Filed 5/16/12 In re Bienek CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re COLE BIENEK on Habeas Corpus.	E054037 (Super.Ct.Nos. RIC1110243 & ICR11887) OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Petition granted.

Marilee Marshall & Associates, Inc., and Christine M. Aros for Petitioner.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Phillip Lindsay, Kathleen R. Walton, and Michael Rhoads, Deputy Attorneys General, for Respondent.

In this matter, we issued an order to show cause to inquire into the Governor's reversal of a decision of the Board of Parole Hearings (the Board) finding petitioner Cole Bienek suitable for parole. Because we find no evidence to support the Governor's

decision, we will vacate that decision and reinstate the Board's order setting a parole date.[1]

STATEMENT OF FACTS[2]

No one can deny (and petitioner does not) that the subject murder was appalling. The crime occurred in 1988, when petitioner was 18 years of age. The victim was a 65-year-old man. Petitioner had met the victim a week or so before the killing when the victim, in short, picked him up as petitioner walked along Palm Canyon Drive in Palm Springs late at night.[3]

Petitioner was high on "speed," methamphetamine, at the time. After sharing a few beers, the victim, as the instigator, performed oral sex on petitioner and then gave him $75. Petitioner then left and purchased more methamphetamine, which he consumed at the "squat" where he was living, an abandoned motel frequented by other transients.

After the drugs were gone, it occurred to petitioner that he might be able to get more money out of the victim, and he returned to the victim's home. Once again, the victim orally copulated petitioner. After the victim fell asleep, petitioner took money

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[1] In fact, petitioner has served more than the term established by the Board.

[2] Most of the facts are taken from the transcript of the 2010 parole hearing.

[3] Petitioner told the panel that he had just done a "dine and dash," that is, eating at a restaurant and then quickly leaving without paying. This candor over a detail the panel would otherwise never have known was repeated with respect to a substance abuse relapse; see *infra*. It is inferable, however, that he had been compiling a steady record of accomplishment and participation.

from his wallet and his car keys. Petitioner then drove the victim's car to a location where he could buy more drugs. He then used the remaining money to put gas in the car, and returned the car and the keys to the victim.

Petitioner then formulated a plan to steal another vehicle belonging to victim and sell it—to "change my luck and kind of, you know, maybe get a place to live and all the kind of distorted dreams that junkies have." He returned to the victim's home while the latter was at work and took the other car, but was stopped by police for speeding and the vehicle was impounded. Petitioner then walked to the victim's home—apparently a matter of some miles, as he was stopped on the highway to Indio—and left a note reading, "'Hans, I'm extremely sorry your car was towed to Indio. I'll be over later so you can kill me.'" Petitioner explained that he was trying to be jocular, so the victim would not press charges.

After spending the rest of that day doing or looking for drugs—as petitioner told the panel, "It's a full-time job to stay high"—he again returned to the victim's home with the intent to rob him. After doing some preliminary rifling through the house, petitioner hid behind a door as the victim entered his home and hit him in the head with a rock he had picked up in the yard. To petitioner's surprise, the victim resisted, and petitioner struck him repeatedly until he fell. He then took the victim's money, credit cards, and car keys before leaving in the victim's Trans Am. Petitioner also admitted to the panel that the victim was making "awful" sounds when he left—the victim was still alive—but petitioner did not call for assistance.

Within a day or so, petitioner, with two young female acquaintances, was apprehended in San Diego. He was still wearing bloodstained clothing and asked a detective with some bravado, "'Am I going to get the death penalty for what I did?'" He eventually entered a guilty plea to second degree murder and was sentenced to a determinate one-year enhancement for use of a deadly weapon, followed by 15 years to life in state prison. (Pen. Code, §§ 187, 12022, subd. (b).)[4]

Petitioner's only previous formal involvement with the law resulted in a trespassing conviction. In that incident, he and a friend remained in a movie theater after the film was over intending to steal candy. However, his behavior had been troubling for several years. He reported that he was raised in a supportive, financially stable household and did well in school until he was about 12 years old—a point at which, he noted at the hearing, he was told that he was adopted. At that time, his grades deteriorated from A's and B's to D's and F's, and he became involved with alcohol and drugs. He also began lying and stealing to the point that he was "kicked out" of his school and sent to a facility called Provo Canyon School, apparently a school for children with disciplinary issues. (Petitioner described it as the kind of school that "you can't get kicked out of" and a "reform school.") He eventually graduated and began working as an electrician's helper while living with his girlfriend. However, that relationship ended and he lost his job (apparently due to his drug abuse), which resulted in his becoming homeless for about two months before the killing. His parents were apparently willing to have him come

[4] All further statutory references are to the Penal Code unless otherwise indicated.

home, but not if he was using drugs—and as described *ante*, drugs were the focus of his life.

