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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

S.M. SALINAS, as WARDEN AT DEUEL  
VOCATIONAL INSTITUTION,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA  
CLARA COUNTY

Respondent,

RICKY A. CARPENTER,

Real Party in Interest.

No. H038008  
(Santa Clara County  
Super. Ct. No. 68207)

S.M. Salinas, warden at Deuel Vocational Institution petitions this court for writ of mandate and or prohibition to prevent the Santa Clara County Superior Court from holding an evidentiary hearing in the case of *In re Ricky Carpenter on Habeas Corpus* to determine whether a life term inmate's rating of moderate risk for violence on a risk-assessment instrument is evidence of an unreasonable risk of violence.

After reviewing preliminary opposition to the petition and petitioner's reply we issued an order to show cause why a peremptory writ should not issue as requested in the petition for writ of mandate and or prohibition. Having received and considered real

party in interest's return and petitioner's reply we conclude that the superior court acted in excess of its jurisdiction in ordering the evidentiary hearing.

*Factual and Procedural Background*

In May 2009, life term inmate Ricky A. Carpenter was given a psychological evaluation in preparation for an upcoming parole suitability hearing. Forensic psychologist Richard Hayward recorded that Carpenter "has displayed signs of improving maturity during his incarceration [and] currently displays improved interpersonal skills and an increased awareness of the impact of his actions on others," but that he never developed the capacity to experience empathy while growing up and "remains deficient in this area."

Carpenter scored in the moderate range of psychopathy when compared to other male offenders, based in large part on his juvenile history and the commitment offense. In the test that assesses likelihood of future violence, Carpenter was "elevated" in the historical domain, "displayed only a few of the predictive factors for recidivism" in the clinical domain (which assesses current and dynamic factors), and was possibly elevated in the management of future risk domain. Overall, he scored in the moderate range for violent recidivism. On the test designed to evaluate the risk of recidivism (whether violent or not), Carpenter was in the moderate level, with his recent pro-social behavior serving to lower his risk to that moderate level. Dr. Hayward wrote that "[a]fter weighing all the data from the available records, the clinical interview, and the risk assessment data, it is opined that Mr. Carpenter presents a moderate risk for violence in the free community."

In September 2009, the Board of Parole Hearings denied Carpenter parole for three years. He sought habeas relief in Santa Clara County Superior Court, and on September 24, 2010, that court ordered the Board to hold a new suitability hearing for Carpenter within 30 days, or by October 22, 2010.

On October 19, 2010, the Attorney General filed a petition for writ of supersedeas asking this court to stay respondent court's September 24, 2010 order pending appeal. On November 23, 2010, the Attorney General filed a motion to dismiss the appeal of the order. It appears that the Board went ahead and held a hearing for Carpenter on October 21, 2010.

At the October 2010 hearing, the Board used the same May 2009 psychological evaluation it had used at the previous hearing, as it was still the most recent evaluation. The Board granted Carpenter parole, but the deputy commissioner at the hearing told Carpenter, "I wanted to put on the record that I had concerns because of the psychological evaluation, of course, I would. The diagnostic tools have said you're a moderate risk of violent reoffending. I thought you and your counsel rebutted that well by pointing out that other reports had placed you at a low level. You also rebutted it just simply by your behavior over the last decades of avoiding violence in an institution."

In March 2011, the Governor reversed the Board's decision to grant Carpenter parole. The Governor wrote, "Mr. Carpenter committed a disturbingly vicious, callous, and inexplicable crime. The psychologist, who most recently evaluated him, concluded he still presents an elevated risk of violence if released, and that his ability to feel empathy for others is deficient. And while the nature of the murder evidences a severe anger problem, Mr. Carpenter's limited efforts to address this problem indicate he has not yet gained the ability to control his anger. This evidence, when taken together, indicates that Mr. Carpenter remains a danger to society."

Regarding Carpenter's psychological evaluation, the governor wrote, "The psychologist who evaluated [Carpenter] in 2009 rated him in the 'moderate' range for psychopathy, and in the 'moderate' risk range for both violent and general recidivism. Overall, the psychologist found that he poses a 'moderate' risk for violence in the free community. The psychologist pointed to Mr. Carpenter's relationship instability, substance abuse, young age at the time of the crime, his present lack of insight,

impulsivity, and unresponsiveness to treatment as factors that contributed to his elevated risk of violent recidivism. [¶] The psychologist also noted that Mr. Carpenter remains deficient in his ability to experience empathy for other people. This is particularly troubling because Mr. Carpenter's crime demonstrated a deficient ability to empathize with other people. The fact that he remains deficient in this area indicates that he remains prone to violence against others for trivial reasons."

