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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re FRANCISCO RAMIREZ,

on Habeas Corpus.

B226184

(Los Angeles County
Super. Ct. No. BH006288)

APPEAL from an order of the Superior Court of Los Angeles County granting a petition for writ of habeas corpus. Patricia Schnegg, Judge. Affirmed.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Phillip Lindsay and Gregory J. Marcot, Deputy Attorneys General, for Appellant Matthew Cate, Secretary of California Department of Corrections and Rehabilitation.

Marilee Marshall, under appointment by the Court of Appeal, for Respondent Francisco Ramirez.

Respondent Francisco Ramirez began serving his life sentence in December 1987, after he pleaded guilty to second degree murder and admitted to personal use of a firearm. The trial court sentenced him to 15 years to life for the murder, plus a consecutive two-year term for the firearm enhancement. Ramirez reached his minimum eligible parole date on November 6, 1997.

On January 28, 2009, Ramirez appeared for his eighth subsequent parole consideration hearing, and the Board of Parole Hearings (Board) found that he 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,” and granted him parole. On June 25, 2009, the Governor reversed the Board’s decision to grant parole, concluding that Ramirez’s “release would pose an unreasonable risk of danger to society at this time.”

Ramirez filed a petition for writ of habeas corpus in superior court, challenging the Governor’s decision. On June 28, 2010, the court granted the writ, ordered the Governor to vacate his decision, and reinstated the Board’s decision. The Attorney General appealed and filed a petition for a writ of supersedeas, which we denied. Ramirez was released on parole.

The Attorney General argues that we should reverse the superior court’s order because “some evidence supports the Governor’s decision that Ramirez is unsuitable for parole,” and even if this court were to conclude otherwise, the proper remedy is to “remand the matter to the Governor to assess Ramirez’s suitability for parole in light of the Court’s analysis of the evidence previously considered.” We disagree with both arguments and affirm.¹

¹ Ramirez contends that this appeal is moot because he already has been released from prison. “A question may be deemed moot when, although it initially presented an existing controversy, the passage of time or the acts of the parties or a court decision have deprived the controversy of its life.” (*Bocato v. City of Hermosa Beach* (1984) 158 Cal.App.3d 804, 808.) “[W]hen a court ruling can have no practical impact or cannot provide the parties with effective relief,” the case becomes moot. (*Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503.) Here, the former Governor opposed Ramirez’s release, and the Attorney General advocates appellant’s position that the trial

BACKGROUND

Commitment Offense

Ramirez was 24 years old when he committed the offense. At that time, he was associating with 18th Street gang members. On April 6, 1986, he was with some of these gang members when they learned that one of their associates had been beaten and stabbed by members of a rival gang. Ramirez, with two 18th Street gang members, decided to retaliate. The three men got into Ramirez's car and drove around looking for members of the rival gang. They confronted, chased and beat a man named Harry Lopez. Ramirez did not know whether Lopez belonged to the rival gang. Ramirez fired three shots at Lopez, striking him in the head and abdomen and killing him. Ramirez initially denied that he was the shooter, but later admitted to a probation officer that he was, and that he had been drinking alcohol for several hours before he committed the offense. He stated that he had consumed six to 10 beers and felt intoxicated at the time of the shooting.

Pre-prison Social and Criminal History

Ramirez was born in Mexico. He lived there in a two-parent household. He is the oldest of seven children. When he was 15, he moved to Los Angeles and lived with an uncle. He attended high school through the tenth grade. He came into this country illegally. He is not a U.S. citizen.

Ramirez married in 1982 and separated in 1985. He has a daughter from that relationship. An April 2007 psychological evaluation report noted that Ramirez was in contact with his daughter and ex-wife.

In 1983, when Ramirez was 21 years old, he was convicted of possession of a dangerous weapon (a knife), a misdemeanor offense. In 1986, he was arrested for lewd and lascivious acts with a child under 14, but he was not convicted.

court's order should be reversed and Ramirez returned to custody. There is an existing controversy in this case that has not become moot.

