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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re GARY ECCHER,

on Habeas Corpus.

G045503

(Super. Ct. No. M-13912)

OPINION

Appeal from an order of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed, with directions.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Phillip Lindsay and Gregory J. Marcot, Deputy Attorneys General, for the People.

Benjamin Ramos, under appointment by the Court of Appeal, for Respondent Gary Eccher.

* * *

The People appeal from the trial court's order granting Gary Eccher's habeas corpus petition after former Governor Arnold Schwarzenegger reversed the Board

of Parole Hearing's (the Board's) decision finding Eccher suitable for parole. In 1985, after freebasing cocaine for more than five hours, Eccher strangled Lianne Lando, his girlfriend and partner in selling and abusing cocaine. Following his arrest and extradition from Mexico a few months later, Eccher admitted his guilt to the police and was convicted of first degree murder, which the trial court reduced to second degree murder, sentencing him to a term of 15 years to life. Based on his rehabilitation and exemplary prison record over 24 years, and after nine parole hearings spanning 17 years, Eccher obtained the Board's parole suitability determination in 2010, which the Governor reversed.

The Attorney General argues the low threshold of "some" evidence supports the Governor's assessment Eccher posed a continuing, unreasonable threat of further violence if released under parole supervision. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191, 1212 (*Lawrence*)). Two superior court judges previously granted Eccher's petitions for habeas corpus in 2004, 2009, and 2010 when the Board denied him parole, and the trial court each time directed the Board to reconsider its unsupported determinations Eccher was not ready to return to society. After the Board's favorable 2010 parole suitability determination and the Governor's subsequent reversal, the trial court granted Eccher's fourth habeas challenge. On appeal, the Attorney General contends the trial court erred in concluding no evidence supported the Governor's parole reversal.

As we explain, the record discloses the Governor made his determination based on putative evidence that while Eccher had addressed his severe drug problem, he also suffered from anger management issues. But as we explain, nothing in the evidence the Governor relied upon suggested Eccher posed a present threat to public safety if

released on parole. Contrary to due process, there was no “rational nexus between the evidence and the [Governor’s] determination of current dangerousness.” (*In re Shaputis* (2011) 53 Cal.4th 192, 221 (*Shaputis II*)). Accordingly, we affirm the trial court’s order granting Eccher’s habeas petition challenging the Governor’s parole reversal. The trial court remanded the matter to the Governor’s office to review the Board’s parole suitability determination again but, as we explain, the proper habeas remedy is to vacate the Governor’s decision and reinstate the Board’s July 2010 parole suitability determination, which we now order.

I

FACTUAL AND PROCEDURAL BACKGROUND

The trial court first granted Eccher habeas relief in 2004 after the Board found Eccher unsuitable for parole in 2003 at his fourth parole hearing. The trial court found the Board’s unsuitability determination “‘bereft of factual support,’” including, for example, no rational articulation of “‘why a 27-year-old bicycle theft was ‘significant’ or how a ‘pattern’ appeared between a 1976 bicycle theft and a 1985 drug-induced murder.” Returning to his fraternity one night in 1976, Eccher and a college friend had ridden off on bikes that belonged to others. Eccher’s companion relinquished his bicycle when confronted by a plainclothed security guard, but Eccher pushed the man away, only to turn himself in later and see the matter dropped until the Board raised it as a reason to deny him parole almost three decades later.

Similarly, the trial court found the Board’s “‘room for improvement’” assessment concerning Eccher’s psychological and social history was “‘simply not accurate.” To the contrary, Eccher’s psychologist reported his “‘substance abuse has been in full remission for over 15 years,” his prognosis for community living was “‘good,” and

he “would be an excellent candidate for parole.” His psychological report revealed “no developmental abnormalities or history, a normal childhood and education, and an intact biological family with whom he enjoyed an excellent relationship.” The trial court observed that, contrary to the Board’s lukewarm depiction of Eccher’s psychological gains, “[t]he report actually stated the following: . . . ‘His judgment and insight appear normal. No mental health treatment is indicated at this time. He is not taking any psychotropic medication and his prognosis for continuing a stable life is excellent The Instant Offense which was Murder was his only crime and this was drug and alcohol related. As stated previously, he has no other record. There is no evidence of any mental abnormalities related to this crime. . . . In my opinion [Eccher] does not pose more than a normal risk factor whether in or out of a controlled environment. No risk factors are apparent.’”

The Board also relied on parole opposition by the district attorney and Lando’s family, but as the trial court remarked, “The family’s unspeakable suffering is not an indicator of whether Petitioner poses an unreasonable risk of danger on release . . . and opposition by the DA is not among the statutory unsuitability grounds.”

