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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re JAMES MACKEY,
on Habeas Corpus.

C070029
(Super. Ct. No. SC045624A)

Petitioner James Mackey seeks a writ of habeas corpus to overturn his parole denial by the Board of Parole Hearings (the Board). The Board's denial was based on the horrific nature of Mackey's offense coupled with his inadequate insight into it. We uphold the Board's denial decision, finding that it meets the "highly deferential" review standard of "some evidence" to support it. (*In re Shaputis* (2011) 53 Cal.4th 192, 198, 221 (*Shaputis*)). Consequently, we deny Mackey's petition. We will

proceed straight to our discussion of the Board's decision, incorporating the pertinent facts as we go.¹

DISCUSSION

I. Summary of the Law Governing Review of Parole Decisions

Shaputis summarized the basic legal principles governing review of parole decisions. As relevant here, those principles encompass the following:

"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

¹ The Board held Mackey's parole hearing on April 1, 2010, denying him another hearing for three years. The trial court, in November 2010, denied Mackey's petition for writ of habeas corpus. In March 2011, we issued an order to show cause for the trial court to consider the matter again. The trial court did so (a different superior court judge presiding), and again denied Mackey's petition for writ of habeas corpus. We issued another order to show cause in February 2012, having the parties formally brief the matter for us (constituting the matter before us now).

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." (*Shaputis, supra*, 53 Cal.4th at pp. 220-221; see also *id.* at p. 199.)

Two other principles bear particular mention here. The first is from *Shaputis* as well, and states that "[o]nly when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor"; in that circumstance, the Board's or the Governor's parole denial is arbitrary and capricious, and amounts to a denial of due process. (*Shaputis, supra*, 53 Cal.4th at p. 211.)

The second principle posits that "[e]vidence 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. To put it another way, the finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense has

some rational tendency to show that the inmate currently poses an unreasonable risk of danger." (*In re Ryner* (2011) 196 Cal.App.4th 533, 548-549 (*Ryner*), fn. omitted.)

Finally, suitability factors favoring parole include the lack of a criminal record (other than the commitment offense), a history of stable relationships, an older age, tangible signs of remorse, marketable skills, reasonable plans for the future, and responsible and rehabilitative institutional behavior. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)²

Unsuitability factors disfavoring parole comprise the counterparts to the factors just noted, and the commission of the offense in an especially heinous, atrocious, or cruel manner. (Regs., § 2402, subd. (c).)

With these principles in mind, we turn to the matter at hand.

As noted, the Board denied Mackey parole based on the horrific nature of his offense and his lack of insight into it.

II. The Circumstances of the Offense

During Mackey's parole hearing, the Board relied on the probation officer's report of the offense, which was based largely on Mackey's October 1990 statement to the probation officer, as follows.

² Undesignated references to regulations are to title 15 of the California Code of Regulations.

To curry favor socially and financially with a wealthy and connected developer named Michael Blatt, Mackey—in early 1989 and then 24 years old—volunteered, in discussions with Blatt, to “find someone to take care of” the victim, Lawrence Carnegie, a real estate agent who was a litigation thorn in Blatt’s business side.

Mackey approached a friend, Carl Hancock, whom he knew from their days playing football at the University of the Pacific. Hancock was game. Mackey provided Hancock with details of Carnegie’s daily routines and with a real estate purchase scenario to lure Carnegie to secluded sites.

Mackey reported to Blatt that he had found someone to “do the job.” Blatt responded that he now had another man he wanted killed, and wanted it done before Carnegie’s undoing—John Farley, who had sued Blatt’s firm for financial mismanagement.

Mackey and Hancock turned their attentions towards Farley, Mackey telling Hancock that he would ask Blatt for \$20,000 for the murders. Hancock began tailing Farley and continued reporting to Mackey.

Then just as suddenly, Blatt changed his mind and said he wanted Carnegie killed before Farley.

Mackey and Hancock then engaged in the following preparatory activities for the Carnegie killing. Hancock twice met with Carnegie to look at property to buy. Mackey obtained cash and a check from Blatt for expenses. And Hancock and

Mackey traveled to Lake Tahoe to scout where they would rent a boat and sink Carnegie's body; they obtained a crossbow (a silent weapon), a sleeping bag, a 50-pound weight, and a rope (to secure the weight to the sleeping bag, into which a lifeless Carnegie would be placed); and they practiced firing the crossbow. As the two men practiced firing, Hancock told Mackey he could not actually commit the killing; Mackey took the deed upon himself.

The day of the murder, February 28, 1989, Mackey rented a car and retrieved Hancock. The two drove to a vacant, rural property (for sale) at which Hancock had arranged to meet Carnegie. The property was close to a direct highway route to Lake Tahoe.