For the first eight years or so of his incarceration, petitioner continued to display a lack of control and disruptive behavior. Through 1997, he accumulated 20 serious rules violations (115's) and a number of counseling reports (128's). His 115's included violations for fighting, battery, resisting a peace officer, and possession of alcohol and marijuana.

However, at that point, his disciplinary infractions ceased. Petitioner discussed his motivation in detail at the hearing. He told the panel that he had used heroin while in prison between 1993 and 1997, pretty much whenever he could scrape together the money to buy it. After another inmate attempted to stab him over a drug debt, he was placed in administrative segregation. Thus, forcibly weaned off heroin, he took the opportunity to do "a lot of thinking" and concluded that he "didn't want to live the lifestyle of being a drug-addicted wannabe in prison."

The record before us focuses on the period following petitioner's previous parole hearing.[5] Of particular interest, given the Governor's reasons for rejecting the Board's findings (see *infra*), is the fact that he began formal involvement with a group called "Men For Sobriety" no later than 2001, as shown by his correspondence to the group. This group—or at least the original organization, "Women for Sobriety"—was founded

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[5] At one point, a panel member commented that "this is since your last hearing. I'm not going to go over the ones [certificates and laudatory 'chronos'] that were already referenced in the prior hearings."

in 1976 and relies upon a "Thirteen Statement Program," each statement being matched with a corresponding affirmation, e.g., "I have a life-threatening problem that once had me," "*I now take charge of my life and my disease*," and "*I accept the responsibility*." (See http://womenforsobriety.org, "New Life" Program, [as of May 8, 2012].)

Petitioner eventually obtained certification as a moderator from the organization and was ultimately successful in persuading the prison authorities to allow him, as moderator, to conduct group meetings. Although he told the panel that he had maintained his sobriety since 1997 before becoming involved in the program, the program "made a lot of sense to me. I liked the philosophy of it . . . ." He described that philosophy as "that used to be me, but that's not me now."

However, in 2006, petitioner suffered a serious and "excruciatingly" painful attack of kidney stones. While in the prison infirmary he at first refused morphine, but his doctors overrode his wishes so that for nine days he received morphine three times a day. When he returned to normal prison life he was prescribed Tylenol with codeine for an additional 10 days, and when that prescription expired he bought the tablets illicitly from another inmate. At that point, he realized that he needed to take a new approach to his substance abuse issues. Accordingly, petitioner went to a Narcotics Anonymous (NA) group and said, "I'm an addict now just like I was then, and I need help." His participation in the program has been consistent since that time.

While incarcerated, petitioner has been active in numerous self-improvement and community-outreach programs such as "Convicts Reaching Out to People," through which he speaks about his life experiences to "at risk" young people. He has taken

college courses toward an Associate of Arts degree. He has participated in arts groups as an instructor as well as a musician and artist; as a founding member of "Artists Serving Humanity," he provides paintings for sale to benefit charities and also has painted portraits for the families of deceased Iraqi war veterans. His supervisor considers his work to be "competitive within the current commercial art market." Laudatory chronos written during the last few years described him as having a "mature and positive approach," being a "positive influence," to "have made a true effort at rehabilitation,"[6] to have demonstrated "selfless dedication to the position" while working for a facility education officer, to have "professional work habits and dependability," and to be "ready to re-enter society on a multitude of levels."

