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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOHN L. BATIE on Habeas Corpus.	D055167 (Super. Ct. No. CR53556)

Petition for writ of habeas corpus following the Governor's reversal of a grant of parole and motion to amend petition. Motion and petition denied.

In 1981 a jury convicted John L. Batie of second degree murder with the personal use of a firearm and the trial court sentenced him to prison for 17 years to life.[1] Batie, now 54 years old, became eligible for parole in 1990. At a hearing in 2007, the Board of

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1 The documents submitted to the Board, to the Governor and to the various courts that have reviewed this matter, including this court, refer to Batie also as "Baitie." Any references to Baitie in documents used in this opinion will thus necessarily refer to the petitioner Batie.

Parole Hearings (the Board) found Batie suitable for parole for the third time.[2] However, the Governor reversed the Board's decision on February 7, 2008, finding Batie's release "would pose an unreasonable risk of danger to society at this time. . . ."

After the Supreme Court and trial court denied Batie's pro per requests for habeas relief, Batie filed the present petition for writ of habeas corpus, challenging the Governor's 2008 decision as violative of his due process rights on grounds the Governor impermissibly relied upon the immutable factors of the aggravated nature of his life crime, his criminal history and his institutional misconduct to reverse the Board's 2007 decision finding him suitable for parole. We issued an order to show cause (OSC) why the relief requested should not be granted and ordered counsel be appointed for Batie. Appointed counsel subsequently filed a supplemental petition additionally claiming the Governor erred by failing to state a nexus to Batie's current unreasonable threat to public safety, Batie was subjected to the executive branch's policy of rarely granting parole, and the Governor's decision violated ex post facto principles, the separation of powers doctrine, and the Eighth Amendment prohibition against cruel and/or unusual punishment.

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[2] The Board previously found Batie suitable for parole at a hearing in 2002, but then Governor Gray Davis reversed the Board's decision. At another hearing in 2004, the Board again found Batie suitable for parole, but Governor Arnold Schwarzenegger (the Governor) reversed that decision. We grant the Attorney General's opposed request to take judicial notice of the fact that we denied Batie's petitions for writ of habeas corpus, in case numbers D049411 and D058150, challenging the Governor's 2005 reversal of the Board's 2004 suitability for parole decision. (Evid. Code, §§ 452, subd. (d), 459, subds. (a), (c).) We presume the Attorney General's reference in his return to this latter proceeding as the same as the 2007 parole proceeding before us was inadvertent.

Counsel also challenges Batie's subsequent 2009 parole proceedings, where the Governor on July 3, 2009 has again reversed the February 2009 Board's decision to grant parole, based on the same grounds as above and further claimed that the Board's 2009 decision granting parole improperly added two years to his base term of confinement for the firearm-use enhancement that was already served as part of his sentence when the Board set his parole release date. Because the Attorney General declined to address these additional issues in his return to the OSC as not being cognizable on Batie's habeas corpus review of the 2007 proceedings that culminated in the Governor's reversal in 2008 of the Board's decision finding Batie suitable for parole, Batie's counsel filed a motion for an order requiring the Attorney General to file a supplemental return to address Batie's challenges to the Governor's reversal of the Board's 2009 parole grant. We ordered the motion to be considered concurrently with this petition for habeas relief. Batie subsequently filed a combined denial and traverse.[3]

With regard to Batie's motion, which we construe as essentially one to amend the initial petition to also challenge the separate 2009 parole proceedings, we deny. Although we take judicial notice of the fact of those proceedings and their results, we decline to expand the subject matter of the current habeas proceeding to include challenges to a separate parole decision made by different parole authorities which would more properly be brought in the first instance before the superior court. (See Cal. Rules

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[3] Contrary to the Attorney General's assumptions in the Return that Batie is also challenging his pre-2007 parole proceedings, Batie's counsel has clarified in the Traverse that Batie is not challenging those earlier proceedings.

of Court, rule 8.385, subd. (c)(2); *In re Rosenkrantz* (2002) 29 Cal.4th 616, 669 (*Rosenkrantz*).)

As to this proceeding, we conclude the record contains "some evidence" to support the Governor's ultimate conclusion that Batie was unsuitable for parole because he currently posed an unreasonable risk to public safety. Accordingly, we deny Batie habeas relief.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Commitment Offense

For purposes of the parole suitability hearing, the Board summarized the basic facts of Batie's life offense from both our earlier appellate decision filed July 30, 1982, and from the summary of the crime in the Board Report dated 2003. The appellate opinion on page two related that:

> "At 9:30 p.m. on Friday, February 13th, 1981, Officer Alan Nunez was on patrol in the Linda Vista section of San Diego, when he heard a gun blast. He arrived at the shooting scene to find James Simmons lying on the ground. The officer attempted to stop the bleeding, and started cardiopulmonary resuscitation. Despite his efforts, Simmons died. The officer checked the crime scene and found no weapons. Earlier in the evening, Baitie and Simmons had quarreled concerning money. The quarrel became a fistfight. After the fight between Baitie and Simmons, Baitie left and returned with a tire iron. There was no confrontation at this time, and Baitie left. He returned between five and thirty minutes later, and addressed Simmons twice, saying, 'All right, come out, James. I'm ready to fight now.' The second time he spoke, Simmons stood up. Baitie fired two shots, and Simmons fell. Simmons was not armed, nor had he made any movement toward Baitie, who was 15 to 25 feet away when he fired. Baitie remained a moment, then turned and ran."