The Board also unreasonably underreported Eccher’s prison performance, which was “exemplary,” including “many vocational and educational endeavors” and more than a decade of active Narcotics and Alcoholics Anonymous (NA and AA) participation, which bolstered the prison psychologist’s assessment that Eccher’s “problems with illegal drugs and alcohol were ‘in full remission.’” The Board instead noted, but did not elaborate on, three “disciplinary” Petitioner received while in prison, but the last one was in 1996 and, as the trial court observed, it did not constitute “reweigh[ing] the evidence to determine that three ‘disciplinary’ (which do not rise to

the level of rule violations) over a period of 19 years do not supply even the modicum of evidence necessary” to support the Board’s current dangerousness conclusion.¹

That left the commitment offense as the remaining reason the Board denied Eccher parole. The trial court observed that the then-recent case of *In re Van Houten* (2004) 116 Cal.App.4th 339 involved denial of parole for an accomplice in the Manson family murders, but “[u]nlike Van Houten, [Eccher] was not in full possession of his faculties at the time of the crime. All agreed he had been freebasing cocaine for hours just before the murder. Indeed, the trial judge reduced the degree of the murder to second. . . . Again, unlike *Van Houten*, the facts here do not support the conclusion that the murder involved particularly egregious acts beyond the minimum necessary to sustain the conviction.”

Accordingly, the trial court held the Board “acted without a factual basis” in finding Eccher unsuitable for parole, and therefore granted Eccher’s habeas petition. The trial court ordered the Board “to vacate its denial and conduct a new parole suitability hearing for Petitioner before the scheduled hearing date of February 2005.” The Board vacated its denial and conducted a new parole hearing in January 2005.

Eccher apparently chose to proceed without an attorney at the 2005 hearing, for which there is no transcript in the present record. The Board again denied Eccher a

¹ A later psychological report summarized Eccher’s three discipline violations as follows: “Calls and Passes — Warned and Reprimanded in 1988; Over-familiarity With Staff in 1995 which consisted of some correspondence and various discussions of personal matters with an employee; and Running a Bookmaking Operation on or about 12/13/1996,” in which “Eccher was observed with his cell mate ‘with gambling slips (parlay cards) and notes (spread sheets and fantasy football gambling paraphernalia),” and a search of their cell yielded a large quantity of cigarettes (689 packs), commonly used in prison gambling wagers.

parole date, and the record does not reflect whether Eccher challenged that determination with a habeas petition in the trial court.

Instead, the record before us shows Eccher appeared for his next parole hearing in February 2007 and again chose to represent himself. The Board, however, concluded he was not entitled to do so because he could not recall from memory the hearing rights outlined in his notice of the hearing. The presiding commissioner specified, “I’m not going to let you look at that document.”

The Governor later relied on the following exchange as a basis for concluding Eccher suffered from dangerous anger management issues. After the Board returned from a brief recess and informed Eccher he would not be permitted to represent himself, Eccher responded, “I object.” He observed he had a right to waive an attorney and represent himself. Obviously frustrated, he requested that the Board “show me a little bit of respect and tell me what statute or what regulation says there’s specific criteria that I have to meet to represent myself.” The presiding commissioner responded that “it’s up to the Panel to decide whether or not you can represent yourself.” When Eccher answered, “No, it’s not. I object. That’s wrong,” and queried, “You have to show me in the statutes or the regulations where that’s listed . . . [i]sn’t that correct,” the deputy commissioner accused Eccher of “being disruptive.” The deputy suggested “you have not paid attention to your rights in the right[s] package” because no prison recordkeeping reflected Eccher had checked out his prison “C-file” for review before the hearing. But Eccher explained he had done so three months earlier, and he complained the record staff’s inaccuracies were beyond his control.

When Eccher requested that the records be doublechecked, the deputy answered, “No, . . . we’ve made our decision,” at which point Eccher interrupted the

deputy. Eccher commented, “If you’re going to kick me out of here because I haven’t met some criteria that isn’t listed anywhere, isn’t that ridiculous?” The presiding commissioner reiterated, “You don’t know what your rights are, sir,” but Eccher challenged her to recite the rights listed in his notice, stating, “I bet you can’t do it without looking at it.” Eccher repeated his challenge, “Peel them off right now if you can do it.” The presiding commissioner stated she had intended “to go over every one of them,” but changed her mind when Eccher interrupted her and the other commissioner. In conclusion, the deputy commissioner stated that “with your behavior and your attitude today,” Eccher had “prov[en] our point” that he was not entitled to represent himself. The Board ordered Eccher to appear with an attorney at a reconvened hearing in October 2007.