Before his sentencing in 1987, Ramirez told a probation officer that he had been using PCP (phencyclidine) on a weekly basis, had been using cocaine since 1984, and that he drank gin on weekends.

Prison Record

Ramirez was disciplined twice in prison for rules violations: in 1989 for possessing another inmate's property, and in 1990 for possessing a stimulant and/or sedative. He was counseled for misconduct once in 1988 for a "failure to report." There is no documentation of any rules violations or misconduct after 1990. Ramirez did not participate in gang activity in prison. In 2007, Ramirez's "placement score [was] 19, the minimum score for life-term inmates."

As the Governor stated in his Indeterminate Sentence Parole Release Review, "Ramirez has made efforts in prison to enhance his ability to function within the law upon release. Ramirez earned his General Equivalency Diploma in 1991, and took additional courses in hazardous materials, 'outrageous math,' and informational courses in hepatitis, tuberculosis, HIV/AIDS, and sexually transmitted diseases and infections. He completed vocational training in small engine repair, paint and decoration, and landscape and horticulture, and he also earned a certificate of proficiency as an upholstery sewer. Ramirez held institutional positions as a medical department porter, janitor, sewing machine operator, culinary worker, painter, furniture finisher, landscaper, groundskeeper, irrigation system worker, textiles worker, and furniture upholsterer. In addition, Ramirez availed himself of some self-help and therapy programs including: Alcoholics Anonymous (AA), Narcotics Anonymous (NA), 12-Step AA/NA Program, Vital Issues Project, Lifeskills program, Impact self-help program, Muslim Anger Management course, 'Way to Happiness' course, Criminon 'Understanding and Handling Addiction' courses, Inmate Employability Anger Management I, II and III, and Criminon 'Communication Tools' course. He has also been commended for his participation in several extracurricular activities including: writing a book report on the book 'When am I going to be happy?,' submitting a poster and essay on drug abuse to the Red Ribbon Campaign, entering an academic team competition, taking various music classes,

contributing to the holiday card drive, and contributing to an ROTC drill team. Additionally he received some positive evaluations from mental health and correctional professionals over the years.”

For his work in the prison upholstery shop, Ramirez “earn[ed] exceptional ratings with positive comments.”

Parole Plans

Ramirez expected to be deported to Mexico after his release from prison. Ramirez told the Board that he planned to live in Mexico City with his parents and work with his brother. At the hearing, the Board referenced letters of support from Ramirez’s parents, brother and friends.

Psychological Evaluations

In his decision to reverse the Board’s grant of parole to Ramirez, the Governor relied on a June 7, 2007 psychological evaluation report. Accordingly, we provide the following summary of this report.

During the evaluation, Ramirez “accepted full responsibility for his behavior in the [commitment] offense.” Ramirez “stated that he was unsure why he shot the victim.” He believed that his intoxication “may have impaired his judgment at the time of the crime.” Ramirez denied that he ever had an anger control problem, but “acknowledged that he was prone to impulsive behavior during his younger years prior to the [commitment] offense.”

The evaluator found “no evidence of severe mental disorder,” but noted “there is documentation to support the following diagnoses: Adult Antisocial Behavior and Alcohol Abuse, by history.” In prior evaluations, Ramirez had been diagnosed with “Alcohol Abuse, in institutional remission.”

To estimate Ramirez’s “risk for future violence in the community,” the evaluator used “two separate assessment guides”: “the Psychopathy Checklist – Revised (PCL-R)” and the “History – Clinical – Risk Management – 20 (HCR-20).” The PCL-R measures “the extent of a selfish, callous and remorseless use of others (interpersonal and affective

traits) as well as a chronically unstable and antisocial lifestyle (general social deviance).” Ramirez’s overall score on the PCL-R placed him “in the **low** range of psychopathy.”

