Filed 2/28/17 In re Buenrostro CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re SALVADOR BUENROSTRO, on Habeas Corpus.	B264275 (Los Angeles County Super. Ct. No. BH009824)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. William C. Ryan, Judge. Petition denied.

Salvador Buenrostro, in pro. per.; USC Gould School of Law Post-Conviction Justice Project, Michael J. Brennan, Heidi L. Rummel and Anna Feingold, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Jennifer A. Neill, Assistant Attorney General, Julie A. Malone and Jennifer O. Cano, Deputy Attorneys General, for Respondent.

INTRODUCTION

Petitioner Salvador Buenrostro is serving an indeterminate term of 15 years to life in the custody of respondent California Department of Corrections and Rehabilitation (CDCR) for a 1984 second degree murder conviction. On March 19, 2014, the Board of Parole Hearings (Board) found petitioner suitable for parole. On July 25, 2014, Governor Edmund G. Brown Jr. reversed the Board's decision. On March 25, 2015, the superior court denied the petition for writ of habeas corpus.

Petitioner filed a new habeas petition with this court, seeking to have the Governor's decision reversed and to be released from prison pursuant to the Board's recommendation.[1] He challenges the Governor's reliance on a 2010 confidential memorandum containing information which was not disclosed to petitioner prior to the parole hearing or the Governor's decision. We conclude that due process requires the CDCR to provide the inmate with all materials it intends to give the Board prior to the hearing unless such disclosure poses an undue risk of harm or threat to prison security. If the CDCR withholds information on these grounds, it must comply with the designation process used for disciplinary hearings pursuant to prison regulations. Any confidential materials ultimately relied upon by the Board or Governor to deny parole must be provided to the superior court

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[1] "An order denying a petition for writ of habeas corpus in the superior court is final immediately upon its filing, and review of the order can only be had by the filing of a new petition in the Court of Appeal. [Citation.]" (*Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1064, fn. 5.)

for an in camera review if the inmate subsequently files a habeas petition. In that review, the court must assess whether the confidential designation, at minimum, meets the standards set forth in CDCR's own regulations.

Because the 2010 memorandum was properly designated confidential and the Governor's conclusion that it was reliable was neither arbitrary nor capricious, the use of the confidential information at petitioner's parole hearing did not violate due process. That information, in conjunction with evidence of petitioner's significant criminal history, is sufficient to support the Governor's denial of parole, under the deferential review standard we must apply to such decisions.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Board Hearing*

Petitioner was 34 years old at the time of the murder. His minimum eligible parole date was August 23, 1990. He was 66 in 2012 when the Board previously found him suitable for parole.[2]

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[2] Penal Code section 3041 provides that the Board shall set a release date when it deems an inmate suitable for parole. The criteria for setting parole dates are set forth in title 15, division 2, chapter 3, article 11 of the California Code of Regulations. "[C]ircumstances tending to establish suitability for parole are that the prisoner: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress has built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the

The Governor reversed the Board's decision, relying in part on certain "confidential memorand[a]" from 2009 and 2010 not disclosed to petitioner, which indicated petitioner sought to inflict violence on other inmates, engage in criminal activities, and violate prison rules.[3]

After a new parole hearing in March 2014, the Board again found petitioner suitable for parole. In support of its finding, the Board cited the following factors: petitioner had admitted that the commitment offense, murder for hire, had been done to enhance the Mexican Mafia's reputation in the community; he had no discipline for drug or alcohol use in prison and only two non-violent sustained rules violations during his 34 years in prison; and he had taken responsibility for his crime and expressed genuine remorse and empathy for the victim's family. The Board noted his long involvement in Victims Awareness and Victims Recognition classes and that he had served as group facilitator, demonstrating understanding of the impact crime has on families and the community. The Board also found while in prison petitioner had distanced himself from the gang with which he had been involved since childhood, and as a result had suffered retaliation, including being stabbed multiple times by

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probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654.)

[3] We previously denied a writ of habeas corpus filed by petitioner challenging the Governor's first denial.

other gang members while in prison. Since 2000, he had been involved in anger management, problem-solving, stress management and other self-help programs.

The Board addressed the concerns raised by the Governor in his reversal of the Board's 2012 parole suitability finding. The Board found that in the intervening year, petitioner had continued with self-improvement programs, had earned laudatory chronos[4] relating to his work and had embarked on substance abuse programming which provided him with a well-considered plan in the event of relapse. As to the "confidential information" relied upon by the Governor in denying parole in 2012, the Board stated that it had considered all 1300 pages of confidential information in his file and was "satisfied that [petitioner's gang affiliation] terminated long ago based upon all the evidence we have, including some rather reliable information in the confidential file . . . ." The Board concluded there was nothing in the confidential "memos that we reviewed that in our minds would deem you unsuitable at this time."

As part of the proceeding, the Board conducted a closed session in which it reviewed the confidential memorandum from 2010, as well as other materials in petitioner's confidential file. The Board noted as part of that review the information provided by the confidential source was deemed reliable by the institution under the criteria set forth in title 15 of the California Code of

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[4] "A 'chrono' is an institutional documentation of information about inmates and inmate behavior." (*In re Stoneroad* (2013) 215 Cal.App.4th 596, 606, fn. 4; see Cal. Code Regs., tit. 15, § 3000 [definition of "General Chrono"].)

Regulations,[5] section 3321, subdivision (c)(1), (3) and (4), since the informant had provided reliable, corroborated, self-incriminating evidence on two prior occasions about inmates other than petitioner. The Board concluded, nonetheless, that it had "determined that the information provided by [the confidential source] was not reliable for our purposes" based on other information before it. Specifically, the Board cited evidence that petitioner was an inactive gang member, his oral responses during the parole hearing denying any involvement with criminal activity in the 2010 time period, and the fact that there was no follow-up investigation into the allegations, nor any proceedings against petitioner based on the 2010 confidential memo.

B. *Governor's Reversal*

The Governor reversed the Board's finding that petitioner was suitable for parole. He "acknowledge[d] that [petitioner] has made efforts to improve himself while incarcerated," "has not been disciplined for serious misconduct since 1991 and was validated as an inactive member of the Mexican Mafia 14 years ago." The Governor also recognized petitioner's participation in self-help programs and commendations for serving as a role model for others. While affirming "these positive steps," the Governor nonetheless found they were "outweighed by negative factors that demonstrate he remains unsuitable for parole."

The Governor characterized the commitment offense as "an unusual crime because [petitioner] was a cold-blooded contract killer who executed an unsuspecting stranger without passion or

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

emotion. After he returned to prison for this murder, [petitioner] was one of the top leaders of the Mexican Mafia for decades, orchestrating and carrying out ruthless criminal activity even while isolated in the Security Housing Unit for 17 years."

