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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re VICTOR SOUSA,  
  
on Habeas Corpus.

H036855  
(Santa Clara County  
Super.Ct.No. 90372)

Victor Sousa is serving concurrent life sentences for 1984 convictions of two counts of kidnapping for robbery. In December 2009, after he had been incarcerated for some 25 years, the Board of Parole (Board) Hearings determined that Sousa was not yet suitable for parole. The superior court granted Sousa’s petition for writ of habeas corpus, vacating the Board’s decision, and directing the Board to conduct a new hearing “comporting with due process.”<sup>1</sup> Warden Gary Swarouth appeals from that order.

In light of the highly deferential standard of judicial review of parole decisions, which the California Supreme Court reiterated recently in *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*), we conclude that some evidence in the record supports the Board’s denial of parole in this case. We further conclude that the Board’s decision comports with *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and its companion case, *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis I*), because there is a clear nexus between factors the Board cited in support of its determination that Sousa was unsuitable

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<sup>1</sup> The court directed the new hearing to be held within 100 days, which direction was stayed by our June 9, 2011 order granting the Warden’s petition for writ of supersedeas.

for parole and the Board's conclusion that he remains a current risk to public safety. As the high court in *Shaputis II* made abundantly clear, we must view these factors through the narrow lens of the applicable standard of judicial review and accept the weight ascribed to them by the Board, as long as: there is some evidence in the record supporting the factors; there is a nexus between them and the conclusion of current dangerousness; and the decision to deny parole is thus not arbitrary or capricious. In this case, those cited factors together support the Board's conclusion that, at the time of the 2009 hearing, Sousa remained an unacceptable risk to society were he then to be released.

Accordingly, we reverse the trial court's grant of a writ of habeas corpus and reinstate the Board's 2009 decision denying parole.

## STATEMENT OF THE CASE<sup>2</sup>

### I. *Sousa's Background*

"Sousa was born in July 1964 in Portugal, the sixth of his parents' six children. When he was four, he immigrated to the United States with his family, who made their home in San Jose. He completed the tenth or eleventh grade but while in high school, he began to use drugs and hang around with the 'wrong crowd.' " His parents both died during his incarceration. Of Sousa's five siblings, one brother has a criminal history and possible involvement with crack cocaine and alcohol. That brother was deported to Portugal around 2000 and Sousa believes that he has now overcome his substance abuse problems. Sousa's other siblings "remain in the United States as law abiding family-related individuals with stable jobs." Sousa has never married and has no children.

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<sup>2</sup> We take much of the background concerning the life crime and other factual matters from our 2008, pre-*Lawrence*, unpublished opinion, in which we reversed the trial court's grant of habeas relief. There we concluded that, despite some mischaracterizations of facts in the record, some evidence supported the Board's 2004 decision finding Sousa then unsuitable for parole. (*In re Sousa* (May 27, 2008, H030913) [non-pub. opn.] )

## II. *Sousa's Criminal History, Including the Commitment Offense*

“In 1981, Sousa, then a minor, committed burglary. He was confined to the California Youth Authority (CYA). In 1982, within four months of being released from the CYA, he was convicted of attempted burglary and second degree burglary,” resulting in another CYA confinement. He was still on CYA parole when he committed the life crimes, described as follows.

“Late at night on July 23, 1983, Sousa, then 19 years old, was driving around with his brother-in-law, Procopio Reyes. They went to a gas station that they had decided to rob, and Reyes brought a gun that had been in his car. They could see two employees inside the station. Reyes and Sousa watched as one of the employees left on his bike. The other, Joe Babineau, closed the station and went to his car to leave. As he attempted to get into his car, Sousa placed the gun to his head and ordered him to scoot over to the passenger side of the car.

“Sousa got in the back seat of Babineau's car and Reyes got into the driver's seat. Reyes and Sousa traded off pointing the gun at Babineau. Reyes drove the car away while Sousa repeatedly demanded that Babineau tell them the combination to the safe located inside the gas station. Babineau said that he did not know the combination, forgetting that the lock was not combination but instead required a key. While the car was moving, Sousa told Babineau to ‘ ‘stay quiet or you are dead.’ ’ ’

“At some point, Reyes stopped the car so Babineau could use a telephone to call someone to get the combination to the safe, as Sousa had ordered him to do. Unable to contact anyone by phone, Babineau was put back into the car, which Reyes drove back to the gas station. He pulled into an alley where he turned the car off. Sousa then ordered Babineau to give him the combination to the safe by threatening to ‘ ‘blow [his] head off right now.’ ’ ’ Babineau again replied that he did not know the combination. Sousa

pressed by asking him who would know it. Babineau replied that a coworker, Noel Scott Smith, would.

“Sousa got Smith’s address from Babineau, and Reyes then drove all three in the car a half a mile to Smith’s house where Babineau was ordered to knock on the door. When Smith came out of the house, Sousa accosted him, held a gun to his head, and took a knife from him. Sousa told Smith, ‘ ‘Don’t move, don’t do anything, because my friend [Reyes] will not mind blowing your partner away.’ ” ’ Smith saw that Reyes held Babineau and was pointing a gun at him. Smith and Babineau were put in the back seat of the car. Sousa demanded that Smith tell him the combination to the gas station safe. Smith replied that there was no combination and that the safe required a key, which he did not have.

“Reyes drove back to the station and held Smith inside the car. Sousa took Babineau to the front of the station and had him open the door. To avoid sounding the alarm, Babineau was ordered to call the alarm company to advise that he had reentered the station. When Babineau could not remember his code number for the alarm, Sousa signaled Reyes to bring Smith inside so he could give his number. Reyes and Smith then went inside.

