No. 24-_____

THE SUPREME COURT OF THE UNITED STATES

SIRHAN B. SIRHAN,

PETITIONER *in forma pauperis*,

V.

STATE OF CALIFORNIA,

RESPONDENT.

APPENDICES A - C TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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APPENDIX

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Memorandum of Decision, In re Sirhan B. Sirhan, Pet. on Habeas Corpus, BH014184, October 2, 2023

APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER

CRIMINAL WRITS CENTER

In re SIRHAN B. SIRHAN, Petitioner, On Habeas Corpus	**Habeas Case No.: BH014184** (Underlying Criminal Case No: A233421) MEMORANDUM OF DECISION (HABEAS CORPUS)

IN CHAMBERS

Petition for Writ of Habeas Corpus (Petition) by Sirhan Sirhan (Petitioner), represented by Angela Berry, Esq and Denise Faura Bohdan, Esq. Deputy Attorney General Jennifer L. Heinisch and Deputy Attorney General Charles Chung for Respondent, the Governor of the State of California, and Deputy District Attorney Steven Katz for Respondent, the People of the State of California. Eric M. George, Esq. and Serli Polatoglu, Esq for the Kennedy Family appearing as Amicus Curiae. Denied.

Petitioner is currently serving an indeterminate life sentence following his 1968 conviction for murder (Pen. Code,[1] § 187). At the time, the jury fixed the penalty at death. In

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

1972, the California Supreme Court upheld the conviction. (*People v. Sirhan* (1972) 7 Cal.3d 710.) While Petitioner's appeal was pending, however, the California Supreme Court held that the death penalty statute was unconstitutional. (*People v. Anderson* (1972) 6 Cal.3d 628.) Consequently, Petitioner's sentence was modified to life in prison with the possibility of parole. (*Sirhan*, *supra* at p. 717.) Petitioner is currently serving his sentence at Richard J. Donovan Correctional Facility, located in San Diego, California. On August 27, 2021, the Board of Parole Hearings (Board) convened a youth offender parole suitability hearing where it found Petitioner suitable for parole. (Subsequent Parole Consideration Hearing (HT), dated Aug. 27, 2021, attached to petn. as Exh. B.) On January 13, 2022, the Governor reversed the Board's decision based on the commitment offense and Petitioner's lack of insight. (Indeterminate Sentence Parole Release Review (Gov. Reversal), dated Jan. 13, 2022, attached to petn. as Exh. A.)

On September 29, 2022, Petitioner filed the instant petition for writ of habeas corpus challenging the Governor's decision. Petitioner contends the Governor's decision improperly relied on the "gravity of the offense and does not provide a nexus between the crime from 52 years ago and current dangerousness." (Petn. at pp. 17.) Petitioner contends the Governor "misconstrued the record and/or relied on incorrect and/or outdated information." (Petn. at pp. 18-26.) Petitioner believes the Governor "failed to apply the correct law and failed to properly consider elderly prisoner factors." (Petn. at pp. 26-29.) Next, Petitioner argues that the Governor "failed to properly assess youthful offender mitigation" evidence. (Petn. at pp. 29-34.) Petitioner contends that the Governor violated his federal and state due process rights by failing to recuse himself from the decision in this case. (Petn. at pp. 34- 35.) Petitioner states that the Governor's decision is not supported by some evidence. (Petn. at pp. 38-46.) Petitioner argues that the Governor's decision violates the United States and California Constitutions' prohibitions against cruel and/or unusual punishment. (Petn. at pp. 46-47.) Finally, Petitioner argues a violation of his right to equal protection of the laws where the Governor is allowed to use "different parole standards for inmates whose murder convictions arise from celebrated or notorious crimes," and that the Governor "evaluat[ed] Petitioner Under a Different, Harsher,

Standard for Granting Parole." (Petn. at pp. 48-52.) On November 16, 2022, the court issued an order to show cause.

On February 3, 2023, the Kennedy family, filed an "Amicus Curiae Brief in Opposition to Petitioner's Petition for Writ for Habeas Corpus." On March 7, 2023, Respondent, the People of the State of California, filed a Return. Also on March 7, 2023, Respondent, the Governor of the State of California, filed a Return. On April 17, 2023, the Kennedy family filed a request for judicial notice requesting that the court take judicial notice of Petitioner's March 1, 2023 parole suitability hearing before the Board.

On August 7, 2023, Petitioner filed a comprehensive traverse, which included opposition to the Kennedy family's participation in these proceedings.[2] Petitioner also filed multiple exhibits as well as a request that Exhibits A and C be filed under seal. On August 15, 2023, the Kennedy family filed "Amici Curiae's Response to Sirhan Bashar Sirhan's Traverse in Support of Petition for Writ of Habeas Corpus."

On August 28, 2023, the court granted the Kennedy family's request to participate as Amicus Curiae and denied the request to take judicial notice of Petitioner's March 1, 2023 subsequent hearing before the Board. (Memorandum of Decision, dated Aug. 28, 2023, case number BH014184.) On September 1, 2023, the court granted in part and denied in part Petitioner's request to file Exhibits A and C under seal.

On August 14, 2023, the court issued an order extending time to rule on the petition to October 14, 2023. (Cal. Rules of Court, rule 4.551(h).) On September 5, 2023, Respondent filed an objection to Petitioner's presentation of "numerous factual allegations" that were not filed in the original petition. Respondent asked for an opportunity to respond if such allegations were going to be considered.[3]

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[2] On May 10, 2023, Petitioner also expressed opposition to the Kennedy's participation in any form in these proceedings in a filing objecting to the court taking judicial notice of the transcript of Petitioner's 2023 suitability hearing before the Board.

[3] The court determined that no such response was necessary as any new issues raised in the traverse for the first time were not entertained. "It is [...] improper to state new claims or theories for the first time in the informal reply or traverse." (*In re Reno* (2012) 55 Cal. 4th 428, 444, disapproved of in *In re Friend* (2021 55 Cal.4th 428 on other grounds.)

SUMMARY

Having independently reviewed the record, and giving deference to the broad discretion of the Governor in parole matters, the court concludes that the record contains "some evidence" to support the determination that Petitioner is not suitable for release on parole because he currently poses an unreasonable risk of danger to society. The court also finds that in rendering his decision, the Governor gave "great weight" to Petitioner's status as a youthful offender and that he gave due consideration to his status as an elderly parolee. Finally, the court finds the Governor was not required to recuse himself, the Governor's review did not violate Petitioner's right to equal protection of the laws, and that Petitioner's continued incarceration is not cruel and/or unusual. Thus, the Petition challenging the Governor's reversal must be denied.

COMMITMENT OFFENSE[4]

> About 8:30 PM on June 2, 1968, two days before Petitioner shot Senator Kennedy, the senator made a speech in the Coconut Grove at the Ambassador Hotel in Los Angeles, following which he delivered a second speech outside the hotel. Petitioner was seen at the hotel about 8:45 that night by an acquaintance. A half hour or less after the senator's second speech, a hostess saw a man who looked like Petitioner in the kitchen near the Coconut Grove.
>
> During the day on June 4, 1968, Petitioner practiced firing at a gun range for several hours and had also practiced shooting at ranges on several prior occasions. On June 4 he engaged in rapid fire with the .22 revolver he used a few hours later to kill Senator Kennedy. The revolver had been obtained by Petitioner in February 1968 when his brother Munir paid a fellow employee for it.
>
> A person who talked with Petitioner at the gun range on June 4 testified that Petitioner stated he was "going to go on a hunting trip with his gun," that he told Petitioner it was not permissible to use pistols for hunting "because of the accuracy," and the Petitioner said, "Well, I don't know about that. It can kill a dog."
>
> About 10 or 11 p.m. on June 4, 1968, a secretary whose duties included seeing that unauthorized persons were not near the Embassy Ballroom at the Ambassador Hotel, saw Petitioner near that room and asked him who he was, and he turned and walked toward the doors leading into the ballroom.
>
> Shortly before midnight on the same day Petitioner asked hotel employees if Senator Kennedy was going to come through the pantry, and they told him that they did not know. One of the employees observed Petitioner for about a half hour in the pantry and noticed nothing unusual about his manner or activity.