Eccher appeared at the October hearing represented by counsel, and a new Board briefly revisited Eccher’s exchange with the commissioners at the February 2007 hearing. The new presiding commissioner stated his impression from the record that Eccher had not been “confrontational or rude” until he learned he would not be allowed to represent himself, at which point his conduct became “inappropriate,” “disrespectful,” “extremely demanding,” and “extremely out of line” because he had no “right to address th[e] Commissioner in that fashion.” Eccher insisted he had a right to represent himself and to be “assertive” about that right, but the commissioner concluded, “It’s a real concern[,] your behavior and attitude that you displayed on that day and how you handled yourself.” The Board again found Eccher unsuitable for parole, and he filed a habeas corpus petition in the trial court.

There, the Attorney General’s office stipulated to a proposed order granting Eccher’s habeas petition based on his right to represent himself before the Board.

Consequently, the trial court in May 2008 ordered the Board to vacate its October 2007 unsuitability determination and to conduct a new hearing. The court specified the hearing was to take place promptly and “petitioner will be able [to] act as his own attorney, absent a finding of any identifiable disability” requiring postponement for accommodation. Eccher suffered no such disability.

The Board conducted a new hearing in August 2008 and again found Eccher unsuitable for parole.

Eccher filed a new habeas petition and the trial court again granted relief, this time on the merits. The court found that while the record supported certain factual findings made by the Board, the Board failed to draw a rational connection between immutable facts of Eccher’s case and a conclusion of current dangerousness. The court noted recent Supreme Court authority holding that “when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.” (*Lawrence, supra*, 44 Cal.4th at p. 1212.) For example, the trial court observed the Board accurately found Eccher has “a record of institutional misconduct,” but it dated back more than a decade and consisted of three incidents in 23 years: a “calls and passes” violation in 1988, “over familiarity with staff (1995)” and “possession of gambling paraphernalia (1996).” None indicated any tendency towards violence.

Similarly indisputable, but without any demonstrable connection to a present danger of violence, the Board found Eccher “has a history of drug related misconduct” and “The commitment offense was carried out for a very trivial motive and in an especially cruel and calculated manner demonstrating a callous disregard for human

suffering.” The trial court held that in merely reciting these factors, the Board failed to connect them rationally to the conclusion Eccher posed a present danger, which the record did not support. The trial court observed: “Petitioner committed the murder and was involved with illegal controlled substances over 23 years ago. . . . The now 54 year old petitioner does not have a juvenile record or other criminal history, apart from the commitment offense. . . . Petitioner has earned two degrees in paralegal studies as well as excellent work reports. He has availed himself of extensive self-help and therapy program[s] including AA/NA, anger management and victims’ awareness. He has earned a vocational certification in mill and cabinet work. He has secured numerous laudatory statements from correctional officers and staff. Petitioner has developed realistic parole plans and been consistently deemed by prison psychologists to pose a low to very low risk of danger to the public if released on parole. The Board itself noted that petitioner has accepted responsibility for his actions and expressed remorse.”

Quoting *Lawrence*, the court explained the Board ““may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate’s criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety.’” (*Lawrence, supra*, 44 Cal.4th at p. 1221, trial court’s italics.) The court concluded the Board’s decision “does not meet this standard.” The court noted the Board “did not clearly focus on an assessment of petitioner’s current dangerousness,” perhaps because it “did not have the benefit of the clarified legal standard” in *Lawrence*, and the trial court therefore granted Eccher’s petition, vacated the Board’s unsuitability determination, and remanded the matter to the Board to conduct a new suitability hearing in accord with the *Lawrence* standard.

The Board conducted a new hearing in July 2009 and again found Eccher unsuitable for parole. The Board agreed, however, to reconsider Eccher for parole in one year instead of in two or more years as in previous denials.

Eccher filed a new habeas petition, which the trial court again granted. In denying parole, the Board had focused on Eccher's prison rule violations in 1995 and 1996, and concluded in particular that his over-familiarity with a correctional officer constituted "'recent flawed judgment' that impacted Petitioner's 'predictability.'" Additionally, while recognizing the commitment offense "no longer weighs heavily against suitability," the Board gave "consideration" to the "facts and circumstances surrounding the 1985 crime" and concluded Eccher "minimized, lacked understanding, and had not come to terms with the 'totality' of those events." The Board believed Eccher's 2008 psychological examination had not "addressed the[se] areas."

To the contrary, the trial court observed that "*All*" of Eccher's psychological examinations, "including the 2008 evaluation, indicated Petitioner had come to an understanding and attitude of remorse for his crime." (Italics added.) Thus, "there was no evidence to support the conclusion Petitioner lacked insight." More to the point, the 2008 evaluation specifically "assessed Petitioner's risk for future violence as 'low' and his level of risk to recidivate also as 'low.'" The report also addressed Eccher's bookmaking rule violation in 1996 and fraternization with a prison guard in 1995. The report concluded "his risk for future violence is not significantly increased as a consequence of his displays of these inappropriate, but non-violent behaviors[.]" In sum, the psychological report furnished no evidence for the Board's stated reliance on that report to deny parole, nor was there any other evidence to support the Board's unsuitability determination.