Carnegie arrived. As he stood near the rental car discussing the property with Hancock, Carnegie had his back to the crossbow-toting Mackey, who was concealed in a nearby garage with the door slightly ajar. Mackey pointed the crossbow at Carnegie's back, fired an arrow and hit his intended target. The arrow did not kill Carnegie but went "through" his back. Hancock and Mackey then tried to suffocate Carnegie with the sleeping bag, only to have a third party unexpectedly drive upon the scene and just as quickly depart.

Mackey then punched and kicked Carnegie into unconsciousness. Mackey and Hancock loaded Carnegie into the trunk of the rental car, and quickly departed themselves. Mackey took the wheel from an erratically driving Hancock, and

headed to an isolated area he knew of in Sonoma County, figuring that the police, if tipped by the third party, would be scouring the highway to Lake Tahoe.

Once they arrived at the secluded north Bay Area location, Hancock opened the trunk and discovered that Carnegie was still among the living. Neither Hancock nor Mackey could bring himself to finish the job. Mackey reasoned he had done more than his share, and it was Hancock's turn. Hancock took the rope, tied a noose in it, put the rope around Carnegie's neck, gave the other end of the rope to Mackey (who was standing outside the driver's door), and told Mackey to pull on the rope. Mackey did so, until Hancock took the rope from him. Hancock closed the trunk, rejoined Mackey in the car, and the two drove to a steep spot near the road, where they threw Carnegie's body down the embankment.

Soon enough, the law caught up with Mackey. Pursuant to a plea agreement, Mackey pleaded no contest to first degree murder with a sentence of 25 years to life. Under this agreement, no special circumstances or enhancements would be charged, Mackey would testify against Blatt, and the district attorney would recommend parole after Mackey had served the minimum possible term of 16 years eight months (providing he had been a good prisoner).

With Mackey testifying against him, Blatt was tried twice. On both occasions, the jury deadlocked. After the first trial,

the district attorney, in a letter dated November 1990, attested that Mackey had fully held up his end of the plea bargain.

The Board deals regularly in murderous fare. But the circumstances of the murder Mackey committed leave a bad taste even within this diet. Overwhelming evidence supports the Board's conclusion that this offense meets almost all of the parole unsuitability factors that are offense related; i.e., the offense was committed in an especially heinous, atrocious or cruel manner, as there were multiple victims (given the plan to murder Farley); the offense was carried out in a dispassionate and calculated manner; the victim was abused, defiled or mutilated; and the offense demonstrated an exceptionally callous disregard for human suffering. (Regs., § 2402, subd. (c)(1).)

III. Insight into the Offense

The critical evidence of Mackey's alleged lack of insight is found in the following exchange at the Board hearing between the Board's presiding commissioner and Mackey, which we quote:

"[COMMISSIONER]: All right. So, when did [victim Carnegie] expire, when did he die?

"[MACKEY]: Later on after we put him in the trunk. We drove up to Sonoma County like you said. Mr. Hancock got out of the car, went to the back, and he said that Mr. Carnegie was still alive.

"[COMMISSIONER]: Okay.

"[MACKEY]: Said that he [Hancock] needed some help. I got out of the car and stood next to the door, the driver side door.

Mr. Hancock brought the end of a rope to me. And he told me to pull. And I pulled until he told me to let go.

"[COMMISSIONER]: So, what were you pulling on?

"[MACKEY]: I knew that the rope was around Mr. Carnegie's neck.

"[COMMISSIONER]: All right. So, you choked him to death after all that?

"[MACKEY]: Yes, Sir."

In its decision, which was couched primarily in the words of the Presiding Commissioner, the Board found with respect to Mackey's insight, based on the above exchange:

"[COMMISSIONER]: . . . So, our question is, . . . what caused all this, why did you do all this, and how close have you come to grips with the crime itself. And I want to point to a couple things, one in particular that I was really disappointed with. And that was just to illustrate how we don't think you have the level of insight that we think you can achieve, but haven't as yet. And that is when we spoke of the crime, you went through the brutal nature of this thing, you got to the place where you were going to dump the body, the remains, and he wasn't a body yet, he was still alive. And your description of what you did at that point you held, at the direction of your crime partner, you held the other end of a rope. You know, you choked that guy and you knew you were doing that at the time. You left that completely out, which separates yourself from the final act of murder. I mean, think about it.

"[MACKEY]: I understand.

"[COMMISSIONER]: You said, I just held the rope. It's like you're holding on to a horse or something. It was much more brutal than that. And I mean, that is astonishing to me after going through the description of the crime, talking about how you kicked him and beat him. . . . But that description of holding the rope, where you're completely divorcing yourself from your act in this final demise of this poor man, was astonishing. I mean, I had to probe you a while to get that out of you. And I knew what happened. And you knew what happened. You knew what was going on.

"[MACKEY]: Yes, Sir."

