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WRITING SAMPLE

This writing sample includes one section of a Habeas Corpus Denial that I helped draft in November of 2009 while interning at the Kern County Public Defenders Office. The issue before the Court is whether or not the Governor fairly based his reversal of the Boards decision to grant parole on "some evidence" in the record that Mr. Salango is still a *current* danger to the public. This Denial argues that the record contains no evidence of current danger, and that the Governor's decision violates due process by relying solely on immutable characteristics of the commitment offense to reverse the Board's decision granting parole.

IV.
ARGUMENT

B. THIS COURT SHOULD GRANT RELIEF BECAUSE RESPONDENT HAS NOT PRODUCED ANY EVIDENCE THAT MR. SALANGO POSES AN UNREASONABLE RISK OF DANGER BASED ON THE COMMITMENT OFFENSE.

Respondent urges this Court to defer to the Governor, contending *In re Lawrence* (2008) 44 Cal.4th 1181 and *In re Shaputis* (2008) 44 Cal.4th 1241, support the Governor's decision. These two cases, however, **do not** permit the Governor to turn Mr. Salango's 18-to-life sentence into life without parole based on two things he can never change - the commitment offense and further rehabilitation.

As the Supreme Court explained in *Rosenkrantz*, [1] denial of parole may be based, **in part**, upon the nature of the commitment offense. (*Rosenkrantz, supra,* 29 Cal.4th at p. 683.) But the relevant statute provides that the Board **must** grant parole unless the gravity of the underlying offense and consideration of suitability factors demonstrate that public safety requires a longer incarceration. (*Id.* at p. 654.) Further, the court strongly cautioned that:

> ... denial of parole based upon the **nature of the offense alone** might rise to the level of a due process violation for example where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense. Denial of parole under these circumstances would be inconsistent with the statutory requirement that a parole date normally shall be set 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public....' [Citation.][2]

(*Id.* at p. 683, citation omitted, emph. added.)

Important to this case, the Court went on to warn that, "The 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 current or past offenses **should not operate so as to swallow the rule that parole is 'normally' to be**

[1] In *Rosenkrantz*, the actual issue before the Court was "whether a decision of the Governor finding a prisoner unsuitable for parole is subject to judicial review, and if so, under what standard." (*Id.* at p. 625.) *Rosenkrantz* failed to prove that then-Governor Davis had a "blanket" policy to deny probation to all inmates serving time for second-degree murder, and was not conducting individualized reviews. (*Id.* at p. 684.)

[2] Penal Code section 3041, subdivision (a)(1)

granted." (*Id.*, emph. added.) The Court stressed that the Board must carefully scrutinize the commitment offense and all other factors to avoid interfering with Legislative intent in setting the punishment for various offenses:

> Otherwise, the Board's case by case rulings 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. (Pen. Code, § 190 et seq.) [¶] Therefore, **a life term offense or any other offenses underlying an indeterminate sentence must be particularly egregious to justify the denial of a parole date.**

(*Id.* at p. 683, emph. added.)

Dannenberg quoted this very admonition in concluding that the Board may consider particularly egregious facts of a commitment offense when determining suitability, but only in the context of "continuing public danger." (*In re Dannenberg*, (2005) 34 Cal.4th 1061, 1070, 1094-1095.) *Dannenberg* specifically observes, "...section 3041 expressly instructs the Board to set an indeterminate life prisoner's parole release date ... unless it finds that the aggravated nature of the inmate's offense or criminal history raises public safety considerations warranting longer incarceration.... [¶] [T]he current statute requires the Board to act in each case, either by setting a parole release date, or by expressly declining to do so for reasons of public safety." (*Id.* at pp. 1097-1098, ital. in orig..)

A conviction for murder does not by itself render an inmate unsuitable for parole. (*Rosenkrantz, supra*, at p. 683.) In particular, a conviction for second-degree murder does not carry a sentence of life without parole; it carries a penalty of 15 years-to-life, as sentence for which parole is not only possible, but also the norm.

In re Lawrence observed:

> [T]he Legislature specifically contemplated both that the Board "**shall normally**" **grant a parole date**, *and* that **the passage of time and the related changes in a prisoner's mental attitude and demeanor are probative to the determination of current dangerousness**. When, as here, all of the information in a post conviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent **articulation of a rational nexus**

> **between those facts and current dangerousness**, fails to provide the required “modicum of evidence” of unsuitability.