“After the call to the alarm company, and with the assistance of the victims, the safe was turned on its side. Sousa then fished into its deposit slot with a coat hanger, removing about \$625, while Reyes went back and forth to the front of the office to look out for police.

“In the meantime, the alarm company had called the owner of the station to inform him that his employees had reentered the building. He drove to the station with his wife and parked outside. When Reyes saw the owner’s car, he and Sousa left the station with the cash that Sousa had gotten from the safe. As he was leaving, Sousa returned Smith’s knife to him.

“For these crimes, and pursuant to a plea bargain, Sousa was convicted of two counts of kidnapping for robbery in violation of Penal Code section 209, subdivision (b),<sup>3</sup> with an enhancement for use of a gun. He was sentenced on each count to life in prison with the possibility of parole, plus two years for the gun enhancement, the life terms and one two-year enhancement to be served concurrently.<sup>[4]</sup>

“In 1988, during his incarceration for the commitment offenses, Sousa was convicted by plea of possession of marijuana in state prison in violation of section 4573.6 and was sentenced to a term of one year and four months, to be served consecutively.

### III. *Post Conviction Factors*

“Sousa began his incarceration for the commitment offenses in January 1984. He began service of the life terms on August 20, 1988. He was first eligible for parole in 1992. His first parole hearing was in May 1991,” and he had eight more before the one in December 2009 that is the subject of this appeal.<sup>5</sup>

In addition to his post incarceration conviction for possession of marijuana in 1988, Sousa received 13 Rules Violation Reports (CDC form 115) from the time of his incarceration through 2004, the last one some five years before the 2009 hearing.<sup>6</sup> “The first violation was in July 1984 and it involved ‘cell visiting.’ This was followed by one in January 1986 for ‘kick[ing] cell door, break[ing] locking device;’ one in November

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<sup>3</sup> Further unspecified statutory references are to the Penal Code.

<sup>4</sup> It appears he was also sentenced for violation of probation to a total term of two years four months, to run concurrently with one of the life terms.

<sup>5</sup> It appears from the record that the December 2009 hearing was treated as a combined regularly scheduled subsequent parole consideration hearing and a new hearing ordered by the superior court as a result of its October 23, 2009 order in another habeas proceeding, which determined that a prior 2008 hearing had deprived Sousa of due process. That proceeding is not relevant here.

<sup>6</sup> A CDC 115 rules violation documents serious misconduct that is a violation of law or otherwise not minor in nature. (*In re Gray* (2007) 151 Cal.App.4th 379, 389 (*Gray*).)

1987 for ‘trafficking narcotics on the CTF mainline;’ one in October 1988 for destruction of state property; one in March 1989 for destruction of state property; one in September 1989 for ‘contraband;’ one in January 1990 for possession of an altered state jacket; one in March 1990 for disobeying a direct order; one in December 1994 for failure to comply with instructions; one in April 1997 for possession of a controlled substance; one in April 1998 for possession of a controlled substance; and the final one in March 2004 for theft” of a pair of boots from the laundry where Sousa worked. When initially confronted with this latter charge, Sousa “denied the theft and stated that [he] had owned the boots for two years.” He later admitted having stolen the boots but, in 2008, still characterized this violation as having been “taken way out of proportion.”

Sousa has been an active participant in Alcoholics Anonymous (AA) since 2002. In 2003, he “received four ‘laudatory chronos’ for participating in [AA] and another that same year for completing the ‘Plato Self Instructional Computer Literacy Program,’ . . . He also received numerous certificates from the Federal Emergency Management Institute for completing courses in disaster management.” He received two laudatory chronos in 2007 for his work and that year participated in a program called “Emotional Awareness and Emotional Healing.” In 2008, he received a laudatory chrono for his participation in Power of Choice, and he received two in 2009 for his participation in Self Esteem by God’s Design and Epictetus Club.

“While in prison, Sousa obtained his GED . . . . He also worked in metal fabrication and laundry, receiving positive performance reviews including for his ‘professionalism and ability to work with others to complete tasks.’ ” He has received some on-the-job training while in prison in textiles and metal fabrication but he has earned no certificates of completion from vocational education. He has worked as a porter, a clerk, a tutor, in the laundry, in the kitchen, in metal fabrication, and most recently on the yard crew, earning above average or better work reports.

#### IV. *Psychological Assessments*

The most recent psychological evaluation in the record is dated June 27, 2009. As part of his clinical assessment, the evaluator discussed Sousa's history of drug use. He was noted to have denied the use of alcohol but did use phencyclidine (PCP) a few times and marijuana daily before his incarceration. He had smoked " 'maybe one joint' " on the day of the crime, but "denied that his marijuana use [had] caused him any problems at all." Though he also used marijuana after his incarceration and, as noted, he received an additional 14-month sentence while in prison for marijuana possession, Sousa told the evaluator that he had stopped using marijuana in 1998. While in prison he also used crank "less than 100" times and heroin weekly or monthly for about three years but denied that this had caused him any problems with his work assignments. As noted, he did receive four CDC 115 rules violations relating to drugs, the last one in 1998. Although he " 'liked getting high with [his] friends,' " he suffered from a medical diagnosis that made it " 'too risky' for him to use drugs again in the future." He had participated in drug relapse prevention programming and AA in the past, had seen "the negative impact of drugs on his life," and no longer wanted to be involved with them.

