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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| In re BRIAN SASS,<br><br>on Habeas Corpus. | B222520<br><br>(Los Angeles County<br>Super. Ct. No. BH006245) |

APPEAL from an order of the Superior Court of Los Angeles County. Peter Paul Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Anya M. Binsacca, Amanda Lloyd, and Charles Chung, Deputy Attorneys General, for Appellant Michael Evans, as Warden, etc.

Marilee Marshall, under appointment by the Court of Appeal, for Respondent Brian Sass.

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After the Board of Parole Hearings (the Board) granted parole to prison inmate Brian Sass, the Governor reversed the grant, and Sass filed a petition for writ of habeas corpus in the Superior Court of Los Angeles County. After concluding that the Governor's decision was not supported by "'some evidence'"[1] to support a finding that Sass's release would constitute a current threat to public safety, the superior court granted the petition and reinstated the Board's decision. Michael Evans, Warden of Folsom State Prison (Warden) appealed from the superior court's order, and we granted his petition for writ of supersedeas, staying the order pending this appeal. We find no error, and affirm the order granting the petition for writ of habeas corpus.

## BACKGROUND

### 1. *Sass's Crimes*

On July 30, 1987, when Sass was 24 years old, he drove with a blood alcohol level of .14 percent, and collided with a car driven by 27-year-old Beverly Ryan, killing her and her unborn child. Sass was convicted of second-degree murder, gross vehicular manslaughter, and felony hit and run, with three prior convictions of driving while intoxicated (DUI). Three other DUI charges were pending at the time of his murder trial, with tests showing blood alcohol levels of .15, .19, and .13. In June 1988, Sass was sentenced to 15 years to life in prison on the murder, with a minimum parole eligibility date of September 27, 1997.

### 2. *2008 Parole Hearing*

At Sass's February 2009 parole hearing, Sass told the Board that prior to the fatal collision, he had consumed numerous beers, as well as some marijuana, methamphetamine, and cocaine, with friends at a bar. Afterward, he left the bar in his half-ton pickup truck, stopped to fill his two gas tanks and buy more beer, and drove out onto a two-lane highway. Sass told the Board that when he realized he was drowsy and tailgating the car in front of him, he intended to pull over, but instead, sped up and tried to pass the car. Sass claimed that he either had an alcoholic blackout or passed out prior

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[1] *In re Lawrence* (2008) 44 Cal.4th 1181, 1191, 1212 (*Lawrence*).

to attempting the pass, and that he did not remember seeing Ryan's car coming toward him. When his truck came to rest, he smelled gasoline, became frightened, and crawled away to hide, despite a fractured neck and knowing that he had caused the collision. He claimed that he passed out and was later awakened by dogs and helicopter lights.

The Board questioned Sass about a memorandum he had given to the Board in 2002. The memorandum is quoted, in relevant part, in the Governor's decision, as follows: "The urge to drive one's own automobile while under the influence of alcohol . . . is no more, or less, earth-shaking, either morally or ethically, than the uncontrollable urge of a hypoglycemic diabetic to over-indulge with a box of chocolate candies immediately prior to getting behind the wheel . . . . The end result is virtually the same. . . . Yet, unlike the DUI driver, the diabetic driver will not be held punitively accountable for their temporary debilitation from the negative effect of their abnormal blood sugar level in the event of a fatal automobile accident . . . . There is . . . an enormous disparity between the two diminished capacities when it comes to the letter of the law. . . . [W]ill 'Mothers Against Drunk Drivers' (MADD) soon share their frequently over-zealous vindictiveness against drivers with a 'sweet tooth[?]' . . . [H]ow many of us, who . . . sit in judgment of a person in [Sass's] situation, have often taken the gamble to drive their vehicle after indulging in a 'few drinks[?]' . . . . The only difference between us and Brian Sass is he gambled once too often and his luck ran out. Thus, he is no more of a criminal than we are. He simply took another chance against the odds and lost. . . . [T]he present drunk driving penal and vehicle codes [should] . . . be replaced with more reasonable and less punitive DUI codes." (Some internal quotation marks omitted.)

Sass explained to the Board that at the time he wrote the memorandum, he had been denied parole several times and was frustrated with the system, so he "vented," attacking the Board and blaming his crime on others. He was also frustrated with his inability to convey to the Board that he was no longer a threat to society, and realized that he "did it in the complete opposite wrong way." Sass recognized that he had been

convicted of seven DUI's, and it was "totally wrong" to compare that with the people with disabilities mentioned in the memorandum, because they did not eat candy or get in wrecks that often. Sass apologized to the Board for the offensive comments in the memorandum. He said that he had learned from his mistake in submitting the memorandum that he alone was responsible for drinking and driving that day.