Ramirez’s overall score on the HCR-20 “indicated that he has risk factors that place him in the **low** risk range for future violence.” In the “‘historical’ domain of assessing the likelihood of future violence,” Ramirez presented “a moderate risk of future violence.” The evaluator explained: “Given that the bulk of data contributing to this estimate is historical, then by definition, this score is not amenable to significant change regardless of the number of years of his incarceration.”

In the “‘clinical’ or more current and dynamic domain of risk assessment,” Ramirez presented a “low risk of future violence.” The evaluator commented that Ramirez “did not present as glib or superficial, and offered no excuses or blame for his behavior except for his own poor choices in life (his excessive use of alcohol). [Ramirez] accepted full responsibility for his behavior in the crime.” Ramirez had “regularly attended AA since 1995.” The evaluator found that he had “access to the appropriate use of judgment or reasoning” and was “emotionally and behaviorally stable.” The evaluator also noted, however, that Ramirez “appear[ed] to have only a superficial understanding of the underlying dynamics related to the violence that occurred in the crime.”

In the “‘management of future risk’ domain” Ramirez presented a “low risk of future violence.” The evaluator found that Ramirez’s “job skills in small engine repair and painting may enhance his ability to secure gainful employment when he is released on parole.” Ramirez stated his plan to continue participation in AA, although he denied that he had a substance abuse problem at the time. Ramirez appeared “very amenable to any recommendations or requirements as set forth by the [Board] in helping to justify parole.” The evaluator commented that Ramirez’s parole plans appear appropriate and feasible, “but not well defined.”

The evaluator also applied the “Level of Service/Case Management Inventory,” which is “an actuarial instrument designed to evaluate levels of risk to recidivate.” Ramirez’s score “indicate[d] that he is in the **medium** category.” The evaluator stated that this particular instrument is “focused on risk of general recidivism and not violence

per se.” The evaluator did not elaborate on the results or the factors used to generate this score.

In conclusion, the evaluator stated: “Overall, then, risk assessment estimates suggest that the inmate poses a **low** likelihood to become involved in a violent offense if released to the free community. This estimate is consistent with his positive behavior programming while incarcerated. The overall risk assessment takes into account the inmate’s cultural background, personal, social and criminal history, institutional programming, community/social support, release plans, and current clinical presentation. In addition, there is the caveat that such an assessment is at least partially based on the likelihood of continued abstinence of any substance abuse.”

In a prior psychological evaluation report, dated April 7, 2007, the evaluator assessed Ramirez’s “dangerousness” as follows: “Within a controlled setting, his violence potential is lower than average due to his excellent institutional adjustment. If released to the community, his violence potential should be about the same as the average citizen’s violence potential. Significant risk factors and precursors to violence for him are a return to alcohol use and/or criminal/gang activity.”

District Attorney’s Position on Parole

In his oral argument to the Board, the deputy district attorney stated that “this was a typical pay-back drive-by type of a gang-related shooting. It was premeditated, planned. It was not accidental. It was not spur of the moment. It was not impetuous.”

Citing the probation report, the deputy district attorney noted that Ramirez originally and “steadfastly claimed that he was born in San Antonio, Texas and was an American citizen.” Later Ramirez “admitted that he was born in Mexico and was an illegal immigrant.”

Referencing the June 2007 psychological evaluation report described above, the deputy district attorney stated that Ramirez’s “understanding of the dynamics and the violence are superficial.” He also asserted that the commitment offense is “not a crime that [Ramirez] has come to grips with.” He concluded that “insight, remorse, coming to

grips are still weak areas.” He also noted that Ramirez’s parole plans “lack specifics,” as mentioned in the psychological evaluation report.