Sousa told the evaluator that he escalated his drug use while in prison in an effort to " 'escape' " his circumstances. The evaluator noted Sousa's history of "resorting to drug use when stressed or disappointed," but he had stopped using all drugs, deciding "to quit everything because [he] wanted to get out" of prison. "When asked what he would do in the community if he had an urge to use he stated, 'I know what drugs have done to my life and I know that because of my health I can't use them in the future. I have also learned that drugs are a temporary solution to the problem. When you come down from drugs the problem is still there.' " But when directly asked to "discuss his relapse prevention plan," Sousa did not appear to understand the question. "He was then asked, 'How will you avoid using alcohol and drugs in the future?' He repeated previous statements saying, 'That is not part of my life anymore,' repeating his desire to remain

clean and sober.” From this, the evaluator concluded that “[a]lthough [Sousa’s] desire appears genuine . . . there are remaining concerns that he does not have any specific plan to avoid substance [abuse] in the community. Because he has a history of resorting to drugs when distressed he is strongly encouraged to establish more specific and comprehensive sobriety plans, . . . Although Mr. Sousa expressed what appears to be a sincere desire to avoid substance use in the free community, the lack of a specific plan and awareness of specific triggers suggests his ability to refrain from use in the community is currently guarded.”

The evaluator also observed that Sousa had a history of being easily and negatively influenced by peers. He also described him as acting in “ ‘impulsive ways’ ” even though “there is not any evidence of an underlying impulse control disorder or mental illness” affecting his decision-making faculties. But, referencing his lack of disciplinary violations in prison since 2004, the evaluator concluded that Sousa “does appear to be learning to make better choices and [to] more carefully evaluate his actions.... [H]is behaviors appear more controlled at this time than they have been in the past.”

Sousa was then diagnosed on Axis I with various drug abuse, all by history, and with Antisocial Personality Disorder on Axis II. In support of this Axis II diagnosis, the evaluator cited Sousa’s criminal history, use of narcotics, and disciplinary violations in prison, concluding that these demonstrated “a repeated failure to conform to social norms, a willingness to deceive others for personal pleasure as well as a failure to plan ahead. His tendency to minimize the impact of his actions on others during the life crime . . . indicates a relative lack of remorse toward the victims.” The evaluator further opined, however, that there “is evidence that his behaviors appear to be shifting toward a more pro-social direction” and noted that a 2008 psychological evaluation had concluded that Sousa did not meet the criteria for an underlying personality disorder. But the 2009 evaluator still concluded that “due to the nature of personality traits, this diagnosis should

remain with the inmate until he is able to demonstrate continued prosocial and unimpaired functioning for a protracted period of time without being under a supervised custodial living circumstance.”

Regarding the life crime, Sousa told the evaluator in 2009 that he had gone along with his cohort’s suggestion to commit it because he wanted to impress him. He said that he was the one who made the verbal threats to the victims because he “was the one who spoke English.” Though Sousa said that he “ ‘accept[ed] equal responsibility for being there,’ ” he appeared to the evaluator to be “unaware of the possible impact of his actions[,] saying, ‘If I knew what would happen when we did that, I know we would have never kidnapped those people,’ ” referring not to harm to the victims but rather to the length of time he had been incarcerated. Sousa clarified, “ ‘26 years locked up for this; there is nothing that is going to get me back into crime. If I had known how long this would get, I never would have done it in the first place.’ ”

From this, the evaluator concluded that Sousa had “not yet demonstrated an understanding of why” he had committed the crimes and he had “not yet verbalized an ability to see the crime from the viewpoint of the victims, choosing instead to focus on the impact to himself and the length of his current incarceration.” The evaluator concluded that Sousa’s “focus remains somewhat self-centered, reflecting the underlying personality structure that influences how he thinks about situations.” Still, the evaluator also observed that while Sousa’s “ ‘self-centered’ ” approach remains, he “appears to have come to more fully appreciate the need for ‘hard work’ and pro-social decisions. ... [H]is desire to avoid future ‘problems’ associated with anti-social activities appears to provide significant motivation for him to more carefully evaluate his decisions. He is encouraged to more fully consider how his past actions have impacted others but his current ‘insight’ regarding how he can effectively avoid getting into trouble is more fully developed than it was at the time of the life crime and is not seen as a significant factor influencing his probability of engaging in future violence.”

Regarding his parole plans, the evaluator noted that Sousa could not identify “stressors or difficulties he expected to face in the free community” and when asked to discuss these, he responded that “ ‘[he] couldn’t really say until [he got] out there.’ He said his main concern would be ‘Go to work then go home. How hard is that?’ He said he did not think he would have any difficulty finding employment because ‘[he had] a good head on [his] shoulders.’ ”

Sousa was assessed for his risk of violence in 2009 using two instruments, the Revised PCL-R and the HCR-20. “In addition, the [LS/CMI] was utilized for assessment of general risk for recidivism, and not violence per se.” On the Revised PCL-R, Sousa placed in the “low range of the clinical construct of psychopathy when compared to other inmates.” He also scored in the low risk category for violent recidivism on the HCR-20. This score reflected historical, clinical, and risk management factors. Of the current and dynamic clinical factors, Sousa “displayed only one of the predictive factors related to violent recidivism,” which the evaluator identified as “his . . . limitations in discussing the underlying personality factors that have shaped his past involvement in criminal activities.” Of the risk management factors on the HCR-20, “relatively few” were identified that caused remaining concerns “for future risk of dangerous behavior.” These were that Sousa’s parole plans had not yet been verified by recent letters and he had “yet to develop a comprehensive relapse prevention plan designed to address the anticipated stress of community re-entry without resorting to drug use.”