(*Lawrence, supra,* 44 Cal.4th at pp. 1226-27, emph. added.)

> [T]he relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they **continue to be predictive of current dangerousness many years after commission of the offense**. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]

(*Id.* at p. 1235, citation omitted, emph. added.)

When determining suitability for parole, the Board or Governor may not be concerned with the commitment crime or whether Mr. Salango has gained insight into the life crime, unless these two factors rationally support the conclusion that he would presently pose an unreasonable risk of danger to society. (*Ibid.*) There is no rational evidence to support this conclusion.

In the present case, the Governor has denied Mr. Salango’s parole based on facts that are unsubstantiated, unreliable, or nonexistent. The Governor’s primary reason for denying parole is because of the gravity of the commitment offense. (Pet. Ex. A. p. 3.) He relies on the fact that Mr. Salango fired one shot at “a vehicle with utter disregard for the safety of others.” (*Ibid.*) However, the Governor’s words, “utter disregard” do not aggravate Mr. Salango’s crime merely by their use and in turn allow the Governor to jump to a conclusion of current dangerousness without due regard for the rule of law.

As the cases articulate, in order to deny parole, the Governor must “identify facts [that] are probative to the central issue of current dangerousness when considered in light of the full record” before him. (*Lawrence, supra,* 44 Cal.4th at p. 1221.) The Governor is required to articulate a rational nexus between the stated facts supporting his decision and their relationship to current dangerousness. (*Id.* at p. 1227.) This the Governor has not done. A decision based on the commitment offense alone, “without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude” is a violation of due process. (*Id.* at p. 1210.)

The Governor has ignored his mandate because contrary to his inexplicable findings, the Board found Mr. Salango suitable for parole. (Pet. Ex. F. p. 80.) Nineteen years after his conviction, Mr.

Salango is now 36 and has matured beyond his years. (*Id.* at p. 82.) At the time of the offense, Mr. Salango was fearful, impulsive, and irrational. (*Id.* at pp. 16-18.) He was a member of the "Manila Boys" gang for a mere six months and has not associated with them since. (*Id.* at p. 25.) He has learned much while incarcerated, most notably, how not to be a follower. (*Id.* at pp. 83-84.)

Mr. Salango has programmed extensively, receiving many laudatory chronos and certificates of achievement. (*Id.* at p. 89.) He has received exemplary psychological evaluations, shown more than adequate remorse, contributed to victim funds, contributed to children charities, greatly elevated his educational status, gained insight and a complete understanding of the underlying causes of the life crime to the best of his ability, and has more than adequate family and community support upon release. (*Id.* at pp. 84-86.)

Mr. Salango has accepted legal and moral responsibility for the fact that he took the life of a young man because he chose to take matters into his own hands. (*Id.* at pp. 17, 23, 53.) He has acknowledged his wrongdoing and taken enormous steps to rehabilitate himself. He feels he "owes it to David and his family and friends never to create this awful harm and violence ever again." (*Id.* at p. 78.) At the time of the commitment offense Mr. Salango was only 17-years-old, impulsive and irrational. (*Ibid.*) Today Mr. Salango is 36 and has "sincerely matured emotionally, mentally, and spiritually." (*Id.* at p. 79.)

Mr. Salango has earned a classification score of 19 which is the lowest score he could earn. Mr. Salango has and continues to involve himself in numerous programs and vocational courses. (*Id.* at pp. 36, 42-46.) He currently works in the lens lab and previously worked in a clerks position where he received above average to exceptional work reports. (*Id.* at pp. 36-38.) He has completed his GED, earned a business certificate, earned his certification in Microsoft Office, and is only 10 units shy of an AA degree with an emphasis in behavioral and social studies. (*Id.* at pp. 38-39.)

The Board recognized Mr. Salango's efforts to rehabilitate himself and they congratulated him on that. (*Id.* at pp. 82, 84, 86, 89, 92.) Mr. Salango is not unreasonably dangerous to the public if released. The governor has failed to provide "some evidence" sufficient to establish a rational nexus between his stated reasons for denial and their relationship to Mr. Salango's current dangerousness.

Mr. Salango admits that, while young, insecure, fearful, and impulsive, he did something that he shouldn't have done, something heinous according to our social norms - he killed another human being.