Board’s Decision

In reaching its January 28, 2009 decision that Ramirez is suitable for parole, the Board expressly weighed the considerations set forth in the regulations, which require it (and the Governor) to consider “[a]ll relevant, reliable information” tending to show either suitability or unsuitability for parole, such as the nature of the commitment offense, the prisoner’s social history, mental state, criminal record, and attitude toward the crime, and the prisoner’s parole plans. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) Of these factors, the Board found the commitment offense to be “particularly troubling and disturbing”: “[T]his was a[n] atrocious and cruel commitment offense. This victim was vulnerable. He didn’t have a weapon. It was carried out in a manner which demonstrates the exceptionally callous disregard for human suffering; and in fact, you ha[d] the opportunity to cease and desist, but you elected to shoot the victim multiple times. The motive for this crime, [was] very trivial in relationship to the commitment offense, and [the] fact that this was gang involved.” The Board also discussed its consideration of Ramirez’s criminal record and gang activity, and his initial failure to admit that he had entered this country illegally from Mexico.

On the other hand, the Board found that Ramirez’s “positive adjustment” and other considerations show that he no longer poses a risk of danger to society. The Board commented that Ramirez had “shown genuine remorse” and an understanding of “the nature and magnitude of the commitment offense.” Ramirez does not have a history of “assaultive” behavior as a juvenile, and his age at the time of the parole consideration hearing (47) “reduces the risk of recidivism.” He had “participated in activities that indicate an enhanced ability to function within the law upon release.” He had “develop[ed] a parole plan for Mexico.”

Governor’s Reversal of Board’s Decision

In reversing the Board’s grant of parole to Ramirez, the Governor noted many positive factors, including that Ramirez had no juvenile criminal record, had no prison

rules violations or misconduct since 1990, had “made efforts in prison to enhance his ability to function within the law upon release,”² and had “maintained seemingly supportive relationships with family and friends despite his incarceration.”

The Governor’s review also identified the negative factors on which he relied to find that “Ramirez still poses a risk of recidivism and violence and that his release from prison at this time would pose an unreasonable risk to public safety.” The Governor described the commitment offense and emphasized the same aspects of the offense that the Board found troubling and disturbing—that it was “atrocious,” involved a vulnerable victim, “demonstrated an exceptionally callous disregard for human life and suffering,” and that the motive “was exceedingly trivial in relation to the magnitude of the crime committed.” The Governor noted Ramirez’s admission that he did not know whether the victim even belonged to the rival gang.

Discussing the June 7, 2007 psychological evaluation report, the Governor stated: “Though the evaluator gave Ramirez an overall ‘low’ rating for future violence, the evaluator noted that this assessment included a ‘moderate’ rating based on historical factors. Additionally, the evaluator rated Ramirez a ‘medium’ risk of general recidivism. These elevated risk assessments indicate that Ramirez still poses an increased risk of committing future crimes. Moreover, the evaluator expressed concern that, in his current clinical factors, Ramirez’s results demonstrated that he ‘appears to have only a superficial understanding of the underlying dynamics related to the violence that occurred in the crime.’ The mental health evaluator’s concern that Ramirez lacks insight into the circumstances leading to his life offense is concerning because Ramirez cannot ensure that he will not commit similar crimes in the future if he does not fully understand and accept responsibility for his criminal conduct.”

The Governor also expressed concern about Ramirez’s parole plans: “Specifically, while Ramirez has developed some marketable skills, I am concerned that he has neither secured employment nor even presented any potential work opportunities

² In our description of Ramirez’s prison record above, we quoted the Governor’s lengthy recitation of Ramirez’s educational, vocational and self-help accomplishments.

in the community to which he plans to parole. Furthermore, given the role of alcohol in the commission of the life offense, I am also troubled by his failure to establish a relapse prevention plan to ensure his continued sobriety in the community. My concern is supported by his 2007 mental health evaluator's caveat that his overall 'low' risk assessment was 'partially based on the likelihood of continued abstinence of any substance abuse.'"

Habeas Corpus Proceedings

The superior court granted Ramirez's petition for writ of habeas corpus, concluding that the Governor's reversal of the Board's finding that Ramirez is suitable for parole "is not supported by some evidence in the record of [Ramirez]'s current risk of danger to society."

