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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

In re DARLENE BRAZIL, on Habeas Corpus.	C065533 (Super. Ct. No. PC20100112)

In 1986, petitioner Darlene Brazil, then 21 years old, smothered her two small children to death and then tried to kill herself so they would all "be together" in heaven. She pleaded guilty to two counts of second degree murder, for which she was sentenced to concurrent terms of 15 years to life in state prison.

In 2009, following an exemplary record that included self-help, extensive therapy, development of job skills, and a comprehensive psychological evaluation concluding that she posed a very low risk of danger to the community, she was unanimously

found suitable for parole by a two-member Board of Parole Hearings (the Board).

Former Governor Arnold Schwarzenegger reversed Brazil's grant of parole based on three cited factors: (1) her crimes were especially atrocious; (2) she exhibits "many" of the characteristics of borderline personality disorder, which "remain predictive" of her current dangerousness; and (3) she lacks sufficient insight into her life crimes.

Brazil petitioned the trial court for a writ of habeas corpus, contending that the Governor's reversal was unsupported by "some evidence" in the record. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212 (*Lawrence*).) The trial court upheld the Governor's decision.

Brazil then petitioned this court for a writ of habeas corpus. We granted an order to show cause before this court. For the reasons that follow, we conclude the Governor's reversal was not supported by some evidence that Brazil poses an unreasonable risk to public safety if released. We shall grant habeas relief and reinstate the Board's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Brazil's Childhood and Family Background

Brazil was born in San Francisco. She was one of eight children. Her parents divorced when she was two years old. Although she denied any history of physical abuse, she reported being the object of inappropriate sexual contact by her older brother when she was in the seventh or eighth grade.

Brazil went to live with her biological father at age 14, but there was conflict, which prompted her stepmother to ask her father to choose between the stepmother and Brazil. Brazil's father chose the stepmother; so by age 16, she was asked to move out of her father's home, traumatizing her greatly.

Brazil met her husband, Frederick Dingess, in elementary school and became pregnant by the time she was 17. The couple had a son, but divorced within three years. In 1984, Brazil began dating another man and bore his son. The man did not work, so she had to support the family by working two jobs.

Subsequently, Brazil and her ex-husband tried to reconcile. The attempt failed, since he began dating other women and staying out all night, as he had done in the past. As a result of rejection by her father and the two men with whom she had serious relationships, Brazil developed feelings of abandonment. She observed, in retrospect, that she was so desperate for love that she would do anything to please a man, rendering her emotionally unstable.

The Life Crime

In the early morning hours of May 20, 1986, Brazil and her two young sons were in a car belonging to her ex-husband Dingess. As she drove to a liquor store to exchange cars with him, she saw him with another woman coming out of the store. Dingess told Brazil that he was sleeping with the woman and said, "'[s]he is a lot better than you.'"

The episode hurt Brazil very deeply. As they parted, she told Dingess, "'[n]o matter what happens, we all still love you.'" Later that evening, she waited for everyone to go to bed, then grabbed a knife from the kitchen. She suffocated her four-year-old son by placing a pillow over his head. When her one-year-old son woke up, she gave him a bottle to calm him down and suffocated him as well. Brazil then tightened a leather belt around her neck and cut her right wrist three times in an effort to kill herself.

The effort was unsuccessful. After passing out, she was discovered lying on a bed next to the boys with a leather belt around her neck, bleeding from the wrist. She later told investigators that after the encounter with Dingess, whom she idolized, she felt she no longer had any reason to live. Her intention was to be with her children "all together in heaven."

On April 3, 1987, Brazil pleaded guilty to two counts of second degree murder and was sentenced to two concurrent indeterminate terms of 15 years to life in state prison.

Post-incarceration History

Other than her life crime, Brazil has no criminal or juvenile record. She has never had alcohol or drug problems. She has had an outstanding conduct record in prison, with only one disciplinary write-up in 1995 that did not involve drugs or violence.

Brazil completed vocational training in carpentry and data processing. She held institutional jobs as a clerk,

housekeeper, machine operator, sewing machine operator, and teacher's aide, and was the lead person for the construction department at the Prison Industry Authority (PIA). She graduated from the apprentice program at PIA Construction Forklift and her computer skills were lauded by her supervisors.

