unsuitable for parole. Our Supreme Court has explained, however, that "the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1211.) "When . . . all of the information in a postconviction record supports the determination that the inmate is rehabilitated . . . [the Governor's] mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id*. at pp. 1226-1227.) In this case, the Governor has not articulated any nexus between the facts of the commitment offense and Chavez's current dangerousness. Accordingly, we must reverse his parole decision.

C. Appropriate Remedy

The Attorney General contends that, even if we affirm the grant of the petition for habeas corpus, we should reverse the trial court's decision to reinstate the BPH's finding that Chavez is suitable for parole. The Attorney General contends that the appropriate remedy is to "remand the matter to the Governor to proceed in accordance with due process standards." This District (and this Division) has considered and rejected this argument numerous times in the past, holding that "'when the reviewing court has determined there is no evidence in the record that would support the denial of parole, there is no reason to order the Board [or Governor] to conduct any further hearing on the matter, at least in the absence of some new evidence about the inmate's post-hearing conduct." (*Gaul, supra*, 170 Cal.App.4th at p. 40; *Rico, supra*, 171 Cal.App.4th at pp. 687-688; *In re Loresch* (2010) 183 Cal.App.4th 150, 162-163.) In this case, the

Governor does not contend that there is any new evidence upon which his decision to reverse the Board's decision could be upheld. Therefore, "'[b]ecause we have reviewed the materials that were before the Board and found no evidence to support a decision other than the one reached by the Board, a remand to the Governor would amount to an idle act.' [Citations.]" (*In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257.)[8]

DISPOSITION

The trial court's grant of petition for writ of habeas corpus is affirmed. The Governor's decision reversing the Board's 2008 decision granting petitioner parole is vacated and the Board's parole release order is reinstated. Petitioner shall remain released from custody on parole under the terms and conditions prescribed by the BPH.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.

[8] Although the Attorney General relied on *In re Prather* (2010) 50 Cal.4th 238, the Supreme Court did not address a remand to the Governor's office in that matter, nor does the reasoning apply here where, unlike *Prather*, there can be no new evidence for the Governor to consider.