DISCUSSION

The Board's and the Governor's Discretion to Grant or Deny Parole

Penal Code section 3041 creates a cognizable liberty interest in parole, within the protection of the California Constitution's due process clause. (Cal. Const., art. I, § 7, subd. (a); *In re Lawrence* (2008) 44 Cal.4th 1181, 1205.) "The granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals *as soon as possible* and alleviate the cost of maintaining them in custodial facilities. [Citations.] Release on parole is said to be the rule, rather than the exception [citation], and the Board is required to set a release date unless it determines that 'the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration' [Citation.]" (*In re Vasquez* (2009) 170 Cal.App.4th 370, 379-380.)

Thus while the California Constitution affords the Governor discretion to review the Board's decision to grant parole to an inmate convicted of murder and sentenced to an indeterminate prison term (Cal. Const., art. V, § 8, subd. (b)), under the governing law, "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.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654.) The Governor’s discretion must be exercised upon the same criteria and standards that apply to the Board. (*Id.* at p. 660.)

The purpose of the Governor’s (and the Board’s) evaluation is “to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 655.) The specified criteria for the evaluation encompass “[a]ll relevant, reliable information” tending to show either that Ramirez is or is not suitable for parole. (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

The Governor’s decision must be based on the same evidence and materials that were before the Board, and it must be based on the same factors that the Board was required to consider in reaching its determination. (Pen. Code, § 3041.2, subd. (a); *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 659-661; *In re Hare* (2010) 189 Cal.App.4th 1278, 1289-1290.) Circumstances that indicate an inmate’s suitability for parole include the inmate’s lack of a significant history of violent crime, his stable social history, his recognition of remorse, that he committed the crime as a result of long-term stress factors or battered woman syndrome, that he is of an age that reduces the probability of recidivism, that he has marketable skills and realistic plans for employment upon release, and that during his incarceration he has engaged in institutional activities that indicate an enhanced ability to function within the law upon his release. (Cal. Code Regs., tit. 15, § 2402, subd. (d).) Circumstances that indicate an inmate’s unsuitability for parole would include that he committed the commitment offense in a particularly heinous, atrocious, or cruel manner; that he has a record of violence; that he has an unstable social history; that he has previously sexually assaulted another individual in a sadistic manner; that he has a lengthy history of severe mental problems related to the offense; and that he has engaged in serious misconduct in prison. (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

“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.” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

Judicial Review of the Governor’s Decision

In reviewing the decision of the Governor to deny parole, “the court’s review is limited to ascertaining whether there is some evidence in the record that supports the Governor’s decision,” based upon the factors specified by statute and regulation. (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 677.) “[A]s specified *by statute*, current dangerousness is the fundamental and overriding question for the Board and the Governor.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1213.) Thus, “the relevant inquiry is whether some evidence supports the *decision* of the . . . Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]” (*Id.* at p. 1212.)

Although this standard is deferential, it is not toothless. (*In re Lawrence, supra*, 44 Cal.4th at p. at p. 1210.) “[D]ue consideration’ of the specified factors 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.” (*Ibid.*)

Therefore if “*the decision’s consideration of the specified factors* is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner’s petition for writ of habeas corpus” (*In re Lawrence, supra*, 44 Cal.4th at p. 1210; *In re Rosenkrantz, supra*, 29 Cal.4th at p. 658.) Likewise, unless the specific factors on which the decision rests support the conclusion that the prisoner would pose a current threat to public safety if released, those factors can provide no support for the decision. (*In re Lawrence, supra*, 44 Cal.4th at pp. 1213-1214.)

Whether the Governor’s decision to reverse the Board’s decision and to deny parole to Ramirez meets these conditions is the review we undertake here. We examine

the factual grounds on which the Governor relied to deny parole to Ramirez in order to determine whether they are supported by some evidence in the record, and whether, if supported, they in turn support the conclusion that Ramirez continues to present an unreasonable risk of danger to society, rendering him unsuitable for parole. (*In re Lawrence, supra*, 44 Cal.4th at p. 1214.)