The Board noted that Sass's past psychological evaluations had been positive, and it considered his December 2008 evaluation. Psychologist Robert E. Record, Ph.D., was requested to assess Sass's potential for violence in the free community, Sass's ability to refrain from the use or abuse of alcohol and drugs when released, and the extent to which Sass had explored his crimes and had come to terms with the underlying causes. He was also requested to provide his opinion regarding the 2002 memorandum.

Dr. Record reported that he had diagnosed Sass with polysubstance dependence in institutional remission, high blood pressure, elevated cholesterol, allergies, hepatitis C, and neck pain. Sass scored high on the GAF (Global Assessment of Functioning), and presented no acute, emotional or mental health symptoms. Dr. Record found that Sass was not selfish, callous, or lacking in remorse or empathy, and that he had taken full responsibility for his crime. Sass had been disciplined only twice during his incarceration, once in 1988 for excessive volume on his television, and once in 1994 for participating in a work strike. Dr. Record concluded that Sass's risk of future violence and overall risk assessment was very low.

Dr. Record asked Sass about the 2002 memorandum. Sass told him that he had trusted his cellmate to write the memorandum, and that it was a bad mistake to do so. He recognized that the ideas set forth were false and defensive, wrongly shifted responsibility away from himself, and did not reflect the person that he had become. Dr. Record stated that Sass was currently able to recognize the ideas expressed in the memorandum as false, and that he understood that he was responsible for the deaths of the victims.

Dr. Record recommended to the Board that it be more concerned with the progress Sass had made since 2002. He had participated in Alcoholics Anonymous (AA) for years, understood the 12 steps and the need for a lifetime commitment, and had established an AA sponsor outside prison. He had worked extremely well to prepare himself vocationally, and was skilled in automobile restoration. He had good family support, a place to live in Lancaster, and job opportunities there as a mechanic.

The Board received laudatory and supportive letters stating that Sass had a good attitude and was repentant. The letters also stated that Sass had been commended for his participation in AA since 1992, and that over the past 22 years, he had completed numerous self-improvement courses. In addition, he had volunteered to help others in such activities, and had done well in his vocational training as a welder. The Board also received a letter from Sass's sister offering him a home, support, and work, and a letter from Sass's AA sponsor, a longtime neighborhood friend. Other letters included job offers. Sass had investigated outside AA meetings and Bible study classes, and had developed a relapse prevention plan.

Sass expressed great remorse to the Board about having taken innocent lives. He remembered the testimony at sentencing of Beverly Ryan's father, and the pain his actions caused him and his family. He wrote a letter of apology to the family.

The Board found the offense had been carried out in an especially cruel and callous manner. Sass followed one car within two feet, travelling at 40 to 50 miles per hour late at night on Sierra Highway, before attempting to pass and colliding head on with Beverly Ryan's car. Two victims were killed. Ryan's father testified that his daughter was so mutilated that the family could not give her an open-casket funeral. Officers found Sass approximately 100 yards away from the collision site, hiding under a bush, and for some time, Sass claimed that he had simply ended up there in the collision, ignorant of what had been happening.

The Board also found that to satisfy his own pleasures, Sass had consumed enough alcohol to have a blood alcohol level of .14 percent at the time it was tested, and had used

cocaine. The Board found the 2002 memorandum "abysmal," because it minimized Sass's crime, suggesting that it was less serious than murder, and ignored the seriousness of his prior criminal record.

However, the Board believed that Sass had, since 2002, addressed all the concerns the memorandum had raised, and had gained insight into the representations made in the memorandum. The Board found that Sass had accepted responsibility for the crime, and had consistently shown remorse. Further, he had participated in prison programs and work, and had been discipline-free for 18 years. Sass's extensive participation in self-improvement programs, especially AA, as well as the psychological evaluations and his viable parole plans, convinced the Board that he was no longer an unreasonable risk of danger to society.

The Board granted Sass parole on February 6, 2009.

**3. *The Governor's Decision***

The Governor recognized Sass's many achievements while in prison, his maintenance of supportive relationships with friends and family, and his positive postrelease plans. The Governor observed, however, that the second-degree murder for which Sass was convicted was especially atrocious, and he cited the Board's findings to the same effect. The Governor stated that the gravity of the crime was one factor supporting his decision, and also noted that the motive for the crime—to satisfy Sass's own pleasures in complete disregard of public safety—was trivial in relation to the offense. There were multiple victims and one of them was mutilated.

The Governor was particularly concerned that Sass did not have adequate insight into his offense and had not fully accepted responsibility for his actions. The Governor expressed concern that the 2002 memorandum demonstrated that Sass did not fully understand the nature and magnitude of his crime, and did not fully accept responsibility for his actions. The Governor quoted extensively from the memorandum to demonstrate Sass's "belief that his responsibility for the death of Ryan and her unborn child was simply due to the unfortunate circumstance that his 'luck ran out,'" and "he still

minimize[d] his culpability for choosing to drive when he knew that it was clearly unsafe to do so." The Governor pointed out that the Board also struggled with Sass's insight into the murder, because of the views expressed in the memorandum, and that in 2008, the Board expressed similar concerns in denying parole.