Brazil also vigorously engaged in therapy and self-help groups. She has participated in Alcoholics Anonymous, Al-Anon, Co-dependents Anonymous (CODA), Anger Management, Breaking Barriers, Convicted Women Against Abuse, Happy Hats for Kids Project, Long Termers Organization, Mexican/American Resource Association, New Beginnings, Parenting, Search for Significance Christian 12-Step Program and Shalom Sisterhood. She regularly attends CODA classes, reads books about codependency, and has co-led her anger management and self-esteem classes.

Plans for Life After Parole

Brazil also developed well-formulated plans for a transition to life outside of prison. She was approved for acceptance into the Crossroads program in Los Angeles, which provides for food, clothing and shelter and features many programs designed to assist its clients to maintain clean living and prevent relapse. She had procured a job offer from a custom sign and design firm in Van Nuys. She also completed a carpenter's apprenticeship program, which earned her a letter of recommendation.

Psychological Evaluations

Psychological evaluations in 2003, 2005 and 2006 diagnosed Brazil with borderline personality disorder. However, her last evaluation in 2009 determined that she no longer suffers from any mental disorders. Since 2005, all her evaluations have concluded that she would not pose an unreasonable risk to public safety.

The 2009 psychological evaluation performed by Jana Larmer, Psy.D., determined that the evidence no longer supports a diagnosis of borderline personality disorder; that Brazil had developed "insight into the causative factors of the life crime, and has gained the self-awareness necessary to accept responsibility for her own actions"; and that she scored in the "low range" of "less than one percent" on the PCL-R test (Psychopathy Check List—Revised), which rates her potential for recidivism.

Parole Hearing and the Board's Decision

Brazil's minimum eligible parole date was January 14, 1996, but each time her case came up for review, her application was denied by the Board.

Brazil's case came on for hearing for the last time on June 23, 2009. She described herself as "very codependent" and "[a]n enabler" at the time of the killings and attempted suicide, prompting her to seek self-help through such groups as Alcoholics Anonymous, Al-Anon and CODA. When asked to explain how she could have committed such a terrible crime, Brazil said she now understands that she was emotionally unstable and

projected her emotions onto her boys. "I wasn't emotionally secure and I know that it was wrong because little boys don't even have emotions yet or know right from wrong." "Throughout the years I think trying to just gain love, like from my father, acceptance, the on-again/off-again relationship I had with Fred [Dingess], not knowing at the age of 16, 17 . . . what love really was. . . . I had abandonment and rejection issues, and throughout the years I've worked on those. I know what the definition of love is now. [¶] . . . [¶] . . . It's a two-way street. . . . Love is compassion, understanding, patience. It's not judgmental. And I don't have to believe that you love me and accept it, no matter how you treat me. And I know that today I'm emotionally stable and I don't even need a relationship or need the companion [*sic*] of somebody to make me feel worthy and have self-esteem."

When questioned about why she did not think she was abandoning her children when she killed them, Brazil replied: "I thought we were all going to go to heaven and be together and live happily ever after where there's no more pain, no more suffering. I didn't look at it as abandonment." Explaining her grief at the loss of her two sons she stated, "Sometimes I think I still grieve. Some days are harder than others. I don't wallow in it. I still miss my boys . . . . I know sometimes I don't have a right because I'm the one that took their lives but it still hurts and I think I will carry this with me for the rest of my life."

At the end of the hearing, Presiding Commissioner Lea Ann Chrones announced that, after weighing the applicable factors set forth in the California Code of Regulations and based on all relevant information available, the Board concluded Brazil was no longer a threat to public safety and was suitable for parole.

The Governor's Reversal

On November 19, 2009, the Governor reversed the Board's decision to grant parole. In support of his decision, the Governor gave three reasons: First, the Governor determined that Brazil's crimes were "especially atrocious." Second, the Governor was "troubled" by the "mixed record" regarding whether Brazil still suffers from borderline personality disorder. Third, the Governor found that Brazil "has still failed to obtain insight into the violent behavior" that resulted in her children's deaths. We shall explore each of these reasons in more detail below.