The Governor noted that his previous decision to reverse the Board's decision to grant petitioner parole "was based on the senseless violence of his crime, his extensive and violent involvement with the Mexican Mafia, his continuing loyalty to the gang, his relatively recent criminal activity, and his limited and inadequate substance abuse programming. [¶] Even though two different parole panels have concluded that [petitioner] is ready to be released, [the Governor] remain[ed] troubled by the nature of the killing in this case, [petitioner's] two decades of leadership and violence in the Mexican Mafia, and a report of recent criminal activity. Although [petitioner] is no longer active in the Mexican Mafia and has made positive efforts to change, there is troublesome information in his confidential file. A reliable informant reported that [petitioner] was still willing to engage in threats of violence against others as recently as 2010. In light of his long and particularly violent criminal history, this information—deemed reliable by highly trained gang experts—gives me pause. The hearing panel found the report from the 2010 confidential informant unreliable because [petitioner] was not disciplined and because there was no follow-up investigation in the file to verify the information provided. However, I cannot conclude—based on this long and serious record and the disturbing information provided by an informant—that [petitioner] is currently suitable for parole."

C. *Denial of Petition in Superior Court*

The superior court denied the petition for writ of habeas corpus. The court stated that it had reviewed the 2010 confidential information on which the Governor relied, and found "it is some evidence[6] of Petitioner's current dangerousness. The confidential memorandum meets the institutional standards of reliability. (. . . § 3321, subd. (c).) Courts must uphold the CDCR's interpretation of whether confidential information is reliable unless that determination is arbitrary, capricious, unreasonable, or an abuse of discretion. (*In re Villa* (2013) 214 Cal.App.4th 954, 969.) Having reviewed the confidential information, the Court finds there is no evidence that the determination was arbitrary, capricious, unreasonable, or an abuse of discretion. The mere fact that the information did not result in disciplinary action does not mean the information was not reliable." The superior court found it significant that, although the Mule Creek State Prison's "'Institutional Gang Investigator did not confirm the reliability of [the] Confidential Memorandum dated April 18, 2010, it was deemed reliable per . . . [section] 3321[, subdivision](c)(1) and subsequently approved to be placed in [Petitioner's] Central File.'"[7]

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6 When evaluating a parole suitability determination by either the Board or the Governor, "'the standard of review is whether there exists "some evidence" demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability. [Citation.]' [Citation.]" (*In re Shaputis* (2011) 53 Cal.4th 192, 209, fn. omitted.)

7 This last finding by the superior court is based on an investigative document created on October 22, 2014, *after* the

The court also considered petitioner's claim that his due process rights were violated by the denial of access to the confidential information. The court concluded that petitioner was aware of the 2010 confidential memorandum prior to the Governor's first reversal. "Any arguments regarding the Governor's first reversal have already been addressed by this Court in connection with Petitioner's previous writ of habeas corpus . . . and are moot."

Alternatively, petitioner claimed he was not provided disclosure of the confidential memorandum in redacted form, thus violating section 3321, subdivision (b)(3)(B). As to the second claim, the court found "there is no indication that Petitioner complied with section 2247 . . . by 'complying with department procedures for review of the documents . . . at least 10 days before the week of the [parole] hearing' or filing an appeal if 'dissatisfied with the disclosure.'[8] Thus, Petitioner has

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parole hearing and the Governor's decision to deny parole to petitioner. As such, the document should not have been considered by the superior court in evaluating whether there was "some evidence" to support the Governor's decision.

8 Section 2247 provides in the context of parole hearings: "A prisoner is entitled to review nonconfidential documents in the department central file. A prisoner is responsible for complying with department procedures for review of the documents and for making his request sufficiently early to permit his review of the documents at least 10 days before the week of the hearing. A prisoner shall have the opportunity to enter a written response to any material in the file. [¶] A prisoner dissatisfied with the disclosure may appeal pursuant to department procedures. (See . . . [§]3003.)"

not exhausted administrative remedies before seeking judicial relief by petition for writ of habeas corpus. [Citations.] The exhaustion requirement is jurisdictional and 'ensures "the use of administrative agency expertise and capability to order and monitor corrective measures." [Citation.]' [Citation.] [¶] In light of the foregoing, [the court concluded,] there is no evidence to support Petitioner's argument that his due process rights were violated. With respect to all of his claims, Petitioner has not stated a prima facie case for relief, and therefore his claims may be summarily denied. [Citation.]"

DISCUSSION

A. *Petitioner Is Not Barred from Challenging the Governor's Reliance on Confidential Materials To Deny Parole*

1. *The Instant Habeas Corpus Petition Is Not Moot*

In his habeas corpus petition before this court, petitioner raises the same due process claims. We agree with the superior court that any claims with respect to the prior parole suitability hearing and the Governor's first reversal are moot. (See *In re Scott* (2004) 119 Cal.App.4th 871, 877, fn. 1; see also *In re J.G.* (2008) 159 Cal.App.4th 1056, 1062.) We disagree, however, with the superior court's conclusion that petitioner is barred from challenging the new parole denial because his prior habeas petition requested review of confidential material "from 2009 and 2010" considered by the Governor at that time. While petitioner knew in very general terms that there was confidential information in his file reviewed by the Board and Governor prior to the initial habeas petition, he did not know about a specific memorandum from 2010 until it was expressly relied upon by the

Governor as the ground for the most recent denial. Petitioner is not barred from seeking relief related to the consideration of this specific information as part of a new habeas petition.

2. *There Is No Requirement To Exhaust Administrative Remedies Under Current Regulations*

Section 2247 establishes a procedure by which a prisoner can seek to review "nonconfidential documents" in the prisoner's CDCR central file prior to a parole hearing. The trial court concluded that petitioner was required to follow this procedure to obtain the confidential memorandum and his failure to do so precluded further review. The plain language of section 2247 does not require exhaustion of internal administrative procedures at the prison before a prisoner may bring a habeas petition to challenge the use of *confidential* documents at a parole hearing.[9]

"The rules of statutory construction also govern our interpretation of regulations promulgated by administrative agencies. [Citation.] We give the regulatory language its plain, commonsense meaning. If possible, we must accord meaning to every word and phrase in the regulation, and we must read regulations as a whole so that all of the parts are given effect. [Citation.]" (*Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 835.) The regulation on its face applies only to *nonconfidential* documents. Had the CDCR intended the regulation to apply to the entirety of the inmate's central file, it would have so provided. Thus, we conclude there was no administrative review process in place at

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[9] We note that the People do not argue that petitioner failed to exhaust administrative procedures.

the prison for petitioner to exhaust prior to his parole hearing, at least with respect to confidential material. Petitioner is not barred by failure to exhaust administrative remedies from seeking release of the confidential source materials as part of this habeas petition.