The court noted it previously afforded the Board the opportunity to reconsider its decision in light of *Lawrence*. Quoting *Lawrence*, the court observed that where “‘evidence of the inmate’s rehabilitation and suitability for parole under the governing statutes and regulations is overwhelming, [and] the only evidence related to unsuitability is the gravity of the commitment offense, and that offense is both temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur, the immutable circumstance that the commitment offense involved aggravated conduct does not provide ‘some evidence’ *inevitably* supporting the ultimate decision that the inmate remains a threat to public safety.’” (*Lawrence, supra*, 44 Cal.4th at p. 1191, original italics.) Granting Eccher’s habeas petition, the trial court directed the Board to conduct a new hearing and to “find petitioner suitable for parole unless either previously undiscovered evidence or new evidence subsequent to [Eccher]’s July 2009 parole hearing . . . ‘supports a determination that he *currently* poses an unreasonable risk of danger to society if released on parole.’”

The Board conducted a new parole hearing in July 2010 and found Eccher suitable for parole. The Board reviewed the facts and circumstances of the murder, Eccher’s family background and preincarceration history, and his postconviction conduct. The Board noted in particular that sometime after Eccher’s 2009 parole suitability hearing, a prison riot erupted during which Eccher worked around the clock and side by side with office staff for 24 hours, including running errands as a trusted porter. The Board cited as evidence of Eccher’s rehabilitation numerous positive “chronos” from prison staff, and the Board observed that his laudatory citation file “actually just goes on and on,” including recommendations he “should be highly commended for his service at a time of crisis within the institution.”

The Board noted Eccher's prison history included "three serious rule violations," but these were "remote in time," with the most recent one being his bookmaking citation in 1996. The Board concluded, "You have shown an ability to function within the rules as evidenced by the lack of serious disciplinary problems over the last 15 years." The Board noted opposition to parole from the Orange County District Attorney, the Anaheim Police Department, and from Lando's sister and mother.

The Board's review included extensive psychological reports dating from 2010 back to 1989. On the advice of counsel, Eccher had declined in 2010 a personal interview for his eighth psychological exam, noting all previous ones were positive and supported parole, but Eccher nevertheless spoke briefly to the psychologist, who found Eccher "appeared to want to participate" despite his attorney's advice. The psychologist's report reiterated previous findings that while Eccher had a history of "Adult Antisocial Behavior," including his life-term offense, all psychological findings over the years indicated a low or very low risk of dangerousness or violence if released to the community. The 2010 report noted that this unanimous conclusion across reporting periods included "formalized risk assessment measures" and that "[u]tilizing formalized, standardized measures rather than relying solely on clinical judgment increases the accuracy of risk assessment prediction and offers a view of risk factors from [the] perspective of both static (or unchanging) and dynamic (changing and highly variable) factors."

In addition to finding Eccher posed a low risk of future violence, the psychologists who examined Eccher over a period of more than two decades consistently identified "his prior drug dependence and abuse as primary diagnostic concerns." The 2010 report reiterated previous assessments that Eccher's cocaine and alcohol

dependence, and cannabis abuse, remained “in full sustained remission in a controlled environment.” None of Eccher’s psychological reports expressed concerns regarding anger management, nor suggested an angry temper posed a problem for Eccher in prison or a risk of violence if released on parole.

The Board noted Eccher’s “extensive” participation in AA and NA programs and “‘a lot’ of self-help programs including anger management, alternatives to violence, substance abuse, and life skills.” The Board specifically noted Eccher’s most recent NA certificate in February 2010, an April 2010 certificate for Gambling Relapse Prevention, and 90 recent hours of life skills training. The Board concluded Eccher’s parole plans were reasonable, including acceptance letters from three sober living homes, four or five employment offers, including as a paralegal, and “many” letters of personal support.

The Board found Eccher suitable for parole at the July 2010 hearing, but the Governor reversed this determination in November 2010. The Governor focused on the gravity of the murder Eccher committed, his lack of insight into the crime, and the Governor’s concern Eccher “may not have sufficiently addressed his anger management and control.” The Governor explained Eccher’s “second-degree murder . . . was especially heinous” because he “‘had a relationship’” with Lando and therefore occupied “‘a position of trust’” that he betrayed. Additionally, the Governor explained Eccher’s motive, in which he admitted he went “over the edge” when “Lianne bit my finger” during their argument, “was exceedingly trivial in relation to the magnitude of the offense he committed.” The Governor relied on the district attorney’s opposition to parole at the 2010 Board hearing, where the deputy district attorney argued, “That’s frightening, if

that's what sends somebody over the edge. And I don't think it can be chalked up to simply being under the influence of cocaine.”