DISCUSSION

I. Principles of Review

"'[T]he governing statute provides that the Board *must* grant parole *unless* it determines that *public safety* requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction. (Pen. Code, § 3041, subd. (b).) And as set forth in the governing regulations, the Board *must* set a parole date for a prisoner unless it finds, in the exercise of its judgment after considering the circumstances enumerated in [title 15,] section

2402 of the [California Code of] [R]egulations, that the prisoner is unsuitable for parole. Accordingly, parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.'" (*Lawrence*, *supra*, 44 Cal.4th at p. 1204, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 654 (*Rosenkrantz*).)

"Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the [Board] the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).)[1]

Factors tending to show suitability for release on parole are (1) the absence of a juvenile record; (2) a history of reasonably stable social relationships with others; (3) tangible signs of remorse; (4) the commission of the crime resulted from significant stress, especially if the stress had built over a long period of time; (5) battered woman syndrome; (6) a lack of a history of violent crime; (7) increased age, which reduces the probability of recidivism; (8) marketable skills and realistic plans for the future; and (9) responsible institutional behavior. (Regs., § 2402, subd. (d).)

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[1] All further references to regulations are to title 15 of the California Code of Regulations.

Factors tending to demonstrate unsuitability for release on parole include the inmate's (1) commission of the offense in an especially heinous, atrocious, or cruel manner; (2) previous history of violence; (3) unstable social history; (4) prior sadistic sexual offenses; (5) lengthy history of severe mental problems; and (6) serious misconduct in prison or jail. (Regs., § 2402, subd. (c).)

"[W]hen the Board determines an inmate convicted of murder is suitable for parole, the Governor has the constitutional authority to conduct a de novo review of the Board's decision." (*In re Rodriguez* (2011) 193 Cal.App.4th 85, 92 (*Rodriguez)*; see *Lawrence*, *supra*, 44 Cal.4th at pp. 1203-1204; see also Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2.) In conducting this review, the Governor is required to consider the same factors considered by the Board, which are specified by the regulations. (Cal. Const., art. V, § 8, subd. (b); *Lawrence*, *supra*, 44 Cal.4th at p. 1204; Regs., § 2402, subds. (c) & (d).) However, the Governor has discretion to be "'more stringent or cautious'" than the Board in "determining whether a defendant poses an unreasonable risk to public safety." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258 (*Shaputis*); *In re Prather* (2010) 50 Cal.4th 238, 257, fn. 12 (*Prather*).)

"[T]he judicial branch is authorized to review the factual basis of a decision . . . denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may

inquire only whether some evidence in the record before the [Governor] supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.) "Only a modicum of evidence is required." (*Id.* at p. 677.)

The ultimate yardstick for any parole decision is "current dangerousness," i.e., whether the facts of the commitment offense, the inmate's efforts toward rehabilitation, her attitude concerning the commission of the crime, and the psychological assessments in the record, provide some evidence that the inmate remains a danger to public safety if released on parole. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1212-1213.) Although judicial review is deferential, it certainly is not "toothless," and "'due consideration'" of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness. In finding a prisoner unsuitable for parole, the Governor must articulate a "rational nexus between [applicable] factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence*, at p. 1210; see also *In re Palermo* (2009) 171 Cal.App.4th 1096, 1106-1108, disapproved on other grounds in *Prather*, *supra*, 50 Cal.4th at pp. 252-253.)

In sum, the deferential nature of the "some evidence" standard does not convert a reviewing court "'into a potted

plant.'" (*Lawrence*, *supra*, 44 Cal.4th at pp. 1211-1212, quoting *In re Scott* (2004) 119 Cal.App.4th 871, 898 (*Scott*).) We must ensure that the denial of parole is based on "some evidence" of current dangerousness, and "such evidence '"must have some indicia of reliability."'" (*Scott*, at p. 899.)

II. Analysis

Initially, we note that virtually all of the parole suitability factors favor Brazil: She lacks any juvenile or criminal record except for the life offenses; she has shown tangible signs of remorse; she has passed into middle age thereby reducing the probability of recidivism; she has displayed outstanding institutional behavior; she possesses excellent marketable skills; and she has concrete and specific plans for life after prison. (Regs., § 2402, subd. (d).) Her current mental health evaluation declared her free of any mental illness and she scored very low on the all-important metric of whether she posed a risk of future violence if released into the community. Yet, based on three cited factors, the Governor reversed the Board's decision. We analyze these reasons below.

