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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re ARTHUR MARTINEZ

on Habeas Corpus.

B219801

(Los Angeles County
Super. Ct. No. BH005882)

APPEAL from an order of the Superior Court of Los Angeles County granting a petition for a writ of habeas corpus. Peter P. Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Heather L. Bushman and Jennifer A. Neill, Supervising Deputy Attorneys General, and Ryan K. Schneider, Deputy Attorney General, for Appellant John Marshall, Warden of California Men's Colony.

Marilee Marshall, under appointment by the Court of Appeal, for Respondent Arthur Martinez.

On October 2, 2008, the Board of Parole Hearings (Board) granted Arthur Martinez parole. The Governor reversed the grant of parole, and Martinez filed a petition for a writ of habeas corpus challenging the Governor's decision. The superior court granted the writ, ordered the Governor to vacate his decision, and reinstated the Board's decision granting parole. The Attorney General appealed, arguing that the only proper remedy is to remand the matter to the Governor with directions "to vacate his decision and to proceed in accordance with due process."¹ We affirm the trial court's order.

BACKGROUND

On September 19, 1981, Carlos Leon told Martinez and his companions, Perez and Marmol, to get off of a car parked outside a store. Martinez, Perez, and Marmol left, but returned to the store later with the intention of intimidating Leon. The three were members of the Magicians gang, which Martinez founded. Martinez, who had just turned 18, was carrying a shotgun and his companion Perez had a .22-caliber rifle. Martinez, Perez, and Marmol found Leon, Emiliano Umana, and two others outside the store. Perez demanded money. One of the men handed over a dollar and began running away. Martinez fired the shotgun into the air and Perez shot Umana and Leon. Umana died at the scene and Leon died three days later. Later on September 19, Martinez, Perez, and Marmol beat a man with fists after he refused to purchase beer for them. The three assailants left the victim lying on the ground, but Perez returned with the rifle and shot the man in each leg. Martinez and Marmol confessed to the crimes after their arrest. Martinez pleaded guilty to second degree murder and admitted a firearm enhancement allegation. Other charges and enhancement allegations were dismissed as part of a plea agreement. Martinez was sentenced to 15 years to life. He entered prison on January 30, 1984.

¹ A related appeal (B218182) challenges the superior court's order granting Martinez's prior petition for a writ of habeas corpus challenging the Governor's reversal of the Board's 2007 grant of parole.

Martinez had prior juvenile adjudications for grand theft person and taking a vehicle without the owner's consent.

During his first four years in prison, Martinez received four CDC-115 disciplinary sanctions, including one in 1986 for stabbing a fellow inmate. Martinez was involved in the Mexican Mafia at the time, but he left that organization in 1988. Martinez denied that he was involved in any Mexican Mafia activities thereafter. He has remained free of discipline since 1986.

Martinez has participated in various self-help programs, including Alcoholics Anonymous, Narcotics Anonymous, and personal growth training. He also completed a victim awareness course and founded a 12-step program for "criminals" and former gang members who want to change their lives. He received laudatory "chrono" reports for his volunteer hospice work and his work as a recreational therapist for developmentally disabled inmates. He obtained his GED in 1992 and was vocationally certified in upholstery and office services. He was also a skilled baker.

The Board first granted Martinez parole in 1998, but the Board's Decision Review Unit disapproved the decision and rescinded the parole date. In 2004 the Board granted parole and the Governor reversed the grant. In 2007, the Board again granted parole and the Governor again reversed.²

On October 2, 2008, the Board held another parole suitability hearing and found Martinez suitable for parole. But on February 25, 2009, the Governor reversed the grant of parole, citing the "especially atrocious" nature of the commitment offense, Martinez's disciplinary history in prison, a confidential 1998 report mentioning Martinez's possible involvement in a Mexican Mafia attack on inmates at a time not specified by the

² Martinez's petition for a writ of habeas corpus challenging the Governor's decision reversing the Board's 2007 grant of parole was still pending in the superior court at the time of the Board's 2008 parole suitability hearing, the Governor's decision reversing the Board's 2008 grant of parole, and the filing of Martinez's petition for writ of habeas corpus in this case.

Governor, and a belief that Martinez minimized his role in the commitment offense and thereby demonstrated a lack of insight.

On March 19, 2009, Martinez filed a petition for a writ of habeas corpus challenging the Governor's decision. On September 9, 2009, the superior court granted the writ, concluding, "The Governor's decision to reverse the Board's finding that the Petitioner is suitable for parole for the fourth time is not supported by some evidence in the record of the Petitioner's current risk of danger to society."³ The court ordered the Governor to vacate his decision and reinstated the Board's decision granting Martinez parole.