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[4] The statement of facts is taken in whole from the California Supreme Court's opinion published at *Sirhan, supra,* 7 Cal.3d. at pp. 717-720.

About midnight on June 4, Senator Kennedy made a speech in the Embassy Ballroom, announcing his victory as a Democratic candidate for president in the California primary. Following the speech, he and his entourage proceeded toward the hotel's Colonial Room, which was then being used as a press room. En route, the senator stopped in the pantry to shake hands with the kitchen staff. Suddenly Petitioner darted toward the senator, pulled out a revolver, and fired several shots. The senator and a man adjacent to him, Paul Schrade, fell. Pandemonium ensued.

A hotel employee grabbed Petitioner around the wrist of the hand holding the gun, but Petitioner, who was still able to move that hand, continued shooting. Irwin Stroll, William Weisel, Elizabeth Evans, and Ira Goldstein were injured by the gunfire. Several persons joined in the struggle and succeeded in restraining Petitioner, and one took the gun from him. When asked, "Why did you do it?", Petitioner replied something to the effect "I can explain."

The senator was taken to a hospital where he underwent surgery. He subsequently died on June 6, 1968. According to the autopsy surgeon, the cause of death was a gunshot wound "to the right mastoid" that penetrated the brain; the senator also received two additional gunshot wounds, one in an armpit and another slightly lower. Expert testimony indicated that the gun was an inch and a half or less from the senator's head when the fatal bullet was fired and in contact with him or within a few inches when the other wounds were inflicted.

Around the time that the senator was taken to the hospital the police arrived at the hotel and took custody of Petitioner. Two officers, petitioner, and Jesse Unruh got into a car and drove to the police station. En route the officers advised Petitioner of his constitutional rights. Subsequently Unruh asked Petitioner "Why did you shoot him?" and Petitioner replied "You think I am crazy? Do you think I will tell you so you can use it as evidence against me?" Unruh also heard Petitioner say "I did it for my country." Unruh believed that Petitioner was not intoxicated, and police officers who were with Petitioner at the time of his arrest or shortly thereafter reached the same conclusion.

At 12:45 a.m., minutes after Petitioner arrived at the police station, he was seen by Officer Jordan. The officer estimated that he was with Petitioner between four and five hours on this occasion. Jordan stated that Petitioner never appeared irrational and that in the officer's many years on the force Petitioner was "one of the most alert, and intelligent people I have ever attempted to interrogate." Jordan initially identified himself and asked Petitioner his name but received no response. The officer then advised Petitioner of his constitutional rights, and Petitioner, after asking a few questions, indicated he wished to remain silent. Petitioner, Jordan, and other officers subsequently discussed various matters other than the case. Tapes of the conversations were played for the jury.

The police found various items on Petitioner's person, including a newspaper article which in part noted that in a recent speech Senator Kennedy "favored aid to Israel 'with arms if necessary' to meet the threat of the Soviets."

A trash collector testified that on one occasion he told Petitioner he was going to vote for Kennedy in the primary election and that petitioner replied "What do you want to vote for that son-of-a-b for? Because I am planning on

shooting him." On cross-examination the witness admitted that following the assassination when asked if he would testify he stated he "would not want to take the oath because he hated Sirhan so much that (he) would do anything to see him convicted."

The prosecution also introduced documents found by the police at Petitioner's home. The documents contain statements in Petitioner's handwriting regarding various matters including, inter alia, killing Senator Kennedy.

APPLICABLE LEGAL PRINCIPLES

The Governor is constitutionally authorized to make "an independent decision" as to parole suitability and is not bound to the Board's finding of suitability. (Cal. Const., art. V, § 8, subd. (b); *In re Rosenkrantz* (2002) 29 Cal.4th 616, 660, 686.) His parole decisions are governed by Penal Code section 3041.2 and section 2402 of Title 15 of the California Code of Regulations[5]. The Governor must consider "[a]ll relevant, reliable information available" (§ 2402, subd. (b)), and his decision must not be arbitrary or capricious, (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 677).

Although the Governor must consider the factors relied upon by the Board, he may weigh them differently. (*In re Prather* (2010) 50 Cal.4th 238, 257, fn. 12.) The paramount consideration in making a parole eligibility decision is the potential threat to public safety upon an inmate's release. (*Id.* at p. 252.) The Governor's decision must be based upon some evidence in the record of the inmate's current dangerousness. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205-1206 (*Lawrence*).) Only a modicum of such evidence is required. (*Id.* at p. 1226.) "This standard is unquestionably deferential, but 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." (*Id.* at p. 1210.)

Factors tending to show unsuitability for parole include the nature of the commitment offense, a previous record of violence, an unstable social history, sadistic sexual offenses, psychological factors, and institutional behavior constituting serious misconduct. (§ 2402, subd.

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[5] All further statutory references are to title 15 of the California Code of Regulations unless otherwise specified.

(c).) Factors tending to show suitability include a lack of a juvenile record, a stable social history, signs of remorse, the crime was committed due to significant life stress, the criminal behavior was the result of intimate partner battering syndrome, a lack of a history of violent crime, the inmate's current age reduces the probability of recidivism, the inmate has realistic plans for release or marketable skills that can be utilized upon release, and the inmate's institutional behavior indicates an enhanced ability to be law-abiding upon release. (§ 2402, subd. (d).) The weight and importance of these factors are left to the judgment of the Board and Governor. (§ 2402, subds. (c) & (d).)

In reviewing the decision of the Governor, the court is not entitled to reweigh the circumstances indicating suitability or unsuitability for parole. (*In re Reed* (2009) 171 Cal.App.4th 1071, 1083.) Instead, "'[r]esolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the [Governor].' [Citation.]" (*Lawrence, supra*, 44 Cal.4th at p. 1204.) Thus, unless the inmate can demonstrate that there is no evidence to support the Governor's conclusion that the inmate is a current danger to public safety, the petition fails to state a prima facie case for relief and may be summarily denied. (*People v. Duvall* (1995) 9 Cal.4th 464, 475.)

When considering the parole suitability of a youth offender[6], the Governor "shall provide for a meaningful opportunity to obtain release" by giving "great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner." (Pen. Code, §§ 4801, subd. (c) 3051, subd. (e).) When considering the parole suitability of an inmate over the age of 50 who has been served 20 years of continuous incarceration on their current sentence, the Governor is required to give "special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence." (Pen. Code § 3055, subd., (c).)

[6] A person who committed an offense at the age of 25 or younger is considered to be a youthful offender. (Pen. Code, § 3051, subd., (a)(1).)

DISCUSSION

The court finds that there is some evidence to support the Governor's decision that parole of Petitioner at this time would constitute an unreasonable risk of danger to public safety due to the heinousness of the commitment offense and Petitioner's lack of insight, including his "implausible and unsupported denials of responsibility and lack of credibility," and what he referred to as Petitioner's "shifting narrative." (Gov. Reversal, at pp. 6, 3.) The court further finds that the Governor gave "great weight" to Petitioner's status as a youthful offender as required by Penal Code section 4801 and that he gave the proper "special consideration" to Petitioner's "age, time served, and diminished physical condition, if any" as provided in Penal Code section 3055, subdivision (c).

Additionally, the court finds due process did not require an in-person meeting before the Governor, and that due process did not require the Governor to recuse himself from Petitioner's case. The court finds Petitioner's right to equal protection of the laws was not violated by allowing the Governor to review his grant of parole. Finally, Petitioner's right to be free from cruel and/or unusual punishment has not been violated because of his continued incarceration.