B. *Standard of Review*

"Whether to grant parole to an inmate serving an indeterminate sentence is a decision vested in the executive branch, under our state Constitution and statutes. The scope of judicial review is limited. The 'some evidence' standard, . . . articulated in *In re Rosenkrantz*[, *supra*,] 29 Cal.4th 616 . . . and refined in *In re Lawrence* (2008) 44 Cal.4th 1181 . . . , is meant to serve the interests of due process by guarding against arbitrary or capricious parole decisions, without overriding or controlling the exercise of executive discretion. [Citations.]" (*In re Shaputis*, *supra*, 53 Cal.4th at pp. 198-199.) The Supreme Court has "explained that, because the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety, and because the inmate's due process interest in parole mandates a meaningful review of a decision denying parole, the proper articulation of the standard of review is whether there exists 'some evidence' demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability. [Citation.]" (*In re Prather* (2010) 50 Cal.4th 238, 252.)

The California Supreme Court has recognized that "the requirement of procedural due process embodied in the California Constitution (Cal. Const., art. I, § 7, subd. (a)) [also] places some

limitations upon the broad discretionary authority of the Board" in the conduct of parole proceedings. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.) The Court has not defined the precise boundary of such limitations, instructing courts to apply an issue-specific analysis to due process challenges brought to the parole hearing process. (*In re Sturm* (1974) 11 Cal.3d 258, 266.)

C. *Due Process Requires Disclosure of Confidential Information Relied Upon by the Board or Governor Unless Its Disclosure Poses Undue Risk of Harm or Threat to Prison Security*

1. *Overview of Treatment of Confidential Information in Proceedings Relating to Prisoners*

More than forty years ago the California Supreme Court rejected the argument that the full panoply of procedural rights announced by the United States Supreme Court in *Morrissey v. Brewer* (1972) 408 U.S. 471 [92 S.Ct. 2593, 33 L.Ed.2d 484] for parole *revocation* hearings was also required in parole *release* hearings.[10] (*In re Sturm, supra*, 11 Cal.3d at p. 266.) As the

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[10] *Morrissey* held that in addition to a separate preliminary hearing, the parolee facing revocation was entitled to a full hearing and the following procedural protections: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation; (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders

court explained at the time in *Sturm*: "there are valid reasons for a distinction between revocation and release. . . . [R]evocation of parole involves the loss of a parolee's conditional liberty, whereas parole release decisions concern an inmate's mere anticipation or hope of freedom [citation]. Furthermore, a parole release proceeding is an attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts; in contrast, a revocation hearing involves a specific charge of out-of-prison misconduct which commends itself to quasi-judicial resolution. [Citations.] We decline, accordingly to hold [parole revocation due process] directly applicable and instead adhere to a case by case determination of whether a particular incident of due process is required for parole decisions under the test we designated in [*In re Prewitt* (1972) 8 Cal.3d 470 (*Prewitt*)]. [Citations.]" (*In re Sturm*, at p. 266.)[11] That test requires a court, "[w]hen

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as to the evidence relied on and the reasons for revoking parole." (*Morrissey v. Brewer*, *supra*, 408 U.S. at p. 489.)

[11] *Morrissey* had explored the substantial differences between the liberty interests at stake in a parole hearing and a parole revocation hearing: "The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. . . . The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole *conditions*. In many cases, the parolee faces lengthy incarceration if his parole is revoked."

determining whether a procedure involved in the term-fixing or parole-granting process violates due process, '. . . [to] consider the objectives sought to be achieved by the challenged procedure, the possible unfairness to the prisoner, and the availability of alternative procedures which are less burdensome to the prisoner.' [Citation.]" (*Prewitt*, at p. 475.)

Applying this case-by-case analysis, the California Supreme Court has held that in the context of parole release hearings due process requires at a minimum a definitive written statement of the reasons for denying parole (*In re Sturm, supra*, 11 Cal.3d at p. 273); the Board must consider all relevant factors (*In re Minnis* (1972) 7 Cal.3d 639, 645-646); and a decision denying parole may not be arbitrary or capricious but must be supported by "some evidence" such that the judicial branch can conduct an "adequate and meaningful review." (*In re Lawrence*, *supra*, 44 Cal.4th at pp. 1204-1205; see generally *In re J.G.*, *supra*, 159 Cal.App.4th at pp. 1063-1064 [reaffirming that inmate has fewer due process rights at a parole setting hearing than at a parole revocation hearing but declining to determine whether due process guarantees an inmate's right to be physically present at a parole hearing].)

Relying on the Supreme Court's decision in *Prewitt*, a parole revocation case, petitioner urges this court to find he has a due process right to review any confidential information considered by the Board or Governor. But *Prewitt* cannot be read as establishing a due process right to receive confidential materials in all cases, regardless of circumstances. In *Prewitt,*

(*Morrissey v. Brewer*, *supra*, 408 U.S. at p. 482, italics added, fns. omitted.)

the authority rescinded a grant of parole based on information contained in confidential statements submitted by a law enforcement agency. (*Prewitt*, *supra*, 8 Cal.3d at pp. 471-472.) Prewitt contended the denial of the right to confront and cross-examine the authors of the confidential statements violated his right to due process. (*Id.* at p. 473.) The Supreme Court agreed, holding that Prewitt was entitled to confidential information relied upon by the authority *subject to* the hearing officers' right to withhold the statements and the names of the informants upon a finding that the disclosure would subject the informant to an undue risk of harm. (*Id.* at pp. 474-475.)

The court acknowledged that "[f]rom the inmate's point of view a policy of nondisclosure increases the potential for unfairness. Unless the prisoner learns what information is in the Authority's possession he cannot intelligently decide what subjects to discuss . . . . [T]he inmate may have no knowledge of even the fact of the lodging of false or inaccurate charges. In such a situation a refusal to apprise him of the source and nature of the information would effectively deny all reasonable opportunity to respond. "'[The] stakes are simply too high . . . and the possibility for honest error or irritable misjudgment too great, to allow'" submission of such potentially damaging remarks without at least an opportunity to challenge them. [Citation.] [¶] At a minimum, and *subject to limitation only when an informant will be exposed to an undue risk of harm*, an inmate should be provided with a copy of any document submitted pursuant to [the applicable statutory provisions], and should be afforded a reasonable opportunity to respond thereto, either in person or in writing. Nothing less will satisfy standards

of fundamental fairness required by the due process clause." (*Prewitt*, *supra*, 8 Cal.3d at pp. 475-476, italics added.)

Prewitt, therefore, while affirming a parolee's due process rights to have a "fair opportunity to respond" to all materials used against him, also affirms that the authorities need not disclose the identity of an informant when "disclosure would subject an informant to an undue risk of harm." (*Prewitt*, *supra*, 8 Cal.3d at p. 478; accord, *In re Love* (1974) 11 Cal.3d 179, 185 [absent evidence that an informant would be endangered, a report used to revoke parole must be provided to the parolee prior to the revocation hearing].)