A. Atrociousness of the Crime

The Governor stated, "Despite the positive factors I considered, the murders Brazil committed were especially atrocious because multiple victims were involved. Additionally, Brazil was in a position of trust regarding her particularly vulnerable children. Instead of dealing with the emotional

upset of seeing her ex-husband with another woman, Brazil victimized innocent children."

The Governor's reliance on this factor lacks support in the record. The factor, as the regulations state, is whether the murder was committed "in an especially heinous, atrocious or cruel *manner*." (Regs., § 2402, subd. (c)(1), italics added.) The factor can have meaning only if the crime is compared to other crimes of equal degree. As we stated in *In re Burdan* (2008) 169 Cal.App.4th 18 (*Burdan*), "'"[A]ll second degree murders by definition involve some callousness—i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and sufferings of others."' [Citation.] '*The measure of atrociousness is not general notions of common decency or social norms*, for by that yardstick all murders are atrocious. [Citation.] Rather, the inquiry is whether among murders the one committed by [Brazil] was particularly heinous, atrocious or cruel.'" (*Burdan*, at p. 36, italics added; accord *In re Smith* (2003) 114 Cal.App.4th 343, 366-367 (*Smith*).)

It cannot be said that smothering two small children with a pillow (as a precursor to attempted suicide) was an especially heinous, atrocious, or cruel method of committing second degree murder. In *In re Dannenberg* (2005) 34 Cal.4th 1061 (*Dannenberg*), the California Supreme Court indicated that, where the nature of the commitment offense is used as a basis for denying parole, the requirement that the offense be particularly egregious is meant to convey "only that the violence or

viciousness of the inmate's crime must be more than *minimally necessary to convict him* of the offense for which he is confined." (*Dannenberg*, at p. 1095.) This case does not satisfy that test. Brazil used no weapon to commit the crimes. She did not shoot her children, beat them or torture them. She accomplished the killings in the most straightforward, direct way available. While the murders were unquestionably the product of a profoundly dysfunctional mental state, it cannot be said that they were particularly more atrocious, heinous or cruel than other second degree murders.

But even if the Governor could rely on the "atrociousness" factor, "some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. (Regs., § 2281, subd. (a).) Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Lawrence*, *supra*, 44 Cal.4th at p. 1221; accord *Rodriguez*, *supra*, 193 Cal.App.4th at p. 94.)

The record is bereft of any nexus between the troubled woman Brazil was when she took her children's lives at age 21 and the woman she is today at nearly 47. She no longer suffers from a psychological disability; she has an outstanding disciplinary record; she has taken advantage of every

conceivable self-help program; she has done volunteer work with children in an attempt to atone for her crimes; and she has been evaluated as posing a low risk of violence if released. As the California Supreme Court has declared, "when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would *not* currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at p. 1219, italics added.)

Accordingly, this factor fails to furnish supporting evidence for the Governor's decision.

B. "Conflicting Evidence" of Borderline Personality Disorder

The Governor also stated that he was "troubled by the mixed record" concerning whether Brazil suffers from borderline personality disorder, and opined that her problematic mental state still poses a threat to public safety. The observation is not an accurate characterization of the record.

1. Old Psychological Evaluations.

To support his view that Brazil's mental stability is still in question, the Governor first referred to her psychological evaluations from 1990, 1994, 1997, and 2000. These outdated evaluations cannot support a finding that Brazil poses a current risk of dangerousness, which is the foundation of any parole eligibility determination. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1254-1255; see, e.g., *Lawrence*, *supra*, 44 Cal.4th at p. 1224

[reliance upon outdated psychological reports, which are clearly contradicted by the petitioner's successful participation in intensive therapy and more recent psychological reports declaring him to be no longer a threat to public safety, fails to supply some evidence justifying the Governor's conclusion that the petitioner continues to pose an unreasonable risk of violence].)

2. 2005 and 2006 Evaluations.

The Governor also relied on Brazil's 2005 psychological evaluation which, after recounting her self-described feelings of worthlessness upon seeing her ex-husband with another woman just before the murders, diagnosed her with borderline personality disorder and called it a "'[*lifelong*] mental disorder.'" Brazil's 2006 evaluation recited the same description.

