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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)**

In re NELSON GAMEZ
on Habeas Corpus.

C069734
(Super. Ct. No. SC051636A)

Governor Jerry Brown reversed the grant of parole issued by the Board of Parole Hearings (the Board) to Nelson Gamez. The Governor denied parole because of the heinousness of Gamez’s crime and Gamez’s lack of insight into the offense. We find that the Governor’s decision is supported by the modicum of evidence required under the “some evidence” standard. (*In re Shaputis* (2011) 53 Cal.4th 192, 198, 220.) Consequently, we shall reverse the trial court’s order granting Gamez’s petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

We begin with an excerpt from Gamez's December 3, 2007 initial parole consideration hearing because that hearing addresses Gamez's crime and level of insight.¹

Probation Officer's Report

The Presiding Commissioner addressed Gamez as follows:

"[W]hat I'm going to do first is read into the record the statement of facts about the life crime. . . . I'm taking that from the [April 14, 1992] *probation officer's report*[.] . . . And this states that,

" "On September 12, 1991, the victim, Martha Gamez, was reported to the Hayward police to be missing. The report was filed by the victim's parents, Ralph and Maria Gamez, and the defendant. According to the defendant, he had last seen his wife on September 11 at 1:00 p.m. when he had dropped her off at the Southland Mall in Hayward. The missing person's report was sent to the detectives on September 18, 1991, for a follow-up. The victim had not returned. This was out of character for her, as she had left two small children, along with all of her belongings, behind.

" "The defendant was re-interviewed by the Hayward detectives, and did tell them that he had been having marital problems but had no idea where the victim had gone. During the course of that contact, bloodstained clothing was recovered from the defendant's apartment and vehicle. Included was a bloodstained floor mat from his 1979 Toyota Supra.

" "On September 20, 1991, the detectives found that the Stockton Police Department had an open Jane Doe murder victim. The murder victim turned out to be Martha Gamez. She was found at approximately 7:00 a.m., September 12, 1991, on River Drive, one-third mile west of Pershing on top of the levee by the Calaveras River. Found above her body was a wine-colored car ashtray. It was later identified as belonging to a 1979 to 1980 Toyota Supra.

¹ After having the record supplemented with the transcript of the December 3, 2007 Board hearing, we requested supplemental briefing from the parties regarding the interplay between Gamez's accounts of the crime at this hearing and those in his 2007 psychological evaluation.

“ ‘At 10:15 a.m. a doctor at the scene reported that the victim had been dead at least three or four hours, and could have been dead up to 12 hours. An autopsy revealed that she had been beaten and died of shock and hemorrhage, a result of stab wounds to her neck and chest. *There were four wounds puncturing a lung and one entered her throat.*

“ ‘*There were 28 stab and incise wounds over her neck, left chest, right abdomen, both arms, both hands, right ear, and behind her right ear.* She had many defensive wounds on her arms and hands. The doctor also stated that he didn’t think Martha Gamez died immediately. She could have died as short as 15 minutes or as long as several hours after she had been stabbed.’ ”² (Italics added.)

Prisoner Evaluation Report

The Presiding Commissioner then stated:

“Okay, and because Mr. Gamez has decided not to discuss the life crime, which is his right, I’m going to read into the record his version. *And I’m going to take that from the most current life prisoner evaluation report, also referred to as the Board report, the December 2007 one.* This starts on page one through page two, under prisoner’s version. This states that,

“ ‘On June 11, 2007, I [Gamez] had an interview with you [prison official] during which you instructed me to submit any changes I wanted to make to my probation and/or police report [i.e., *the probation officer’s report* just quoted above]. In regards to the quote *police report* unquote, I really don’t see the need to make any changes to the facts of my case as being presented therein [i.e., to the facts as presented in *the probation officer’s report* just quoted above]. What I would like the record to show is how sorry I am for what happened the day I committed the crime. I am very sorry from the very bottom of my heart. I also want the record to show that because of my commitment offense my life has changed dramatically.’ ”³ (Italics added.)

² For his crime, Gamez was convicted of first degree murder with a weapon enhancement and was sentenced to 26 years to life.

³ Gamez continues for several paragraphs describing how he “accepted full responsibility for [his] actions” and noting that he apologized to the victim’s family for “all of the pain and sorrow” that he caused.