The Board then noted the summary in 2003 said that:

> "Police officers were notified on February 13th, 1981 at approximately 2130 hours of a shooting at Ideal Liquor Store. Upon arrival, officers observed the victim lying face-down in the parking lot with two bullet wounds. Witnesses told police officers the defendant had been in an altercation with the victim shortly before the shooting. The altercation was the result of an argument over money that Baitie owed Simmons. Simmons then threw a bottle at Baitie, striking him on the side of the head. Baitie left and returned with a tire iron, but was restrained by witnesses. Baitie then left a second time, and returned with a handgun and shot Simmons."

When Batie was arrested several hours later, a search revealed a hypodermic syringe in his sock and subsequent testing revealed Batie had been using cocaine. In an interrogation at the police station, Batie told the police officers Simmons had been drunk, was bullying him, had called him a "sissy," and had cut his (Batie's) hand when he slammed a beer bottle against his head. Batie also said that during the fight Simmons had taken some money from him and he had left and returned with a gun with the intention of "pistol-whipping" Simmons to get the money back. He shot Simmons when he came at him with a knife because he felt Simmons was going to stab him.

Following jury trial, Batie was convicted of second degree murder with the use of a firearm. Batie told the probation officer before sentencing that during the fight with Simmons he had left after the bottle throwing and had retrieved a crowbar from the back of the liquor store before confronting Simmons again in front of the store who also had a crowbar and knife and told Batie he was going to stab and kill him. During the fight, Batie lost "a couple of dollars" and then obtained the gun with the intention of making Simmons give him back his money. However, when Simmons lunged at him with a knife, Batie thought his life was in danger and shot down toward the ground, hitting

Simmons when he fell. Batie claimed he did not intend to kill anyone, did not shoot to kill Simmons, and only ran because Simmons's companion "was coming at him."

The trial court sentenced Batie to prison for a total of 17 years, consisting of an indeterminate term of 15 years to life for the second degree murder and a two-year enhancement for the firearm use.

B. Batie's Criminal History and Postconviction Conduct

When Batie entered prison, he was 25 years old and had an extensive prior criminal record, both as a juvenile and as an adult. At the ages of 13 and 14, Batie had been made a ward of the juvenile court because he had committed several batteries, one by beating a younger retarded boy and another by being involved in a strong-armed robbery. At the ages of 16 and 17, Batie had attempted to shoplift men's clothing from a store, had stolen a car from a dealership and while driving away had collided with another car, had looted a liquor store, and had committed a car burglary.

As an adult, Batie had been convicted of attempted burglary in 1973 and burglary in 1978 of various businesses and had served time for those offenses. He had also committed misdemeanor offenses in 1974 for altering identification items, in 1975 for shoplifting/petty theft, in 1977 for uttering offensive words, and in 1980 for urinating in public. In January 1981, Batie had again been convicted of burglary and failed to appear for his sentencing and revocation of probation hearings the same day he shot and killed Simmons.

Batie's early years in prison were marked by disciplinary problems. Between 1982 and 1994, he received six "115's," the most serious of which involved force and violence in

1987, and 12 "128's" or minor incidents of misconduct, the latest in 1997.[4] Batie has remained free of serious disciplinary issues since that time.

Batie's conduct in prison from 1997 to the present has been commendable. In addition to his good disciplinary record, Batie has participated in numerous self-help and therapy programs, including Alcoholics Anonymous (AA), Narcotics Anonymous (NA), Substance Abuse Therapy Group, Millati Islami, a nationally recognized Islamic oriented addiction recovery program, How to be a Father and Anger Management Course, Interfaith-based anger management course, individual therapy and participation in Arts & Corrections, specifically the CTF music program and the annual Children's Christmas Festival. He has received favorable reports from various correctional professionals and prison staff over the years and has maintained supportive relationships with family and others.

In addition, Batie completed his high school equivalency, received optical training and vocational certifications in machine shop and small engine repair, and had held various institutional jobs as a clerk in the chaplain's office, in the library for four years and in the canteen.

Before his 2007 review hearing, Batie had contacted various employment resource programs regarding future employment, and if released from prison, had made plans to live with his mother in San Diego and accept a job offer to trim trees with a friend of his family's in his landscaping business.

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4 A CDC Form "115" documents misconduct believed to be a violation of law that is not minor in nature, while a CDC Form "128" documents incidents of minor misconduct. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

C. The Present Proceedings

1. Suitability Hearing

At Batie's September 24, 2007 suitability hearing before the Board, it was noted his minimum parole eligibility date was July 5, 1990, this was the tenth hearing since that time and he had two earlier hearings before the Board that had been grants, but those had been reversed. After the Board read into the record the summary of facts from the appellate opinion and summary in the 2003 Board Report, it asked Batie to explain in his own words what had happened then.

