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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re RICHARD LEE SMITH on Habeas Corpus.	G039301 (Super. Ct. No. M-11470) O P I N I O N

Original proceeding; petition for a writ of habeas corpus to challenge an order of the Superior Court of Orange County, Kazuharu Makino, Judge. Petition denied in part and granted in part. Parole denial vacated. Matter remanded to Board of Parole Hearings.

Marilee Marshall & Associates and Marilee Marshall for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Heather Bushman and Amanda Lloyd, Deputy Attorneys General, for Respondent.

* * *

In 1986, petitioner Richard Lee Smith was convicted of second degree murder and was sentenced to a term of 17 years to life. Our court affirmed his conviction in 1988. (*People v. Smith* (Jul. 29, 1988, G004334) [nonpub. opn.].) He first became eligible for parole in 1995. At his fifth parole hearing on July 25, 2006, parole was denied.

Petitioner filed a petition for writ of habeas corpus in the Orange County Superior Court, which was denied. He then filed his petition here, alleging that the decision of the Board of Parole Hearings is unsupported by the record and that, therefore, it violates his rights under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

The Board of Parole Hearings is vested with the power to determine when a felon sentenced to life in prison can safely be released on parole. (Pen. Code, §§ 3040, 3041, 5077.) The scope of our review is limited. As both parties realize, "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . 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.) *In re Singler* (2008) 161 Cal.App.4th 281 suggests, however, that our "Supreme Court has endorsed subsequent Court of Appeal decisions that give courts greater leeway in reviewing the Board's determination that an inmate remains a danger to public safety." (*Id*. at p. 287.) And "the relevant test is not whether some evidence supports the reasons cited for denying parole, 'but whether some evidence indicates [an inmate's] release unreasonably endangers public safety.' [Citations.]" (*Id.* at p. 295, fn. omitted.)

Our review of the record fails to disclose evidence supporting a number of the board's findings. It is not clear that the board properly considered whether it is appropriate to continue to rely on the especially cruel manner in which the crime was

committed well over a decade after petitioner first became eligible for parole. And it is also unclear whether the board is concerned that petitioner, if released on parole, may cease taking his psychotropic drugs. Because we cannot determine that the board would have denied petitioner parole had it relied only on findings supported by substantial evidence, we must vacate the denial of parole and remand for the board to conduct a new parole suitability hearing. (*In re Roderick* (2007) 154 Cal.App.4th 242, 276-277.) The hearing shall be conducted no later than 60 days from the date this opinion becomes final. (See *id.* at p. 278.)

FACTUAL BACKGROUND

1. The Facts Described in Our 1988 Opinion

Our opinion affirming petitioner's conviction summarizes the events surrounding the crime as follows:

"At the time of the crime and for 12 years before, defendant was a philosophy professor at California State University Fullerton. He was viewed as intelligent and politically active. He also had a history of mental illness dating from 1967. He was hospitalized six times between 1967 and 1973, with diagnoses including acute paranoid schizophrenic reaction, chronic undifferentiated schizophrenia and chronic paranoid schizophrenia.

"In 1981 or 1982, defendant met Consuelo Matters, a student at the university. Consuelo was then married to Donald Matters. By late 1982 or 1983, defendant was in love with Consuelo. Over a period of several months, he gave considerable financial support to her and her children. He considered the relationship a very close one; she may not have so characterized it.

"Consuelo and her husband were separated in the summer of 1983.

"On April 30, 1984, while defendant's car was undergoing routine maintenance, defendant rented a blue Camaro from a car rental agency. He was dressed in conspicuously mismatched clothes.

"At about 1:30 a.m. on May 3, 1984, a man driving a Camaro and wearing a trench coat was seen taking the license plate from another Camaro. The stolen plate's number was 1ECX911. Defendant's alarm clock was later found to be set for 1:36 a.m.