Following *Prewitt*, in *In re Olson* (1974) 37 Cal.App.3d 783 (*Olson*) two inmates sought release of their entire confidential file to determine why they had been denied parole. Balancing the state's articulated need to maintain the confidentiality of certain files against the inmates' asserted need to challenge information that might be false or inaccurate, the court extended *Prewitt* to parole hearings. *Olson* required that an inmate be provided his confidential file prior to a parole hearing, unless to do so would jeopardize the safety of correctional personnel or other individuals. (*Olson*, at pp. 789-790; accord, *In re Muszalski* (1975) 52 Cal.App.3d 475, 481) [inmate seeking parole entitled to in camera review of any documents withheld by the department as "confidential," and department must establish designation was not "arbitrary or unreasonable"].)

Acknowledging that the issue "whether the private interest of an inmate in his liberty outweighs the public interest in preserving confidentiality will arise in future cases of term fixing and parole granting," (*Olson*, *supra*, 37 Cal.App.4th at p. 790) the court in *Olson* recommended the following procedures be adopted:

"Since the Department [of Corrections] and its component agencies are under the obligation, in the first instance, to disclose to an inmate or his attorney all documents in the files pertaining to him upon request, such documents shall be made available to the inmate or his attorney upon receipt of such request. If, in the judgment of the [d]epartment, the security of the institution will be jeopardized or an informant will be exposed to an undue risk of harm by the disclosure of a particular document, the [d]epartment may refuse to make available to the inmate or his attorney any document deemed to have such potentiality provided, that in conjunction with the refusal, the [d]epartment make known to the inmate or his attorney the general nature of the document withheld and the reason for nondisclosure. If the inmate disagrees with the [d]epartment's justification for withholding the document from his perusal, or the propriety of the [d]epartment's determination, review thereof can be had through a habeas corpus petition filed by the inmate. Upon the presentation of such petition to the court, and upon its request, the document in question shall be forwarded to the court for its private perusal for the sole purpose of determining whether it is clothed with the indicia of confidentiality justifying nondisclosure. If the sole issue before the court is the question of disclosure it appears that the court may issue its order forthwith granting or denying the writ. (See Pen. Code, § 1476.)" (*Ibid*.)

Subsequently, the Department of Corrections promulgated two regulations relating to confidential information in an inmate's file: Sections 2235 and 3321.[12] Section 2235, which

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[12] "The Legislature has given the Director of the Department of Corrections broad authority for the discipline and classification of persons confined in state prisons. (Pen. Code, §§ 5054, 5068.)

relates specifically to parole release hearings, provides that "[n]o decision shall be based upon information that is not available to the prisoner unless the information has been designated confidential under the rules of the department and is necessary to the decision." The regulation further provides that "(a) . . . [t]he reliability of confidential information to be used shall be established to the satisfaction of the hearing panel. A finding of reliability shall be documented by the hearing panel. A hearing may be continued to establish the reliability of the information or to request the department to designate the information as nonconfidential. [¶] (b) . . . If confidential information affected a decision the prisoner shall be notified of reports on which the panel relied." (*Ibid.*)

Section 3321 was promulgated to govern the use of confidential information in a prisoner's file in the specific context of prison discipline proceedings.[13] It details what information

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This authority includes the mandate to promulgate regulations governing administration, classification and discipline." (*In re Lusero* (1992) 4 Cal.App.4th 572, 575.)

[13] Section 3321, as amended in October 2014, provides in pertinent part: "(a) The following types of information shall be classified as confidential: [¶] (1) Information which, if known to the inmate, would endanger the safety of any person. [¶] (2) Information which would jeopardize the security of the institution. [¶] (3) Specific medical or psychological information which, if known to the inmate, would be medically or psychologically detrimental to the inmate. [¶] (4) Information provided and classified confidential by another governmental agency. [¶] (5) A Security Threat Group debrief report, reviewed and approved by the debriefing subject, for placement in the confidential section of the central file. [¶] (b) Uses of specific

must be kept confidential, including "[i]nformation which, if known to the inmate, would endanger the safety of any person" and "[i]nformation which would jeopardize the security of the institution." (*Id*., subd. (a)(1) & (2).) "Only case information meeting the criteria for confidentiality shall be filed in the

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confidential material. [¶] (1) No decision shall be based upon information from a confidential source, unless other documentation corroborates information from the source, or unless other circumstantial evidence surrounding the event and the documented reliability of the source satisfies the decision maker(s) that the information is true. [¶] (2) Any document containing information from a confidential source shall include an evaluation of the source's reliability, a brief statement of the reason for the conclusion reached, and a statement of reason why the information or source is not disclosed. [¶] (3) The documentation given to the inmate shall include: [¶] (A) The fact that the information came from a confidential source. [¶] (B) As much of the information as can be disclosed without identifying its source including an evaluation of the source's reliability; a brief statement of the reason for the conclusion reached; and, a statement of reason why the information or source is not disclosed. [¶] (c) A confidential source's reliability may be established by one or more of the following criteria: [¶] (1) The confidential source has previously provided information which proved to be true. [¶] (2) Other confidential source have independently provided the same information. [¶] (3) The information provided by the confidential source is self-incriminating. . . . [¶] (d) Filing confidential material. [¶] (1) Only case information meeting the criteria for confidentiality shall be filed in the confidential section of an inmate's/parolee's central file. . . ." The prior version of section 3321, which was in effect during the parole hearing and Governor's review in this case, did not differ in any material respect.

confidential section of an inmate's/parolee's central file." (*Id.*, subd. (d)(1).)

An inmate's entitlement to review and test confidential information in the prison discipline context was examined in *In re Jackson* (1987) 43 Cal.3d 501 (*Jackson*). The court in *Jackson* explained that unlike the approach used in federal cases, this state's "'due process analysis must start not with a judicial attempt to decide whether the statute has created an "entitlement" that can be defined as "liberty" or "property," but with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at state.' [Citation.]" (*Id.* at p. 510.) "Once it is determined that due process rights are triggered, however, a flexible balancing standard" should be used, weighing "'(1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' [Citation.]" (*Id.* at pp. 510-511.)[14]

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[14] *Jackson* adopted the due process analysis used in *People v. Ramirez* (1979) 25 Cal.3d 260, which considered an inmate's request to be committed for treatment to the California Rehabilitation Center (CRC) rather than prison. The CRC had deemed the inmate "'not a fit subject for confinement or

After weighing these competing interests, the court in *Jackson* concluded that due process does not require a hearing officer to interview a confidential informant prior to finding an accused inmate guilty of a violation based solely on information from a confidential source, "so long as there exists in the disciplinary record information (confidential or otherwise) on which a reviewing court can conclude the hearing officer actually made a reliability and truthfulness determination, and that the determination is supported by evidence." (*Jackson*, *supra*, 43 Cal.3d at p. 504.)