During his incarceration, petitioner has maintained a close relationship with his parents, who will provide a home and job if petitioner can arrange to be paroled to Arizona, where they live. A longtime family friend also offered petitioner employment in the La Quinta area and, at the time of the hearing, he also had at least two offers of a place to live in the area. One of those offers was from another old family friend who planned to serve as petitioner's Alcoholic Anonymous (AA) and NA sponsor. Petitioner also had an offer to write freelance for a golf publication. Among the letters of support presented at the hearing, those from persons who had observed or worked with petitioner in prison consistently used such terms as "hard-working, committed, courteous and

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[6] "[O]ne of the few inmates . . . ."

respectful, . . . thoughtful and [an] insightful listener," "respectful, responsible, dedicated to positive attitudes," "stabilizing presence and a leader," and "positive, respectful."

As noted, petitioner described a good relationship with his parents. However, he also told the panel that as he skipped kindergarten, he was usually younger and smaller than his classmates. (He described himself as "the little fat kid in the front of class that used to raise my hand and answer all the questions.") As a result, he was the subject of frequent bullying, including an incident at the reform school where an older student attempted to pull petitioner's head down to his crotch. Petitioner admitted to the panel that he had felt a lot of "rage" from these experiences, and also noted his conflicting feelings of shame after accepting money from the victim for prostituting. Petitioner believed that these feelings triggered an explosion of this rage, with the methamphetamine a contributing factor in his loss of control in beating the victim to death.

Finally, petitioner's most recent psychological evaluation prepared in 2009 expressed the view that petitioner had "gained insight into his self-centered thinking and his feelings of anger and rage prior to the offense. He also displayed insight into his difficulties communicating his feelings and into the impairment of his judgment and impulse control that resulted from his use of methamphetamine . . . ." The evaluator also felt that he "has displayed an improved ability to understand and appreciate the impact of his actions on others." The overall view, taking into account several sets of criteria, was that petitioner represented a low risk of violence if released.

After deliberating, the panel acknowledged that the crime was still difficult to think about, but it concluded that it was no longer probative with respect to petitioner's future conduct. The panel particularly noted petitioner's substance abuse relapse in 2006, but felt that his response to the backsliding reflected his increased level of understanding as to the nature and significance of his addiction. After finding him suitable for parole, the panel asked petitioner to create a written "relapse prevention plan" (if he did not have one prepared), which his eventual parole agent could review and enforce. It also indicated that conditions of parole would be imposed, which would include abstention, drug and alcohol testing, and regular participation in AA/NA or a similar program.

The Governor,[7] however, exercised his authority under section 3041.2 and reversed the finding of suitability. In his letter notifying petitioner of that decision, the Governor, after summarizing the record and noting the positive factors, stressed the "exceedingly violent and savage nature" of the murder, as well as its callousness. He also expressed concern over petitioner's "failure to devise thorough and detailed plans for addressing and maintaining his sobriety in the community." He noted petitioner's continuing issues with substance abuse while incarcerated, including the 2006 relapse, and criticized petitioner for not participating in substance abuse programs "on a consistent basis" until 2005. Finally, the Governor theorized that the extent of petitioner's substance abuse history indicated that he would "likely benefit greatly from paroling to a sober living facility . . . ."

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[7] Former Governor Arnold Schwarzenegger issued the decision.

This petition followed. As we will explain, the Governor's core finding that petitioner continues to represent an unreasonable risk of violence is not supported by the necessary modicum of evidence. Accordingly, we will grant the petition and reinstate the finding of suitability.

DISCUSSION

While this petition was pending—indeed, while this court was in the process of preparing the tentative opinion—the California Supreme Court restated and clarified the powers and duties of the courts in reviewing parole decisions. (*In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*).)[8] As a result, we do not need to set out a treatise or extensive discussion of prior authorities, but will simply summarize the rules under which we consider this petition.

First, however, to backtrack somewhat, the Governor does have the power under section 3041.2 to conduct a de novo review of the Board's decision. (See Cal. Const., art. V, § 8, subd. (b); *In re Ryner* (2011) 196 Cal.App.4th 533, 544.) While the Governor, like the Board, must consider the same factors relating to suitability and unsuitability,[9] the Governor has the discretion to take a stricter or more cautious view of the evidence than did the Board. (*Shaputis I*, *supra*, 44 Cal.4th at p. 1258; *In re Ryner*, at p. 544.) Our review of the Governor's decision is deferential; we respect his exercise of discretion and correct only decisions that are arbitrary, capricious, or fatally lacking in

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[8] The Supreme Court previously decided an earlier petition by the same inmate, *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis I*).