The Commitment Offense

The Governor partially based his reversal on Petitioner's commitment offense. (Gov. Reversal at p. 2.) The Governor may consider an inmate's commitment offense if it was "committed in an especially heinous, atrocious or cruel manner." (§ 2402, subd. (c)(1).) The commitment offense may be considered especially heinous, atrocious, or cruel when: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled or mutilated during or after the offense; (D) the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering; or (E) the motive for the crime is inexplicable or very trivial in relation to the offense. (§ 2402, subd. (c)(1)(A)-(E).)

Here, the Governor found that "the gravity of [Petitioner's] crimes alone counsels against his release." (Gov. Reversal, at p. 3.) The Governor noted the "immeasurable suffering" caused to the Kennedy family as a result of the offense.[7] (*Id.*)

The evidence in the record supports the Governor's finding that the commitment offense was "especially heinous, atrocious, or cruel." Multiple victims were attacked during Petitioner's shooting, including Senator Kennedy who was killed. Petitioner fired shots into a crowded area of the hotel kitchen, injuring five other victims. (§ 2281, subd., (c)(1)(A).) Additionally, the motive offered by Petitioner, Kennedy's speech indicating support for Israel, is an "inexplicable" motive or one which is "very trivial in relation to the offense." (§ 2281, subd., (c)(1)(E).) Thus, rendering the offense "especially heinous, atrocious, or cruel."

Additionally, the Board found the commitment offense to be "extremely aggravated" because it involved multiple victims, involved a United States senator and potential presidential candidate, was committed under the influence of alcohol, and was in response to anger about the Arab-Israeli conflict. (HT at pp. 161-162.)

The commitment offense, an immutable factor, may no longer indicate a current risk of danger to society in light of a lengthy period of incarceration. (*Lawrence*, *supra*, 44 Cal.4th at p. 1211.) However, the Governor may rely upon the commitment offense's circumstances as a basis for denying parole if those circumstances, when considered in light of other facts in the record, continue to predict current dangerousness years after the offense's commission. (*Id.* at pp. 1214, 1221.) In cases where other factors indicate a lack of rehabilitation, the aggravated circumstances of the commitment offense may provide "some evidence" of current dangerousness even decades after it is committed. (*Id.* at p. 1228.) The Governor may base a reversal of parole upon immutable facts only if something in Petitioner's pre – or post – incarceration history, or his current demeanor and mental state, demonstrates that he remains a continuing threat to public safety. (*Id.* at p. 1214; see also, See *In re Casey* (B321709, filed Sept. 28, 2023) 2023 WL 6302695 at *4 ["We are aware that aggravated circumstances of the crime

[7] While the court acknowledges that the Kennedy family has suffered from the murder, and American political history was deprived of a potential leader, the notoriety of the victim is not a basis to deny parole.

are not alone sufficient to deny parole. [Citation] But aggravated circumstances coupled with what the Governor could reasonably conclude is inadequate insight justify denial in this case."].) As discussed *post*, other evidence in the record indicating a lack of rehabilitation supports the Governor's determination that Petitioner continues to pose an unreasonable risk of danger to society if released on parole.

Lack of Insight & Credibility

"Shifting Narrative"

The Governor partially based his decision on Petitioner's lack of insight. The Governor noted that "[a]fter decades in prison, Mr. Sirhan has failed to address the deficiencies that led him to assassinate Senator Kennedy. Mr. Sirhan lacks the insight that would prevent him from making the same types of dangerous decisions he made in the past." (Gov. Decision at p. 3.) Specifically, he pointed to Petitioner's "shifting narrative about his assassination of Senator Kennedy, and his current refusal to accept responsibility for his crime," as "the most glaring evidence of Mr. Sirhan's deficient insight." (*Id.*) An inmate's lack of insight is not listed in Penal Code section 3041 or its corresponding regulations. However, section 2281 allows the Governor to consider "[a]ll relevant, reliable information," that bears on an inmate's suitability for release, including the inmate's "past and present mental state" and his "past and present attitude toward the crime . . . ." (§ 2281, subd. (b).)

As articulated by the California Supreme Court, "the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*In re Shaputis* (2011) 53 Cal.4th 192, 218 (*Shaputis II*).) Lack of insight "can reflect an inability to recognize the circumstances that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to those circumstances and, if confronted by them again, would likely react in a similar way." (*In re Ryner*, *supra*, 196 Cal.App.4th at p. 547.) "[T]he finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense

has some rational tendency to show that the inmate currently poses an unreasonable risk of danger." (*Id.* at pp. 548-549.)

In reaching his conclusion, the Governor cited various examples of Petitioner's statements regarding the commitment offense throughout the years. (Gov. Reversal at pp. 3-5.) The Governor also pointed to the most recent comprehensive risk assessment (CRA) conducted by the Board psychologist in 2021. (*Id.* at p. 5.) He noted that the psychologist found Petitioner "denied planning the crime and denied remembering committing any illegal act on the night in question." (*Id.*; see also CRA at p. 9), and that "[d]espite multiple attempts, Mr. Sirhan would not report his understanding of the facts of the crime, as he instead referenced others' reports." (*Id.*; CRA at p. 8.) The Governor further noted that the "psychologist observed that 'Mr. Sirhan reported significant memory impairments' that were only present 'when [Mr. Sirhan was] discussing his history of engaging in antisocial and violent actions.'"[8] (*Id.* at pp. 5-6; CRA at p. 9.) The Governor pointed out that the psychologist "found Mr. Sirhan's 'current cognitive abilities appear grossly intact,'" and that his "answers were 'evasive,' he appeared to be 'engaging in significant impression management,' and 'overall, he was not believed to be a reliable source of information.'" (*Id.* at p. 6.)

Overall, the Governor found Petitioner's "implausible and unsupported denials of responsibility and lack of credibility elevated his risk level." (*Id.* at p. 6.)

Political Violence

The Governor also found that Petitioner lacked insight into his specific "risk for inciting further political violence" and that "these gaps in Mr. Sirhan's insight have a close nexus to his

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[8] The Board psychologist noted Petitioner's answers were evasive not only with regard to the commitment offense, but also with regard to a discussion surrounding a 2016 incident he had with another inmate with whom he worked. This prompted the psychologist to find that his lapses in memory or "evasiveness" were with regard to events that make him look bad and thus, was "engaging in significant impression management." (CRA at pp. 3, 5.) In another discussion between Petitioner and the psychologist regarding a 1970 Rules Violation Report he denied remembering the 1970 incident and said, "'I must have been in a fugue or some other state of mind, because I don't remember it.' When clarifying details were queried, he replied, 'I was confused. Again, you've never lived under a sentence of death, have you?'" (CRA at p. 6.)

current risk." (*Id.* at pp. 6-7.) Specifically, the Governor pointed to the CRA which stated that, when asked about his having received assistance from terrorists in the past, Petitioner "laughingly dismissed the incident" and "neither disclaimed the violence committed in his name nor renounced his prior acceptance of assistance from terrorist groups." The Governor acknowledged that these incidents were in the past but remained concerned that Petitioner demonstrated an "inability to appreciate their current relevance" and that this revealed "glaring gaps in insight." (*Id.* at p. 6.)

The Governor also found Petitioner demonstrated a lack of insight into this specific risk factor during the hearing before the Board. The Governor noted that when the Board "suggested that [Petitioner] would be 'naïve' not to expect public attention upon his release and calls for him to express his views on the Israeli-Palestinian conflict" when he stated that he "found that 'hard to foresee'." (*Id.* at pp. 6-7.) Instead, when asked if he may be a "lightning rod to foment violence," Petitioner "rejected this possibility out of hand." (*Id.* at p. 7.)