Again, the 2005 and 2006 evaluations are of dubious utility in determining whether Brazil is currently eligible for parole. The Governor could not reasonably rely on them to reverse the Board unless the reports, along with other evidence, indicated that Brazil posed a present risk of danger to the community if released. Moreover, a careful review of the evaluations refutes the idea that her mental condition is unstable or indicative of a threat to public safety.

Both the 2005 and 2006 evaluations were performed by staff psychologist Robert Smith, Ph.D. In each, Dr. Smith stated that Brazil was not undergoing any mental treatment since she was

"*not diagnosable with the requisite 'serious mental disorder.'*" (Italics added.) In each report, the doctor described her prognosis as "Excellent for continued mental stability." In each, he opined that Brazil was (1) mentally stable, with no history of disciplinary violations; (2) posed "no immediate threat of dangerousness"; and (3) fell into the "low to moderate" range of risk of violent recidivism. Finally, in each evaluation, the doctor endorsed Brazil's release on parole, conditioned on a viable parole plan and support from the community.

Because both the 2005 and 2006 evaluations concluded that Brazil suffered from no serious mental disorder, was emotionally stable and was a suitable candidate for parole, the mere fact that Dr. Smith used the adjective "lifelong" in his description of borderline personality disorder furnishes no evidence that Brazil, in 2009, posed a risk of danger to the community or was otherwise unsuitable for parole.

3. Dr. Larmer's 2009 Evaluation.

While the Governor acknowledged that Dr. Larmer, in her 2009 report, found that Brazil did not suffer from borderline personality disorder, he emphasized that the doctor found Brazil met *four* out of nine criteria for this diagnosis and described a fifth factor as "arguable." Voicing his concern that Brazil still has "many of these same traits [that] contributed to [her] decision to murder her sons," the Governor thus determined that the "continued validity [of these traits] remains predictive of

her current dangerousness." The Governor misrepresents the nature of Dr. Larmer's evaluation.

Dr. Larmer states that Brazil shows no evidence of behavioral instability and no tendency toward violent outbursts, physical aggression or verbal threats. She notes that Brazil "maintains positive and rewarding relationships with peers and work supervisors," and has had no disciplinary violations for the last 10 years.

While acknowledging that older psychological reports included a diagnosis of borderline personality disorder, Dr. Larmer determined that a diagnosis of any Axis II disorder was not supported by "available evidence."

It is true, as the Governor stated, that Dr. Larmer found Brazil met four of the nine personality traits characteristic of borderline personality disorder.[2] However, each of those four criteria was derived from her past history, and most of those related to her then 23-year-old crime.

More importantly, the full context of the psychological assessment refutes the notion that Brazil fell just short of being diagnosed with borderline personality disorder. Dr. Larmer declares, "The above examination of Ms. Brazil's *history* provides specific examples of four out of nine diagnostic criteria, which does not support a diagnosis of Borderline Personality Disorder. Ms. Brazil has not

[2] Five positive criteria are considered the minimum to support a diagnosis of borderline personality disorder.

demonstrated a pervasive pattern of instability of personal relationships, self image, and affects, and marked impulsivity in a variety of contexts that is indicative of a Borderline diagnosis. It is *arguable*, certainly, that she exhibits *specific traits* of Borderline Personality [D]isorder. These traits do not seem to impair her ability to create and maintain positive relationships with her peers or her work supervisors. If Ms. Brazil exhibited symptoms of Borderline Personality Disorder, one would expect to see evidence of impulsive behaviors and difficulty in relationships across situations both prior to and during her incarceration. While the prison environment is certainly more controlled than the free community, an individual with Borderline Personality Disorder would still demonstrate the same patterns of inner experience and behaviors. *Ms. Brazil does not appear to exhibit enough of the characteristic features of that diagnosis. The information in her C-file indicates that she has demonstrated emotional and behavior stability while incarcerated for quite some time*." (Italics added.)

In a later section of the evaluation, Dr. Larmer reports that she administered the Level of Service/Case Management Inventory test, an actuarial test used to evaluate risk of recidivism. Brazil scored lower than *99 percent* of the North American sample of incarcerated female offenders. Thus, the doctor viewed her as having a "relatively *low risk*" for violence if released into the community. (Italics added.)