Carpenter filed a habeas petition in Santa Clara County Superior Court to protest the Governor's decision. In July 2011, the court appointed counsel for Carpenter and issued an order to show cause because, among other things, his "petition squarely presents the question of: Just what does a 'moderate' rating mean? To a lay person the word moderate . . . connotes something in the range of a 50% risk. That is to say, a 'moderate' rating may . . . make it seem the odds are even that the person will reoffend. However, this Court is aware from other petitions and forensic evaluations that the terms 'low,' 'moderate' or 'high' are not measures on a scale of 100%, but rather are comparisons to the 'base rate' of the population to which the inmate belongs. It has been said that moderate essentially means average for the kind of risk being considered and therefore does not indicate 'elevated risk' as the Governor states. [¶] . . . If 'moderate' simply equates to average for any life term inmate who has surpassed his MEPD<sup>1</sup> then it may be the case that a 'moderate' rating cannot, as a matter of law, be grounds for a parole denial given that there is a presumption that parole shall normally be granted. (PC § 3041.)"

The Attorney General filed a return; then, supplemented the record with an article from a journal called "AP-LPS News."<sup>2</sup> The article, "Assessing Risk for Violence using Structured Professional Judgment," listed the HCR-20 used in Carpenter's evaluation as an example of a structured professional judgment instrument. The article noted that such

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<sup>1</sup> MEPD —minimum eligible parole date.

<sup>2</sup> There is no explanation as to the type of journal the article came from or what the letters AP-LPS stand for.

instruments "provide non-numeric estimates of the likelihood of future violence." The article defined as "high risk" a person who "will likely be violent in the future if no appropriate risk management plans are not enacted [sic]," as "low risk" a person who requires "minimal or no supervision, monitoring, management or intervention in order to stem violent risk," and as "moderate risk" a person who is "neither high nor low risk."

Carpenter filed a traverse that included a declaration from forensic psychologist Melvin Macomber, who attested that he had for 40 years been treating and evaluating life term inmates for the Department of Corrections and Rehabilitation. Dr. Macomber said that the two primary tests used in these evaluations were not standardized and tested for accuracy on inmates and therefore should not be used to predict an inmate's risk of dangerousness. He said it was simply not possible to develop measures that predict an inmate's risk of future violence because there is not a large enough population of life term inmates released on parole who recidivate. He wrote that "what is 'low,' 'moderate,' or 'high' risk is subjective and varies greatly from one assessor to the next (one psychologist or Board member may feel that a 15% risk is low, while others may term it moderate or high)." In a separate letter, he wrote that "[e]veryone knows that the true violence potential of released murderers that have served decades in prison is less than 1%."

On October 28, 2011, the superior court ordered an evidentiary hearing to determine if Carpenter's " 'moderate' risk rating was relevant and reliable." In November 2011, the Attorney General filed a motion to vacate the order for an evidentiary hearing. However, on December 29, 2011, the court denied the Attorney General's motion. The court wrote that "the slight expense Respondent will suffer will be offset many times by the savings realized if it is established either (1) that suitable inmates are being improperly denied parole based on invalid risk assessment ratings, or (2) that the 'FAD' protocols are valid and this issue need not be litigated again."

On the same day the superior court denied the Attorney General's motion to vacate the hearing, the Supreme Court published *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis*

*II*). On January 5, 2012, the Attorney General filed a motion for reconsideration of the order denying its motion to vacate the evidentiary hearing, pointing out that the Supreme Court had just written in *Shaputis II* that " 'it is not a judicial function to weigh conflicting views in the social or psychological sciences for the purpose of developing rules binding on the executive branch.' (*Shaputis II, supra*, [53 Cal. 4th at p. 220].)"

On January 25, 2012, the superior court issued an "order regarding hearing." The court acknowledged that "to the extent the hearing on the **reliability** question might have involved a debate about conflicting expert opinions, such is foreclosed by *Shaputis II*. But as [Carpenter] correctly points out, the more central issue of **relevance** is the true question that needs to be answered." (Bold in original.)

The superior court reframed the issue to be addressed at the evidentiary hearing as follows: "under even the most favorable professional definition of 'moderate,' does such a rating provide evidence of an 'unreasonable risk?'" The court added, "In short, the purpose of the hearing will not be to weigh into, or resolve, conflicting views among scientists. Its purpose is to determine whether the parole decisionmaker is misinterpreting and misapplying the psychologists' unanimous intent and meaning when they give that rating." (Bold and underline in original.)

On March 8, 2012, the Attorney General on behalf of the Warden at the Deuel Vocational Institute filed a petition for writ of mandate and/or prohibition.

#### *Discussion*

Certainly, judicial review of a decision rendered by the Board or the Governor denying parole or reversing a grant of parole is available. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1203; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664.) The standard of review applied by a superior court in evaluating a parole-suitability determination is whether some evidence supports the core statutory determination that a prisoner remains a current threat to public safety. (*In re Lawrence, supra*, 44 Cal.4th at pp. 1191, 1210; *In*

*re Shaputis* (2008) 44 Cal.4th 1241, 1254 (*Shaputis I*); *In re Rosenkrantz, supra*, 29 Cal.4th 616, 677 (*Rosenkrantz*).