The Governor noted this concern to be exacerbated by Petitioner's "lack of the skills required to control his response to external triggers, which are critical for mitigating the public safety risk he poses." (*Id.* at p. 7.) This failure was demonstrated by Petitioner when answering questions before the Board regarding his "internal mental processes for dealing with stressors." Petitioner's answers indicated he "does not understand these processes or their steps, from self-awareness to effective self-control." (*Id.*) The Governor noted that the Board found his answers regarding anger management were "sufficient to manage" his risk, but the Governor disagreed. As a result, the Governor found Petitioner "cannot safely be released because he has refused to acknowledge these risks and to develop the skills to mitigate them." (*Id.*)

Although the Board opined that Petitioner's insight was "imperfect" in these areas, but found it was not enough to indicate current dangerousness (HT at pp. 161-164), the Governor may weigh the evidence differently. (*In re Prather*, *supra*, 50 Cal.4th at p. 257, fn. 12.) The Governor has the discretion to be more stringent or cautious than the Board in determining current dangerousness. (*In re Busch* (2016) 246 Cal.App.4th 953, 966, citing *Lawrence*, *supra*, 44 Cal.4th at p. 1212.) It is not for the reviewing court to decide what evidence in the record is

convincing; that decision lies solely with the Governor. (*In re Shaputis* (2011) 53 Cal.4th 192, 199, 211 (*Shaputis II*).) Thus, this court must defer to the Governor's weighing of the evidence.

Additionally, suitability for parole is an individual inquiry and must consider the passage of time and any changes in the inmate's psychological or mental attitude. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1255 (*Shaputis I*).) Petitioner has been incarcerated for 53 years, yet the Governor found his "inconsistent" descriptions of his role, his "claimed shifting memory lapses, minimized [ ] participation in the crimes, and outright deni[als] of guilt continue to demonstrate his "deficient insight." (Gov. Reversal at p. 3.) Thus, the court finds that Petitioner's lack of insight into his crime and his risk for political violence given the nature of his offense supports the Governor's finding that Petitioner, if paroled, would pose an unreasonable risk of danger to society. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1205-1206.) The court finds the Governor established a nexus between Petitioner's commitment offense and current dangerousness and that his decision was not arbitrary or capricious. (*Id.* at p. 1210; *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

Youth Offender Consideration

Petitioner argues that the Governor "failed to properly assess youthful offender mitigation" evidence. (Petn. at pp. 29-34, Traverse at p. 28-33.) Because Petitioner committed the life crime when he was 24, he qualifies for youth offender parole consideration pursuant to Penal Code section 3051. When considering the parole suitability of a youth offender, the Governor "shall provide for a meaningful opportunity to obtain release" by giving "great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner." (Pen. Code, §§ 3051, subd. (e), 4801, subd. (c).) The Governor must actually apply and grapple with each of these factors, not merely give "lip-service" to them. (*In re Perez* (2016) 7 Cal.App.5th 65, 93.) The United States Supreme Court has identified (1) lack of maturity, impulsiveness, recklessness, heedless risk-tasking, and underdeveloped sense of responsibility, (2) vulnerability to negative influences and outside pressures and limited control over their environment, and (3) lack of well-formed character, as the hallmarks of youth. (*Miller v. Alabama* (2012) 567 U.S. 460, 471-472.)

The Governor "carefully examined the record for evidence of youthful offender factors." (Gov. Reversal at p. 7.) The Governor "acknowledged that, at the time of his crimes, Mr. Sirhan exhibited some of the hallmark features of youth" and that he "has made some efforts to improve himself in prison through self-help programming and other prosocial efforts." He found, however, that "the record evidence shows that he has not internalized his rehabilitation programming sufficiently to reduce his risk for future dangerousness." The Governor noted that, though Petitioner was found to pose a "low risk" of current dangerousness during his recent CRA, the psychologist had concerns about Petitioner's "'treatment responsiveness' in the community because Mr. Sirhan continues to have problems with certain risk factors despite engaging in relevant programming." (*Id.* at p. 8; see, CRA at p. 8.) Therefore, the Governor found that "even after according these youthful offender factors great weight, I conclude they are eclipsed by the strong evidence of Mr. Sirhan's current dangerousness." (*Id.* at p. 8.) The Governor gave great weight to the extent to which Petitioner displayed the hallmark features of youth and subsequent growth and maturity and found the evidence of current dangerousness still outweighed that finding. This court is not entitled to reweigh the evidence.

Next, Petitioner states that the Governor must not have provided "fair rumination of youthful offender factors" because his decision did not refer to and thus must not have "considered the extensive report of Dr. Megan Williamson, the psychologist who evaluated Mr. Sirhan in the context of youthful offender mitigation." (Petn. at pp. 43-44.) There is no evidence the Governor did not consider this report in rendering his decision simply because he did not discuss it. (See *In re Casey* (B321709, filed Sept. 28, 2023) 2023 WL 6302695, at *3 ["But the dissent fails to point to anywhere in the record that shows that the Governor ignored Casey's statement, or for that matter, ignored any relevant evidence. The Governor simply did not find such evidence convincing."].) The Board also did not make mention of the report in discussing Petitioner's status as a youthful offender and ultimately rendering its decision to grant parole, yet, Petitioner did not take issue with that lack of discussion.

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Elder Parole Consideration

Petitioner believes the Governor "failed to apply the correct law and failed to properly consider elderly prisoner factors." (Petn. at pp. 26-29; Traverse at pp. 33-36.) When an inmate reaches the age of 50 years old or older and has served a minimum of 20 years of continuous incarceration on their current sentence, Penal Code section 3055, subdivision (c) requires that "the board shall give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence." (Pen. Code § 3055, subd. (c).)

Here, before rendering his decision, the Governor noted that he "must afford special consideration to whether age, the amount of time served, and diminished physical condition reduce the inmate's risk of future violence." (Gov. Reversal at p. 2.) In applying this law, the Governor stated that he "gave special consideration to the Elderly Parole factors for inmates who are older than 60 and who have served more than 25 years in prison." (*Id.* at p. 8.) He noted that Petitioner was 77 years old and had served 53 years in prison.

In undertaking his evaluation of this factor, the Governor also pointed out a discrepancy between the findings of the psychologist and the Board in this regard. (*Id.* at p. 8.) Specifically, the psychologist found that Petitioner "has not had any significant problems with his advancing age. His current cognitive abilities appear grossly intact and there were not any records reviewed that suggest otherwise. He reported significant memory impairments, however, these were only presented when discussing his history of engaging in antisocial and violent actions." (CRA at p. 9.) On the other hand, the Board found that "he is 'significantly impaired…as far as committing additional crimes.'" (HT at p. 162.)

The Governor is entitled to resolve disputes in the evidence and this court must apply deference to those decisions. (*Lawrence*, *supra*, 44 Cal.4th at p. 1204 ["'[r]esolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the [Governor].' [Citation.]"].) To this end, the Governor found the "evidence of Mr. Sirhan's diminished physical strength [did] not mitigate the serious threat to public safety that he

currently poses." (Gov. Reversal at p. 8.) Therefore, the court finds that the Governor satisfied the requirements of Penal Code section 3055, subdivision (c).

Finally, Petitioner contends the Governor failed to properly weigh this factor because he applied the improper standard. (Petn. at pp. 38-41.) The court notes that Penal Code section 3055 was amended and became effective January 1, 2021, one year before the Governor's reversal decision. The amendment served to change the age for elder parole consideration from 60 to 50 years old and the years of incarceration from 25 to 20. In failing to correctly account for the amendment, the Governor applied the old standard to his review of Petitioner's elder parole consideration.

In practice, however, the Governor noted that Petitioner was 77 years old, well over the old or current standard, and the Governor noted that Petitioner has been in prison for 53 years, also well over either standard. As discussed, *ante,* the Governor gave concrete reasons for finding Petitioner's status as an elder parolee failed to outweigh his current risk. The court finds this error by the Governor is harmless and that under either standard the Governor would have reached the same conclusion.

Weighing of the Factors

The Governor noted that Petitioner was 24 years old at the time of the offense and has been incarcerated for 53 years. (Gov. Reversal at pp. 2, 7-8.) The Governor acknowledged Petitioner "exhibited some of the hallmark features of youth" and "has made some efforts to improve himself in prison through self-help programming and other prosocial efforts." (*Id.* at p. 7.) He also stated that Petitioner "has undoubtedly matured in some ways over the last 53 years." (*Id.*) The Governor concluded, however, that these factors "are eclipsed by the strong evidence of Mr. Sirhan's current dangerousness." (*Id.* at p. 8.)