Batie's version of the commitment offense more or less tracked what he had related at the time of the crime, that he and a companion had gotten into an altercation over money with Simmons and his companion who were both drunk. Batie explained in more depth, however, that the original conflict had been between him and Simmons's companion who advanced on him and picked up some money that dropped out of Batie's pocket while Batie's companion was physically fighting with Simmons. It was during this fight that Simmons tried to hit Batie's companion with a bottle, but it hit Batie in the head instead. When Batie ran into the liquor store bleeding, Simmons and his companion went across the street by their car. When Batie came out of the store, Simmons told him to get out of there because he was going to get him. They exchanged words and that is when Batie went "around the side and got a tire iron. I came back around, and we met in half the street, but he had a tire iron and a knife, so that was [what] stopped it. I wasn't subdued by nobody. Nobody subdued me, nobody stopped me. What stopped me was the knife and the weapon he had, even though I had a tire iron also." Batie said that is

when he went behind the liquor store, got the gun and came back, confronting first Simmons's companion for the money and then when Simmons came over threatening him with a knife, Batie backed up, panicked, "went into [his] shirt [for the gun] and shot him twice." Batie then dropped the gun and ran.

In response to questions from the Board, Batie denied owing Simmons money, agreed the whole fight was "a big mess," and denied it was his intention to shoot anybody even though he left and retrieved the gun. He did so to scare Simmons and his companion. Batie stated "[i]f [Simmons] wouldn't have came out at me, I probably wouldn't have took the gun out and, I don't know what would have happened. It was my intention that I wasn't going to shoot anybody; it was to scare them, you know, until the confrontation with [Simmons] happened." Batie also said Simmons had grabbed him with his hand not holding the knife as he was backing away from him and that he "shot down . . . in the thigh, and when [he shot the second time, Simmons had] moved over and another shot went into his thigh."

After then reviewing his prior juvenile and adult record before prison, and noting he also had been arrested for possessing marijuana in 1974 and trespassing in 1979, the Board looked at Batie's social history, confirming his birth date, current age of 52 years, his siblings, his parent's separation and the fact that he began "acting out" after his father died when he was 11 or 12 years old. Batie explained that back then he hung out on the street in his neighborhood with "the wrong crowd." He dropped out of school in the tenth grade, married at the age of 20, divorced five years later after having one child, who was now 31 years old. Batie had an ongoing relationship with his daughter through

correspondence, was very close to his brothers and sisters, including the three brothers who live in San Diego, and was in constant contact with his mother who also lived in San Diego. Batie additionally corresponded with a friend he grew up with who was a retired Marine and who had offered assistance to Batie when he gets out of prison.

Batie, who had been an auto machinist before the life crime, next discussed that job experience, his recreational drug and alcohol usage, noting he no longer touched either, and his "backsliding" after his divorce and before he got to prison where he finally grew up. The Board then switched to Batie's postconviction time in prison, noting his last parole hearing had been April 3, 2006, at which time he had received a one-year denial with the Board asking him "to stay disciplinary free, earn positive chronos and participate in self-help [programs]." Batie thereafter discussed with the Board his various clerk positions at the prison, his glowing work reports, his vocational certifications, and his 1994 disciplinary violation for "ownership of how to make PCP," which he explained he took responsibility for because it was found in a search of his cell even though it belonged to his cellmate.

The Board noted that since the last review period Batie had completed an 18-week seminar he had already taken before on "How to Become a Sober Father and Not Get Angry." Batie took it again as a facilitator because there was no other self-help group open for him and it helped him deal with frustrations, which he believed were the reasons for most of his actions; through the course he learned to stop and rethink what he was doing. Batie had also continued to participate in AA and NA meetings, which he had been active in for about five years. He had also taken a Muslim Development Center

seminar for leadership training, which emphasized controlling anger, with the purpose of getting involved in community work with today's youth. Although Batie did not believe he always had an anger problem, through the classes he had come to recognize that some anger was involved in "getting that gun."

The Board also considered Batie's latest psychological evaluation, dated August 20, 2007, by Richard Starrett, Ph.D., noting Batie's poly-substance abuse was in "controlled environment remission," he had an "antisocial personality disorder by history," his "dangerousness level was slightly less than average compared to other inmates" in January 2006, his violence potential was likely no higher than that of the average citizen in the community in August 2004, and in August 2001 his potential for violence was "significantly below average." As for Batie's overall risk assessment, the report stated, "[t]he inmate's level of psychopathy . . . is in the low range. The inmate's overall propensity for violence is in the low/moderate to low range when compared to similar inmates. The inmate's general recidivism is rated in the medium range." Dr. Starrett noted that scores on these tests were limited in range for someone like Batie "who has an extensive history of early antisocial behavior" because the static factors could not be lessened even if the person's values had changed or how much time had passed.

As to Batie's exploration of the commitment offense, Dr. Starrett commented that he had identified factors associated with Batie's past involvement in criminal and addictive behavior that were attractive to him concerning the life offense. Batie had been drinking, was angry about the situation, and had overreacted to the older male. Starrett opined it was "unlikely that a requirement for further exploration of the instant offense

will produce more significant behavioral changes of a positive [or] pro-social nature in the inmate."

When questioned about his parole plans, Batie said he would live with his mother in San Diego and work for a friend of a friend's landscaping business while he sought work in an area for which he was trained. The Board had letters from his mother and the owner of the landscaping business supporting Batie's living and work arrangements if released on parole, as well as numerous other supportive letters concerning his release.