Subsequently, *Ochoa v. Superior Court* (2011) 199 Cal.App.4th 1274 (*Ochoa*) was decided, presenting the same factual scenario we consider here. As with the instant case, *Ochoa* involved the Governor's reversal of a decision by the Board to grant parole, based in part on confidential information in the inmate's prison file. (*Id.* at p. 1277.) The Board had declined to use the confidential information in making its decision based in part on the fact that there had been no investigation of the

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treatment'" in the CRC, which provided drug rehabilitation treatment and other services in a custodial setting, because the director believed he posed too great a risk. (*Id.* at pp. 264, 266.) The court announced the four-part test later approved by *Jackson,* cautioning "'due process is flexible and calls for such procedural protections as the particular situation demands.'" (*Ramirez*, at p. 268). Applying this test to the facts before it, *Ramirez* held that an inmate seeking entry into the CRC was entitled to certain procedural safeguards because the inmate had an "important interest[] in (1) being informed of the nature of and reasons for the proposed action, (2) ensuring that the [d]irector [did] not base his decision on erroneous or irrelevant facts, and (3) presenting his case for not being excluded." (*Id.* at p. 274.)

allegations contained in the confidential information. (*Id*. at p. 1278.) The Governor, however, relied on the confidential information, which had been "'deemed reliable'" and placed in the inmate's file. (*Ibid*.)

The inmate then filed a petition for writ of habeas corpus. In the order to show cause, the superior court expressed concern that there was no indication the inmate had ever received the confidential information prior to his parole suitability hearing. (*Ochoa*, *supra*, 199 Cal.App.4th at pp. 1278-1279.) In response, the warden filed the confidential information under seal with the court, explaining that it had been designated as confidential to protect the safety of prison informants and deemed reliable under section 3321. (*Ochoa*, at p. 1279.) The inmate filed a motion to unseal and disclose the confidential information, claiming due process required he be provided with at least a redacted copy of the information so he could present a defense. (*Id*. at pp. 1279-1280.) The court concluded that due process required disclosure and ordered the warden to disclose the information or proceed without it. (*Id*. at p. 1280.) The warden filed a petition for writ of mandate.

The Court of Appeal reversed, holding it was an abuse of discretion for the superior court to order disclosure or nonreliance on the confidential information, where such information "(1) was clothed with the indicia of reliability and therefore conditionally privileged, and (2) came from prison inmate informants who would necessarily be endangered if their identifies were disclosed." (*Ochoa*, *supra*, 199 Cal.App.4th at p. 1283.) The court explained: "[t]here is a valid state interest in keeping certain prison inmate records confidential to (1) protect individuals, including informants inside and outside of prison, (2) ensure

institutional security, and (3) encourage candor and complete disclosure of information concerning inmates from both public officials and private citizens." (*Id*. at p. 1280, citing *Olson*, *supra*, 37 Cal.App.3d at p. 788, fn. 5.)

Nonetheless, the court concluded that elemental due process required that upon a petition for habeas corpus review of a parole denial decision, the court should conduct an in camera hearing pursuant to Evidence Code section 915, subdivision (b), to determine whether confidential information could be disclosed to the inmate's attorney without revealing an informant's identity. (*Olson*, *supra*, 199 Cal.App.4th at p. 1283.)[15] The court "'deem[ed] such procedure to be an expedient one in view of the need to balance the respective rights of [the inmate] and the state in accordance with the views articulated in *Prewitt*.'" (*Ibid*.) The court cautioned: "'"[Q]uestions of confidentiality are complex and can only be made by trained, experienced correctional authorities knowledgeable about the inmate in question, the entire content of his file (not just the contested documents the court reviews), prison life in general, morality and ethics of the prison setting, prison relationships, and the rehabilitative process. In many cases the reasons for confidentiality may not spring from the face of the document but may be based on other factors in the inmate's file or other conditions in the institution, or a psychological factor that would require expert analysis to

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[15] The *Ochoa* court made no reference to CDCR regulations governing parole hearings or the handling of confidential information within an inmate's files, nor did the court discuss precisely when this hearing would take place: whether prior to the parole hearing itself or after a parole decision had been made.

appreciate." . . . "Such a hearing would allow the custodian of records . . . to explain the significance of the documents and the reasons for their being withheld. Anything less would have the court acting in a vacuum, unable to obtain or use the factual tools which are essential to an informed judgment.'" [Citation.]" (*Ibid.*)

Based on these precedents, petitioner argues that the Governor's decision to reverse the Board's 2014 parole grant violated his due process rights on two separate grounds: (1) the Governor based his decision on confidential information that petitioner did not have a meaningful opportunity to address, and (2) the confidential information did not constitute reliable evidence of current dangerousness to warrant denial of parole.

2. *Due Process Requires Disclosure of Confidential Information Prior to a Parole Hearing Subject to Safeguards To Ensure Prison Security*

We consider first petitioner's due process challenge to the Governor's reliance on confidential information withheld from him during the parole hearing. The controlling due process analysis was set forth in *Jackson*, which balances the governmental interests against the private interests at stake. More specifically, we consider (1) the nature of the private interest, (2) the risk of an erroneous deprivation of that interest, (3) the dignitary interest at stake, and (4) the countervailing governmental interest. (See *Jackson*, *supra*, 43 Cal.3d at p. 511.)

Following the analysis used in *Jackson*, we first consider whether the regulations developed by the CDCR for parole hearings satisfy the requirements for due process when these factors are properly weighed. Here the CDCR's regulations

provide that a parole decision may not be based on information not available to the inmate unless such "information has been designated confidential *under the rules of the department* and is necessary to the decision." (§ 2235, italics added.) Thus, the current regulations contemplate the use of confidential information provided it has been "designated" as confidential according to established rules used by the correctional department.

Section 2235 does not define what is meant by the "rules of the department," and there is no other regulation that is part of the section governing parole hearings which defines how information can be designated as confidential prior to a hearing. However, the CDCR has adopted explicit rules with respect to what information can be designated as confidential as part of its disciplinary procedures, specifically in section 3321. Neither side directed us to, nor could we find, any other CDCR rule setting forth the process by which information relating to an inmate may be deemed confidential by the CDCR and maintained in the CDCR's files on an inmate.[16] While section 3321 relates to prison discipline, it clearly can and has been applied to the maintenance of *any* confidential information in an inmate's file which is generated during the inmate's confinement. Indeed, in their response to the petition, the People concede section 3321 should be followed to determine what information should be designated as "confidential" in relation to a parole hearing.

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[16] The Board also has rules relating to its collection and release of confidential information, but those rules do not relate to information collected by the CDCR and so are inapplicable here. (See § 2087.)