The Governor acted within his discretion when he weighed the parole suitability factors and the evidence before him since the Governor may use his judgment, independent of the Board's conclusion, to determine each factor's weight and importance as well as what weight to attribute to all available information. (§ 2402, subds. (b)-(d); *Lawrence*, *supra*, 44 Cal.4th at p. 1204.) This court is not entitled to reweigh the evidence before the Governor; rather, it is tasked

with determining whether the record contains some evidence in support of the Governor's conclusion. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 656, 665-677.) The court finds there is some evidence to support the Governor's reversal of the Board's decision that Petitioner was suitable for parole.

In-Person Meeting

Petitioner claims he "was not allowed to appear before the Governor and personally demonstrate his suitability." (Petn. at p. 18.) Specifically, he contends that "because the Governor elicited, received, and considered extraneous information, never considered by the 2021 Board, the Petitioner's right to be heard to respond to such evidence was triggered." (Traverse at p. 39.) "This[, he contends,] violated the procedural due process guarantee of a meaningful opportunity to be heard, contributed to whimsical conclusions regarding [Petitioner's] lack of suitability, and led to an arbitrary reversal of the Board's well-reasoned and duly considered decision." (Petn. at p. 18.) Petitioner states "that the Governor admittedly viewed and considered extraneous evidence." (Traverse at p. 39.) He argues that "for the Governor to consider 'new evidence', that evidence must have been unavailable at the time of the original hearing, go directly to the issue of current dangerousness, and the prisoner must have been given an opportunity to respond." (Traverse at pp. 40-41.)

In making this argument, Petitioner gives only one example of "new evidence." He states, "the new evidence included an out-of-court statement by a prison guard that was not subject to cross-examination or otherwise tested for authenticity and veracity." (Traverse at p. 39.) The Governor does not refer to any such statement by a prison guard in his Reversal Decision. Instead, in reviewing the Governor's decision, the court does not note any reference to the Governor viewing or considering outside or "new" evidence in rendering his reversal decision.[9] The Governor points to statements made by Petitioner on the record throughout the years. (See fn 9.)

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[9] As discussed in more detail in this court's "ORDER RE: APPLICATION TO FILE AMICUS BRIEF IN OPPOSITION TO PETITION & REQUEST FOR JUDICIAL NOTICE," dated August 28, 2023, in case number BH014184, the court posits Petitioner is referring to the

The Board also refers to Petitioner's previous denial and the reason for that denial, including his lack of memory and varying accounts of what occurred during the commitment offense (see HT at p. 26-27). Accordingly, Petitioner is not only on notice regarding his prior statements made at trial, to the Board, to psychologists, and to the media, but also that they have historically been deemed relevant in determining his suitability for parole. The fact that the Governor pointed to Petitioner's prior statements in rendering his decision did not entitle Petitioner to an in-person hearing or meeting.

Governor Recusal

First, Petitioner contends that the Governor violated his federal and state due process rights by failing to recuse himself from the decision in this case. (Petn. at pp. 34- 35; Traverse at pp. 41-62.) He points to various public statements made by the Governor before and after Petitioner's 2021 grant of parole by the Board about both his fondness for Senator Kennedy and the grant of parole itself. In support of this claim, Petitioner cites various authority regarding judicial impartiality and recusal. (*Id.*) There is no evidence that the Governor's statements about the case or his fondness for the victim, Senator Kennedy, in any way affected his decision. Rather, the decision issued by the Governor was detailed and enumerated each of the grounds for reversal based on record evidence. Furthermore, the Governor's decision provided the reasons for reversal and their nexus to Petitioner's current dangerousness.

Petitioner's reliance on cannons of judicial ethics and statutes regarding judicial recusal is misplaced. These do not apply to the executive branch and the Governor's authority to review parole decisions of the Board. Instead, California Constitution, article V, section 8, subdivision (b) grants the Governor the authority to determine an inmate's suitability for parole and reverse any grant of parole made by the Board for any person serving an indeterminate life term for murder. (See Cal. Const., art. V, § 8, subd., (b) & Pen. Code, § 3041.2.)

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briefing filed with the Governor's office by counsel for the Kennedy family after the Board granted Petitioner parole. As noted, in rendering his decision, the Governor refers only to record evidence, including prior statements made by Petitioner to police, at trial, to the Board throughout the years at various hearings, to journalists during televised interviews, and to psychologists during interviews for risk assessments. (Gov. Reversal at pp. 3-5.)

More importantly, as discussed *ante*, the reversal decision issued by the Governor reflects an "individualized consideration" of the relevant factors regarding Petitioner's suitability for parole and does not rely on any extra-record evidence or statements. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 685 [See also, "As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision."] *Id.* at p. 677.) Accordingly, Governor Newsom's previous statements regarding his views on rejecting the Board's recommendation of parole for Petitioner and/or his fondness for the victim are of no moment and Petitioner's due process rights are intact. Thus, there is no authority to support the notion that the Governor was required to recuse himself from performing his constitutional and statutory duty to review Petitioner's grant of parole.

Second, Petitioner argues that the Governor based his reversal on a "factor not permitted by law, to wit, admission of guilt." (Traverse at p. 48.) Not so. He compares the Governor's decision to the decision rendered by then-Governor Schwarzenegger's reversal of parole in *In re McDonald* (2010) 189 Cal.App.4th 1008. In *McDonald*, the governor's reversal was based on the heinousness of the commitment offense and the petitioner's lack of insight where he claimed innocence. The court found this was improper because "[t]he Governor's finding in this case is phrased in terms of McDonald's denial of involvement in the crime; he suggests no other basis on which to find a lack of insight." This is not the case here.

As discussed *ante*, the Governor reversed Petitioner's parole due to the heinousness of the commitment offense and Petitioner's lack of insight surrounding his "shifting narrative," demonstrating a lack of credibility, his failure to appreciate the continuing relevance surrounding the potential for political violence, and his lack of insight into his "external triggers," finding that he "does not understand these processes or their steps, from self-awareness to effective self-control." (Gov. Reversal at p. 6-7.) Of note, each of these areas was also discussed as concerns

by the Board and the psychologist. (HT at pp. 165, 173, 183[10]; CRA at p. 8 ["It is currently unknown to what degree, if any, [Petitioner] has insight into personal causative factors associated with his violence during the commitment offense."].)

The Board stated they thought that Petitioner would be "naïve" not to expect attention surrounding the ongoing Israeli-Palestinian conflict[11], and as discussed, the psychologist noted that Petitioner was evasive and engaging in "significant impression management," and was "not believed to be a reliable source of information." (CRA at p. 5.) With regard to his insight, the psychologist stated, that Petitioner "has 'current problems with lack of insight and treatment responsiveness. Petitioner denied remembering ever engaging in any form of violence throughout his life.[12] He provided answers that were interpreted as evasive. It is currently unknown to what degree, if any, [Petitioner] has insight into personal causative factors associated with his violence during the commitment offense." (CRA at p. 8.) The psychologist found Petitioner to display "glibness, grandiosity, manipulation, lack of remorse, poor behavioral control, irresponsibility, and failure to accept responsibility for own actions." (CRA at p. 7.) Therefore, there is more than ample evidence in the record to support the finding of lack of insight made by the Governor.

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[10] The Board noted that Petitioner's "implausible denial along with attendant, lack of responsibility or insight, along with the aggravating nature of the crime, to be sufficient to deny you." (HT at p. 183.) However, "in considering those things, [the Board] saw improvement that you've made and all of the other mitigating factors and did not find that your lack of taking complete responsibility adds to current dangerousness." (HT at p. 183.)