The Governor discounted drugs as a factor in the crime. According to the Governor, focusing on drugs as a causative factor reflected inadequate “insight.” The Governor concluded that “although Eccher says he accepts responsibility for his actions, he has still not developed adequate insight into his role in the life offense because he consistently blames his murderous actions on his voluntary drug use.” The Governor relied on Eccher’s 1993 psychological exam for his first parole hearing, where the evaluator wrote Eccher’s “insight into the offense appears to be limited” because Eccher “d[id] not want to blame his substance abuse for his behavior, however, he c[ould] not provide any further explanation for his actions.”

The Governor acknowledged Eccher’s explanation and understanding grew over the years. The Governor acknowledged Eccher recognized his problems in his 2004 mental health evaluation. As recounted by a prison psychologist, Eccher stated in the 2004 evaluation that “he loved this young lady” and committed the crime “because of his anger and denial of drugs to him,” which he recognized was “no justification” for his actions. The Governor acknowledged Eccher expressly recognized in his 2007 psychological evaluation that his anger was “misdirected” at Lando. Eccher described the murder scene to the psychologist as an “episode of anger and misdirected rage . . . emanating from a confused mind due to severe cocaine addiction.” Eccher viewed his offense as a “singular” aberration, which the interviewing psychologist did not suggest was an inaccurate or unrealistic assessment, but in 2010 the Governor remained “troubled by Eccher’s inability to effectively manage his anger.”

The Governor cited as evidence of Eccher's continuing anger management difficulties his "outburst" concerning self-representation at his 2007 parole hearing. The Governor explained that "[u]nder questioning by the Board regarding his qualifications to [represent himself], Eccher became 'disruptive,'" and "[u]ltimately, because of his 'behavior' and 'attitude' that day, the Board denied his request to represent himself at the hearing." The Governor also cited Eccher's 2010 mental health evaluation that, according to the Governor, "diagnosed him with Adult Antisocial [*sic*] Behavior." Specifically, the Governor expressed concern about the psychologist's notation in the 2010 report that "Mr. Eccher has exhibited an inability to accept social norms with respect to lawful behavior, exhibiting aggressive and impulsive behavior, deception, manipulation, drug use, and opportunistic behaviors as an adult." The Governor concluded: "In light of the fact that many of these same traits contributed to Eccher's decision to murder his girlfriend, I believe their continued validity remains predictive of his current dangerousness. Additionally, given the role that anger apparently played in Eccher's commission of the life offense, this recent outburst [at the 2007 parole hearing] leads me to believe that he does not have his anger under control and that he remains a risk to the community."

Granting Eccher's subsequent habeas petition, the trial court found no evidence supported the Governor's stated concerns that Eccher posed a current danger if released on parole. The trial court observed the "first two and one-half pages of the Governor's four-page reversal letter relate to the crime," but "[t]he Governor may not continue to rely solely on the commitment offense to deny parole . . . because the crime is 'both temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur.'" (Quoting *Lawrence*, *supra*, 44 Cal.4th at p. 1191.)

The trial court explained the Governor misapprehended as a “diagnosis” a portion of Eccher’s 2010 psychological evaluation labeled “Adult Antisocial *Behavior*” (italics added). In fact, the reporting psychologist expressly noted, as the trial court explained, “Petitioner did *not* have a diagnosis of Antisocial Personality *Disorder*, as distinct from ‘Adult Antisocial *Behavior*.’” (Original italics.) The trial court observed the latter was “based on historical factors and is never going to change,” and therefore did not support finding Eccher presently unsuitable for parole. Contrary to the impression the Governor fostered of the 2010 evaluation, the trial court noted the authoring psychologist concurred in previous psychological evaluations that found Eccher’s “risk potential for violence is ‘low.’”

The trial court explained that in light of Eccher’s postconviction history, including full remission of his addictions and 17 years of active NA and AA participation, the remote events noted in Eccher’s timeline of antisocial behavior, including the 1976 bicycle theft, the commitment offense and earlier arrests for selling alcohol to minors at his father’s bar, did not reasonably support the Governor’s conclusion Eccher posed a current danger to society.

Similarly, the trial court examined Eccher’s remarks at his 2007 parole hearing and found they could not reasonably support a conclusion he posed a current threat to public safety. “[T]here is no support in the transcript of that exchange for the Governor’s concern that Petitioner had not ‘sufficiently addressed his anger management and control.’ On the contrary, during what must have been a frustrating situation for Petitioner, he did not react in an extreme manner[.]” The court noted “no disciplinary action was instituted against [Eccher] based on his behavior at that hearing.”