When asked about the victim, Batie said he had known of Simmons, he was not an enemy, he was a human being and "it was a tragedy for him to lose his life, and basically over nothing, you know." Batie had to live "day in and day out, you know, a man losing his life." Batie had apologized to Simmons's daughter at a Board hearing in 1998, for having to grow up without a father. After seeing her at the hearing, Batie started feeling bad about having "took her father," as he always had, being sorry that did happen and wishing he could have just walked away from that.

When the deputy district attorney asked Batie if he thought anger contributed to the life offense and what he had done to prevent such a recurrence from happening, as far as his anger, Batie replied that is why he went to anger management groups and learned to weigh things out and about ways to diffuse anger so he could just walk away if he could not diffuse it. Batie had used such principles in prison when situations arose and it worked.

When Batie's counsel asked him whether his remorse would be any different if the People's rendition of facts were true rather than his own version, Batie said, "no, it would

be the same, my remorse." Batie explained that he would still have the remorse and be sorry and that he felt bad and lived every day with that. Every day he also tried to find a way to help people and to "give back" because he knew he "took a man's life."

When the Board then inquired how Batie would prevent himself from being in a position "where [he felt] like [he was] going to have to act out as [he has] in the past when it comes to [his] economic situation," Batie responded he would not "live in that lifestyle," he had grown up, had gotten older, and his earlier crimes were not really for the money but "just the anger and the ego that caused that. . . ." He had confronted Simmons and would not put himself in such a situation again because he had a whole new way of looking at the world, people's circumstances and of handling things.

Before closing statements, the Board noted that, in addition to opposition from the San Diego District Attorney's office, it also had opposition to Batie's parole release from the San Diego Police Department based on Batie's "adult life filled with criminal activity, capped by a vicious murder." In Batie's final comments to the Board, he asked to be given a chance because he had become a different person, had made changes through all his classes, groups and therapy and now looked at the world differently, basically through remorse and disgust for how he had been before.

2. The Board's Decision

Based on the totality of the record, the Board concluded that Batie was "suitable for parole . . . [a]nd would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." The Board explained that with regard to the life offense, even though there were differences in the descriptions of that offense, Simmons

was dead and Batie did not claim self-defense at the hearing, but rather acknowledged he had "pushed the boundaries of [his] actions, and did not stop." The Board did not find the commitment offense to be an egregious event, but only "a misunderstanding," where "[b]oth sides aggravated the issues [and u]nfortunately, [Batie was] the stupid one." The Board did not feel that Batie had tried to excuse his behavior, that he had gained insight into the situation so that he now knew ways to stop such behavior, and that he showed "the appropriate remorse."

The Board explained that its decision was also supported by the circumstances that Batie now had a stable family and social history even though he did not start out with one, that he had enhanced his ability to function within the law upon release through postconviction work and participation in education, self-help and treatment programs, that he had matured and grown with greater understanding, which was supported by the psychological evaluation, and that he had realistic parole plans.

The Board further noted Batie had maintained positive institutional behavior for over 12 years, his last act of violence was in 1987 when he received a "115" for punching another inmate in the face, and he had "continued to move forward even though [he] faced adversity when it comes to the reversals of grants [of parole], and [he had not] let it get [him] down. . . ." The Board also specifically noted that both reversals by the Governor, Davis in 2003 of a 2002 grant of parole, and Schwarzenegger in 2005 of a 2004 parole grant, had raised the issue regarding anger and the fact Batie had not taken sufficient anger management classes at those times. The Board found that Batie had now

sufficiently addressed the issue of anger because he had taken four anger management classes since 2002, three of which were within the last year.

The Board then set Batie's parole release date, imposed conditions for his release, and reminded Batie that the Governor would have the last say as to whether he would be released on parole.

3. The Governor's Reversal

On February 7, 2008, after considering the "very same factors the Board must consider," the Governor reversed the Board's decision. After summarizing the offense from the probation report, and acknowledging Batie's "creditable gains" in his almost 27 years in prison, i.e., his participation in educational programs, vocational training, institutional jobs, self-help, therapy and extracurricular activities, as well as having "seemingly solid relationships and close ties with supportive family and friends," some positive evaluations from various mental health and correctional professionals over the years and realistic parole plans, the Governor concluded Batie still posed an unreasonable risk of danger to society if released based on "the gravity of the murder perpetrated by Mr. Baitie, along with his criminal record and his record of prison misconduct [which] presently outweigh the positive factors." The Governor specifically stated with regard to these reasons that:

> "Despite the positive factors I considered, the second-degree murder for which Mr. Baitie was convicted was especially atrocious because there is evidence in the record before me that he premeditated on some level to kill Mr. Simmons. Indeed, the sentencing judge said, 'not only is [murder in] the 2nd degree clear, but I think in my mind the 1st degree was very clear . . . . ' According to the Court of Appeal opinion, between 5 and 30 minutes passed from the time Mr.

Baitie first argued and fought with Mr. Simmons to the time Mr. Baitie shot him. Mr. Baitie had a sufficient amount of time to cool off, and left the scene twice. But he returned each time with a different weapon. He first returned with a tire iron, but he was prevented from attacking Mr. Simmons. According to his probation report, he then left saying that he would 'get' Mr. Simmons, and that Mr. Simmons 'better not be there when he got back.' Mr. Baitie retrieved a gun and returned to the parking lot. He called to Mr. Simmons to come out, saying they would fight, but then shot Mr. Simmons twice, killing him. The gravity of the second-degree murder perpetrated by Mr. Baitie would alone be sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety risk. The San Diego County District Attorney's Office and the San Diego Police Department agree, registering opposition to parole with the 2007 Board based, in part, on the gravity of the offense. But other facts also support my decision.