[9] Title l5 of the California Code of Regulations, section 2042.

factual support. (*Shaputis II*, *supra*, 53 Cal.App.4th at p. 215; *Shaputis I*, *supra*, 44 Cal.4th at pp. 1260-1261.)

Shaputis II elaborates upon the deference that must be given either to the Board *or* the Governor. A decision by either need be based only upon "some evidence" which bears upon the evaluation of the inmate's future dangerousness. (*Shaputis II*, *supra*, 53 Cal.App.4th at p. 209; see also *In re Lawrence* (2008) 44 Cal.4th 1181, 1209.) The courts are not free to reject plausible evidence upon which the Board or Governor relies, even if there is ample contradictory evidence. (*Shaputis II*, at p. 210.)

It is also appropriate for the decisionmaker to consider all aspects of the inmate's mental state, including his remorse, attitude, and understanding of the offense. (Cal. Code Regs., tit. 15, § 2402, subds. (b), (d).) The fact that such an analysis may involve, or result in, a certain subjective evaluation of the inmate does not make it improper or subject to disregard by the courts. (*Shaputis II*, *supra*, 53 Cal.App.4th at p. 219.)

However, nothing in *Shaputis II* disavowed the clear statement in *In re Lawrence*, *supra*, 44 Cal.4th 1181, to the effect that in light of the constitutional liberty interest at stake, judicial review of parole decisions "certainly is not toothless." (*Id*. at p. 1210; see also *In re Criscione* (2009) 180 Cal.App.4th 1446, 1458.) In other words, *Shaputis II* does not turn the courts into the "potted plants" first deplored by the court in *In re Scott* (2004) 119 Cal.App.4th 871, 898; indeed, *Lawrence* notes *Scott's* use of the term in its discussion of the necessity of a judicial review "sufficiently robust to reveal and remedy any evident deprivation of constitutional rights." (*In re Lawrence*, at p. 1211.) *Shaputis II* compels deference to the view of the evidence taken by the Board or

Governor; it does not require, or countenance, abdication of the judicial responsibility to ensure that a parole decision is in fact supported by some relevant evidence. Indeed, although *Shaputis II* describes a reversible decision as "arbitrary" (*Shaputis II*, *supra*, 53 Cal.App.4th at p. 215), which certainly seems to impose a daunting task on the disappointed inmate, the court also cites *Lawrence* and *Shaputis I* in noting that the challenged decision must be "reasonable." (*Shaputis II*, at p. 212.) "Reasonable" is a possible antonym for "capricious" or "arbitrary," but it is also on the other end of the spectrum from "unreasonable." We therefore do not think that the more colorful "arbitrary" and "capricious," which admittedly carry a more censorious innuendo, do not additionally expand the scope of judicial review. In other words, our approach to the matter is, if the Governor's take on the evidence is "reasonable," we must deny the petition. If it is not, we may grant relief.

We turn now to the case at hand and the Governor's analysis of the evidence.

The Governor first relied on the brutal nature of the crime—a point clearly supported by the evidence. However, the nature of the crime is only "evidence" of unsuitability if it has current "predictive value." (*In re Lawrence*, *supra*, 44 Cal.4th at pp. 1201, 1212, 1218-1219.) *Lawrence* explains that the nature of the crime is certainly evidence that the inmate was a danger to the public at that time, but that affirmative evidence of the inmate's subsequent personal and emotional development over a period of time may eliminate the value of that factor as a predictor of future behavior. (*Id*. at p. 1219; *In re Ryner*, *supra*, 196 Cal.App.4th at p. 546.) We recognize that petitioner continued to commit serious acts of misbehavior for several years after his conviction.

But we agree with the Board, which evidently realized that 13 years of unblemished performance makes reliance *solely* upon the nature of the crime untenable because there is no longer a nexus between the life crime and the petitioner's future behavior. (See *In re Lawrence*, at p. 1227.) In other words, at this point in time, there is no rational basis for believing that petitioner has a *current* propensity for violence.