"Donald Matters worked in construction and generally left for work at 5:30 a.m. On May 3, 1984, at 5:30 a.m., Donald and defendant were seen standing in the street talking. Defendant was wearing a tan car coat or trench coat. Fifteen to twenty minutes later, neighbors heard gunshots and screams. Three witnesses placed defendant or a man wearing a tan coat at the scene; one witness saw him holding a pistol. Defendant walked or ran to a late model Camaro whose license plate included the figures "1" and "E," and drove away.

"Defendant gave Consuelo her customary wake-up call between 7:00 a.m. and 8:00 a.m. that morning. She noticed nothing unusual in his manner.

"When questioned by police, defendant stated he had spent the night on campus studying, except for a trip home between 3:00 a.m. and 4:00 a.m. The campus security officer did not see a Camaro on campus that night or morning, nor did he see defendant during his hourly building checks.

"On May 11, after defendant was arrested, he was interviewed by a psychiatrist, Dr. Klatte. Defendant told Klatte that God had directed defendant and had taken defendant over in order to kill Donald. In a later interview with a court-appointed psychologist, defendant denied having killed Donald and said his previous statement had described a 'delusional memory.' In interviews with another psychiatrist, defendant seemed intermittently aware of having killed Donald.

"The gun used in the crime was never found; however, police found a gun cleaning rod in defendant's home.

"Defendant was charged with murder (Pen. Code, § 187), with an additional allegation of use of a firearm in the commission of the offense (Pen. Code, § 12022.5). He entered a plea of not guilty and later a plea of not guilty by reason of insanity." (*People v. Smith, supra,* G004334, at pp. 2-4.)

2. The Record of the Parole Hearing

Petitioner testified at the hearing and acknowledged the accuracy of the planning that went into the commission of the crime: "the rental car, the changing of the license plates, the hooded sweatshirt, [and] the trench coat." He had purchased the gun during his 1984 spring vacation, presumably some weeks before the May 3 murder. He waited for about 45 minutes for the victim to come out of his house, talked to him for several minutes in the middle of the street, then, after the two embraced, pulled out the gun and shot the victim three or four times. Thereafter, he disposed of the gun in a trash can, replaced his vehicle's license plates, and threw the stolen plates away. A month or so before the murder, petitioner had set the victim's car on fire. He stated that the victim's wife, who was in the middle of getting divorced, had asked him "to get rid of [the victim]." Petitioner had been paying her "at least a thousand dollars a month" and after the murder gave her all of his money.

Before the crime, petitioner had been hospitalized because of mental illness six times; four of these hospitalizations were voluntary. At the time he committed the murder, petitioner was not taking medication, none had been prescribed, and he had not been under the care of a psychiatrist for some time.

Petitioner testified that at the time of the crime, he was not married but in 1987 he remarried the wife whom he had divorced in 1980; he was still married. If granted parole, he would reside with her. The panel received a letter from petitioner's wife, a special education teacher, in support of his being granted parole. The letter noted that the couple never had "any domestic disputes or anything remotely close to domestic

violence." Petitioner receives approximately $1,200 per month from Social Security and additional benefits through PERS.

Dr. Laura Petracek, who conducted a psychological evaluation, reported that petitioner suffered from schizophrenia, paranoid type. Her report stated that the conditions were in remission with "psychotropic medications in a controlled environment." It noted: "The only factors that appear to predict an increased risk of dangerousness are the nature of his crime and the presence of severe Axis I mental disorder. Overall, it is my impression and opinion that his risk for violence among his peers in a Level Two facility is much lower than average. His risk for violence in an uncontrolled community setting would be below average as long as he was under psychiatric treatment, but unpredictable if off medication and under stress." Among Petracek's clinical observations, she noted: "My conclusion in this matter is that this inmate appears to be a better than average candidate for parole based on the information obtained in this assessment, but with the strict provision that he continue in mandatory psychiatric treatment for the foreseeable future."

The board denied parole.