Noting the Governor’s authority to review Board parole determinations and that “the Governor ha[d] not ignored” any specific judicial directives concerning Eccher’s parole application, the trial court remanded the matter to the Governor’s office “for reconsideration in light of this court’s conclusions, to proceed in accordance with due process of law.” The trial court cautioned, “Should the Governor choose to repeat the same decision based on the same record, and on remand unjustifiably deny parole a second time, ‘a more drastic intervention, such as an outright order’ for parole release ‘may well be warranted.’” (Citing *In re Prather* (2010) 50 Cal.4th 238, 262 (*Prather*) [remand to Board following Board’s initial, unsupported parole unsuitability determination] (conc. opn. of Moreno, J.)) The People now appeal the trial court’s habeas ruling overturning the Governor’s present dangerousness conclusion for lack of evidence.

II

DISCUSSION

Where, as here, the trial court has not conducted an evidentiary hearing, we review the trial court’s grant of habeas corpus relief de novo. (*In re Ryner* (2011) 196 Cal.App.4th 533, 543 (*Ryner*)).

“‘[P]arole is the rule, rather than the exception,’” for inmates sentenced to life terms for homicide (*Lawrence, supra*, 44 Cal.4th at p. 1204) because state law requires that the Board “‘normally’” must set a parole date for an eligible inmate and “‘must’” do so unless the inmate poses a current threat to public safety. (*Prather, supra*, 50 Cal.4th at p. 249, quoting Pen. Code, § 3041, subds. (a) & (b); all further statutory references are to the Penal Code.) Consequently, parole applicants have a “due process liberty interest in parole” and “‘an expectation that they will be granted parole unless the

Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.” (*Lawrence*, at pp. 1191, 1204; see § 3041; Cal. Code Regs., tit. 15, §§ 2402, 2281.) Those circumstances include “the nature of the commitment offense including behavior before, during, and after the crime; the prisoner’s social history; mental state; criminal record; attitude towards the crime; and parole plans. [Citation.]” (*In re Gomez* (2010) 190 Cal.App.4th 1291, 1304 (*Gomez*).

If the Board determines an inmate convicted of murder is suitable for parole, the Governor may review the decision. (Cal. Const., art. V, § 8, subd. (b); § 3041.2; *Lawrence, supra*, 44 Cal.4th at pp. 1203-1204.) “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.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 626, fn. 1 (*Rosenkrantz*)). “[T]he fundamental consideration in parole decisions is public safety” (*Lawrence*, at p. 1205.)

“[T]he judicial branch is authorized to review the factual basis of a decision . . . denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether some evidence in the record before the [Governor] supports the decision to deny parole, based upon the factors specified by statute and regulation.” (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) “Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor.” (*Id.* at p. 677.)

Due process requires at a minimum that parole “suitability determinations must have some rational basis in fact.” (*In re Scott* (2005) 133 Cal.App.4th 573, 590, fn. 6.) “Accordingly, when a court reviews a decision of the Board or the Governor, the

relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.” (*Lawrence, supra*, 44 Cal.4th at p. 1212.) Stated another way, not only must there be some evidence to support the Governor’s factual findings, there must be a connection or “rational nexus between the evidence and the [Governor’s] determination of current dangerousness.” (*Shaputis II, supra*, 53 Cal.4th at p. 221.)

Here, the Governor relied on the facts of the commitment offense to deny Eccher parole. The Governor found “the second-degree murder for which Eccher was convicted was especially heinous” because, reiterating the Board’s conclusion in finding Eccher unsuitable for parole in 2009, Eccher had abused a “position of trust, having had a relationship with this individual.” The Governor identified retaliation as the motive for the offense, triggered when Lando bit Eccher’s finger, and the Governor found this motive “exceedingly trivial in relation to the magnitude of the offense he committed.” The Governor also found Eccher committed the murder in a “brutal” manner, citing a detective’s statement in the 1986 probation report that Eccher “tried to kill the victim three different ways, i.e., he hit her over the head with a lamp, strangled her with the electrical cord, and submerged her head in a bathtub filled with water.”²

² Eccher admitted to a prison psychologist facts not discovered in the police investigation or uncovered at trial, including that before moving Lando to the bathtub where she was found, he “got a bucket of water and attempted to put her nose in it to see if she [w]as breathing. He was unable to do so and he next recall[ed] putting her head underwater in the bathtub to see if ‘bubbles would come up’.” When he did not see any bubbles, he realized she was dead and he panicked and fled. He “d[id] not recall taking the suitcase in which they kept their mushrooms, cocaine, and marijuana and drug money. However, he did admit that he had the items in his possession.”