However, as the Governor recognized—and we agree with his focus—the key factor in this case is petitioner's substance abuse and its relation both to the murder and to the evaluation of his risk of future violence. By his own admission, at the time of the murder, petitioner's life centered upon getting and using drugs, specifically methamphetamine. There can be little dispute that the abuse of controlled substances either reduces moral inhibitions or liberates violent impulses, or both. Thus, we do not disagree that if there were room for reasonable doubt as to petitioner's commitment to sobriety, this would be "some evidence" for concern that petitioner might resort again to violence.

However, the "facts" upon which the Governor relied in this respect do not withstand close inspection. The Governor's statement that petitioner's consistent participation in substance abuse counseling did not begin until 2005 is simply incorrect. (Cf. *In re Morganti* (2012) 204 Cal.App.4th 904, 920 [board "put[] words in [the inmate's] mouth" with respect to his supposedly sole reliance on religion as an abstinence plan].) While it is true that it was in 2006 that he committed himself to the AA/NA program, as we discussed *ante*, he had been working with the "Men For Sobriety" program for several years before that, even if he was unable to begin to lead formal group

involvement until 2005. Furthermore, we are unable to ascertain any basis in the record for the Governor's criticism of a lack of consistency in petitioner's pre-2005 participation.[10] In this case, there is no evidence to support a suspicion that petitioner's participation and internalization of substance abuse information is either feigned or incomplete.

We also find the Governor's reliance on the 2006 relapse to be somewhat unfair, because, as we have noted *ante*, neither the Board nor the Governor would have known anything about it if petitioner had not volunteered the information as part of his overall explanation of his progress and increased self-awareness. It is also worth stressing that the "relapse" was not volitional with petitioner, but was triggered by the administration of morphine by medical personnel in connection with a medical condition, after petitioner had, by his account, successfully achieved almost 10 drug-free years. His reaction to his failure, within two weeks, was to accept that he needed more help in facing his addiction, and he immediately began AA/NA. In our opinion, this incident does not provide any support for the conclusion that petitioner is likely to affirmatively seek out controlled substances if released. We agree with the Board that it affirmatively reflects his ability to confront and deal with risks and relapses.

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[10] The Attorney General cited *In re Hernandez* (2011) 200 Cal.App.4th 1507, 1520, a case in which the Court of Appeal upheld a denial of parole in part because the inmate had told a psychologist that he was only attending AA/NA meetings because he was required to do so, had only attended for three years, and was unable to recite any of the "12 Steps." Not only are the facts in the present case clearly distinguishable, but the Supreme Court granted review of *In re Hernandez* on February 29, 2012, S198526. As it did not direct that the opinion remain published, *In re Hernandez* is not longer citable. (Cal. Rules of Court, rule 8.1105(e)(2).)

The Governor was also concerned that petitioner had not prepared a "relapse prevention plan," although he noted that the Board had asked him to do so at his parole hearing in 2007. Petitioner has secured an AA/NA sponsor—a family friend whom he described as a "surrogate father"[11] and who would be available 24 hours a day if petitioner felt the desire to drink or use drugs. (As noted *ante*, his sponsor has also offered him a place to live if he is paroled to the La Quinta area.) As he explained to the panel, a member's relationship with his sponsor is "one of the fundamental parts" of a relapse prevention plan. He also stressed to the Board that (as evidenced by his decision to turn to AA/NA, a program he had previously avoided because he didn't like to think of himself as an addict) "I know how to ask for help." He repeated also the support of his family. In light of these facts, petitioner's failure to prepare some kind of written "relapse prevention plan" in no way suggests recalcitrance or indifference; indeed, he may have been (as we are) unable to ascertain just what additional advance planning he needed to show the Board. All in all, the absence of a written "relapse prevention plan" is not evidence that petitioner is likely to relapse in fact.

The Governor's final concern was that petitioner had not arranged for a "halfway house" or structured environment. In our view, this comes close to undesirable "micromanaging" of the parole process; surely it is for the Board and parole authorities to set such a requirement if their expertise deems it appropriate. But, in any event, this factor is not evidence of dangerousness. Petitioner has a strong support system in place.

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[11] Petitioner had also apparently been a student of the sponsor's wife as a child.