[11] The Board noted a concern that "you would become some type of...symbol or lightning rod to ferment [*sic*] violence." In response, Petitioner stated, "I see that point, but I discount it wholeheartedly. The same—the same argument can be said or made that I can be a peacemaker and a contributor to, uh, a friendly nonviolent way of resolving the issues. And that's, if I – if I do do that" because he stated he intends instead to focus on his family. The commissioner stated, "but I think we, you would be naïve and I would certainly be more naïve if I didn't think that were you to be released people weren't gonna request to interview you and that if either one of us would think that the topic of the modern conflict wouldn't be raised with you." Petitioner responded, "It...it's hard to foresee, I don't expect it, but if it does come, it does occur, I would be more of a peacemaker." (HT at pp. 35-36.)

[12] See footnote 6.

Third, Petitioner claims that cases regarding judicial bias apply equally to the Governor's review of parole grants. (Traverse at p. 52.) He cites to *Haney v. Kane,* 2007 U.S. Dist. LEXIS 33830, which cites *Withrow v. Larkin* (1975) 421 U.S. 35, and states, a "'fair tribunal is a basic requirement of due process.'...This applies to administrative agencies which adjudicate as well as to courts." (*Id.* at pp. 46, 95.) The Governor is the head of the executive branch and is neither a judicial officer nor an administrative agency. The authority granted him by the California Constitution is properly carried out, as discussed *ante*, if he cites legally relevant factors for his reversal and provides a nexus between those factors and the inmate's current dangerousness. As discussed, the Governor has done so.

Fourth, Petitioner argues California Constitution article V, section 8(b) "sets up an intolerable risk of probability of bias for the Governor and is therefore unconstitutional", "thus depriving inmates due process of law." (Traverse at pp. 59, 86-96.) The court notes this argument was not offered in the petition and was only put forth for the first time in Petitioner's traverse. "It is [...] improper to state new claims or theories for the first time in the informal reply or traverse." (*In re Reno* (2012) 55 Cal. 4th 428, 444, disapproved of in *In re Friend* (2021 55 Cal.4th 428 on other grounds.) Thus, the merits of this argument will not be addressed.

Equal Protection

Petitioner contends that his right to equal protection of the laws was violated because the Governor is allowed to use "different parole standards for inmates whose murder convictions arise from celebrated or notorious crimes." (Petn. at pp. 48-52; see also Traverse at pp. 97-100.) The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend.) A similar requirement is included in article I, section 7, of the California Constitution.

The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner; if the persons are not similarly situated for purposes of the challenged law, there is no equal protection violation. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836; *People v. Adams* (2004) 115 Cal.App.4th 243, 262.) If two or more similarly situated

groups are found to be treated in an unequal manner, the court would undertake the second level of analysis. In this case, determining a violation would be analyzed under a rational relationship test because inmates are not a suspect class. "The status of being incarcerated is neither an immutable characteristic nor an invidious basis of classification." (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 178.) A defendant does not have a fundamental interest in a specific term of imprisonment. (*People v. Acosta* (2015) 242 Cal.App.4th 521, 527.) Where legislation does not involve a suspect class or a fundamental right, there need only be a rational relationship between the disparate treatment and some legitimate governmental purpose in order to survive rational basis review. (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) If a plausible basis exists for the disparity, courts may not second-guess the wisdom, fairness, or logic of the law. (*Ibid.*) This is so because equal protection recognizes that persons similarly situated with respect to the legitimate purpose of a law receive like treatment, but it does not require absolute equality. (*People v. Romo* (1975) 14 Cal.3d 189, 196.)

Petitioner argues that the first step in the two-step equal protection analysis has been established because "article V, section 8, subdivision (b) of the California Constitution has resulted in the creation of a class of inmates convicted of high profile, notorious murders whose grants of parole by the Board are reversed by the Governor as a result of political or popular influences that, properly, are not considered by the parole authority. This allows subjective and often irrelevant or irrational concerns to override carefully considered factual judgments by the Board." (Petn. at p. 51, see also Traverse at pp. 97-100.) Not so, Petitioner's claim fails at the threshold.

There is no evidence the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. Petitioner inaccurately describes the class as a group of "inmates convicted of high profile, notorious murders." In fact, the class is inmates convicted of any murders. In California, there is only one standard for determining suitability for parole by both the Board and the Governor.[13] (Pen. Code § 3041; *Rosenkrantz, supra,* 429

[13] The court notes if an inmate believes the Governor has failed to properly perform his duties, the opportunity for judicial review of the decision is available. The inmate may have the

Cal.4th at p. 654; *Lawrence, supra,* 44 Cal.4th at p. 1206.) This standard is the same in every parole suitability review for indeterminately sentenced inmates, and the Governor's mandate is the same in every parole grant review for those serving indeterminate sentences for murder. As discussed, *ante,* the Governor's decision is supported by some evidence and provided a well-reasoned and individualized consideration of Petitioner's suitability and current dangerousness. This is required for each of the Governor's reversal decisions, regardless of the notoriety of the offense. Accordingly, the court finds no equal protection violation in allowing the Governor to perform his constitutionally and statutorily provided duties.

Excessive Incarceration

Petitioner argues that the Governor's decision violates the United States and California Constitutions' prohibitions against cruel and/or unusual punishment. (Petn. at pp. 46-47, Traverse at pp. 101-113.) He cites *In re Palmer* (2021) 10 Cal.5th 959 (*Palmer*) and *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*) to support his claim.

The California Constitution prohibits the infliction of cruel or unusual punishment. (Cal. Const., art. 1, § 17.) A sentence is constitutionally invalid under the state constitution only if it shocks the conscience and offends fundamental notions of human dignity. (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085, quoting *Lynch*, *supra*, 8 Cal.3d at pp. 424–425.) To maintain the balance of power within the tripartite system, courts must uphold a sentence prescribed by statute unless its unconstitutionality "clearly, positively and unmistakably appears." (*People v. Carmony*, *supra*, at p. 1086, quoting *Lynch*, *supra*, at p. 415.)

In *Palmer*, the California Supreme Court set out to decide "whether inmates may challenge their continued incarceration as constitutionally excessive when the Board repeatedly denies parole, and what remedy is available when continued incarceration becomes constitutionally excessive." (*Palmer*, *supra*, 10 Cal.5th at p. 967.) The Supreme Court held that inmates may seek relief through the courts and, indeed, the factors outlined in *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*) apply when inmates challenge their continued incarceration as

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reversal decision reviewed by the court to determine whether the Governor's decision was legally sound.

constitutionally excessive after repeated denials of parole. (*Palmer*, *supra*, at pp. 968, 971–973.) The California Supreme Court further held that if an inmate's continued incarceration has become excessive, a court may order the inmate's release from prison. (*Id.* at p. 980.)

In *Palmer*, the California Supreme Court found that deference to the penalty prescribed by the Legislature is an important element to consider in any constitutional disproportionality analysis. (*Palmer, supra,* 10 Cal.5th at p. 973.) Regardless of whether an inmate's challenge to his sentence comes at the time of imposition or, as here, after many parole denials, however, "the court's inquiry properly focuses on whether the punishment is 'grossly disproportionate' to the offense and the offender or, stated another way, whether the punishment is so excessive that it "'shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478, quoting *Lynch, supra*, 8 Cal.3d at p. 424, 921; see *In re Butler* (2018) 4 Cal.5th 728, 744 ["an inmate sentenced to an indeterminate term cannot be held for a period grossly disproportionate to his or her individual culpability"]; *Id.* at p. 746, ["A sentence violates the prohibition against unconstitutionally disproportionate sentences only if it is so disproportionate that it 'shocks the conscience' "].)" "A claim of excessive punishment must overcome a 'considerable burden' (*People v. Wingo* (1975) 14 Cal.3d 169, 174), and courts should give "'the broadest discretion possible'" (*Lynch*, *supra,* at p. 414) to the legislative judgment respecting appropriate punishment." (*In re Palmer*, *supra,* at p. 972.)