DISCUSSION

1. Our Standard of Review

"A defendant sentenced to an indeterminate life term is normally entitled to parole if the Board of Parole Hearings finds he does not pose an unreasonable risk to public safety. (Pen. Code, § 3041, subd. (a)). California Code of Regulations, title 15, section 2402 establishes the 'general guidelines' for determining whether a defendant poses such a danger. Section 2402 sorts the factors relevant to assessing a defendant's risk into two categories: those that tend to show *unsuitability* for parole, such as an especially atrocious crime by the defendant and a history of violence; and those factors

that tend to show *suitability,* such as lack of a criminal history, good prison behavior, and remorse." (*In re Lee* (2006) 143 Cal.App.4th 1400, 1405-1406, fn. omitted.) Thus our inquiry is whether there was some evidence supporting the board's determination that petitioner would pose an unreasonable risk to public safety if parole were granted.

2. Standard to Be Applied By the Board

While the "some evidence" rule governs our review on appeal, the preponderance of evidence standard applies to the board's determinations. (*In re Tripp* (2007) 150 Cal.App.4th 306, 312 [prisoner's unsuitability for parole must be established by a preponderance of the evidence]; see Evid. Code, § 115.) The applicable statutes and regulations create a presumption in favor of parole, unless "public safety requires a lengthier period of incarceration . . . ." (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 654; accord, Pen. Code, § 3041, subds. (a) & (b); Cal. Code Regs., tit. 15, § 2401.) Given the Legislature's conclusion prisoners who have served their minimum parole-eligibility terms are "normally" entitled to a parole date absent an unreasonable risk to public safety (Pen. Code, § 3041, subd. (a)), the burden rests on the board to ascertain that evidence demonstrating a prisoner's unsuitability preponderates over the parole presumption and factors suggesting suitability.

"'Preponderance of the evidence' is usually defined in terms of 'probability of truth.' [Citation.]" (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482-483.) In other words, the evidence must, "'when weighed with that opposed to it, ha[ve] more convincing force and the greater probability of truth.' [Citation.]" (*Id*. at p. 483.) Inferences drawn from facts may support the conclusion a prisoner poses an unreasonable danger to the public if paroled, but the nature of the preponderance standard requires more than a mere possibility of dangerousness. Instead, under the preponderance standard, the inferences favorable to a particular conclusion must be "*more reasonable or probable* than those against [it]. [Citations.]" (*Ibid.*) "[T]o constitute an inference, the

conclusion must to some degree reasonably and logically follow from the preliminary facts. If, upon proof of the preliminary facts, the conclusion is mere guesswork, then we refer to it by such words as speculation, conjecture, surmise, suspicion, and the like; and it cannot rise to the dignity of an inference. [Citation.]" (*People v. Massie* (2006) 142 Cal.App.4th 365, 374.) In short, to be legally adequate, an inference must be '"drawn from evidence rather than . . . mere speculation as to probabilities without evidence.'" (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 45.)

3. Panel's Stated Reasons For Its Ruling

The panel decided petitioner was "not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison." In its detailed ruling, the board noted it considered many factors in denying parole. The presiding commissioner Garner explained the board's reasoning as being based on the following factors, which we present in the order noted by Garner: (1) the commitment offense "was carried out in an especially cruel and callous manner"; (2) petitioner did not have a record as a juvenile or as an adult; (3) his "institutional behavior . . . has been fine"; (4) he "managed to do independent studies in the unavailability of the formal programs"; (5) the psychological report "is generally favorable, although it does note the need for lifelong medications"; (6) parole plans were acceptable and disclosed that petitioner would be able to support himself; (7) "there is no way that the panel can compel a parolee to medicate, and . . . parole is a five-year period, it's not a lifelong parole"; (8) petitioner "need[s] therapy in order to face, discuss and understand and cope with stress in a non-destructive manner"; and (9) petitioner lacked remorse.

Findings two, three, four, and six obviously would support a grant of parole. We therefore examine whether any facts support the panel's remaining findings.