“A reviewing court independently reviews the record if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely upon documentary evidence” as occurred here. (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192.)

Grounds for Governor’s Denial of Parole

1. Commitment offense

One of the factors the Governor cited in reversing the Board’s grant of parole to Ramirez is the “gravity of the crime”—an offense that Ramirez committed more than 22 years before the January 2009 parole consideration hearing. The commitment offense in this case was one, “isolated incident,” and not part of a pattern of violent conduct occurring either pre- or post-incarceration. (See *In re Shaputis* (2008) 44 Cal.4th 1241, 1259 [the murder in this case “was the culmination of many years of petitioner’s violent and brutalizing behavior toward the victim, his children and his previous wife”]; *In re Ross* (2009) 170 Cal.App.4th 1490, 1507-1508 [petitioner’s threat to public safety was demonstrated by the commitment offense, in combination with his 11 criminal convictions prior to the murder, which included assault with a deadly weapon, battery and assault with an automobile, as well as his post-incarceration conduct which included threatening prison staff on two occasions].)

“[T]he 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 postincarceration 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 of the statutory determination of a continuing threat to public safety.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1214.)

2. Risk ratings in June 2007 psychological evaluation

In an attempt to show that the commitment offense is probative of Ramirez’s current dangerousness, the Governor cited the report from the June 2007 psychological evaluation. This report does not support the Governor’s conclusion that Ramirez poses an unreasonable risk to public safety. The evaluator’s conclusion was that Ramirez “poses a **low** likelihood to become involved in a violent offense if released to the free community.” Ramirez’s score on the HCR-20—“a measure that includes 20 risk factors for future violence”—“place[d] him in the **low** risk range for future violence.” Moreover, the report from the April 2007 evaluation includes the following conclusion: “If released to the community, [Ramirez’s] violence potential should be about the same as the average citizen’s violence potential.”

The Governor ignored Ramirez’s overall score on the HCR-20 and instead pointed to the result in one of the three domains of the HCR-20, the historical domain, in which Ramirez “present[ed] a moderate risk of future violence.” The evaluator clearly explained, however, that Ramirez’s score in this domain “is not amenable to significant change regardless of the number of years of his incarceration” because “the bulk of data contributing to this estimate is historical”—Ramirez’s illegal entry into the country, his criminal history, his association with the 18th Street gang and his alcohol and drug use. Thus, these immutable factors, which cannot be changed no matter how complete Ramirez’s rehabilitation might be, are not predictive of his current dangerousness.

The Governor also emphasized Ramirez’s score on the LS/CMI instrument. The evaluator’s entire discussion about the LS/CMI states: “The Level of Service/Case Management Inventory (LS/CMI) was utilized as an objective assessment in [sic] the inmate’s likelihood for general recidivism. . . . “The Level of Service/Case Management Inventory is an actuarial instrument designed to evaluate levels of risk to recidivate. The instrument is focused on risk of general recidivism and not violence per se. The inmate’s overall LS/CMI score indicates that he is in the **medium** category.” The evaluator did

not explain what factors were used to derive this score. It may well have been the aforementioned immutable factors which caused Ramirez's score to end up in the medium category. Nor did the evaluator explain the meaning of a score in the "medium category."

Without more information about the LS/CMI, we cannot find that Ramirez's score constitutes some evidence supporting the Governor's conclusion that Ramirez's "release would pose an unreasonable risk of danger to society at this time." We note that it appears from the overall favorable nature of the report that the evaluator was not concerned from a public safety standpoint about Ramirez's score on the LS/CMI. At the outset of his discussion about the various instruments he used, the evaluator explained: "[T]he following results need to be regarded with some level of caution since some individuals may possess idiographic differences that could limit the applicability of these instruments. The evaluator has taken these differences into consideration in determining how much weight to allot each of the measures and in formulating an overall estimate of risk for future violence in the community." His overall assessment of Ramirez was positive and does not support a conclusion that Ramirez is not suitable for parole.