Despite the horrific nature of his offense and his defiant youth, he has maintained the love and support of his parents and the esteem of those who know him. He has employment offers and housing available to him. There is no basis for the insistence that he needs more "structure"; indeed, it could much more reasonably be said that the scarce resources of such facilities would be wasted on petitioner and should be saved for a parolee with fewer options. (See *In re Ryner*, *supra*, 196 Cal.App.4th at p. 551 [rejecting Governor's reliance on speculation that the inmate might need "more" anger management therapy in the absence of any evidence of a current, or even recent, anger problem].) Finally on this point, and also as we discussed *ante*, the Board has imposed conditions of parole that will subject petitioner to strict and constant scrutiny and continued participation in substance abuse programs.

Of course, it is true that relapse into substance abuse remains a constant concern, especially where an inmate's commitment offense was either related to, or committed under the influence of, alcohol or drugs. However, the mere fact that an inmate was a substance abuser in the past, like the nature of the commitment offense, cannot be used as a basis for the denial of parole in perpetuity. (*In re Morganti*, *supra*, 204 Cal.App.4th at p. 921, citing *In re Lawrence*, *supra*, 44 Cal.4th at p. 1226.) It is only where there is an *increased* or *unusual* risk that the inmate will relapse and that a substance abuse history will justify continued findings of unsuitability for parole. (*In re Morganti*, at p. 922.) Where an inmate has demonstrated a lengthy history of abstinence from alcohol or drugs, and has participated fully in self-help programs targeted at substance abuse, there is no basis for reliance on speculative concerns. (See *In re Loresch* (2010) 183 Cal.App.4th

150, 160-162 [the improper use of hypothetical speculations as to the inmate's response to "worst case, what if" stressors in the complete absence of any current "warning signs"]; also *In re Ryner*, *supra*, 196 Cal.App.4th at p. 551.)

As the cases teach, the paramount concern in making a parole decision is the safety of the public. (*Shaputis II*, *supra*, 53 Cal.App.4th at p. 209.) It is for this reason that courts must take a deferential approach when the Board or the Governor concludes that an inmate does represent a measurable risk to the public if released. But a decision based on no evidence cannot stand.

When petitioner committed the life offense, he was a troubled and drug-addled teenager. He is now a man in his 40's, with substantial accomplishments, who has demonstrated his ability to conform to expected standards of behavior for over 13 years. With one brief lapse, in part not of his own making, he has broken his pattern of substance abuse simply because he does not like the person that he was and recognizes that using drugs will prevent him from not just reaching his goals, but from being the person he wants to be.[12] Neither the lack of a written "relapse prevention plan" or the

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[12] "My constant reminder to stay on the path that I'm on is that I don't like that person that I was. I'm not a violent person. I'm a drug addict. I will be a drug addict for the rest of my life, and I don't like the person that I am when I'm on drugs. I'm a useful, happy, contributing, helpful teacher when I'm not on drugs. I have things to offer people. I have things to offer the community."

fact that he does not currently intend to enter a "halfway house" is evidence that he is at risk of relapse into drug use and criminal activities.[13]

As we have also explained, petitioner's extended period of good behavior and accomplishment in rehabilitative and service activities also serves to reduce the continuing predictive value of the offense, especially once current substance abuse is removed from the equation. The Board's decision was therefore well-reasoned and well-supported, while the Governor's reversal is devoid of factual support. The Governor's conclusion that petitioner *currently* represents an unreasonable risk to public safety cannot stand. The proper remedy in this situation is to vacate the Governor's decision to reinstate that of the Board. (*In re Ryner*, *supra*, 196 Cal.App.4th at p. 553; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256.)

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[13] Of course, we recognize that with respect to substance abuse and addiction, there are no absolutes and no guarantees; the program of AA/NA itself encourages its participants to approach sobriety one day at a time. But given petitioner's success at sobriety, his expressed commitment to AA/NA, the conditions of parole imposed by the Board, and the personal support available to him, the possibility of a relapse not only into drugs but into crime remains wholly speculative and cannot be used to deny parole.

DISPOSITION

The petition is granted and it is so ordered.

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CODRINGTON
Acting P.J.

We concur:

HOLLENHORST
J.

RICHLI
J.