The Governor stated: "Given the central role that alcohol played in the commission of the life offense as well as his multiple previous convictions and arrests for driving under the influence of alcohol, Sass's lack of insight indicates that he still poses a risk of committing similar offenses if released." The Governor also found that although Sass claimed that he no longer harbored the beliefs expressed in the memorandum, his explanation to the Board in the recent parole hearing suggested that he still did not fully accept responsibility for his actions. On June 30, 2009, the Governor reversed the Board's grant of parole.

**4. *Habeas Petition***

After the Governor reversed the Board's grant of parole, Sass filed a petition for writ of habeas corpus in the superior court. The court found that the record did not contain some evidence to support the Governor's determination that Sass was not suitable for release on parole because he currently presented an unreasonable risk of danger to society. The court reviewed the evidence and concluded the commitment offense and Sass's prior convictions did not continue to indicate a current risk of violence, after more than 20 years of positive rehabilitation, and that the Governor failed to support his contrary finding with some evidence. The court granted the petition on February 4, 2010, ordered the Governor to vacate his decision, and reinstated the Board's grant of parole. The Warden filed a timely notice of appeal.

## DISCUSSION

### I. Standard of Review

The Warden contends that the superior court erred in granting the petition, because the record contained sufficient evidence to support the Governor's decision to reverse the grant of parole. "[T]he courts are authorized to review the factual basis of a

decision . . . to ensure that the decision comports with the requirements of due process of law, but . . . 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 upon the factors specified by statute and regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 (*Rosenkrantz*); see Pen. Code, § 3041, subd. (b); Cal. Code Regs., tit. 15, § 2402.) Evidence supporting the decision must be relevant and reliable. (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

The Governor independently reviews a prisoner's suitability for parole de novo, with "discretion to be 'more stringent or cautious' in determining whether a defendant poses an unreasonable risk to public safety. [Citation.]" (*Lawrence*, *supra*, 44 Cal.4th at p. 1204, quoting *Rosenkrantz*, *supra,* 29 Cal.4th at p. 686.) He is authorized by the California Constitution to affirm, modify or reverse the Board's decision, but must do so "on the basis of the same factors which the parole authority is required to consider." (*Rosenkrantz*, *supra*, at pp. 659–660; Cal. Const., art. V, § 8, subd. (b).)

Those factors include "the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release." (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

Like the superior court, we review the Governor's decision to reverse the Board's determination that an inmate is suitable for parole, by asking "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*Lawrence*, *supra*, 44 Cal.4th at pp. 1191.) This standard of review is "extremely deferential," and "'does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the

evidence. . . ." (*Rosenkrantz*, *supra,* 29 Cal.4th at p. 665.) We must "affirm the Governor's interpretation of the evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors. [Citation.]" (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258.) The "some evidence" review accords the inmate due process so long as the Governor's decision shows due consideration of the specified factors, and his reasoning establishes a rational nexus between those factors and the determination of current dangerousness. (*Lawrence*, *supra*, at p. 1210.)

**II. No Evidence Supports the Governor's Decision**

The Governor based his decision, in part, on factors relating to the commitment offense. He agreed with the Board that the offense was carried out in an especially cruel, callous, and dispassionate manner, resulting in multiple victims. Although Dr. Record reported that Sass had participated in AA since 1992, understood the 12 steps and the need for a lifetime commitment, and had established an AA sponsor outside prison, the Governor also found that Sass's inability to refrain from driving under the influence of alcohol prior to and at the time of his commitment offense indicated that he posed a risk of committing similar offenses if released.

A crime committed more than 20 years ago may have little, if any, value in predicting future criminality. (*Lawrence*, *supra*, 44 Cal.4th at p. 1219.) While the Governor may not base his decision solely on the gravity of the commitment offense, he may consider the circumstances of the offense to the extent they support the ultimate conclusion that an inmate continues to pose an unreasonable risk to public safety. (*Lawrence*, *supra*, at pp. 1219, 1221; Cal. Code Regs., tit. 15, § 2281, subd. (a).)

"Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before . . . the Governor." (*Lawrence*, *supra,* 44 Cal.4th at p. 1221.) "[W]hen there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not

currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness." (*Id*. at p. 1219.)

In finding current dangerousness, the Governor relied in part upon the 2002 memorandum. As the superior court observed in granting Sass's petition, the 2002 memorandum may have been evidence of a lapse in judgment eight years ago, but the remaining evidence on the record shows that Sass currently has significant insight and remorse. As the court also observed, although the memorandum showed a lack of insight, one psychologist concluded in 2005, and another in 2008, that despite the memorandum, Sass continued to gain insight and remorse.