3. Insight

As an additional reason for reversing the Board's grant of parole, the Governor stated that Ramirez "has not gained adequate insight into the circumstances of his offense." In support of his position, the Governor cited the evaluator's statement in the June 2007 report that Ramirez "appear[ed] to have only a superficial understanding of the underlying dynamics related to the violence that occurred in the crime." The evaluator stated this opinion as part of his discussion of the "clinical" domain of the HCR-20, a domain in which Ramirez scored in the low risk range for future violence. The evaluator did not elaborate on the reason he characterized Ramirez's understanding as "superficial." Earlier in the report, however, he noted that Ramirez "stated that he was unsure why he shot the victim."

Before the shooting, Ramirez and other gang members set out to retaliate for the stabbing of one of their associates by a rival gang member. They saw the victim and

confronted him. Ramirez did not know whether the victim belonged to the rival gang, but he shot him anyway. At the January 28, 2009 parole hearing, Ramirez explained that he had no valid reason to shoot the victim, so any reason he stated would be “senseless.” We find this to be an insightful response.

According to the Governor, “The mental health evaluator’s concern that Ramirez lacks insight into the circumstances leading to his life offense is concerning because Ramirez cannot ensure that he will not commit similar crimes in the future if he does not fully understand and accept responsibility for his criminal conduct.” The record does not support the Governor’s *concern*. The evaluator concluded that Ramirez “accepted full responsibility for his behavior in the [commitment] offense.” The Governor did not point to anything else in the record which indicated that Ramirez did not accept responsibility for the shooting. The record demonstrates that Ramirez addressed his issue with alcohol and refrained from participating in any gang activity in prison. Both alcohol use and association with gang members are factors which played a role in the shooting. Thus, it is not clear how the perceived lack of insight that the Governor described might lead to future violence.

This is not a case like *In re Shaputis, supra*, 44 Cal.4th at page 1260 where the petitioner’s lack of insight was demonstrated in the record and supported the Governor’s conclusion that he remained dangerous and unsuitable for parole. In that case, the petitioner continued to claim the shooting of his wife was an accident where the evidence demonstrated otherwise, and he “minimize[ed] his responsibility for the years of violence he inflicted on his family.” (*Id.* At p. 1260, fn. 18.)

4. Parole Plans

The Governor’s final ground for reversing the Board’s grant of parole to Ramirez is his concern that Ramirez’s “parole plans are not sufficient to ensure his success in the community.” The Governor referenced the June 2007 psychological report in which the evaluator found Ramirez’s parole plans to be appropriate and feasible but not well-defined.

As set forth above, Ramirez told the Board at the January 2009 hearing that he planned to live in Mexico City with his parents and work with his brother after his release. He presented letters of support from his parents and brother to this effect. (During the June 2007 psychological evaluation, Ramirez did not mention that he would work with his brother.) Ramirez also informed the Board that he intended to continue his participation in AA, which dated back to 1995. The Governor acknowledged that Ramirez had “maintained seemingly supportive relationships with family and friends despite his incarceration.”

In urging this court to reverse the superior court’s decision, the Attorney General does not reference Ramirez’s parole plans. She does not argue that there is anything about Ramirez’s parole plans which constitutes some evidence supporting the Governor’s decision. Accordingly, our discussion on this issue will be brief.

Suitability for parole is shown where the “prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.” (Cal. Code Regs., tit. 15, § 2281, subd. (d)(8).) Ramirez has done both, as evidenced by his letters of support from his family, and his long list of vocational accomplishments set forth above and in the Governor’s decision.

We conclude that the Governor’s decision that Ramirez poses a current threat to public safety is not supported by some evidence in the record.

Reinstatement of Board’s Decision

The Attorney General argues that we should remand the matter back to the Governor rather than affirm the trial court’s order and reinstate the Board’s decision. We disagree.