In *Shaputis II*, the California Supreme Court reaffirmed "the deferential character of the 'some evidence' standard for reviewing parole suitability determinations." (*Shaputis II, supra*, 53 Cal.4th at p. 198.) The "some evidence" standard refers to evidence of current dangerousness. There must be "'some evidence" supporting the core statutory determination that a prisoner remains a current threat to public safety—not merely "some evidence" supporting the Board's or the Governor's characterization of facts contained in the record.'" (*Id.* at p. 209.)

"It is the job of a reviewing court to proceed case by case, examining each record and applying the deferential 'some evidence' standard to the parole determination before it. Of course judges are not blind to recurring features of the cases that come before them. They may properly be skeptical of stated reasons that appear to be unsupported by the record. Yet considerations of judicial restraint and comity between the executive and judicial branches counsel against including mere suspicions in the court's opinion." (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

Nevertheless, a reviewing court may consider only whether there is a nexus between the evidence and the determination of current dangerousness, and it has the duty to uphold the governor's decision "unless it is arbitrary or procedurally flawed." (*Shaputis II*, at p. 221.) "The court is not empowered to reweigh the evidence" (*ibid.*), and it may not decide what kind of evidence is most probative of a current unreasonable risk. (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

"[I]t has long been recognized that a parole suitability decision is an 'attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.' [Citations.]" (*Shaputis II, supra* at p. 219.) "It bears emphasis that while 'subjective analysis' is an inherent aspect of the parole suitability determination, it plays a proper role only in the *parole authority's*

determination [and by parity of reasoning, the Governor's determination]. [Citation.] The courts' function is one of objective review, limited to ensuring that the Board's or Governor's analysis of the public safety risk entailed in a grant of parole is based on a modicum of evidence, not mere guesswork. [Citation.]" (*Ibid.*)

In order to meaningfully answer the question of whether a moderate risk for violence rating on a risk assessment instrument provides relevant evidence of an unreasonable risk of violence, experts must be called and testimony elicited as to what, in their opinion, a moderate risk for violence rating means in terms of an unreasonable risk of violence. Thus, by deciding to conduct its own inquiry into whether psychological test scores rating Carpenter a moderate risk for violence are relevant in determining whether Carpenter is currently dangerous, the court is attempting to quantify the probative value of a "moderate" rating. That is not a judicial function. The superior court is acting in excess of its jurisdiction. The weight to be given any one piece of evidence is a matter within the authority of the Governor. (*Rosenkrantz, supra*, at p. 677.)

*Shaputis II* indicates that "it is not a judicial function" to determine how valuable or relevant risk-assessment instruments are in predicating future recidivism. (*Shaputis II*, at p. 220 [finding that the judiciary is not tasked with evaluating the efficacy of insight as a predictor of future violence].) Further, *Shaputis II* confirmed that issues related to "the social or psychological sciences" are more appropriately reserved for the Legislature and the Board's rulemaking process. (*Ibid.*, [the inmate's arguments on the efficacy of insight as a predictor of future violence would be more appropriately presented to the Legislature, or to the Board in its rulemaking capacity].)

A writ of prohibition lies to restrain a threatened exercise of judicial power in excess of jurisdiction. (Code Civ. Proc. § 1102; *Aronoff v. Franchise Tax Bd.* (1963) 60 Cal.2d 177, 181.) Any acts that exceed the defined power of a court in any instance, whether that power be defined by rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to

indicate that those acts may be restrained by prohibition. (*Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 291.) The writ lies to prevent the exercise of any unauthorized power, in a cause or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction. (*Ibid.*)

We are cognizant that pretrial writ relief is sparingly granted. (*Ochoa v. Superior Court (Glasgow)* (2011) 199 Cal.App.4th 1274, 1277-1278.) However, "where there is not a plain, speedy, and adequate remedy in the ordinary course of law" this court may entertain and issue such writ. (Code Civ. Proc., § 1103.) We find this to be such a case.

The superior court's order for an evidentiary hearing contemplates the presentation of expert witnesses to answer questions on the efficacy of the moderate risk for violence rating on risk-assessment instruments as applied to life-term inmates. At a minimum, the Board of Parole Hearings will have to pay for and/or make use of an attorney and at least one expert witness to attend a hearing in Santa Clara County; money and resources will have to be expended. In these days of strained budgets and limited resources, appeal is not an adequate remedy for such losses. (See *Dept. of Public Works of Cal., Division of Water Rights v. Superior Ct. In & For Siskiyou County* (1925) 197 Cal. 215, 223-224 [when respondent court can make no valid disposition of the proceeding before it, the writ should issue so that the petitioners are not put to the expense and annoyance of attending what would undoubtedly be a protracted hearing].)

#### *Disposition*

Let a peremptory writ of prohibition issue restraining respondent superior court from conducting an evidentiary hearing, in the case of *In re Ricky Carpenter on Habeas Corpus*, into whether a life term inmate's rating of moderate risk for violence on a risk-assessment instrument is evidence of an unreasonable risk of violence. This opinion is

made final as to this court seven days from the date of filing. (Cal. Rules of Court, rule 8.490(b)(3).)

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ELIA, J.

WE CONCUR:

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PREMO, Acting P.J.

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BAMATTRE-MANOUKIAN, J.