"Although Mr. Baitie says he accepts responsibility for this actions and is remorseful, he told the 2007 Board he did not intend to kill Mr. Simmons, and that he only planned to use the gun to scare Mr. Simmons and his companion. Mr. Baitie further claimed, according to the probation report, that Mr. Simmons came toward him with a knife, ignored a warning to halt, and then grabbed him, at which point Mr. Baitie panicked and fired the gun. I do not accept Mr. Baitie's version of events. As I noted in my 2005 decision, the Court of Appeal opinion stated that Mr. Simmons was unarmed, made no movement toward Mr. Baitie, and was standing 15 to 25 feet away when he was shot to death. Mr. Baitie returned to the scene twice, with two different weapons, and said he would 'get' Mr. Simmons. And according to the police reports, two witnesses said they saw Mr. Baitie approach Mr. Simmons, make a comment, pull out a gun from under his clothing, point the gun at Mr. Simmons, and fire.

"I also have concerns about Mr. Baitie's lengthy criminal record. According the probation report, Mr. Baitie, at age 13, was adjudicated for battery and made a ward of the court after he beat a younger boy who had a mental disability. A year later, Mr. Baitie committed another battery. He was also adjudicated as a juvenile for theft, joyriding and burglary. As an adult, Mr. Baitie was convicted for burglary and attempted burglary, and he was sent to jail for each offense. Mr. Baitie was on probation for burglary when he committed the life offense and according to the probation report, he

> failed to appear at a sentencing hearing and a revocation hearing the very day he murdered Mr. Simmons. Mr. Baitie's adult criminal record also includes convictions for receiving stolen property, buying/selling items with the identification removed, petty theft, and disturbing the peace. Mr. Baitie's criminal history is significant -- especially his history of violent and aggressive behavior as a juvenile -- and this weighs against his parole suitability at this time.
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> "Mr. Baitie's prison misconduct is equally unacceptable. During his incarceration for the life offense, Mr. Baitie was disciplined six times for rules violations, including violations for force and violence, possessing instructions for manufacturing PCP, being out of bounds, refusing to lock-up, and for calling a correctional officer an obscene name. He was also counseled 12 times for less serious misconduct, most recently in 1997. Mr. Baitie's misconduct in prison demonstrates his continued inability or unwillingness to conform his behavior to the rules, and this also weighs against his parole suitability at this time."

The Governor believed that releasing the then 52-year-old Batie from prison "would pose an unreasonable risk of danger to society at this time." Accordingly, the Governor reversed the Board's 2007 decision to grant parole to Batie.

3. The Habeas Proceeding

Batie first petitioned the Supreme Court for a writ of habeas corpus challenging the Governor's decision reversing the Board's parole grant, which was denied without prejudice to filing in the trial court. Batie then petitioned the San Diego County Superior Court for a writ of habeas corpus alleging the Governor's decision reversing the Board's parole grant was arbitrary and capricious and violated his due process rights because there was no evidence he was a current risk of danger to society as neither his prior criminal history or misconduct in prison provided any evidence he would pose a current threat and there was undisputed evidence of his rehabilitation while in prison. The trial

court denied the petition, noting that even though the law in the parole area had been clarified since the Governor's reversal, there was some evidence to support it based on Batie's lack of insight into his commitment offense.

As noted above, Batie has now petitioned this court for a writ of habeas corpus challenging the Governor's reversal.

DISCUSSION

A. The Parole Suitability Framework

Although this court recently recognized in *In Re Vasquez* (2009) 170 Cal.App.4th 370 (*Vasquez*), that "[t]he 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), and that] 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]" (*id*. at pp. 379-380), once the Board does set such a date, the California Constitution empowers the Governor to review the parole decision of an inmate who has been convicted of murder and sentenced to an indeterminate prison term. (Cal. Const., art. V, § 8, subd. (b).)

The decision whether to grant parole is an inherently subjective determination (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 655) that is guided by a number of factors, some objective, identified in Penal Code section 3041 and the Board's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The Governor's decision to affirm, modify, or reverse the

decision of the Board rests on the same factors that guide the Board's decision (Cal Const., art. V, § 8, subd. (b)), and is based on "materials provided by the parole authority." (Pen. Code, § 3041.2, subd. (a).) "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the Board's decision." (*Rosenkrantz, supra*, at pp. 660-661.)

In making the suitability determination, the Board and the Governor must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, § 2402), such as the nature of the commitment offense including behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude towards the crime; and parole plans. (§ 2402, subd. (b).) The circumstances that tend to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel manner;[5] (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison.

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[5] Factors that support the finding the crime was committed "in an especially heinous, atrocious or cruel manner" (§ 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

(§ 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (§ 2402, subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)

These criteria are "general guidelines," illustrative rather than exclusive, and " 'the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board or Governor].' " (*Rosenkrantz, supra*, 29 Cal.4th at p. 654; § 2402, subds. (c), (d).) Thus, the endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz, supra,* at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the Board or Governor is free to consider facts apart from those found true by a jury or judge beyond a reasonable doubt. (*Id*. at p. 679.) Nonetheless, the Governor's decision, like the Board's decision, must comport with due process. (*Id.* at p. 660.)