Martinez was released on parole on September 1, 2009. On September 24, 2009, the Attorney General filed a timely appeal of the superior court's order.

DISCUSSION

The Attorney General does not dispute the superior court's finding that there was no evidence to support the Governor's decision that Martinez was unsuitable for parole or otherwise challenge the merits of the trial court's ruling granting Martinez's habeas corpus petition. The Attorney General contends only that the court's remedy — reinstatement of the Board's decision releasing Martinez from prison — was improper because it granted Martinez relief beyond the process due and violated the separation of powers doctrine.

The identical issues were raised and rejected in a comparable posture in *In re Masoner* (2009) 179 Cal.App.4th 1531 (*Masoner*). There, the Board granted Masoner parole, the Governor reversed the decision granting parole, Masoner petitioned for a writ of habeas corpus, and the superior court granted the writ, employing essentially the same remedy as in this case: the court ordered the Governor to vacate his decision, reinstated the Board's decision granting parole, and ordered Masoner released in accordance with the date set by the Board. (*Id.* at p. 1535.) The Attorney General appealed, challenging

only the remedy on the grounds that the court's order improperly divested the Governor of his right to review the Board's parole decisions, afforded Masoner a remedy in excess of due process, and violated the separation of powers. (*Id.* at p. 1536.)

The court in *Masoner* rejected each of the Attorney General's arguments. With respect to the contention that the superior court's order divested the Governor of his right to review a grant of parole, the court held that the Governor's right to review was satisfied by the review that resulted in his reversal of the Board's grant of parole. (*Masoner, supra*, 179 Cal.App.4th at p. 1537.)

With respect to the contention that the superior court's order provided Masoner with more process than due process required, the *Masoner* court noted that, "Although the Board can give the prisoner a new hearing and consider additional evidence, the Governor's constitutional authority is limited to a review of the materials provided by the Board." (*In re Smith* (2003) 109 Cal.App.4th 489, 507; accord, [*In re*] *Masoner* [(2009)] 172 Cal.App.4th [1098,] 1106.) Remanding the matter to the Governor would be an idle act because the Governor has already reviewed the materials provided by the Board and, according to the superior court's unchallenged order, erroneously concluded that there was some evidence in those materials to support a reversal of the Board's decision. [Citations.]" (*Masoner, supra*, 179 Cal.App.4th at p. 1538.)

The *Masoner* court concluded that the Attorney General forfeited the separation of powers contention by failing to provide any analysis or cite any authorities. The court went on to note that it would reject the contention even if it had been preserved. Citing *In re Rosenkrantz* (2002) 29 Cal.4th 616, the *Masoner* court explained, "In *Rosenkrantz*, the Supreme Court held that judicial review of the Governor's parole decisions under the 'some evidence' standard does not violate the separation of powers doctrine. (*Rosenkrantz, supra*, 29 Cal.4th at p. 667.) A necessary component of judicial review is the power of the courts to provide the aggrieved party with a meaningful remedy. The

³ The Governor reversed grants of parole by the Board on three prior occasions,

remedy provided here does not infringe on the core functions of the Governor or on the Governor's specific authority to review the Board's parole suitability decisions. As stated, the Governor has already reviewed the Board's 2007 decision." (*Masoner, supra*, 179 Cal.App.4th at p. 1539.)

Finally, the *Masoner* court observed, "In the present case, appellant contends that the matter must be remanded to the Governor even though the superior court found that there was no evidence to support the Governor's reversal of the Board's parole decision, a finding the Governor does not challenge. If we were to adopt appellant's position, however, a prisoner's due process rights and the writ of habeas corpus would be meaningless under the circumstances of this case because the Governor could arbitrarily detain a prisoner indefinitely, without evidence of the prisoner's current dangerousness and in violation of California law, and the courts would have no practical power to grant the prisoner relief. The rule proposed by appellant would entitle the Governor to repeatedly 'reconsider' the release of the prisoner no matter how many times the courts found that there was no evidence that the prisoner was currently dangerous. Such a rule would violate principles of due process and eviscerate judicial scrutiny of the Governor's parole review decisions. We thus reject appellant's arguments and hold that the superior court acted well within its authority in declining to remand the matter to the Governor." (*Masoner, supra*, 179 Cal.App.4th at p. 1540.)

For the reasons set forth in *Masoner, supra*, 179 Cal.App.4th at pages 1538–1540 (with the exception of the forfeiture conclusion), we reject the Attorney General's contentions and conclude that the superior court's remedy in this case was proper.

and the Board's own Decision Review Unit disapproved the 1998 grant of parole.

DISPOSITION

The order from which the appeal was taken is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.