Under *Lynch*, to determine the proportionality of punishment and culpability, courts consider (1) the characteristics of the offense, (2) the challenged punishment in comparison to punishments for more serious offenses, and (3) the challenged punishment in comparison to punishments for the same offense in different jurisdictions. (*Lynch*, *supra*, 8 Cal.3d at pp. 425–429.) Any one of these factors may be sufficient to demonstrate disproportionality of a sentence.[14] (*People v. Mendez* (2010) 188 Cal.App.4th 47, 64–65.)

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[14] The court notes that Petitioner contends that Respondent DA misstates the law in this regard by arguing "that Petitioner must satisfy all three of the approaches delineated in *Palmer* before his sentence will be deemed a violation of the cruel or unusual punishment clause." (Traverse at pp. 103-104.) In support, Petitioner cites to DA Return at p. 13, lines 13-14. The court finds no such contention in Respondent DA's return.

The court notes that Petitioner's petition fails to plead disproportionality under any of the three prongs. Instead, Petitioner states that his "continued incarceration for more than 50 years based on a crime he committed as a youthful offender, in which the Board has found him suitable for parole is 'shocking and offensive' within the meaning of the state and federal Constitutions. (U.S. Const., 8th Amend; Cal. Const., art. I,§ 17.)" (Petn. at p. 47.) In his traverse for the first time, Petitioner pleads each of the three prongs for demonstrating disproportionality. (Traverse at pp. 101-104.) Although normally arguments pled for the first time in Petitioner's traverse are not entertained, because the Respondent DA addressed the *Lynch* factors in their return, the court will entertain Petitioner's pleading of the factors in his traverse.

Prong 1:

Nature of the Offense

When considering whether Petitioner's sentence has become unconstitutionally disproportionate, such that it "shocks the conscience and offends fundamental notions of human dignity," the court must start by looking at the nature of the offense. (*Dillon, supra,* at p. 478.) In doing so, the court does not only look at the crime in the abstract, but also the facts of this crime in particular, "i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Id.* at p. 479.) Thus, the first *Lynch* factor indicates disproportionality where the facts of the crime in question—including motive, involvement, manner committed, harm caused, and personal characteristics of the offender—indicate that the crime involved a comparatively low degree of danger to society. (*People v. Reyes* (2016) 246 Cal.App.4th 62, 87, quoting *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 88.)

Preliminarily, Petitioner does not give an analysis under this "nature of the offense" prong. Instead, he discusses only the "nature of the offender" portion of this prong, which the court addresses *post*. Regarding the offense, Petitioner was convicted of the murder of Senator Robert Kennedy and assault with a deadly weapon of five other victims harmed during the attack. According to the California Supreme Court opinion in this case, Petitioner obtained a

gun four months before the offense. Two days before the shooting, on June 2, 1968, Petitioner was seen at the Ambassador Hotel approximately 15 minutes after Senator Kennedy made a speech in the Coconut Grove at the hotel. About a half hour after Senator Kennedy delivered a second speech outside the hotel, a hostess saw a man who looked like Petitioner in the kitchen near the Coconut Grove.

On the day of the shooting, Petitioner was seen at the gun range practicing firing for several hours, he also engaged in rapid fire with the same .22 revolver that he used to kill Senator Kennedy. At around 10 or 11 that evening, Petitioner was seen near the Embassy Ballroom of the Ambassador Hotel. Shortly before midnight, hotel employees stated that Petitioner asked them if Senator Kennedy was going to come through the pantry. Petitioner shot Senator Kennedy and the others shortly after.

Immediately following the shooting, Petitioner said, "I did it for my country" and did not appear intoxicated. At the time of his interrogation, Petitioner appeared "alert and intelligent." Various items, including a newspaper article which in part noted that in a recent speech Senator Kennedy "favored aid to Israel 'with arms if necessary'" were found on Petitioner's person. There were also documents found which contained statements in Petitioner's handwriting regarding various matters including killing Senator Kennedy.

These facts demonstrate a premeditated killing of Senator Kennedy.[15] The motive given for the offense was political and driven by Petitioner's anger regarding Senator Kennedy's stance

[15] The court notes Respondent DA makes references to later enacted "special circumstances" that were not applied to Petitioner because they did not exist at the time. (DA Return at pp. 15-16, 19-20.) The Petitioner takes exception to those references. (Traverse at p. 109-112.) The court disagrees with Petitioner that these references in any way implicate protections against *ex post facto* laws. The court understands that Petitioner stands convicted of first degree murder with no special circumstances. Also, Petitioner objects to Respondent DA's description of the offense as "aggravated." (*Id.*; DA Return at pp 19-22.) The court notes Petitioner's objections and considers only the facts of Petitioner's offense and his conviction for first degree murder.

on Israel. Petitioner cites various articles shedding further light on his motive[16]: "he became fixated on Kennedy after the Senator promised to send 50 fighter jets to Israel if elected president (Kujawaky, Paul (May 29, 2008)" and "My only connection with Robert Kennedy was his sole support of Israel and his deliberate attempt to send those 50 fighter jet to Israel to obviously harm the Palestinians ("Sirhan Felt Betrayed by Kennedy" *The New York Times,* Associated Press, Feb. 20, 1989)." (Traverse at p. 108.)

The facts also demonstrate a reckless disregard for human life. Petitioner states that he was drinking, and perhaps drunk, at the time of the offense and that his mistake that night was mixing alcohol and firearms. (HT at pp. 37-41.) If true, in addition to the evidence of premeditation, he fired multiple shots into a crowded space while intoxicated.

The intended victim, Senator Kennedy, and the ultimate harm caused is also worth noting. (See, *Solem v. Helm* (1983) 463 U.S. 277, 292-293 ["Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." "The absolute magnitude of the crime may be relevant."; *Carmony, supra,* 127 Cal.App.4th at p. 1077.) The harm caused by this murder created more widespread victimization than a typical murder. It created fear and upset to his family, friends, those at the hotel at the time of the shooting, as well as the nation. This fact tends to aggravate the circumstances surrounding the offense. Thus, in considering the totality of the circumstances, the nature of the offense does not indicate a finding of disproportionality.

Nature of the Offender

This part of the first prong, "asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Dillon* (1983) 34 Cal.3d 441, 479.) In *People v. Dillon, supra,* 34 Cal.3d 441, the defendant was a 17-year-old high school student when he and several friends undertook the robbery of a marijuana farm. When confronted by one of the

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[16] The court notes that Petitioner uses these articles to demonstrate that he had youthful impetuosity and the "kind of skewed thinking [that] is devoid of any grounding in reality" and, like Palmer, "had no idea of the consequences of his conduct." (Traverse at p. 108.) The court disagrees.

farmers, armed with a shotgun, an inexperienced and frightened Dillon shot his weapon multiple times hitting and ultimately killing the victim. (*Dillon, supra,* at pp. 483-484.) At trial, a psychologist testified that Dillon functioned "like a much younger child." (*Id.* at p. 483.) He was charged and convicted of first degree felony murder and attempted robbery. The judge sentenced him to life in state prison because he was mandated to do so, but found that he did not believe Dillon to be a danger to society as a typical first degree murderer due to his extreme immaturity and his lack of any prior criminal record. (*Id.* at p. 486.) The California Supreme Court also found Dillon to be an extremely immature youth with no prior trouble with the law, and his crime was a sudden reaction to a quickly developing situation. (*Id.* at p. 488.) Accordingly, the Court reduced his degree of murder to second degree and committed him to the Youth Authority.