Aggravated conduct that demonstrates an “exceptionally callous disregard for human suffering” may bear continuing relevance to indicate an inmate’s present dangerousness. (*In re Scott* (2004) 119 Cal.App.4th 871, 891-892.) Nevertheless, precisely because parole suitability depends on whether the prisoner poses a current danger to society, the circumstances of the commitment offense alone do not inevitably preclude parole. Rather, “the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate’s criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate’s crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor.” (*Lawrence, supra*, 44 Cal.4th at p. 1221, original italics.)

Notably, “the statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, *particularly after these prisoners have served their suggested base terms*, the underlying circumstances of the commitment offense alone *rarely will provide a valid basis* for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.” (*Lawrence, supra*, 44 Cal.4th at p. 1211, italics added.) Here, Eccher has served more than a decade in prison past his original base term of 15 years, and he has done so despite repeated grants of habeas corpus relief.

The Governor found ongoing relevance in the commitment offense based on Eccher’s asserted lack of insight and failure to take responsibility for the crime.

According to the Governor, Eccher lacked “adequate insight into his role in the life offense because he consistently blames his murderous actions on his voluntary drug use.” Specifically, it appears the Governor concluded the requisite degree of insight and manner of taking responsibility for the crime required acknowledging anger, rather than drug use, explained Lando’s slaying. Consequently, the Governor found “Eccher’s inability to effectively manage his anger” to be “troubl[ing]” and a bar to parole.

Nothing in the record, however, including voluminous, unanimous reports by numerous mental health experts, supports the attenuated role the Governor cast for drugs in Eccher’s crime or his psychological makeup at the time, nor does the record support the Governor’s personal assessment of Eccher as a person plagued by anger problems. The psychologists who examined Eccher over a period of more than two decades instead consistently identified “his prior drug dependence and abuse as primary diagnostic concerns.” Nevertheless, assuming *arguendo* the Governor correctly identified anger as an important or even primary factor in the crime, the relevant inquiry was the degree of danger, if any, Eccher might pose if released from prison decades later. (*Lawrence, supra*, 44 Cal.4th at pp. 1211, 1221.)

In a typical report concluding Eccher’s “likelihood of re-offending remains a **low to very low risk**” (original boldface), one psychologist observed, “It is a good indicator that he accepts full responsibility for the murder of the victim. Although difficult and painful, his continuous disclosure of the events of the crime is seen as a move in the right direction as pertains to reducing the likelihood of reoffending. He did express empathy for the victim and [her family] as well as appropriate remorse.” The psychologist noted that, “addressing the persistence of the family in requesting that parole be denied,” Eccher explained “he understands ‘because of the pain and suffering I

caused them . . . When taking the Victim Awareness class one thing jumped out at me — for a parent the loss of a child is a wound that never heals . . . It’s an unnatural state (losing a child) . . . I don’t blame them.” (Original ellipses.) The expert also noted correspondence from Eccher’s trial attorney 20 years after the crime describing Eccher as the “most remorseful client I have ever represented.” However, the expert did not seek “more specific content in this area . . . as empathy and remorse are often not good predictors of future recidivism.”

Rather, consistent with all previous and succeeding expert evaluations, the psychologist found Eccher posed a low to very low risk “for future violence” based on objective and clinical assessment tools. For example, Eccher “score[d] in the insignificant range on the PCL-R, a measure of psychopathy which suggests that he does not have a significant propensity for future criminality. He does not appear to be suffering any emotional problems and has no ongoing treatable symptoms of an Axis I mental disorder.” Actuarial factors indicated a low to very low risk of violence given his age and, apart from the life offense, his stable background including academic and sporting achievement, including a soccer scholarship through three years of college, and a postconviction record in which “[h]e has been considered an exemplary inmate, especially during the past ten years of his incarceration.”

Eccher’s “historical abuse of alcohol and/or illicit drugs” raised “some concern” given “the unpredictable and/or dynamic nature of addiction,” but his recidivism “still remains a **low risk**” given his demonstrated “commitment to remain clean and sober,” including his lengthy history of active NA participation. The psychologist observed Eccher had “matured significantly over the past twenty one years and has a more than adequate degree of insight as pertains to this matter.” The

psychologist noted in particular Eccher's insight into his own potential for future violence: "The best indicator is that I'm never going to use alcohol or drugs again . . . My pattern of being cocaine/drug free when combined with 22 years of having no problems with anger . . . you have my first 30 years where none of that happened then a little block of time — 5 years [of addiction] . . . then the next 22 years of my life." (Original ellipses.)

The psychologist concluded, concurring in previous assessments of Eccher's recidivism risk and consistent with later expert evaluations: "If released to the community, there remains a **low to very low** risk that he would be a danger to others in society based on clinical and actuarial forensic data. The strongest factors that would suggest a lowering of the risk in this case pertain to his age, level of insight, dedication to sobriety and the maturation that has apparently taken place while in [prison] custody[.] The strongest factor that points to any risk in this case is that he committed the Life Term Offense and his history of severe addiction to cocaine. To a lesser extent, his past history of [three rules violations] is a decreasingly relevant factor in assessing future risk. He has shown a high level of motivation in programming at State Prison over many years. In committing the Life Term Offense, he made a severe error in judgment. In summary, the likelihood of re-offending remains a **low to very low risk** in this individual."