B. Judicial Review

In *Rosenkrantz,* the California Supreme Court addressed the standard for a court to apply when reviewing a parole decision by the executive branch. The court held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra,* 29 Cal.4th at p. 658.) *Rosenkrantz* further held that the same standards of review are applicable when a court reviews a Governor's decision reversing the Board. (*Id*. at pp. 658-667.)

In conducting this independent review of the Governor's decision, "[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Rosenkrantz, supra,* 29 Cal.4th 616, 677.) Although a court must ensure that the Governor considered the same factors the Board considered, "the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*Ibid*.)

In *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), our Supreme Court reaffirmed its analysis in *Rosenkrantz, supra,* 29 Cal.4th 616, that the Governor's decision of parole suitability is subject to the "some evidence" standard of review. (*Lawrence, supra,* at p. 1205.) However, in doing so it recognized that *Rosenkrantz's* characterization of that standard as extremely deferential and requiring "[o]nly a

modicum of evidence" (*Rosenkrantz, supra*, at p. 667), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra*, at p. 1206.) The court in *Lawrence*, recognizing that the legislative scheme contemplates "an assessment of an inmate's *current* dangerousness" (*id*. at p. 1205), clarified that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is "whether some evidence supports the *decision* of the Board or 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." (*Id*. at p. 1212.)

As to this standard, the court in *Lawrence* further explained that although it was "unquestionably deferential, [it was] certainly . . . not toothless, and 'due 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." (*Lawrence, supra,* 44 Cal.4th at p. 1210, italics added.) Because consideration of public safety is the primary statutory issue to be determined in deciding whether an inmate should be granted parole (Pen. Code, § 3041, subd. (b); *Lawrence, supra*, at p. 1205), "[t]his inquiry is, by necessity and by statutory mandate, an individualized one," and requires a court to consider the circumstances surrounding the commitment offense, along with the other facts in the record, to determine whether an inmate poses a current danger to public safety. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255 (*Shaputis*).)

Regarding such consideration, "although the Board and Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, 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 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 to the statutory determination of a continuing threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.)

In this case, because the court below denied Batie's petition for a writ of habeas corpus, the current petition for habeas relief is an original proceeding that requires we independently review the record to determine whether there is some evidence to support the Governor's decision in reversing the Board's grant of parole for Batie. (*In re Scott* (2004) 119 Cal.App.4th 871, 884.) In other words, "we independently review the record [citation] to determine 'whether the identified facts [by the Governor] are probative to the central issue of current dangerousness when considered in light of the full record before [him].' [Citation.]" (*Vasquez*, *supra*, 170 Cal.App.4th at pp. 382-383.)

C. Analysis

The Governor's decision in reversing the Board's grant of parole was essentially based on four factors, two related to the circumstances of the commitment offense, its gravity and Batie's failure to accept responsibility for the crime, Batie's lengthy criminal record both as a juvenile and as an adult, and Batie's record of misconduct in prison.

Although we are mindful that the aggravated nature of the life crime is not sufficient in and of itself to justify a decision denying parole unless, when considered in light of the other facts in the record, they are probative in showing that the inmate is currently dangerous (*Shaputis, supra*, 44 Cal.4th at pp. 1254-1255), we find that in this case the record shows Batie's commitment offense combined with his attitude about that crime and his failure to take full responsibility for it are probative that he is a continuing threat to public safety and provide "some evidence" in support of the Governor's reversal decision.

With regard to the commitment offense, which the Governor found to be "especially atrocious," such finding was based on some evidence in the record that suggested the killing was premeditated and supportive of first degree murder. As the Governor noted, our appellate decision stated that between 5 and 30 minutes had passed from the time Batie and Simmons first argued and Batie shot him, giving Batie time to cool off, but instead he left and returned twice to challenge Simmons, each time with a different weapon; first with a tire iron and then with the gun hidden under his clothing. When he returned the second time with the gun he had retrieved from a place behind the liquor store, Batie had called out to Simmons who was sitting unarmed 15 to 25 feet away and had made no movement toward him before shooting Simmons twice as he stood up. Certainly these circumstances of the commitment offense are despicable, went beyond the basic elements for second degree murder, and fully justify Batie's conviction and sentence for that offense. However, as noted earlier, such reason would only provide "some evidence" to support the Governor's ultimate conclusion and reversal of the parole

grant here if there were other facts in the record to provide a "rational nexus" for concluding Batie's offense of ancient vintage continues to be predictive of current dangerousness. (*Lawrence, supra*, 44 Cal.4th at pp. 1210, 1213, 1221.) In this case, we believe the Governor's related reason based on his concerns about the genuineness of Batie's acceptance of responsibility and expressions of remorse provides that rational nexus.

The Governor noted that although Batie said he had accepted responsibility for his actions and is remorseful, he continued to assert that he did not intend to shoot and kill Simmons, but intended only to scare him with the gun. As Batie specifically continued to claim he only shot Simmons because he panicked when Simmons came toward him with a knife, grabbed him and threatened him even though the evidence at trial showed Simmons did not advance on Batie or have a knife at the time Batie returned with the gun, the Governor could have reasonably found that Batie had not yet accepted full responsibility for the killing and was minimizing his culpability for the offense.