In *In re Palmer* (2019) 33 Cal.App.5th 1199, the Court of Appeal found Palmer's extreme youth, 17 years old at the time of his offense, very important. (*In re Palmer* (2019) 33 Cal.App.5th 1199, 1210.) The Court also found it important that due to the circumstances of his upbringing he suffered from low self-esteem and, as a result, began committing crimes and using drugs in an effort to be accepted by his peers. (*Id.*) Palmer had some prior brushes with the law having sustained charges for robbery, burglary, and attempted burglary prior to his commitment offense. (*Id.*)

Turning here to "the offender," Petitioner was a 24-year-old man at the time of the offense, a youthful offender to be sure, but not a juvenile like Dillon or Palmer, just 17 at the time of their offenses. There is little doubt, however, that Petitioner suffered a traumatic childhood and adolescence fraught with violence. It is these experiences which led to a diagnosis of post-traumatic stress disorder (HT at pp. 172, 178) and provided the motive for the offense. In his traverse, Petitioner makes a direct comparison of himself to Palmer, stating, his "traumatic childhood experiences sculpted a personality as a youth that was 'easily aroused by emotionally loaded situations' and 'likely to respond in an impulsive and at times aggressive manner,' with 'poor behavior controls' and a mindset that could 'not identif[y] with an adult male figure.' When combined with the 'immaturity, impetuosity, and failure to appreciate risks

and consequences' that characterized his youth, [Petitioner] made an 'impulsive,' 'spur of the moment' decision that didn't make any sense' to him when he was older—exactly like Palmer." (Traverse at p. 108.)

While the court agrees that Petitioner was a youthful offender and suffered a "traumatic childhood experience [that likely] sculpted his personality as a youth," the court disagrees that the offense was "impulsive", impetuous, or "spur of the moment." As discussed in more detail *ante,* the offense here was considered well in advance. Petitioner obtained a firearm; he practiced shooting on multiple occasions, including the day of the offense; he was at the Ambassador Hotel on two occasions leading up to the offense and even asked questions regarding where the victim might be; he was found to have articles about his victim in his pocket; and his diary entries expressed a desire to kill Senator Kennedy. This factor also does not indicate a finding of disproportionality.

Prong 2:

Comparison to other California Punishments

The second *Lynch* factor indicates disproportionality where the challenged punishment is significantly more severe than the punishments prescribed by California law for crimes which are more serious in terms of potential danger to society. (*People v. Mendez*, *supra*, 188 Cal.App.4th at p. 64.) First degree murder is the most heinous of all crimes and accordingly carries the most severe sentence. (*People v. Edwards* (2019) 34 Cal.App.5th 183, 196–197.) Petitioner argues his 54 years in custody for first degree murder is excessive when compared to other first degree murderers within the state. (Traverse at pp. 112-113.)

He cites six examples of California inmates with "worse" institutional behavior and classification scores than his to support this contention. This comparison is misplaced for a number of reasons. First, there is no citation indicating the source of this information. Second, while each entry explains the inmate's conviction, classification score, and number of rules violations, it does not explain the reasons given for their eventual finding of suitability, arguably

the most important detail.[17] Petitioner was not found unsuitable by the Governor due to his classification score or institutional misconduct. Third, the entries do not include the number of years served by the given inmate, making this comparison of little use when arguing disproportionality based on years served for a more severe offense.

Petitioner does not, in either his petition or his traverse, demonstrate that his punishment has been significantly more severe than the punishments prescribed by California law for crimes which are more serious in terms of potential danger to society. (*People v. Mendez*, *supra*, 188 Cal.App.4th at p. 64.) Instead, he concedes that "no comparison can be had utilizing the second or third *Lynch/Palmer* tools when a prisoner challenges his particular length of confinement for first degree murder, since first degree murder is the most serious offense." (Traverse at p. 104.) There is no evidence to support a finding of disproportionality using the second *Lynch* factor. (*Lynch*, *supra*, 8 Cal. 3d at pp. 426–427.)

Prong 3:

Comparison to Out of State Punishments for Second Degree Murder

The third *Lynch* factor indicates disproportionality where the challenged punishment exceeds that which the defendant would be subject to in a "significant number" of other jurisdictions for the same offense. (*Lynch*, *supra*, 8 Cal.3d at p. 427.) Petitioner does not provide any contentions regarding this particular prong and concedes that no comparison can be utilized for this prong under *Palmer/Lynch* for first degree murder. (Traverse at p. 104.) Thus, there is no finding of disproportionality under this prong.

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[17] The court notes, "[c]ourts need not rank every convicted defendant on a continuum of culpability and ensure each of their sentences are precisely matched to their particular culpability as compared to another defendant's culpability. (See *People v. Mincey* (1992) 2 Cal.4th 408, 476, 6 Cal.Rptr.2d 822, 827 P.2d 388 ['intercase' proportionality review not required].) Rather, the Eighth Amendment prohibits only sentences that are *grossly* disproportionate to an individual's crime. Our Supreme Court has cautioned this limitation 'will rarely apply to those serious offenses and offenders currently subject by statute to life-maximum imprisonment.' (*Dannenberg, supra,* 34 Cal.4th at p. 1071, 23 Cal.Rptr.3d 417, 104 P.3d 783.)" *In re Williams* (2020) 57 Cal. App. 5th 427, 438.)

Accordingly, the court finds that when considering all three of the *Lynch* factors, the term of incarceration in the instant case is not disproportionate. Petitioner is serving an indeterminate life sentence. The statutory maximum for Petitioner's offense is life in prison; thus, he has no vested right to a term that is less than life in prison. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1097–1098.) Petitioner's indeterminate life sentence for first degree murder, while lengthy, does not shock the conscience or offend fundamental notions of human dignity, nor is it "unmistakably" unconstitutional. (*People v. Carmony*, *supra*, 127 Cal.App.4th at p. 1086.)

DISPOSITION

For all the foregoing reasons, the Petition for Writ of Habeas Corpus is DENIED. The Clerk is ordered to serve a copy of this order upon Angela Berry, Esq. and Denise Bohdan, Esq., as counsel for Petitioner, and upon Deputy Attorney General Charles Chung, as counsel for Respondent, the Governor of the State of California, and upon Deputy District Attorney Steven Katz, as counsel for Respondent, the People of the State of California. The Clerk is also ordered to serve a copy of this order up Eric George, Esq. and Serli Polatoglu, Esq, as counsel for the Kennedy family.

Dated: 10-2-2023

WILLIAM C. RYAN
Judge of the Superior Court

Send a copy of this order to:

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Decision, In re Sirhan B. Sirhan, Court of Appeal of the State of California,

B338429, July 22, 2024

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re SIRHAN B. SIRHAN on Habeas Corpus.	B338429 (Super. Ct. Nos. BH014184 & A233421) (William C. Ryan, Judge)

ORDER

THE COURT:

The court has read and considered the petition for writ of habeas corpus filed June 17, 2024. The petition is denied. Petitioner fails to demonstrate that the Governor failed to give "due consideration of the specified factors" as applied to petitioner "in accordance with applicable legal standards." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.) Additionally, the record reflects "some evidence" supporting the conclusion that petitioner constitutes a current threat to public safety. (*In re Shaputis* (2011) 53 Cal.4th 192, 214- 215.) Petitioner does not establish that any due process violation occurred or, that if any violation occurred, it would not be harmless error.

Petitioner fails to demonstrate Article V, Section 8(b) of the California Constitution or Penal Code Section 3041.2 violate due process. He also fails to demonstrate that Article V, Section 8(b) violates equal protection.

Petitioner has not demonstrated his continued incarceration is grossly disproportionate to the offense or so excessive that it shocks the conscience

and offends fundamental notions of human dignity. (*In re Palmer* (2021) 10 Cal.5th 959, 972; see also *In re Lynch* (1972) 8 Cal.3d 410, 425-430.)

Finally, petitioner does not demonstrate there was any error in the superior court's August 28, 2023, order. (See *In re Marriage Cases* (2008) 43 Cal.4th 757, 791, fn. 10.)

MOOR, Acting P.J. KIM, J. DAVIS, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Memorandum of Decision, In re Sirhan B. Sirhan, California Supreme Court, S28634, September 25, 2024

APPENDIX C

Court of Appeal, Second Appellate District, Division Five - No. B338429

S286234

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re SIRHAN B. SIRHAN on Habeas Corpus.

The petition for review is denied.

GUERRERO
Chief Justice