2007 and 2010 Psychological Evaluations

The other pertinent facts here are as follows. After initially denying involvement, Gamez accepted responsibility for the crime. During his 2007 psychological evaluation, Gamez stated that the murder was preceded by protracted conflict between Gamez, his wife, and his in-laws. Gamez had an affair with his sister-in-law and his sister-in-law told him that Martha was cheating on him. On the day of the murder, Gamez and Martha were arguing in Gamez's car. Gamez told Martha that he was cheating on her and then accused her of infidelity. Martha began hitting Gamez with her purse. Gamez then repeatedly stabbed Martha.

In December 2007, the Board denied Gamez parole. Among other factors, the Board cited Gamez's 2007 psychological evaluation, which concluded that Gamez lacked insight because he shifted blame for his crime onto his wife and in-laws. The Board also denied parole because of Gamez's inability to develop marketable skills while in prison. Gamez's habeas petition was denied by the superior court in July 2008.

Following his 2007 parole denial, Gamez received vocational training and participated in anger management programs. In 2010, Gamez also wrote a letter of remorse apologizing "to all of the victims of my commitment offense" and declaring that he was "here today, not to blame nobody else, but to take full responsibility of [his] . . . wrong acts and actions." Gamez's 2010 psychological report found that Gamez's remorse appeared heartfelt and genuine. The report concluded that Gamez represented a "low risk for violence in the free community." In 2010, the Board granted Gamez parole because of his "exceptional" behavior in prison, involvement in self-help programs, "very good parole plans," and "overall low risk for recidivism."

Parole Status

The Governor reversed the Board's 2010 parole grant and, in September 2011, the trial court reversed the Governor, constituting the matter before us. In denying parole,

the Governor cited the heinousness of Gamez's crime and Gamez's lack of insight into his crime. The Governor concluded that Gamez lacks insight because he "continues to minimize his role in the murder, and fails to accept responsibility for the full extent of his actions." To support this finding, the Governor relied upon the 2007 and 2010 psychological evaluations.

During his 2007 psychological evaluation, Gamez stated that *he stabbed Martha three to four times, but he acknowledged there were other " 'cuts.' "* (Italics added.) Gamez also stated that *he used a small knife to stab Martha and the cuts were not deep.* Gamez said that, after the stabbing, he pushed Martha out of the car; as he drove off, Martha stood and apologized to him.

The Governor found Gamez's description of the crime in his 2007 psychological evaluation "utterly unbelievable." According to the Governor, Gamez's description implies that someone else came along and stabbed Martha 24 to 25 additional times. Additionally, by stating that he used a "small knife" and Martha's "wounds were not deep," the Governor contends Gamez further minimizes his role in the crime, and such minimization provides evidence of lack of insight. This lack of insight, as well as the heinousness of Gamez's crime, the Governor maintains, provides evidence of Gamez's continued dangerousness.

We find the Governor's decision is supported by the modicum of evidence required under the "some evidence" standard; consequently, we reverse the trial court's order granting Gamez habeas corpus relief.

DISCUSSION

I. Summary of the Law Governing Review of Parole Decisions

"The essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety. [¶] That question is posed first to the Board and

then to the Governor, who draw their answers from the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior. [¶] . . . [¶] Judicial review is conducted under the highly deferential 'some evidence' standard. The executive decision of the Board or the Governor is upheld unless it is arbitrary or procedurally flawed. The court reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision. [In this way, a proper balance is struck between an inmate's due process liberty interest and the executive branch's discretion in making parole decisions.] [¶] The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence." (*In re Shaputis, supra*, 53 Cal.4th at pp. 220-221, paragraph numbering omitted.)

II. The Circumstances of the Offense

In reversing the Board's grant of parole, the Governor relied in part on the "particularly vicious manner" of Gamez's crime. The Governor may rely upon the "aggravated nature of the crime" in denying parole. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1214.) The Governor could justifiably find the circumstances of Gamez's crime to be "aggravated" or "particularly vicious." Here, Gamez stated he repeatedly stabbed his wife, pushed her out of the car, and left her "standing" by the side of the road as he drove away. The Governor may not, however, rely *solely* on the circumstances of a crime committed long ago to establish the required "some evidence" of current dangerousness; there must be some linkage between those circumstances and *current* dangerousness. (*Lawrence*, at p. 1214.) Therefore, we must determine whether Gamez's alleged lack of insight provides some evidence that Gamez represents a continuing threat to public safety.