On the LS/CMI instrument, which evaluates levels of risk of general recidivism and not violence per se, Sousa scored in the moderate range. One factor increasing his risk level was his “past history of drug-related problems.” Despite Sousa’s moderate risk level for future criminal behavior on this instrument, the 2009 evaluator still placed Sousa’s overall risk assessment for future violence in the low range, attributing this to “significant behavioral changes noted in his disciplinary history” and that he “does appear to be taking important steps to address the underlying personality factors that have

shaped his behavior in the past. . . . [H]e presents as strongly determined to avoid anti-social behaviors in an effort to avoid future legal problems.” Sousa’s overall low risk assessment was predicted to likely increase if he “became involved with alcohol or drugs or if he experienced sustained financial problems.” He could decrease his threat level “if he were to more carefully consider how his actions have affected others, in addition to remaining focused on the negative consequences to himself. He could reduce the potential for future violence by developing more comprehensive leisure skills and pro-social peer networks, working as well to enhance his post-release relapse prevention [plan] to include triggers to drug use and possible options. Finally, Mr. Sousa is encouraged to consider active participation in some type of proven relapse prevention group or activity as a means of further supporting his resolve to remain sober.”

Sousa was also evaluated in July 2008. The evaluator then noted that Sousa had “discussed the changes in his thinking” that had occurred during his incarceration. He described himself as a better person for coming to understand that his crime was “very wrong” and for knowing that he did not want to return to prison. When asked to describe the biggest change in him since his incarceration, Sousa could not articulate it, saying, “I don’t know[.] I’m at a loss for words[.] I don’t know how to express it.” Sousa also stated, “I think if I get out I’m going to be fine because when you’re locked up this amount of time[.] I don’t think you want to be locked up any longer. Time will get to you.” The evaluator observed that although Sousa appeared to have adequate parole plans, of concern was that he did not “anticipate any problems with his plan and seem[ed] to underestimate any difficulty that may arise from reintegrating into society.”

Sousa was also then given an Axis I diagnosis of various drug abuse but no Axis II diagnosis. He was specifically noted to then lack any significant symptoms of a mood or thought disorder on Axis I or any personality disorder on Axis II.

Based on the PCL-R instrument, Sousa’s score reflected a “low range of psychopathy when compared to other offenders in the normative sample.” Sousa also

then placed in the low range for future violence on the HCR-20 instrument. Within the clinical realm of this instrument, which is more current and dynamic than the historical realm, Sousa was then described as demonstrating only “superficial insight into his past behavior. He has developed some understanding regarding the causative factors of the life crime however he has more work to do in this area. He has developed control over his behavior and is not impulsive. He has ascribed to prosocial values in more recent years and did not verbalize any negative attitudes which would contribute to violent behavior. He does not have any symptoms of mental illness. He has participated in self-help groups which suggest he is responsive to rehabilitation efforts.” In the future risk management realm, Sousa was noted to have adequate but unverified parole plans and was lacking a “viable substance abuse relapse prevention plan.”

Sousa was then estimated to present a low risk of violence, with the “caveat that he remain[] abstinent from all alcohol and drugs in the community.” He was assessed as being able to decrease his risk of recidivism by “developing more insight into all the causative factors of the life crime; verifying all plans for employment and residence in the community as well as creating a plan for his county of parole; and continuing with self-help.”

Regarding his past substance abuse, Sousa was then acknowledged to have stopped using all drugs in 1999 but it was “concerning” to the evaluator that he did “not have an adequate plan to avoid substance [abuse] in the community.... He voices a commitment to abstinence which is positive but he should be encouraged to seek out substance related treatment in the community to help guard against relapse.”

As to what might be termed Sousa’s level of “insight” about his life crime, the evaluator acknowledged that Sousa had “spent some time exploring the commitment offense and seems committed to avoid causing future harm.” But he was noted to have “a minimal understanding of the causative factors of the life crime and previous antisocial acts. His understanding is limited to his perception that he wanted to impress

his crime partner. Although this is a good start and does provide some insight into his behavior at the time it appears that there are likely more substantial underlying causes. He has yet to identify any . . . reasons that may explain why he engaged in burglary and kidnap for robbery.” Although the evaluator opined that Sousa takes responsibility for his crime and has remorse, in her opinion, “he ha[d] not yet fully explored the commitment offense or come to terms with the underlying causes.”<sup>7</sup>

#### V. *Parole Plans*

If paroled, Sousa planned to live with his brother in Manteca and he had a job offer with a “power wash company” in San Ramon. He would depend on his brother for transportation to and from work until he had “[his] own place or [his] own car.” His sister also offered to provide “financial assistance, clothing, food and transportation.” In addition, Sousa had worked to improve contact with his other brother, who had already been deported to Portugal, in the event he too was deported upon release due to an INS hold. His brother would help him find work there and provide him with a place to live.