4. Factual Basis for Denial of Parole

The evidence does support the panel's finding that the commitment offense "was carried out in an especially cruel and callous manner." We will discuss below why this, by itself, may be insufficient to support the denial of parole. We are left with (1) the need for lifelong medications, (2) the panel cannot compel petitioner to medicate, (3) petitioner needs therapy to cope with stress, and (4) petitioner lacks remorse. The record does not contain any evidence supporting the last two of these findings. All the evidence is to the contrary.

a. The Need for Therapy

As to the need for therapy, the prison psychologist who evaluated Smith for his most recent parole hearing concluded: "He has developed an understanding of his susceptibility to relationship-related stressors and appears to have a steady and stable relationship with his wife, with whom he has been for many years prior to and during incarceration. There appears little more that can be done psychologically for this inmate while he is confined. It is my opinion that if parole is denied, it should be based on issues other than those psychological in nature."

Nothing in Smith's prison history suggested stress management posed a problem for him. The psychologist identified pre-incarceration "work-related stress and the breakdown of relationships with women" as stressors "precipitating" and "exacerbating" pre-prison psychotic episodes. But no evidence suggested a likelihood either of these flashpoints would recur.

Employment-related stress would not be a factor because the panel excused Smith from employment verification based on his eligibility for Social Security benefits and his PERS pension. And, in 1987, three years after the commitment offense and early in his incarceration, Smith remarried his wife and the record reflects this relationship, far from a source of stress, proved "a major support" for Smith over the next 20 years.

Commission of a crime resulting from "significant stress in his life, especially if the stress had built over a long period of time," is a factor in favor of parole, not against it. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(4).) The rule presumes such stress is an anomaly. Because the board's mandate is to assess future dangerousness (Pen. Code, § 3041, subd. (a)), there is no reason to deny parole if the commitment offense culminates """'a long, entangled, emotional event the likes of which [is] not likely to ever be duplicated again especially after all the positive gains this inmate has made.'""" (*In re Burdan* (2008) 161 Cal.App.4th 14, 27.)

b. Lack of Remorse

As to the alleged lack of remorse, the record is also to the contrary. Petracek's report notes that petitioner "is able to express remorse and accepts responsibility for his crime . . . ." In response to a deputy district attorney participating in the hearing suggesting that petitioner failed to show remorse, petitioner testified: "Of course I do [feel remorse], and I've written letters to the judge and to the district attorney's office expressing apologies and remorse. There's no amount of remorse that can make up for taking a life. It's -- it's impossible. . . . I have grief, I have guilt, I have sorrow, I have shame. . . . I still can't believe that I did this, this poor man and his children and his family and all this grief and sorrow that I've caused. I do works of penance, even make small monetary contributions, but there's nothing anybody can ever do to make up for the loss of a life. The remorse is there, but its not going to - - it doesn't make it up. It doesn't . . . ."

There was no evidence to contradict either the psychologist or petitioner with respect to petitioner's remorse for the crime.

c. The Immutable Facts

We are left with the nature of the crime and petitioner's need for continued medication as bases for the denial of parole.

(1) The Nature of the Crime

The board's conclusion petitioner committed the offense in a "cruel and callous" manner is supported by the evidence. But as the court stated in *In re Burdan, supra,* 161 Cal.App.4th at p. 28, "the relevant test is not whether some evidence supports the reasons cited for denying parole, 'but whether some evidence indicates a parolee's release unreasonably endangers public safety.' [Citations.]" (Citing *In re Lee*, *supra*, 143 Cal.App.4th at p. 1408; see also *In re Tripp, supra,* 150 Cal.App.4th at p. 313.) In *Rosenkrantz* our high court stated that "'[t]he Board's authority to make an exception [to the requirement of setting a parole date] based on the gravity of a life term inmate's . . . past offense should not operate so as to swallow the rule that parole is "normally" to be granted. Otherwise, the Board's case-by-case ruling would destroy the proportionality contemplated by Penal Code section 3041, subdivision (a), and also by the murder statutes, which provide distinct terms of life without possibility of parole, 25 years to life, and 15 years to life for various degrees and kinds of murder. [Citation.]'" (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 683.)