The Governor recognized the positive factors favoring parole, and the gains Sass had made since his incarceration, but found that Sass's 2009 statements to the Board regarding the memorandum showed that he continued to lack insight into his crime. Sass explained to the Board that he had been frustrated with the system, so he "vented," attacking the Board and blaming his crime on others. The Governor found that this explanation showed that Sass blamed his lack of insight on continued incarceration, demonstrating that he had not fully accepted responsibility for his actions. It is clear in Sass's explanation, however, that he was describing his state of mind in 2002, not 2009. No evidence in the record suggests that Sass harbors the same opinion now. Indeed, Dr. Record concluded that Sass had learned more about his crime and himself from the memorandum than he could have in years of therapy.

"Some evidence" of current dangerousness means having a rational basis in fact. (*In re Scott* (2005) 133 Cal.App.4th 573, 590, fn. 6.) The facts before the Board and the Governor showed a prisoner with no discipline problems in 18 years, who had made a lifetime commitment to a 12-step program, and had established an AA sponsor outside prison. The evidence demonstrated that Sass had become skilled in welding and automobile restoration, and that he had good family support, a place to live in Lancaster, and job offers. Sass expressed great remorse about having taken innocent lives and causing pain to these victims' family. In sum, the evidence amply supported the Board's

finding of current suitability for parole, and none refuted it. We find no rational basis in fact to support the Governor's decision.

**III. Vacating the Governor's Decision Without Remand was the Proper Remedy**

The Warden contends that the proper remedy upon vacating the Governor's decision would have been to remand the matter to the Governor for further review, rather than reinstate the Board's decision. The Warden points out that remand to the Board is proper when a Board decision is vacated, and argues that because the Governor is vested with the same broad discretion in parole matters as the Board, there should be no difference in remedy when a gubernatorial decision is vacated. We disagree. Although the Board can give the prisoner a new hearing and consider additional evidence, the Governor cannot. (*In re Smith* (2003) 109 Cal.App.4th 489, 507.) Thus, the power of the Governor to review a vacated decision is not the same as the Board's.

When the Governor's decision is vacated by the court, remand does not result in a new hearing, because the Governor's decision to affirm, modify, or reverse the decision of the Board must be based on the same factors and the same materials that guided the Board's decision. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 659–661; Cal. Const., art. V, § 8, subd. (b); Pen. Code, §§ 3041, 3041.2, subd. (a); see Cal. Code Regs., tit. 15, §§ 2281, 2402.) "Remanding the matter to the Governor would be an idle act because the Governor has already reviewed the materials provided by the Board and, according to the superior court's unchallenged order, erroneously concluded that there was some evidence in those materials to support a reversal of the Board's decision. [Citations.]" (*In re Masoner* (2009) 179 Cal.App.4th 1531, 1538.)

The Warden also contends that the California Supreme Court has "indicated" that remand to the Governor is the proper procedure. The Warden relies on *In re Rosenkrantz*, *supra*, at page 658, where the California Supreme Court held that the appropriate remedy, when the decision of the *Board* is not supported by some evidence, is to order the Board to vacate its decision denying parole, and conduct a new hearing.

The Court did not reach the question of what remedy is appropriate upon finding that the Governor's decision is unsupported by some evidence.

Indeed, not only has the Supreme Court not indicated that the remedy should be the same in both instances, it has affirmed a judgment that had afforded the remedy of reinstating the Board's parole release order, rather than remanding to the Governor. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1190, 1201, 1229.) Further, declining to remand to the Governor for further consideration has been the approach of many appellate decisions since *Lawrence*—all recognizing that when the record reflects no evidence supporting the denial of parole, the proper disposition is to avoid remand and, in effect, to order the release of the inmate. (See, e.g., *In re Moses* (2010) 182 Cal.App.4th 1279, 1313–1314; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256–257; *In re Burdan* (2008) 169 Cal.App.4th 18, 39; *In re Vasquez* (2009) 170 Cal.App.4th 370, 386–387; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491–1492.)

Accordingly, we conclude that the superior court ordered the appropriate remedy of vacating the Governor's decision and reinstating the Board's grant of parole.

## DISPOSITION

The order granting the petition for writ of habeas corpus is affirmed. Thus, the Governor's decision reversing the Board's grant of parole remains vacated, and the Board's 2009 grant of parole is reinstated on the terms and conditions stated therein. This court's stay of the order granting the petition for writ of habeas corpus is dissolved.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

____________________, J.
DOI TODD

We concur:

____________________, P. J.
BOREN

____________________, J.
ASHMANN-GERST