#### VI. *The Parole Board Hearing and Decision*

The hearing took place on December 2, 2009. One commissioner expressed particular concern during the hearing about Sousa’s 2004 disciplinary violation for theft, when he was 38 years old and had been incarcerated for 20 years. The commissioner emphasized that theft “is in line or the same type of offense for which [Sousa] had been sent to [CYA] and for which [he had] received [his] life term[s],” suggesting that Sousa had not yet learned that theft was wrong. The commissioner also pointed out that when Sousa was initially confronted about the 2004 theft that led to this last disciplinary violation, he had denied it, only later admitting that he had stolen. And he had suffered

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<sup>7</sup> Our prior opinion also discusses Sousa’s earlier psychological and mental health reports. But we omit discussion of reports preceding 2008 here as many of them are not contained in this record, other than appearing in our prior opinion, and they were not discussed at the 2009 Board hearing.

significant consequences from the violation, including removal from his job, for which he had received good work reports, and a reduction in his prison wages. It was also noted during a discussion of Sousa's psychological reports that his 2004 violation for theft "and lying about" it was inconsistent with his having expressed to the 2009 psychological evaluator that he took responsibility for his crime and had learned that "[i]f you want anything in life, go work for it. You can get anything that way."

Taking a cue from the 2009 psychological report, Sousa's attorney submitted on his behalf a written relapse prevention plan that Sousa had prepared. It included an identification of his "triggers" and a plan to deal with them through support from Narcotics Anonymous (NA), his family, and his religious faith.

After deliberating, the Board panel announced its decision that Sousa was not yet suitable for parole because he continued to pose an unreasonable risk of danger were he to be released. Sousa received a two-year denial, the Board considering the hearing to be "pre-Marsy's" law.<sup>8</sup>

In support of its denial, the panel first cited the commitment offense. While acknowledging that it "did not weigh heavily against suitability," there were still multiple victims and it did involve violence in that the victims were kidnapped and threatened and thereby suffered mental anguish. Also, the crime was noted to have displayed a "callous disregard for human suffering" in that the victims were "driven around in a car, not knowing if [they were] going to be killed." The Board further suggested that the motive for the crimes—money—was inexplicable.

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<sup>8</sup> "Marsy's Law" refers to the 2008 amendments to section 3041.5. These amendments include a minimum three-year period until a subsequent parole hearing may be scheduled, absent a change in circumstances or new information that in the Board's discretion, establishes a reasonable likelihood that considerations of public safety do not require such a lengthy period. (§ 3041.5, subds. (b)(3) & (4).)

The Board also cited Sousa's prior criminality as a juvenile in committing "the same kind of crimes that the commitment offense involved," evidencing a pattern of stealing, and his "failed previous attempts at rehabilitation" with two CYA commitments. The Board observed that Sousa was on probation when he committed the life crimes and that his later conduct "has continued to indicate that [he] cannot abide by the rules and laws of society, which makes [him] an unreasonable risk of danger today." What illustrated this to the Board more than the commitment offenses was Sousa's 2004 disciplinary violation for theft. While the Board acknowledged that the passage of five years in some cases would mitigate the violation's present impact, with Sousa, other factors such as his age and length of incarceration at the time of the violation, as well as its similarity to the life crime in that it also involved thievery, made the violation still directly relevant to his current dangerousness. It showed that he was "still committing the same kind of crimes just five years ago, after all this time of being incarcerated. It shows poor judgment, poor impulse control" and at Sousa's age, reflects that he still "ha[s] issues with following the laws of society" and understanding "the moral principle that's involved," i.e., that it is "wrong to steal and take from others." The panel again observed that Sousa initially denied the theft leading to the 2004 violation, that he did not have a reason to steal in that he was making relatively decent prison wages and was a good worker, and that the violation resulted in the loss of his job and reduced wages.

The panel further expressed that it did not consider Sousa's young age at the time of the life crimes to favor suitability because, at nearly 40 years old, he was still committing theft, referring again to the 2004 disciplinary violation, and already had a significant criminal history as a juvenile when he committed the life crimes. It also considered the 2009 psychological evaluation to be "not totally supportive of release" and Sousa's relapse prevention plan "not real well developed" and "minimal at best," lacking as it did a sponsor and an AA or NA meeting schedule. Based on his statements reflected in his 2009 psychological evaluation, the Board considered Sousa to have a "total lack of

insight into substance abuse and the recidivism rate and relapsing,” considering Sousa’s recently developed relapse prevention plan to be only the “tip of the iceberg.” It also cited the conclusion in the 2009 evaluation that Sousa “ ‘can be said to act in impulsive ways,’ ” failing to “ ‘make pro-social decisions in the face of antisocial influences,’ ” characterizing this conclusion as currently applicable to Sousa’s behavior and also to the life crimes committed some 26 years before.

The panel also cited the 2009 psychological evaluation’s conclusion that Sousa lacked an understanding of the impact of the commitment offenses on anyone other than himself, telling Sousa, “If you can’t see that it impacts other people, the victims, there’s less of a reason not to . . . commit a crime” in the future. The panel equated this with a lack of remorse and posited that as a result of the crimes, the victims are “probably afraid to even leave their home[s],” “imprisoned in their minds to live in fear.”

The panel further cited that Sousa had “not obtained a vocation” and “really [didn’t] have any marketable skills.” The panel considered this more important than ever “in today’s world . . . because we have people out there that do have marketable skills that are taking unskilled jobs because of the economy.” They considered Sousa not “fully aware of the stresses” he would be confronted with “out in free society,” needing to be able to cope with all sorts of situations and not being cognizant of this reality, particularly “in light of the fact that [Sousa] [didn’t] really have a way of supporting [him]self at this point.” The only jobs that would be available to Sousa without a marketable skill “are the lowest paying jobs where people generally get treated the worst,” putting Sousa “at high risk” without him even realizing it. The panel considered Sousa’s lack of a marketable skill to be a “big impediment to making it on the outside.” Being able to make a living, on the other hand, would mean Sousa would not have “to resort to violence or crime.” According to the panel, when an inmate has no job skills and poor impulse control, “those are major factors for committing crime” and this was “exactly how [Sousa] committed [his] life crime.”