Cruel or callous criminal conduct reveals a deliberate disregard or indifference, at the time of the offense, for the security and dignity of others that may warrant an inference of future dangerousness, to the degree the offender's emotional calcification persists. The question whether there may come a point after a lengthy period of incarceration at which the gravity of the prisoner's commitment offense may be insufficient to deny parole is pending before our Supreme Court. (*In re Lawrence* (2007) 150 Cal.App.4th 1511, review granted Sept. 19, 2007, S154018.) We have no doubt denial of parole based solely on the unchanging factor of the nature of the crime violates

a defendant's right to due process, absent an individualized assessment of his or her present dangerousness.

We agree with the observation that a "parole board's sole supportable reliance on the gravity of the offense and conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. Over time, however, should [the inmate] continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of the [commitment] offense and prior conduct would raise serious questions involving his liberty interest in parole. [¶] . . . A continued reliance in the future on an unchanging factor, . . . conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." (*Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 916-917; see also *In re Barker* (2007) 151 Cal.App.4th 346, 374 ['"Given the lapse of 2[9] years and the exemplary rehabilitative gains made by [Barker] over that time, continued reliance on the aggravating facts of the crime no longer amount[s] to "some evidence" supporting denial of parole'"]; *In re Elkins* (2006) 144 Cal.App.4th 475, 498-499 ["Reliance on an immutable factor, without regard to or consideration of subsequent circumstances, may be unfair, run contrary to the rehabilitative goals espoused by the prison system, and result in a due process violation"; *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846, 854 ["We hope that the Board will come to recognize that in some cases, indefinite detention based solely on an inmate's commitment offense, regardless of the extent o his rehabilitation, will at some point violate due process, given the liberty interest that flows from the relevant California stautes"].)

Here, the board did not decide the callousness petitioner displayed in his commitment offense demonstrated a continuing, present dangerousness that outweighed all other factors. Rather, the board merely recited that the commitment offense was "cruel and callous" and included this factor as one among others in denying parole,

including a need for continued therapy and petitioner's lack of remorse. As noted, these latter factors find no support in the record. A decision denying parole "'cannot stand' when findings on important factors lack evidentiary support and it is not clear that the Board would have reached the same conclusion" based solely on other factors. (*In re DeLuna* (2005) 126 Cal.App.4th 585, 598; *In re Roderick*, *supra*, 154 Cal.App.4th at p. 276.) Accordingly, we vacate the board's decision denying parole and remand for a new hearing in which the board must assess whether petitioner poses a present danger upon release in light of his remorse, his "graduation" from therapy, and all other relevant factors, including the nature and gravity of his commitment offense, his age, the passage of time and, as we discuss in the next section, his need for medication.

(2) The Need for Psychotropic Medicine

This leaves us with the final basis stated by the board in support of the denial of parole: the danger that petitioner may cease to take his psychotropic medicine. The board observed "that there is no way the panel can compel a parolee to medicate, and that parole is a five-year period, it's not a lifelong parole." The upshot of the panel's rationale is that no prisoner requiring medication could ever be paroled, swallowing the presumption in favor of parole without regard to the question the panel is charged to evaluate: *this* prisoner's future dangerousness. The necessity of lifelong medication presents a legitimate concern in the abstract. But due process requires an "individualized consideration" of the prisoner's prospects on parole. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.) And, as discussed, the burden rests on the parole board to ascertain that evidence of dangerousness preponderates over other factors before the board may deny parole. The mere possibility an inmate may fail to medicate is insufficient. Consequently, we are remanding the case to the board so that the panel can reach an evidence-based conclusion on remand concerning the likelihood petitioner will abandon his medication regimen.

DISPOSITION

The board's decision denying petitioner parole is vacated. We deny petitioner's request for an order directing the board to set a parole date. The matter is remanded to the board to conduct a new parole suitability hearing consistent with this opinion. The hearing shall be held no later than 60 days after the date this opinion becomes final.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.