III. Gamez's "Lack of Insight"

The Governor concluded that Gamez lacks insight because Gamez continues to minimize his role in the murder of his wife by failing to accept responsibility for the full extent of his actions. To support this conclusion, the Governor relied on alleged conflicts between Gamez's description of the crime and the record. The relevant elements of Gamez's description of the crime may be divided into two categories: (1) a quantitative one, the number of times Gamez stabbed Martha; and (2) a qualitative one, the severity of Martha's wounds.

As we shall explain, we do not find that Gamez's description of the number of stabbings is inconsistent with the record, but we do find that his description of the severity of the stab wounds in this heinous offense provides the Governor with "some evidence" to conclude Gamez is currently dangerous.

Regarding the quantitative factor—the number of stabbings—the Governor found Gamez's account of the crime in his 2007 psychological evaluation to be "utterly unbelievable" because that account implied that someone else came along and stabbed Martha 24 or 25 additional times. In reaching this conclusion, the Governor misreads the record. The official version of the crime establishes that Martha's body was found with 28 total stab *and* incised wounds.⁴ Martha's body was found with five stab wounds each sufficient to cause death—four in her lungs and one in her neck. Many of the other wounds were defensive. Gamez stated in his 2007 psychological evaluation that he stabbed Martha three to four times and he caused other cuts on Martha's body. Although the record establishes there were five significant stab wounds (among 28 stab and incise wounds) and Gamez stated that he stabbed Martha only three or four times (and acknowledged there were other "cuts"), we do not find that such a minor discrepancy may itself be read as reflective of a material deficiency in Gamez's understanding of the

⁴ Incised wounds are "longer than they are deep."

crime. (*In re Ryner* (2011) 196 Cal.App.4th 533, 548 [“Evidence of lack of insight is indicative of a current dangerousness only if it shows a *material* deficiency in an inmate’s understanding and acceptance of responsibility for the crime.”].) Furthermore, during his 2007 Board hearing, Gamez accepted the account of the facts of the crime as set forth in the probation officer’s report, which showed five major stab wounds among 28 stab and incise wounds.

Regarding the qualitative factor—the severity of the stab wounds—during his 2007 psychological evaluation, Gamez stated that he stabbed Martha with a “ ‘little knife to cut electrical cables and oranges.’ ” He noted that since the knife was small, Martha’s wounds were not deep. The Governor may fairly read this description as inconsistent with the record and reflective of a material deficiency in Gamez’s understanding of the crime. The record establishes that four of Martha’s stab wounds punctured her lung and one stab wound entered her throat. Each of these wounds individually was of sufficient depth to cause death. Gamez stated that the mortal wounds he inflicted were not deep. The Governor could conclude that Gamez’s continued inability to appreciate the gravity of his offense reflects a material deficiency in his understanding of the crime, which provides evidence of Gamez’s lack of insight into this terrible crime. As such, the Governor’s finding of Gamez’s current dangerousness is supported by the modicum of evidence required under the “some evidence” standard.

We also note that the Governor may rely on the 2007 psychological evaluation because more recent evidence does not render the evaluation irrelevant. Gamez himself does not provide a subsequent account of the pertinent details of the crime. As such, the 2007 psychological evaluation remains probative of Gamez’s current psychological state. (See *In re Shaputis*, *supra*, 53 Cal.4th at p. 211 [“It is true that often the most recent evidence as to the inmate’s level of insight will be particularly probative on the question

of the inmate’s present dangerousness, but that is not *necessarily* the case. If the newest evidence is unreliable or insubstantial, the parole authority is not bound to accept it.”].)

It does not matter whether we believe that Gamez is currently dangerous. (*In re Shaputis, supra*, 53 Cal.4th at p. 221.) The “some evidence” standard does not empower a court to reweigh the evidence. (*Ibid.*) The Governor’s decision will be upheld unless it is arbitrary. (*Ibid.*) Here, we must concede that the Governor could justifiably find that Gamez’s account of the crime during his 2007 psychological evaluation provides evidence of minimization. Such minimization of a heinous crime may reflect lack of insight into the crime, which provides some evidence of Gamez’s continued dangerousness.

DISPOSITION

The trial court order granting writ of habeas corpus is reversed.

_____ BUTZ _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ ROBIE _____, J.