Since the same doctor upon whom the Governor relied in concluding that Brazil's personality traits "remain[] predictive of her current dangerousness" came to the opposite conclusion *based on the same data*, the Governor's reliance on isolated bits of Dr. Larmer's evaluation that are "remov[ed] . . . out of its thoughtful consideration within the whole" cannot be deemed credible evidence supporting the denial of parole. (*Rodriguez*, *supra*, 193 Cal.App.4th at pp. 91, 100.)

C. Lack of Insight

The Governor's final reason for denying parole is one that has, by now, become a familiar refrain: that Brazil still has not gained "adequate insight" into the behavior that led to her life offenses.[3]

In support of this observation, the Governor first cites to previous evaluations of Brazil. Again, absent a nexus to her present mental state, such reports have no value in predicting

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[3] As one Court of Appeal has recently explained, "[n]either Penal Code section 3041, nor the governing regulations list 'lack of insight' as an unsuitability factor. However, in *Shaputis*, *supra*, 44 Cal.4th 1241, the companion case to *Lawrence* (see *Lawrence*, *supra*, 44 Cal.4th at p. 1191, fn. 2), the court upheld the denial of parole because the inmate's lack of insight into his offense and its causes together with the aggravated nature of the offense supported a finding that he was currently dangerous and therefore unsuitable for parole. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1258-1261 & fn. 20.) [¶] Just as the heinous nature of the commitment offense became a standard reason to deny parole after *In re Dannenberg*[, *supra*,] 34 Cal.4th 1061, so too an inmate's lack of insight has become a standard reason after *Lawrence* and *Shaputis*, so much so that it . . . has been dubbed the 'new talisman' for denying parole." (*Rodriguez*, *supra*, 193 Cal.App.4th at p. 97.)

current dangerousness. It is, after all, understood that Brazil was previously denied parole based, in part, on the fact that she continued to exhibit some of the personality traits that led to the crime. Nevertheless, as Commissioner Chrones pointed out, since 2005 all of Brazil's psychological evaluations concluded that she no longer poses an unreasonable risk of recidivism. If outdated psychological evaluations could continue to be relied on to deny parole despite an outstanding institutional record and a clean psychological bill of health, then the concept of rehabilitation and its concomitant promise of parole based on self-improvement would be nothing more than a chimerical sham. This, however, is not the law. (*Lawrence*, *supra*, 44 Cal.4th at p. 1224.)

The Governor also cites Brazil's explanation of her motivation *in 1986* for committing the crimes, and then quotes the following response from Commissioner Chrones at the parole hearing. "*Your thought process makes no sense. The reasons that you felt you wanted to kill the boys and then in turn kill yourself, quite frankly to us makes no sense. It was an extraordinarily selfish act as you were mad and jealous with your ex-husband.*" Based on this remark, the Governor concludes that Brazil "still struggles to understand her actions in the life offenses," thereby "indicat[ing] that she has not accepted full responsibility for her prior crimes and lacks insight into the circumstances of the offenses." The Governor misstates the record. A review of the 2009 transcript reveals that the

commissioner's comment was not a reference to Brazil's current state of mind, but her distorted reasoning at the time she committed the crimes.

Stated the commissioner: "Now, Ms. Brazil, in granting you parole, we considered the nature and the gravity of your commitment offense and I don't think that anybody in this room would disagree that [it] is—I mean, the standard words, heinous, atrocious and cruel don't even begin to describe what you did. You murdered your own children, ma'am, and that is the most horrendous of horrendous crimes. . . . How much more callous could that be? And the motive is absolutely inexplicable. Your thought process makes no sense. The reasons that you felt you wanted to kill the boys and then in turn kill yourself, quite frankly to us makes no sense. It was an extraordinarily selfish act as you were mad and jealous with your ex-husband. . . . *But certainly it was 23 years ago and regardless of how truly god-awful that was, it was 23 years ago and because of your positive adjustment and considerations that show you no longer pose a risk of danger, you make this grant of suitability . . . . Your insight has certainly gained since you've been incarcerated. You have taken the opportunity to have a lot of counseling and therapy along the way, gone to I think a lot of self-help classes that* [*Commissioner Bentley*] *will go over in a bit. And I think that your insight into the crime is as good as it will probably ever be.* I'm not a doctor . . . [but] [t]he psychiatrist in the most recent report states that [she] felt

you had appropriate insight. I think that you have *appropriate insight* for the reasons that you feel that you did what you did." (Italics added.)