Because an inmate's acceptance of responsibility and signs of remorse may be considered in determining the inmate's suitability for parole (§ 2402, subd. (d)(3); *Shaputis, supra*, 44 Cal.4th at p. 1246),[6] to the extent these factors show an inmate lacks insight into and understanding of the behavior precipitating the commitment offense, they

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6 We recognize an inmate cannot be required to discuss the circumstances of the commitment offense or to admit guilt in order to be found suitable for parole. (Pen. Code, § 5011; Cal. Code Regs., tit. 15, § 2236.) However, if an inmate, as here, chooses to discuss the circumstances of the commitment offense, or his or her responsibility and remorse for an offense, the Governor may consider the inmate's remarks to the extent they are relevant to the inmate's parole suitability. (§ 2402, subd. (b).)

also can support a conclusion the inmate is currently dangerous and unsuitable for parole. (*Id.* at p. 1260.)

In *Shaputis*, the Supreme Court considered the inmate's claim there that the killing was accidental, even though he admitted his conduct was wrong and that he felt remorse for the crime, as some evidence of the inmate's unsuitability for parole because it showed he had failed to gain insight or understanding into either his violent conduct or his commission of the commitment offense. (*Shaputis*, *supra*, 44 Cal.4th at p. 1260.) As established in *Shaputis*, "where the record also contains evidence demonstrating that the inmate lacks insight into his or her commitment offense or previous acts of violence, even after rehabilitative programming tailored to addressing the issues that led to commission of the offense, the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration." (*Lawrence*, *supra*, 44 Cal.4th at p. 1228.) Such is the case here.

Although expressions of insight and remorse will vary from inmate to inmate and there are no special words for an inmate to articulate in order to communicate he or she has committed to ending a previous pattern of violent or antisocial behavior (*Shaputis*, *supra*, 44 Cal.4th at p. 1260, fn. 18), Batie's attitude about the commitment offense, claiming that he did not intend to shoot Simmons or kill him, is in sharp contrast to an inmate who has "consistently, repeatedly, and articulately . . . expressed deep remorse for [his] crime." (*Lawrence*, *supra*, 44 Cal.4th at p. 1222.) Batie's articulated acceptances of responsibility and expressions of remorse were that he was the one who had confronted Simmons, he knew he had taken his life, he knew Simmons lost his life "over nothing,"

he lived "day in and day out, you know, a man losing his life," he was always sorry that it happened and wished he could have just walked away from that, his remorse was the same no matter what the facts because he had taken a man's life, and he had disgust and was remorseful for the person he had been before entering prison. These various remarks, even if sincere, are largely undercut by Batie's continual assertions he did not intend to shoot or kill Simmons, he only intended to scare Simmons and his friend, and he only fired the gun when he panicked to protect himself. Although the Board apparently agreed with Batie's attorney that Batie's remarks concerning remorse showed he took full responsibility for killing Simmons even though his version of the facts did not comport with his reported level of participation in the killing set out in our appellate opinion, the Governor does not have to accept the Board's finding on such matter. (See *Rosenkrantz*, *supra*, 29 Cal.4th at p. 667.) The Governor's independent assessment that these same facts suggested that the killing was premeditated and not unintentional or an accident as Batie still claims is a reasonable interpretation of the evidence and is not arbitrary or capricious. Moreover, they provide some evidence that Batie lacks insight into and understanding of the behavior that led to Simmons's death. Thus, Batie's insistence that the murder of Simmons was an unintentional incident caused by Simmons coming after him is further evidence of Batie's unsuitability for parole.

Even though Batie has taken great strides to enhance his ability to function within the law upon release from prison by participating in educational, vocational and self-help programs and has maintained strong familial relationships and friendships, Batie's extensive pre-incarceration criminal history and prison disciplinary history further

supports the Governor's decision reversing the Board. Although Batie's criminal history, which included numerous theft offenses and several violent acts when he was a juvenile, was admittedly over 27 years ago, the Governor could properly consider that history of misconduct as additional support in finding that Batie had demonstrated difficulty in conforming his behavior to society's rules, which could effect his risk of failure on parole. (See *In re Reed* (2009) 171 Cal.App.4th 1071, 1082.)

Moreover, even though only one of Batie's multiple prison disciplinary actions involved violent behavior, many of them, including his most recent disciplinary action in 1997 for disobeying orders, facially indicate Batie's inability or unwillingness to live within the rules. Analogous behavior of not being able to follow society's rules led to the commitment offense and Batie's other numerous crimes as a juvenile and young adult. Although the most recent disciplinary violation was 12 years before the current Board hearing, Batie's reply to the Board's question as to one of his earlier disciplinary violations provides another indication of his minimizing his responsibilities. Specifically, in response to a question about the 1984 finding by the prison authorities that Batie had been in possession of instructions on how to manufacture PCP, Batie said he only accepted responsibility for the charge because the plans belonged to his roommate and were found in their cell. The Governor could rationally draw the inference that Batie's answer was an additional example of his failure to take responsibility for his actions, similar to his minimizing his role in Simmons's murder.