In addition to Sousa's 2004 disciplinary violation for theft, the panel also cited his history of post-incarceration misconduct, including multiple violations for drugs and the felony conviction for marijuana possession, showing that after many years in prison, "the light still [had]n't come on."

Sousa was commended for obtaining his GED while incarcerated, for participating in programs, for reducing his classification score, and for developing the basics of a relapse prevention plan. But the panel concluded that, on balance, negative factors then tipped the scale against suitability for parole.

#### VII. *Sousa's Habeas Proceeding and the Trial Court's Order*

On September 14, 2010, Sousa filed his petition for writ of habeas corpus in the trial court. In October 2010, the court issued its order to show cause. In it, the court said that the Board, in violation of *Lawrence, supra*, 44 Cal.4th 1181, had considered the life crimes as a basis for parole denial without establishing a nexus between them as an immutable, static factor and Sousa's current dangerousness. The court posited that the Board's decision reflected "the now disapproved *Dannenberg* formula"<sup>9</sup> and without such a nexus, the law post-*Lawrence* no longer allows for the "Board's regulations to have weight of their own." The court suggested that the Board had failed to revise "its regulations so as to conform to the new nexus rule."

The Warden filed a return to the order to show cause. Sousa joined the Warden's return with a traverse.

In March 2011, the trial court issued its order granting the petition and directing the Board to conduct a new hearing "comporting with due process." The order concluded that the Board had violated *Lawrence* "by continuing to use the Title 15 criteria as grounds for parole denial in and of themselves" without the required nexus between the

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<sup>9</sup> *In re Dannenberg* (2005) 34 Cal.4<sup>th</sup> 1061 (*Dannenberg*).

life crime and current dangerousness.<sup>10</sup> The order also identified as error the Board’s “characterization of the static aspects of the crime . . . in a way that was inconsistent with” our prior opinion. According to the court, this error was “compounded by the Board’s speculative conclusions about victim impact.” The order further determined that the Board erred by “[m]isconstruing several selected sentences from the [2009] psych report . . . as reflecting current impulsivity” when the evaluator was in fact referring to historical data. Finally, the order concluded that the Board had erred by focusing “on insight as a goal in and of itself rather than as a means of changing and avoiding criminal behavior” when for Sousa, as for “many common criminals,” “the deterrence effect of incarceration is the stronger, and sufficient, motivator.” In this respect, the order determined that the Board misread *Shaputis I* to hold that “all inmates must always gain all possible insight. ‘Lack of insight’ is probative of unsuitability only to the extent that it is [] rationally indicative of the inmate’s current dangerousness.’ [Citation.] If factors and forces other than insight make an individual a ‘low risk for violence in the free community[,]’ the Board may not inexplicably reject this relevant[,] reliable information.”

The Warden timely appealed.

## DISCUSSION

### I. *Appealability and Contentions on Appeal*

The Warden properly appeals from a final order of the superior court made upon the return of a writ of habeas corpus under section 1507. He contends that the superior court erred in granting Sousa’s petition because “some evidence” cited by the Board supports its decision that Sousa is not yet suitable for parole as he remains a current danger.

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<sup>10</sup> Cal. Code Regs., title 15.

II. *The Legal Framework of Parole Decisions and Judicial Review Thereof*  
A. *Board Decisions*

The Board is the administrative agency within the executive branch that is generally authorized to grant parole and fix release dates. (§§ 3040, 5075 et seq.) The specified factors applicable to the Board’s parole decisions are stated in section 3041 and regulations setting forth very specific considerations that the Board must take into account in determining whether a life prisoner is suitable for parole. (Cal. Code Regs., tit. 15, §§ 2281, 2402.)<sup>11</sup>

Section 3041, subdivision (a), provides that “The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime.” Section 3041, subdivision (b), provides that the Board “shall set a release date *unless* it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, . . .” (Italics added.) Thus, the overarching consideration in the suitability determination, and the one that is prescribed by statute, is whether the inmate is currently a threat to public safety. “ ‘And as set forth in the governing regulations, the Board must set a parole date for a prisoner unless it finds, in the exercise of its judgment after considering the circumstances set forth in section 2402 of the regulations, that the prisoner is unsuitable for parole. Accordingly, parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.’ [Citations.]” (*Lawrence, supra*, 44 Cal.4th at p. 1204.)

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<sup>11</sup> Further references to the regulations or “Regs.” are to title 15 of the California Code of Regulations.

A parole release decision by the Board is essentially discretionary in that it is “the Board’s attempt to predict by subjective analysis” the inmate’s suitability for release on parole. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)). Such a prediction requires analysis of individualized factors on a case-by-case basis and the Board’s discretion in that regard is “ ‘ “almost unlimited.” ’ ” (*Ibid.*)

Section 2402 of the regulations sets forth the factors that the Board is required to consider and balance in the parole suitability determination.<sup>12</sup> (*Rosenkrantz, supra*, 29 Cal.4th at pp. 653-654.) Subdivision (a) reiterates the statutory public safety factor by stating that “[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.” (Regs., § 2402, subd. (a).) Subdivision (b) provides that “[a]ll relevant, reliable information . . . shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner’s social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner’s suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.” (Regs., § 2402, subd. (b).)