The Attorney General relies on the California Supreme Court’s decision in *In re Prather* (2010) 50 Cal.4th 238, 243, in which the Court “determine[d] the proper scope of an order directed to the [Board] when a reviewing court concludes that a decision to deny parole by the Board is not supported by ‘some evidence’ that a prisoner remains a current threat to public safety.” The Court discussed the conflict that had “emerged among the appellate courts” where some courts were “order[ing] the Board simply to hold a new

suitability hearing ‘in accordance with due process,’ [and] other courts [were] direct[ing] the Board to find the prisoner suitable for parole unless *new* evidence—that is, evidence that has emerged subsequent to the parole-suitability hearing under review—supports a determination that the prisoner remains currently dangerous.” (*Id.* At pp. 243-244.) The Supreme Court concluded that “a decision granting habeas corpus relief in these circumstances generally should direct the Board to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider.” (*Id.* at p. 244.) Such limitations infringe on the authority of the executive branch to make parole determinations, and therefore violate the separation of powers established by the Constitution. (*Id.* at p. 253.)

Here, we are not reviewing a decision of the Board denying parole, but a decision of the Governor reversing the Board’s decision to grant parole. *Prather* does not address the remedy required in this situation.

The Attorney General notes that “the ultimate discretionary decision of parole suitability remains with the executive branch.” She argues that a remedy which does not afford the Governor another opportunity to “consider all relevant and reliable information in the record, with consideration of the court’s order, in order to make the decision whether the inmate is suitable for parole” would “materially impair [the Governor’s] parole authority and thus violate principals [sic] of separation of powers.” We disagree. Because the trial court’s order in this case reinstated a decision of the Board—an institution of the executive branch—to grant parole, it does not infringe on executive branch authority over that determination, as discussed in *Prather*. (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1024.) By overturning the Governor’s veto of the Board’s decision to grant parole, “[t]he power of the executive branch is . . . not infringed, but respected.” (*Ibid.*)

In *In re McDonald, supra*, 189 Cal.App.4th 1008, 1023, the Court of Appeal concluded that remand to the Governor under the circumstances presented here is not the proper remedy. The court explained: “Unlike the Board, which has the obligation and

ability to take evidence, consistent with due process protections, the Governor cannot create an evidentiary record. A return to the Governor for reconsideration would therefore mean that the Governor could look again only at the record before him on initial consideration, the same record this court has reviewed. We have reviewed that record, and neither the Governor, nor the Board, has the authority to “disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record.” [Citation.] (*Id.* at p. 1024, quoting *In re Prather, supra*, 50 Cal.4th at p. 258.) The appellate court also explained that, “The Constitution provides for a single review by the Governor of a determination by the Board, and does not authorize repeated reviews of that single determination.” (*Id.* at p. 1024, citing Cal. Const., art. V, § 8, subd. (b).) The court in *McDonald* affirmed the trial court’s order reinstating the Board’s decision. Despite the Attorney General’s claims to the contrary, we conclude *McDonald* was correctly decided.

The Governor already has exercised his review of the Board’s decision as provided under the California Constitution, and remand to the Governor is not required. The Governor has stated his reasons for reversing the grant of parole to Ramirez and we have concluded that the Governor’s decision is not supported by some evidence in the record. The Governor may not now base his decision on new evidence that was not before the Board. As we discussed above, the Governor’s decision must be based on the same evidence and materials that were before the Board, and it must be based on the same factors that the Board was required to consider in reaching its determination. (Pen. Code, § 3041.2, subd. (a); *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 659-661; *In re Hare, supra*, 189 Cal.App.4th at pp. 1289-1290.)

Accordingly, we affirm the trial court’s order reinstating the Board’s decision to grant parole. Ramirez shall remain released from custody on parole. (*In re McDonald, supra*, 189 Cal.App.4th at p. 1025, fn. 4, 1026.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.