By extracting a single comment from the commissioner's discourse, the Governor has made it appear as if the commissioner was saying the opposite of what, in context, was being communicated. Clearly, the commissioner was trying to convey that, while Brazil's motives for killing her children *23 years ago* were selfish, bizarre and inexplicable, through positive adjustments in prison, including therapy and self-improvement, she now exhibits appropriate insight into her crimes. Hence, reliance on the commissioner's "makes no sense" comment offers no support for the Governor's finding that Brazil remains currently dangerous due to insight deficiency.

The Governor also claims that the "2009 mental-health evaluation raises additional concerns about Brazil's lack of insight." Specifically, the Governor points out, Dr. Larmer stated that Brazil showed only "'*some* insight into how the situational factors, her internal experiences and her dysfunctional coping mechanisms contributed to her life crime.'" In addition, Dr. Larmer "opined that Brazil could '*decrease* her risk of violence if she participated in individual therapy focused on continuing to develop a strong sense of self and continuing to explore the causative factors of the life crime . . . .'" (Italics added by Governor.) Weaving these two statements together, the Governor deduces that "despite her

participation in some therapy programs, [Brazil] still has not gained adequate insight into her behavior."

The Governor's reasoning indulges in the implicit presumption that a prisoner must possess *total* "insight" and present *zero* risk of violence to be a suitable parole candidate. However, nothing in the statutes or regulations indicates that perfection is required.

Finally, as we have noted (fn. 3, *ante*), "insight" is not listed among the suitability factors in either Penal Code section 3041 or in the regulations, nor is "lack of insight" listed as a factor indicating unsuitability. (See Regs., § 2402, subd. (c).) The Governor's reliance on "lack of insight" has its genesis in the case of *Shaputis*, *supra*, 44 Cal.4th 1241. (*Rodriguez*, *supra*, 193 Cal.App.4th at p. 97.) There, despite powerful evidence that Shaputis had intentionally killed his wife, including a long history of abuse and violence, he kept insisting that the crime was an *accident*.[4] Under such circumstances, the California Supreme Court concluded that "some evidence in the record support[ed] the Governor's conclusion that [Shaputis] remain[ed] a threat to public safety in that he

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[4] Remarkably, when Shaputis was asked by the parole board why he committed the murder and to explain why he would not now commit such a crime, he refused to answer on the advice of his attorney. (*Shaputis*, *supra*, 44 Cal.4th at p. 1252.) In *Shaputis*, the board also considered itself "severely restricted" by prior instructions from the appellate court and found Shaputis suitable for parole only "reluctantly." (*Id.* at pp. 1252-1253.)

ha[d] *failed to take responsibility* for the murder . . . , and despite years of rehabilitative programming and participation in substance abuse programs, ha[d] failed to gain insight into his previous violent behavior . . . ." (*Shaputis*, *supra*, 44 Cal.4th at p. 1246, italics added.)

Brazil's case bears no resemblance to *Shaputis*. She has not engaged in behavior that could be deemed excuse-making or a failure to accept responsibility for her crimes. She even told the Board that she would consider it fair if she spent the rest of her life in prison, while adding that "I know that I can make better decisions today than I could have 23 years ago." In her written statement, Brazil explained that she understands that she was an emotionally unstable person who could not deal with abandonment and rejection. "I didn't know how to deal with my problems or even admit that I had a problem. [¶] At the time I wasn't thinking about leaving Billy or Brian with anyone[.] I thought I was the only one who could take care of them." She continued, "I have learned that I don't react then think. I have learned to stop and think . . . : When something hurts so badly or when someone hurts you, it doesn't mean that it is the end of the world. . . . [¶] I am truly sorry for this crime[.] I killed Billy [and] Brian. And there were so many people affected by my action . . . . I can not make up for what I did, but every day I work at being the best person I can be[.] I do the best I can, and honor the memory of Billy and Brian every[] day."

Indeed, Dr. Larmer, the same expert whom the Governor cited to support his "lack of insight" finding, paints a much different picture. Says Dr. Larmer, "Ms. Brazil appears to have *gained insight* into the underlying personality structure, relationship dynamics and dysfunctional coping mechanisms that contributed to her life crime. *She does not use those issues to rationalize or justify her crime, and she takes responsibility for her behavior that night*." (Italics added.)