Because Batie has not accepted his role in the commitment offense and in at least one disciplinary violation, rather appearing to currently externalize his involvement, the

Governor could properly find that Batie continues to lack insight as to his wrongful actions. Thus, the egregious nature of his life offense, coupled with his prior criminal history, disciplinary record, and his lack of awareness into his life offense and other wrongful actions, tends to show Batie has not committed to ending his previous pattern of antisocial behavior and, therefore, provides some evidence and a rational nexus to support the Governor's conclusion Batie is currently dangerous and his release would pose an unreasonable public safety risk. (*Shaputis*, *supra*, 44 Cal.4th at p. 1260; *Lawrence*, *supra*, 44 Cal.4th at p. 1228.)

Contrary to Batie's contention that the Governor failed to give him an individualized consideration, the record belies such an assertion. That the Governor may not have given the same weight to favorable factors as the Board did or that Batie would have given to them does not show a lack of individualized consideration. There is no requirement that the Governor give greater weight to factors favoring a prisoner's release, or even agree with favorable evidence. Nor is it for this court to reweigh the evidence provided there is some evidence, as we have found, to support the Governor's determination that the inmate poses an unreasonable risk of current danger. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1258, 1260-1261.)

We also reject the claim that there is no nexus between the factors relied upon by the Governor and Batie's current threat to public safety. Although the Governor did not specifically state that there was a "rational nexus" between any factor and his ultimate conclusion, the some evidence standard only "requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those facts and

the necessary basis for the ultimate decision--the determination of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1210.) Here, the Governor gave more than a mere "rote recitation" of the parole unsuitability factors, providing a two and one-half page statement of reasons explaining the basis of his reversal of the Board's decision. As noted above, such reasoning provides a rational nexus to the Governor's decision. The court in *Lawrence* held that such nexus exists where an inmate, as in this case, lacks insight or remorse into a particularly aggravated murder offense. (*Id*. at p. 1228.) No additional pro forma recitation on the record is required where the reasoning, as here, sufficiently provides the rational nexus. (*Id*. at p. 1210.)

As for Batie's ex post facto claim, he acknowledges it has been resolved against him by our Supreme Court in *Rosenkrantz, supra*, 29 Cal.4th 616, 636-640, that we are bound by such decision (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and that he raises it only to preserve it for "further litigation." Regarding his separation of powers doctrine argument based on the bare assertion that the Governor acted contrary to the Legislature's intent, Batie has failed to provide any supportive authority. Because the Governor has a constitutional mandate to conduct final review of parole matters, we reject such claim. (Cal. Const., art. V, § 8, subd. (b); *Rosenkrantz, supra*, 29 Cal.4th at p. 638.)

We further conclude that Batie's additional contentions regarding a Governor's no parole policy at initial parole proceedings and that the reversal here violates the Eighth Amendment prohibition against cruel and/or unusual punishment are meritless. The first contention is untimely and unsupported, made 19 years after Batie's initial parole

consideration on March 7, 1990, and the statistics submitted by his counsel do not overcome the presumption that the Governor has regularly performed his official duty. (See *Rosenkrantz, supra*, 29 Cal.4th at pp. 683-684.) The latter assertion is meritless because Batie has not alleged that his sentence is disproportionate to his offense. Nor, in light of the holding in *Lockyer v. Andrade* (2003) 538 U.S. 63, where the United States held that two consecutive 25-years-to-life terms in prison for two counts of petty theft under California's Three Strikes Law was not grossly disproportionate to the offenses, do we believe Batie would be able to show that his indeterminate life term with the possibility of parole for the more serious offense of second degree murder constitutes a term grossly disproportionate to his offense.

DISPOSITION

The motion to amend the petition and the petition for writ of habeas corpus are denied.

HUFFMAN, Acting P. J.

I CONCUR:

IRION, J.

I dissent. As the majority notes, our task is to independently review the record to determine if the facts cited by the Governor are probative to the central issue of current dangerousness. (*In re Vasquez* (2009) 170 Cal.App.4th 370, 382-383 (*Vasquez*).) The Governor mentions four factors in reviewing the Board's decision. First he states the murder was especially atrocious because petitioner premeditated on some level to kill the victim. Respectfully, I do not think the facts of the second degree murder are unusual to any degree and do not qualify as especially aggravating.

Secondly, the Governor discusses petitioner's lack of insight and remorse. Certainly Batie has repeatedly accepted responsibility for his crime and expressed remorse but he has also stated he did not intend to shoot and kill the victim. Since this last statement is at variance with the facts of the case, as stated in our earlier opinion, the Governor questions his complete acceptance of responsibility. While that conclusion certainly may be drawn, it adds little to the conclusion of petitioner's current risk of dangerousness 29 years later.

The other two factors mentioned by the Governor, Batie's previous criminal record and misbehavior during the first years in prison are undisputedly accurate. They do not, in my view, provide a sufficient basis to conclude there is some evidence of a current risk to the public if Batie is released. He has had no disciplinary problems since 1997 and has taken, as the majority concludes, "great strides to enhance his ability to function within the law upon release from prison by participating in educational, vocational and self-help programs and has maintained strong familial relationships and friendships." (Maj. opn. at

p. 27.) While these factors might justify denying parole initially, they do not form a rational basis for repeatedly denying Batie his freedom on the ground he is currently dangerous. He has now been incarcerated for this second degree murder for 29 years. Accordingly, I would grant the petition.

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McINTYRE, J.