(*Id.* at p. 23.) But the inquiry requires comparison to other murders, and when compared to other second-degree murders, there is nothing particularly atrocious or cruel about this one. Mr. Salango pled to murder in the second degree and the court found no aggravating circumstances. (Ret., Ex. 1.) Mr. Salango is entitled to parole by law, unless unsuitability factors indicate that he is **currently** dangerous to the public.

The Second District Court of Appeal recently reversed the Governor's denial of parole based solely on the commitment offense in *In re Gray*, *supra*, 151 Cal.App.4th 379. Like Mr. Salango, Gray was convicted of second-degree murder with personal use of a firearm. Like Mr. Salango, he made considerable gains while incarcerated, and his file contained laudatory chronos and psychiatric evaluations.[3] Nevertheless, the Governor reversed the Board's decision to parole Mr. Gray, concluding:

> Even considering Mr. Gray's present gains, the gravity of the second degree murder perpetrated by Mr. Gray is alone sufficient for me to conclude that his release from prison would pose an unreasonable public safety risk at this time.
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> * * * * *
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> At age 55 now, after being incarcerated for more than 25 years, Mr. Gray continues to make creditable gains in prison, including accepting responsibility for his actions and expressing remorse. But given the current record before me, and after carefully considering the very same factors the Board must consider, I find that the gravity of the murder perpetrated by Mr. Gray presently outweighs the positive factors.

(*Id.* at p. 396, emph. added.)

The Court reversed, holding that the Governor's decision was unsupported by even "some" evidence. Reciting the factors set forth in Title 15, section 2402 of the California Code of Regulations, the Court observed that:

> ... there is no dispute that all other applicable regulatory criteria indicate that Gray is suitable for parole. Gray has no juvenile or adult record. He has a stable social history, and has shown remorse. His psychological evaluation indicates his future violence potential is low. His age reduces the probability of recidivism. He has realistic plans for release. His activities while incarcerated show that he has an enhanced ability to function within the law....

(*Id.* at p. 403.)

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[3] These achievements are set out in detail at pages 36-54 of the parole hearing record.

Accordingly, nothing in the commitment offense supported the Governor's finding that the crime showed an element beyond the minimum necessary for second degree murder and the Court granted the petition. (*Id.* at p. 410.)

In *In re Barker, supra*, the defendant was convicted of two counts of second-degree murder and one count of first-degree murder, stemming from the 1976 killing of a friend's parents and grandfather. (151 Cal.App.4th at p. 353.) Barker conspired to kill the parents, and actually beat and shot the grandfather.[4] (*Ibid.*) In 2005, the Board denied parole, based solely upon the "unchangeable facts of his commitment offenses." (*Id.* at p. 351.) Barker stressed that "the 'overarching consideration' in determining whether to grant parole is 'public safety.'" (*Id.* at p. 357, quoting *Scott II, supra*, 133 Cal. App.4th at p. 591.) A large factor in that consideration is the defendant's age at the time of the offense, and the passage of time since the offense:

> In *Elkins, supra*, 144 Cal.App.4th 475, we agreed with the observations of the federal district court in *Rosenkrantz v. Marshall* (C.D.Cal.2006) 444 F.Supp.2d 1063, that "'the general unreliability of predicting violence is exacerbated in [a] case by ... petitioner's young age at the time of the offense [and] the passage [in that case] of nearly twenty years since that offense was committed....'" (*Elkins, supra*, at p. 500.)

(*Barker* at pp. 376-377.)

The same principles apply here: Mr. Salango's offense was committed when he was 17 years old; he is now 36 years old. Nineteen years later, this offense has no predictive value and cannot rationally serve as even "some" reliable evidence to support a conclusion that Mr. Salango is a threat to society. *In re Lawrence, supra*, instructs that the predictive value of the commitment offense becomes worthless over time. (44 Cal.4th at p. 1218.) The result is the same even if the Governor concluded that this offense was somehow more heinous than any other murder, a proposition for which neither the Governor nor Respondent has presented any evidence.

[4] Tried as an adult, Barker was sentenced to three concurrent sentences: 5-years-to-life for each second-degree murder conviction, and life for the first-degree murder conviction. His first minimum parole eligibility date was set at August 25, 1983. The Board denied parole ten times, including in 2005. (*Id.* at p. 351.)