Section 2235's provision that confidential information may be used in parole hearings, provided it has been designated confidential under the rules of section 3321, subdivision (a), comports with the requirements of due process for prisoners preparing for parole hearings as articulated by *Prewitt* and *Jackson*. The regulation recognizes that an inmate seeking parole has a genuine anticipation of freedom which warrants some protection and that there must be safeguards against the erroneous deprivation of such freedom as a result of the use of unreliable information. The regulation balances the inmate's interest that the government not use unreliable or untested information from a jail informant, against the prison's need to ensure that inmates who come forward with information are protected from reprisal. It does so by limiting and specifying the type of information that may be designated as confidential to information that would jeopardize the safety and security of the institution or pose a larger security threat. Only information that meets these institutional criteria may be withheld from a prisoner seeking parole.

Thus, we hold that in the context of a parole hearing, due process is satisfied if, before using confidential information at a parole hearing, the institution complies with the designation process set forth in section 3321, subdivision (a), including ensuring that the only documents withheld as confidential pose the security risks set forth in section 3321, subdivision (a)(1) through (5). At the hearing, the Board need not conduct an in camera interview of the informant, a procedure rejected by *Jackson* in the context of prison discipline proceedings. However, if the Board considers confidential information, it must make a record, written or oral, of any confidential information it reviews,

so that a reviewing court knows what information was considered.

If the Board denies parole in whole or in part on the basis of confidential information, and a habeas petition is filed to challenge the parole decision, such findings must be submitted to the superior court, along with the confidential information, filed under seal, for in camera review, the procedure endorsed in *Ochoa*. The court's initial review focuses on a determination whether the evidence supports the institution's assertion of a need for confidentiality. Because over-designation of material as confidential serves no administrative purpose and impairs an inmate's ability to present relevant information at a parole hearing, this initial analysis will evaluate the institution's basis for deeming the information confidential in the first place. In reviewing the confidential designation, the court must "give 'considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.' [Citation.]" (*In re Furnace* (2010) 185 Cal.App.4th 649, 666.) Review of the safety determination should be deferential. (See *Ochoa*, *supra*, 199 Cal.App.4th at p. 1283; see also *Mendoza v. Miller* (7th Cir. 1985) 779 F.2d 1287, 1293.) If a court finds there is insufficient evidence to warrant the confidential designation even under this deferential standard, the petition must be granted, the information ordered disclosed and the petitioner given an opportunity to respond to such information at a new parole hearing. While in most circumstances this review will take place after a parole decision has been made, we acknowledge that in some circumstances the inmate may seek habeas review of the confidential designation prior to the parole hearing, a process

approved in *In re Muszalski*, *supra*, 52 Cal.App.3d 475 and by this court today.

In sum, considerations of due process allow the Board and Governor to consider confidential information from the CDCR when considering an inmate's suitability for parole, provided the CDCR complies with the "rules of the department" in sections 2235 and 3321 for designating and handling confidential source materials.

3. *The Board and the Governor's Determination of Reliability of Confidential Information in a Parole Proceeding Must Comply with Applicable Prison Regulations and Must Be Supported by Some Evidence, But Need Not Comply with Prison Regulations Relating to Discipline*

The instant writ petition raises a further question about procedural due process in the parole hearing context when the Board or Governor bases a decision to deny parole on confidential information. We again consider whether the regulations enacted by the CDCR meet the requirements for due process in this regard. The specific regulation enacted to govern these decisions is section 2235, which provides that "[n]o decision shall be based upon information . . . designated confidential" unless it is "necessary to the decision" and "[t]he reliability of confidential information to be used shall be established to the satisfaction of the hearing panel."

By contrast, the regulations governing prison discipline, specifically section 3321, contain more detailed rules as to when prison officials may rely on confidential information to impose discipline within the prison. Section 3321, subdivision (b)(1),

currently provides, "No decision shall be based upon information from a confidential source, unless other documentation corroborates information from the source, or unless other circumstantial evidence surrounding the event and the documented reliability of the source satisfies the decision maker(s) that the information is true." Subdivision (c) of the same regulation spells out that a "confidential source's reliability may be established" by one of six specific criteria, including prior truthful information from the same informant, that the information is self-incriminating, and that the source is the victim, among others.

Petitioner argues that he was denied due process because the confidential information was not separately corroborated from another source nor did it otherwise meet the strict requirements of section 3321, subdivision (b)(1).

While we acknowledge that *Jackson* found section 3321, subdivision (b)(1), to satisfy due process for prison discipline decisions, we do not think due process *mandates* that the Board and the Governor follow that section's requirements when confidential information is considered in a parole proceeding. (*Jackson*, *supra*, 43 Cal.3d at p. 515.)[17] There are several significant differences between the two proceedings and the underlying statutory and constitutional framework. Significantly, article V, section 8, subdivision (b) of the California

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[17] *Jackson* analyzed an earlier version of section 3321. The language relied upon by *Jackson* (and at issue here), which requires corroboration by other sources or evidence, was previously contained in subdivision (c) of section 3321; that same language with slight modifications not material here was renumbered as subdivision (b)(1).

Constitution grants to the Governor the ability to review a parole decision "subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider." Thus the Governor must apply the same suitability factors as the Board and, pursuant to Penal Code section 3041.2, subdivision (a), "when reviewing the board's decision . . . shall review materials provided by the board." In determining suitability for parole, the California Code of Regulations provides that the Board, and therefore the Governor, must consider "[a]ll relevant, reliable information" (§ 2402, subd. (b)) in evaluating whether "an inmate *continues* to pose an unreasonable risk to public safety." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221.) There is no statement in the Constitution or Penal Code curtailing the Governor's and Board's ability to determine what is "relevant" and "reliable" information.

The California Supreme Court has held that "'[t]he [Board's] discretion in parole matters has been described as "great" [citation] and "almost unlimited" [citation].' [Citation.]" (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.) "Resolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the Board." (*Id.* at p. 656.) The court further concluded that the broad discretion to be granted to the Board also exists with regard to decisions rendered by the Governor. (*Id.* at p. 677.) "Although 'the Governor's decision must be based upon the same factors that restrict the Board in rendering its parole decision' [citation], the Governor undertakes an independent, de novo review of the inmate's suitability for parole. [Citation.]" (*In re Lawrence*, 44 Cal.4th at p. 1204, citing *In re Rosenkrantz*, at p. 660.) The judiciary is only

"empowered to review a decision by the Board or the Governor to ensure that the decision reflects 'an individualized consideration of the specified criteria' and is not 'arbitrary and capricious.' [Citation.]" (*In re Lawrence*, at p. 1205.)

While the Board and Governor must apply the same suitability criteria and consider the same evidence, because the Governor is to conduct a de novo review, the Governor is not required to give the same weight to the evidence, nor to come to the same ultimate conclusions with respect to suitability. It follows that the Governor may reach a different conclusion with respect to the reliability of evidence presented, including confidential information. Since the Governor may consider de novo all factors relied upon by the Board pursuant to the California Constitution and Supreme Court precedent, it follows the Governor may also determine the reliability of confidential information so long as it is done to the satisfaction of the Governor and the decision is documented so that a reviewing court can ensure the determination of reliability by the Governor, like all aspects of a decision to deny parole, is not arbitrary nor capricious.