Subdivision (c) specifies six nonexclusive circumstances, which are set forth as “guidelines,” tending to show unsuitability. The importance of these circumstances, or

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<sup>12</sup> For prisoners convicted of murder and specified attempted murders before November 8, 1978, these identical criteria are set out at section 2281 of the regulations.

combination thereof, is left to the judgment of the Board. These circumstances include, as relevant here, the “(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered [regarding the commitment offense] include: [¶] (A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] . . . [¶] (D) The offense was carried out in a manner [that] demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense. [¶] . . . [¶] (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.” (Regs., § 2402, subd. (c).)

Subdivision (d) is the converse of subdivision (c). It specifies nine circumstances, likewise set forth as “guidelines,” tending to show suitability for release, and the importance attached to any circumstance or combination of circumstances is again left to the judgment of the Board in the particular case. (Regs., § 2402, subd. (d).)

The foregoing factors are “ ‘general guidelines,’ ” illustrative rather than exclusive, and “ ‘the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board].’ ” (*Rosenkrantz, supra*, 29 Cal.4th at p. 654; Regs., tit. 15, § 2402, subs. (c) & (d).) “[T]he fundamental consideration in parole decisions is public safety,” and, therefore, “the core determination of ‘public safety’ . . . involves an assessment of an inmate’s *current* dangerousness.” (*Lawrence, supra*, 44 Cal.4th at p. 1205.) While the Board’s discretion in parole suitability determinations is very broad, it is not complete or absolute. In exercising its discretion, the Board is constrained by the procedures specified by statute. And its analysis “requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*Id.* at p. 1210.)

## B. *Judicial Review*

The statutory and regulatory frameworks for parole suitability decisions “establish that the decision to grant or deny parole is committed entirely to the judgment and discretion of the Board . . . .” (*In re Prather* (2010) 50 Cal.4th 238, 251 (*Prather*)). After the Board renders a parole decision, article V, section 8 of the California Constitution provides the Governor with the authority to review that decision, and affirm, modify, or reverse it on the basis of the same factors that the Board is required to consider. (*Lawrence, supra*, 44 Cal.4th at pp. 1203-1204, fn. 9; Pen. Code § 3401.2.) Accordingly, parole decisions lie fundamentally within the province of the executive branch.

It follows that judicial review of the Board’s (or the Governor’s) decisions concerning parole suitability is quite circumscribed. First, “the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation.” (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) “Due process of law requires that this decision be supported by some evidence in the record. 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 [Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. 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 [Board’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 [Board’s] decision.” (*Rosenkrantz,*

*supra*, at pp. 676-677; see also *Shaputis II, supra*, 53 Cal.4th at p. 210; *Lawrence, supra*, 44 Cal.4th at p. 1204; *Shaputis I, supra*, 44 Cal.4th at pp. 1260-1261.)

In *Lawrence*, the Supreme Court “resolved a conflict among the appellate courts regarding the proper scope of the deferential ‘some evidence’ standard of review” set forth in *Rosenkrantz*. (*Prather, supra*, 50 Cal.4th at p. 251.) *Lawrence* “clarified that in evaluating a parole-suitability determination by either the Board or the Governor, a reviewing court focuses on the ‘some evidence’ supporting the core statutory determination that a prisoner remains a current threat to public safety—not merely ‘some evidence’ supporting the Board’s or the Governor’s characterization of facts contained in the record.” (*Prather, supra*, at p. 251.) Specifically, the court explained in *Lawrence*, “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.” (*Prather, supra*, 50 Cal.4th at p. 252.)

Moreover, “[w]hile the evidence supporting a parole unsuitability finding must be probative of the inmate’s current dangerousness, it is not for the reviewing court to decide *which* evidence in the record is convincing. (*Lawrence, supra*, 44 Cal.4th at pp. 1204, 1212.) 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 Governor. In that circumstance, the denial of parole is arbitrary and capricious, and amounts to a denial of due process. (*Id.* at pp. 1204-1205.)” (*Shaputis II, supra*, 53 Cal.4th at p. 211.) Accordingly, “[u]nder the ‘some evidence’ standard of review, the parole authority’s interpretation of the evidence must be upheld if it is reasonable, in the sense that it is not arbitrary, and reflects due consideration of the relevant factors.

(*Shaputis I, supra*, 44 Cal.4th at p. 1258; see *Lawrence, supra*, 44 Cal.4th at pp. 1204-1205.)” (*Shaputis II, supra*, 53 Cal.4th at p. 212.)

“As noted in *Rosenkrantz*, the ‘ “ ‘some evidence’ ” standard is extremely deferential,’ and cannot be equated with the substantial evidence standard of review. [Citation.] Nevertheless, it may be stated in terms parallel to that more familiar standard: When reviewing a parole unsuitability determination by the Board or the Governor, a court must consider the whole record in the light most favorable to the determination before it, to determine whether it discloses some evidence—a modicum of evidence—supporting the determination that the inmate would pose a danger to the public if released on parole. [Citations.] The court may not ... substitute its own credibility determination for that of the parole authority. [Citations.] Any relevant evidence that supports the parole authority’s determination is sufficient to satisfy the ‘some evidence’ standard. [Citation.]” (*Shaputis II, supra*, 53 Cal.4th at p. 214, fn. omitted.)