Although the Presiding Commissioner mistakenly recounted that Mackey said he merely "held" the other end of the rope (Mackey actually said he "pulled" the rope), and although Mackey has consistently maintained that he "pulled" the rope,³ this does not diminish the essential point underlying the Board's determination regarding Mackey's insight: Even after all these years, even after all the brutal acts Mackey admits he undertook in this offense, Mackey is still divorcing himself from the "final act" of actually killing Carnegie. That is, Mackey is reluctant to say, on his own, that he pulled the rope *so as to strangle Carnegie to death*. The Board found this reluctance "astonishing." The Board remarked that it had to "probe

³ See Mackey's 1990 probation report statement, upon which the Board relied in detailing the circumstances of the offense.

[Mackey] a while to get [this] out of [him]." Mackey even acknowledged he understood the Board's point.

Also, as noted, the Board, in setting forth the circumstances of the offense, relied on Mackey's 1990 statement to the probation officer. That statement contains the following passage: "Mackey believes that he is to blame for Lawrence Carnegie's death. He believes that he was the catalyst for the murder. Although Blatt wanted Farley and Carnegie killed and depended on Mackey to be the 'middle man' to set up the killings, Mackey feels that if he had tried to talk Blatt out of the murders, Blatt would not have followed through with plans to kill either man." There is a certain detachment in this passage that mirrors Mackey's detachment from the end of the rope that choked the life out of Carnegie. (See *Shaputis, supra*, 53 Cal.4th at pp. 214-215, fn. 11 [court review under the "some evidence" standard is not limited to the evidence explicitly cited by the Board or the Governor in its decision, but extends to the entire record].)

This evidence involving insight constitutes "some evidence"—a "modicum of evidence"—of "a *material* deficiency in [Mackey's] understanding and acceptance of responsibility for the crime" (*Ryner, supra*, 196 Cal.App.4th at p. 548), which supports the Board's conclusion that (1) Mackey lacked insight into his offense, and (2) this lack of insight was, as the law on parole suitability requires, "rationally indicative of

[Mackey's] current dangerousness (*Shaputis, supra*, 53 Cal.4th at pp. 214, 219).

IV. Psychological Evaluation

A psychological evaluation of Mackey in February 2009 opined that, based on the data from the available records, the clinical interview, and the customary risk assessment protocols, Mackey "presents a relatively Low Risk for violence in the free community."⁴ The evaluation also concluded that Mackey "appears to have developed insight into many of the causative factors underpinning his life crime and he articulated personal changes that he has made to address those issues"

The Board partially discounted this psychological evaluation for its failure to question Mackey more extensively about his insight into the horrific nature of the offense. We also note that the evaluation does not discuss, or even mention for that matter, defendant's agreement to kill a second victim (the plan to murder John Farley, also arising from litigation against Blatt). (See *Shaputis, supra*, 53 Cal.4th at pp. 214-215, fn. 11 [court review under the "some evidence" standard extends to the entire record].)

⁴ The risk assessment protocols were the PCL-R (Psychopathy Check List-Revised), the HCR-20 (Historical-Clinical-Risk Management-20), and the LS/CMI (Level of Service/Case Management Inventory).

V. Other Factors Regarding Parole Suitability or Unsuitability

Other than the factors related to the offense and the issue of insight, the parole factors favor parole.

At the time of the offense, Mackey had a college degree and was married. He divorced after the murder, and has remarried in prison to a woman he has known since junior high school. While in prison, he has also earned a master's degree in humanities.

Prior to the offense, Mackey had no history of crime or violence, and has never had an issue with drugs or alcohol. He has but one rule violation in prison, and that was in 1996 for horseplay, which was reduced to a mere administrative violation. His prison work reports, primarily in the culinary area, are generally above average to exceptional. In May 2009, Mackey became certified in air conditioning and refrigeration work; he has also completed a paralegal course and had a real estate license.

He has attended and received laudatory evaluations in several rehabilitative and self-help programs, including Christian 12-step, Victim Awareness Offenders, Good Intentions/Bad Choices, Anger Management, Shortcut Thinking, Relationship Healing, Power and Control Issues, Development of Trust, and Relapse Prevention.

Mackey's parole plan is to live with his wife in Manteca, where he has two job offers and support from a minister and from family and community members.

VI. Conclusion

We conclude that the Board's parole denial is supported by "some evidence," a "modicum of evidence." (*Shaputis, supra*, 53 Cal.4th at pp. 198-199.) The horrific circumstances of the commitment offense, together with the evidence of Mackey's lack of insight into the offense, support the Board's conclusion that Mackey "currently poses a threat to public safety." (*Id.* at pp. 220-221.) There is a "rational nexus" between this evidence and the Board's determination of current dangerousness. (*Id.* at p. 221.)

DISPOSITION

The petition for writ of habeas corpus is denied.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.