There is no language in the California Constitution or in the Penal Code which expresses an intent to impose on the Board or the Governor's decisionmaking the same criteria expressed in section 3321, subdivision (b)(1), for evaluating the use of confidential informants in prison discipline cases.[18] Without a

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[18] While *Jackson* affirmed that section 3321's procedures for handling confidential information satisfied due process in the context of prison disciplinary proceedings (*Jackson*, *supra*, 43 Cal.3d at p. 513), the Supreme Court did not hold that strict compliance with all aspects of section 3321 was mandated by

clear expression of intent to graft section 3321, subdivision (b)(1)'s specific criteria for evaluating the reliability of confidential information onto the parole review process, we decline to do so.

Furthermore, in weighing the different interests involved, as required by the due process analysis set forth in *Jackson* and *Ramirez,* we must recognize the different governmental interests involved in parole and prison discipline hearings. The government clearly has a significant interest in ensuring security within its correctional facilities. Balanced against the state's interest in maintaining order in its correctional facilities is the inmate's significant interest in not losing prison privileges based on unreliable and untested "jailhouse" informants. Weighing these competing interests, the court in *Jackson* concluded that section 3321, subdivision (b)(1)'s criteria for evaluating reliability and truthfulness of a confidential source afforded the inmate due process in the context of a prison discipline hearing.

The governmental interests at stake in parole hearings, however, are different. The government's function is to ensure that only those inmates who pose no risk of current dangerousness are released into the public on parole. The

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notions of due process. *Jackson* also did not consider the unique status of parole hearings, which are governed by provisions of the California Constitution, Penal Code and separate prison regulations from those governing discipline. We respectfully disagree with the dissent, which concludes that both the Board and the Governor must strictly comply with section 3321, subdivision (b)(1)'s factual findings as to reliability of confidential information before basing the denial of parole on such information.

government's interest in ensuring the safety of innocent members of the public who may encounter a parolee who continues to "pose an unreasonable risk to public safety" is greater than maintaining security in the prison for other inmates and jailhouse informants. If an individual is improvidently paroled and returned to the community, the risks of renewed criminal activity are great. By contrast, in a tightly controlled correctional facility, there are numerous measures already in place to ensure the safety of guards and inmates after an erroneous disciplinary decision. Given these heightened security concerns, section 2235's standard of reliability properly balances the inmate's right to a fair hearing against the government's function of providing for the security of its citizens.

D. *The CDCR Did Not Commit Error in Designating the 2010 Memorandum Confidential*

This court has conducted an independent review of the confidential memorandum. The court agrees that the memorandum meets the institutional standards for a confidential designation and contained the CDCR's required information about the reliability of the source. (§ 3321, subds. (a) & (c).) The two-page memorandum described information reported to a prison guard by an inmate, which because of the nature of the information would need to be deemed confidential or endanger the safety of persons in the prison. It described a follow-up interview in which the source provided consistent information and resulted in additional security steps being taken at the facility. Given the extremely sensitive nature of the information disclosed in the confidential report, the CDCR's determination that the inmate reporting required additional security measures

taken on his behalf, and the CDCR's expressed concern about maintaining the confidentiality of the report, the document was "clothed with the indicia of confidentiality justifying nondisclosure." (*Olson*, *supra*, 37 Cal.App.3d at p. 791.) Giving proper deference to correctional officials' evaluation of the security risks posed by release of the information, we find that the CDCR did not violate petitioner's due process rights by presenting confidential information to the Board and the Governor which was not also disclosed to petitioner or his counsel.

We further conclude the CDCR did not violate petitioner's due process rights when it also did not provide the memorandum in redacted form, one of the options contemplated by the case law. In the instant case, it would have been impossible to produce the memorandum with information redacted and still ensure the integrity of the confidential process and the safety of the reporting inmate. The allegation of misconduct was so specific that to adequately protect the confidentiality of the source, the institution would have had to delete all identifying information about the informant, the date and location of the incident, the investigating officer, and the actual jail rule alleged to have been violated, in short, the entire substance of the confidential memorandum. The institution's decision not to produce the memorandum in redacted form was a reasonable one under these circumstances.

E. *Some Evidence Supports the Governor's Determination of Reliability of the Confidential Information and Reversal of the Board's Decision*

We turn then to the question whether the Governor's reliance on the confidential memorandum in this case warrants reversal of the Governor' decision and reimposition of the grant of parole. The Governor was explicit that it was the 2010 confidential memorandum, in conjunction with other information, which led him to conclude petitioner still poses a threat to public safety.

The Governor complied with the requirements of due process articulated above and in the case law, as well as the CDCR's regulations: the only confidential information he relied upon had been designated as confidential under the rules of the department; the information was necessary to his decision; he was satisfied with the reliability of the information and documented such reliability; and the Governor's final decision notified petitioner that confidential information had been used. (See § 2235.) Further, the confidential report was then provided to the superior court, as part of the response to the habeas corpus petition, for that court to review the need for confidentiality, the reliability of the confidential information, and ultimately, whether there was some evidence to support the Governor's decision.[19]

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[19] The Governor's reference to "highly trained gang experts" appears to have been in error, as the People conceded at oral argument. We understand the Governor to have been referring to the three members of the prison command staff who deemed the confidential source to be reliable. The record does not establish these officials to be "gang experts" per se; it establishes

We independently review the confidential information to determine whether the Governor's determination that it was reliable was arbitrary and capricious. In this case, the memorandum provided detailed information about the reliability of the same source, including two other instances in which the source had provided reliable information. On both occasions, the information was self-incriminating and proven to be true through independent investigations. Further, the new information about petitioner from this confidential source was self-incriminating. Given this documented evidence in the record, it was not arbitrary or capricious for the Governor to rely on the confidential memorandum in determining that petitioner posed a continued threat to public safety. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

Petitioner nonetheless contends that the Governor could not rely on the confidential memorandum once the Board determined it was not reliable. Petitioner cites no authority to limit the ability of the Governor to make his own determination as to the reliability of confidential information. Rather, the Governor has the constitutional authority to make an independent determination as to parole suitability. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 670; *In re Busch* (2016) 246 Cal.App.4th 953, 966.) This includes the authority to resolve conflicts in the evidence and to determine the weight to be given

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they are members of the institutional staff, who are in the best position to assess credibility and reliability of a confidential source. (See *In re Cabrera* (2012) 55 Cal.4th 683, 690 [where appropriate, courts should defer to CDCR's expertise in prison management].)

to the evidence. (*In re Shaputis*, *supra*, 53 Cal.4th at p. 210; *In re Busch*, at p. 967.)