Of course, as head of the executive branch, the Governor retains discretion to be "more stringent or cautious" than the Board in determining whether a defendant poses an unreasonable public safety risk (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258), and that discretion logically extends to disagreeing with experts retained in the executive's service. We agree with the trial court, however, that no evidence supports the Governor's decision. Nothing in the record supports the Governor's core conclusion that

Eccher poses a current danger because of a lack of insight that manifests itself in ongoing anger problems. The Governor relied for his current dangerousness conclusion on Eccher's 2010 psychological examination and, as the Governor phrased it, Eccher's "outburst" at his 2007 parole hearing.

The Governor, however, misread or erroneously cited the 2010 psychological examination, which in no way supports his conclusion. It appears the Governor simply misapprehended as a "diagnosis" a portion of Eccher's 2010 psychological evaluation labeled "Adult Antisocial *Behavior*" (italics added). In fact, the reporting psychologist expressly noted, as the trial court explained, "Petitioner did *not* have a diagnosis of Antisocial Personality *Disorder*, as distinct from 'Adult Antisocial *Behavior*.'" (Original italics.) The latter was based on historical factors that were never going to change, and therefore did not support finding Eccher presently unsuitable for parole. Contrary to the impression the Governor fostered of the 2010 evaluation, the authoring psychologist concurred in all previous evaluations that Eccher's risk potential for violence was low.

Similarly, Eccher's remarks at his 2007 parole hearing did not support a conclusion of present dangerousness. The Governor saw them as a telltale sign of a simmering propensity to anger. But the record provides no support for this interpretation. Over the course of more than two decades of incarceration, and almost a decade past the end of his initial base term with no rule violations in almost 15 years, and none at all giving any suggestion of temper, nothing in the record suggested Eccher suffered from anger management problems. Only the commitment offense and perhaps his drunken push in taking a bike on campus more than 30 years earlier indicated *any* tendency towards using force in anger. Both occurred under the influence of drugs or alcohol, a

risk factor Eccher had battled into full remission for more than 20 years of what he acknowledged must be a lifelong sobriety campaign.

Eccher's remarks at the 2007 hearing do not undercut this exemplary postconviction record, and must be viewed as those of an advocate, given his right of self-representation, which the Board erroneously and unjustifiably denied. More to the point, nothing about Eccher's remarks carried even the faintest trace of a threat or otherwise hinted at force or violence as a manner of dealing with frustration, obstacles, or problems. Instead, Eccher's advocacy demonstrated a commitment to *process* as a means to resolve disputes, despite repeated, nominally successful but unfruitful grants of habeas relief. In sum, the Governor failed to establish any "rational nexus between the evidence and [his] determination of current dangerousness" (*Shaputis II, supra*, 53 Cal.4th at p. 221), and therefore the trial court properly granted Eccher's habeas corpus petition.

III

REMEDY

The trial court remanded the matter to the Governor's office for reconsideration based on the then-recent case of *Prather, supra*, 50 Cal.4th 238, 252, which involved remand *to the Board* when the record relied on by the Board provides no evidence to support the *Board's* denial of parole. Subsequent cases have since clarified, as the parties agree, that when no evidence supports the Governor's reversal of the Board's parole suitability determination, the Board's constitutional authority to determine in the first instance an inmate's suitability for parole must be respected by the judiciary and reinstated. (See, e.g., *Ryner, supra*, 196 Cal.App.4th at pp. 552-553; *In re Copley* (2011) 196 Cal.App.4th 427, 431-432; *In re Nguyen* (2011) 195 Cal.App.4th 1020, 1036; *Gomez, supra*, 190 Cal.App.4th at pp. 1310-1311; accord, *Lawrence, supra*, 44 Cal.4th at

pp. 1201, 1229 [affirming court of appeal’s reinstatement of Board’s parole suitability determination].) As a panel of this court explained in *Gomez*, when the *Governor’s* reversal is unsupported by the requisite evidence of current dangerousness, “we are not concerned with infringing on the authority of the executive,” to the contrary, by “reinstat[ing] an earlier executive branch decision — made by the Board,” the “power of the executive branch is . . . not infringed, but respected.” (*Gomez*, at pp. 1310-1311.)

IV

DISPOSITION

The trial court’s order granting Eccher’s habeas corpus petition is affirmed with the caveat that the Board’s grant of parole is “hereby reinstated.” (*Gomez, supra*, 190 Cal.App.4th at p. 1310.)

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.