Finally, even if Brazil possessed some residual lack of insight, it would not justify denial of parole absent a rational connection between this condition and her *current* risk of danger. (*Rodriguez*, *supra*, 193 Cal.App.4th at pp. 97-98.) In light of Dr. Larmer's findings that Brazil (1) no longer suffers from a mental disorder, (2) accepts responsibility for her crimes, and (3) presents an extraordinarily low risk of recidivism, the cited evidence cannot sustain the conclusion that she would be a danger to public safety if released.

Because none of the three reasons cited by the Governor finds support in the record, we conclude that his reversal of the Board's decision cannot withstand judicial scrutiny.

III. Remedy

Citing *Prather*, *supra*, 50 Cal.4th at pp. 254-257, the Governor contends that if we conclude that his decision to veto the Board was unsupported by some evidence, the proper remedy is to remand the matter to the Governor for reconsideration. We disagree.

In *Prather,* a Court of Appeal had reversed a decision of the parole board *denying* parole, finding that the decision lacked support in the record. However, rather than remand to the parole board for reconsideration, the appellate court directed it to order the petitioner's release unless, after a hearing, it found *new and different evidence* supporting a determination that parole was unsuitable. (*Prather*, *supra*, 50 Cal.4th at p. 246.) The Attorney General argued that this disposition infringed upon the authority of the executive branch to review parole suitability determinations. The California Supreme Court agreed, holding that "it is improper for a reviewing court to direct the Board to reach a particular result or to consider only a limited category of evidence in making a suitability determination." (*Prather*, at p. 253.) "A reviewing court should not compromise the Board's authority by engaging in speculation concerning the type of evidence that might change the calculus of the Board's parole decision. Instead, a proper judicial review and remand will ensure that the Board retains its full discretion to determine whether a new evaluation by that body is necessary and whether, in light of the court's findings, the inmate should be released." (*Id.* at p. 258.)

Prather is not apposite because, in our case, the Board *granted* the prisoner's application for parole. The decision we reach *affirms* an earlier decision by the Board and overturns only the Governor's reversal of that decision. (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1024 (*McDonald*).) Since both the

Board and the Governor have exercised plenary review of the record, there is no potential abridgment of executive authority.

As the court in *McDonald* pointed out, a remand to the Governor under the present circumstances would be an idle act. "Here, in contrast [to *Prather*], we reinstate an earlier executive branch decision—made by the Board—overturning only the 'veto' of that decision by the Governor. [Citation.] . . . [¶] Unlike the Board, which has the obligation and ability to take evidence, consistent with due process protections, the Governor cannot create an evidentiary record. A return to the Governor for reconsideration would therefore mean that the Governor could look again only at the record before him on initial consideration, the same record this court has reviewed. We have reviewed that record, and neither the Governor, nor the Board, has the authority to '"disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record."'" (*McDonald*, *supra*, 189 Cal.App.4th at p. 1024; see also *In re Masoner* (2009) 179 Cal.App.4th 1531, 1540 [proposed remand after board grants parole and court reverses the Governor's veto would render the "prisoner's due process rights and the writ of habeas corpus . . . meaningless . . . because the Governor could arbitrarily detain a prisoner indefinitely, without evidence of the prisoner's current dangerousness and in violation of California law"].)

Accordingly, the proper remedy is not to remand to the Governor, but to reinstate the decision of the Board, grant the petition, and order Brazil's release. (*In re Gomez* (2010) 190 Cal.App.4th 1291, 1310; *McDonald*, *supra*, 189 Cal.App.4th at pp. 1024-1026.)

DISPOSITION

The petition for a writ of habeas corpus is granted and the grant of parole is reinstated. The Board is directed to proceed in accordance with its usual procedures for release of an inmate on parole unless, within 30 days of the finality of this decision, the Board determines that cause for rescission of parole may exist and initiates appropriate proceedings to determine that question. (See *In re Twinn* (2010) 190 Cal.App.4th 447, 474.) In the interests of justice, this opinion shall be final as to this court five days from the date of filing. (Cal. Rules of Court, rule 8.387(b)(3)(A); *In re Gomez*, *supra*, 190 Cal.App.4th at p. 1310; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491-1492.)

BUTZ, J.

We concur:

RAYE, P. J.

DUARTE, J.