Because the Governor was entitled to make a determination as to the reliability of the confidential memorandum and found it to be reliable, the question is whether "some evidence," confidential memorandum included, supports the Governor's determination to deny parole. "[U]nder the 'some evidence' standard, '[o]nly a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board or] the Governor. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of [the Board or] the Governor . . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the . . . 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 . . . decision.' [Citations.]" (*In re Shaputis*, *supra*, 53 Cal.4th p. 210.) The determination as to which evidence in the record is convincing is left to the discretion of the Board or Governor. (*Id.* at p. 211.) "Only when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process. [Citation.]" (*Ibid.*)

We agree with the superior court that, when the 2010 confidential memorandum is considered, there is "some evidence" supporting the Governor's determination that petitioner remains a current threat to public safety. (See *In re Shaputis*, *supra*, 53 Cal.4th p. 209.)

DISPOSITION

The petition for writ of habeas corpus is denied.

KEENY, J.*

I concur:

SEGAL, J.

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

ZELON, J., Dissenting.

I respectfully dissent.

In this case, the majority affirms the Governor's decision overruling the grant of parole to petitioner Salvador Buenrostro by the Board of Parole Hearings (Board). The Governor relied on confidential information in respondent's files that had neither been disclosed to petitioner nor found reliable by the Board. In concluding that information was reliable, the Governor made findings unsupported by any evidence in the record. Because this action by the Governor does not comply with the standards applicable to his review, I would reverse his decision.

In arriving at this conclusion, I agree with much of the majority decision. I will not repeat the factual summary contained there, but would note two important facts that appear to be undisputed. First, the Board found that the confidential information ultimately relied on by the Governor could properly be included in petitioner's file under the applicable regulations, but was not sufficiently reliable to be used as the basis for a parole determination. Second, the Governor's stated reason for considering the information, despite the Board's conclusion, was that the information had been "deemed reliable by highly trained gang experts." A detailed search of the record, however, finds no evidentiary support for this conclusion, and the People conceded at oral argument before this Court that there was none.[1]

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[1] The majority's conclusion in footnote 19 about the individuals who found the information sufficiently reliable to include in petitioner's file is based on surmise, rather than the record. Even were we to know the actual qualifications of the individuals involved, we would be left with the fact that those

Our analysis must start with the role of the Governor and the Board in this process. The Supreme Court has made clear that "because the core statutory determination entrusted to the Board and the Governor is whether the inmate poses a current threat to public safety, the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191; see also *In re Shaputis* (2011) 53 Cal.4th 192, 209.) Where "'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.' [Citation]. This standard is unquestionably deferential, but it certainly is not toothless . . ." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1210.) In this case, the governor relied on: the commitment offense; petitioner's long association with the Mexican Mafia, in which the Governor conceded the petitioner was no longer active; and the 2010 confidential report. Thus, in reviewing the Governor's decision, we must consider whether he could rely on the only information that related to current dangerousness: the confidential information at issue here.

Where I must respectfully part ways with the majority is their conclusion that the Governor could properly rely on that confidential information. Having determined that Title 15 of the

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individuals made no findings as to the propriety of using that information for either a parole determination or discipline; we also do not know if they were either qualified, or authorized, to make any determination concerning use of the information.

California Code of Regulations, section 2235,[2] which governs the use of confidential information in parole proceedings, incorporates section 3321's requirements concerning the designation of confidential information, specifically section 3321, subdivision (a), the majority nonetheless concludes that subdivision (b)(2) of the same rule, which governs the use of such information, applies only to the designation and handling of confidential information, but not its use by the Board and Governor.[3] The majority, as did the trial court, applied the requirements of section 3321 to support a finding that the information was sufficiently reliable to be placed in respondent's file, but both the majority and the trial court failed to apply section 3321, subdivision (b)(2) to its use.[4]

Section 3321, subdivision (a), however, is only part of the regulation. Reading the entirety of the regulation, as we must (See, e.g., *Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 835 ["we must read regulations as a whole so that all of the parts are given effect."]; *In re Villa* (2013) 214 Cal.App.4th 954, 964 [in interpreting a

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[2] Future references to rules, unless otherwise designated, are to Title 15 of the California Code of Regulations.

[3] In contrast, the People conceded at oral argument that section 3321, subdivision (b) is both applicable and binding on the Governor, as well as the Board.

[4] Section 2235 of the regulation requires specific findings as to the basis for finding information reliable. Those findings must be based on evidence in the record before the Board, which becomes the record before the Governor. (*In re Jackson* (1987) 43 Cal.3d 501, 516.)

regulation, court must avoid an interpretation that "renders any language mere surplusage."]), we cannot ignore section (b), which governs the use of information that is confidential for purposes of that section. Subdivision (b)(2), which the majority declines to apply, prohibits the use of such confidential information unless "other documentation corroborates information from the source" or "unless other circumstantial evidence surrounding the event and the documented reliability of the source satisfies the decision maker(s) that the information is true. Here, although the reliability of the source finds support in the record, the corroboration required is absent, as the Board itself found.

Under our Constitution, "[t]he Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. (Cal. Const., art. V, § 8, subd. (b).) (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.) While the Governor may reweigh the evidence in the exercise of his discretion, "the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious." (*Ibid*.) The Governor's decision must be based on evidence in the record on which he is legally entitled to rely. Where, as here, the relevant regulations do not permit reliance on the evidence, the Governor's decision may not stand. (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1023.)

Nor did the Governor find any corroboration, as defined by subdivision (b)(2). His factual finding, which all parties concede was erroneous, does not contain information relevant to the corroboration required by the regulations. Thus, even were there evidence in the record of the involvement of "highly trained gang

experts", there is no evidence in the record of corroborating documentation or circumstantial evidence.

Any suggestion that, even though the Governor erred in his evaluation of the factual record and his statement of reasons for reversing the Board, we can nonetheless speculate that other facts not found in the record would support the same conclusion, has no basis in the jurisprudence surrounding gubernatorial review of parole board actions. The Governor has only a single opportunity to review a decision by the Board and is required to state all of the reasons for his determination, which forms the basis for our review. (Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2; *In re McDonald, supra*, 189 Cal.App.4th at pp. 1024-1025.) "Due process and a prisoner's right to a fair hearing require[] that 'the Governor should state all of the reasons for his determination in the first instance, permitting prompt review, compliance with Constitutional mandates, and a predictable process'". (*In re Twinn* (2010) 190 Cal.App.4th 447, 473.)

There is no evidence in the record that supports the Governor's conclusion that petitioner is currently dangerous and thus unsuitable for parole. For these reasons, I would reverse the Governor's decision and remand the matter to the Board to proceed in accordance with its procedures for release of an inmate, or to initiate proceedings for rescission of parole if it determines in good faith that cause exists to do so.

ZELON, Acting P. J.