“[W]hile the ‘some evidence’ standard ‘certainly is not toothless’ (*Lawrence, supra*, 44 Cal.4th at p. 1210), and ‘must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights’ (*id.* at p. 1211), it must not operate so as to ‘impermissibly shift the ultimate discretionary decision of parole suitability from the executive branch to the judicial branch’ (*id.* at p. 1212). Under the framework established by legislation and initiative measure, the Board is given initial responsibility to determine whether a life prisoner may safely be paroled. (Pen. Code § 3040.) The Governor is granted de novo review of the Board’s decision, and is free to make his or her own determination, based on the same factors the Board must consider. (Cal. Const., art. V, § 8, subd. (b).) [¶] Although ... the ultimate conclusion on parole suitability is subject to judicial review, that review is limited, and narrower in scope than appellate review of a lower court’s judgment. The ‘some evidence’ standard is intended to guard against arbitrary parole decisions, without encroaching on the broad authority granted to the Board and the Governor. (*Lawrence, supra*, 44 Cal.4th at pp. 1204-1205, 1212;

*Rosenkrantz, supra*, 29 Cal.4th at pp. 664-665.)” (*Shaputis II, supra*, 53 Cal.4th at p. 215.)

Accordingly, a reviewing court may not interfere with the Board’s or the Governor’s determination on parole suitability unless that determination lacks any rational basis and is merely arbitrary or capricious, resulting in a denial of due process.

### III. *Some Evidence Supports the Board’s Decision To Deny Parole*

The circumstances relied on by the Board in its finding against Sousa’s suitability for parole were manifold and interrelated. Sousa challenges many of them, but most are supported in the record. And taken together, as the Board considered them, the factors that are supported established a nexus between even the static and immutable past circumstances—such as the life crimes and Sousa’s criminal history—and a conclusion that, in 2009, he remained a current danger.

#### A. *The Commitment Offenses*

Regarding the commitment offenses, as noted, the Board acknowledged that they did not “weigh heavily against suitability” but found nevertheless that the crimes were perpetrated against multiple victims, displayed a callous disregard for human suffering in that the victims were driven around not knowing whether they would be killed, had an inexplicable motive, and involved violence in that the victims were kidnapped and threatened. The first three of these factors directly derive from section 2402, subdivision (c), of the regulations, which provides that a commitment offense tends to show unsuitability if the prisoner committed it in an “especially heinous, atrocious or cruel manner,” as defined by the presence of specified circumstances. (Regs., § 2402, subd. (c)(1)(A), (D), & (E).)

Contesting the evidentiary support for these regulatory factors aggravating the life crimes, Sousa points to our prior opinion in which we concluded, under the law pre-*Lawrence*, that apart from the fact of multiple victims, the circumstances of Sousa’s life crimes were not more than minimally necessary to sustain convictions for kidnap for

robbery under *Dannenberg, supra*, 34 Cal.4th at pp. 1098, 1095. In that opinion, we specifically rejected that Sousa’s verbal threats to the victims, the monetary motive for the crimes, or the manner in which they were committed were “some evidence of aggravating factors beyond what was minimally necessary to sustain convictions for kidnapping for robbery.” We did conclude, however, that the Board was entitled, and even bound, to consider the fact that multiple victims were attacked in separate incidents as tending “to show the heinousness of the crimes and thus favoring unsuitability for parole by statute and regulation.” (Regs., tit. 15, § 2402, subd. (c)(1)(A).)

We reached this conclusion in anticipation of *Lawrence*, acknowledging in our analysis that even if the crimes were aggravated by the presence of a regulatory finding, this would not eternally provide adequate support for parole denial absent a “*nexus* that links that *finding* to the Board’s *conclusion* that the prisoner currently poses an unreasonable risk of danger to society if released. [Citations.]” We further concluded that Sousa’s commitment offenses, as aggravated by the existence of multiple victims combined with other factors then cited by the Board of which there was evidentiary support in the record (Sousa’s criminal history, escalating pattern of criminal conduct, previous probation and parole failures, and negative institutional behavior, particularly the 2004 disciplinary violation), established some evidence in support of the conclusion that Sousa then remained a current danger. Then, as we perceived the law, and now, whether or not the commitment offense is aggravated by the presence of one or more regulatory factors, it is sufficient to support a conclusion of current dangerousness *as long as* there is a nexus between the Board’s findings regarding the offense and present behavior. (*Lawrence, supra*, 44 Cal.4th at pp. 1210, 1227; *In re Ryner* (2011) 196 Cal.App.4th 533, 546 (*Ryner*) [commission of even a heinous crime is insufficient to deny parole unless factors demonstrating unsuitability, supported by some evidence, are probative of a nexus between the gravity of the offense and a present risk to public safety].)

Here, it remains undisputed that the life crimes involved multiple victims and that the crimes may together be considered aggravated under the regulatory factors for this reason. (Regs., tit. 15, § 2402, subdivision (c)(1)(A).) Consequently, we need not address or resolve Sousa’s challenges to the evidentiary bases for the other aggravating factors about the crimes cited by the Board (displaying a callous disregard for human suffering, inexplicable motive, and involving violence). Moreover, even if the gravity of the crimes was not elevated by the presence of regulatory factors, the offenses, while usually insufficient standing alone to deny parole, could still be considered by the Board as relevant to the parole suitability determination. After all, the Board must consider “[a]ll relevant, reliable information” in making its determination, which includes “the base and other commitment offenses,” whether or not aggravated. (Regs., tit. 15, § 2402, subd. (b).)

Sousa suggests that the parole authority’s ability to rely on regulatory factors that aggravate a life crime, and therefore tend toward parole unsuitability, is in question after *Lawrence*. This is not the case. *Lawrence*, *Shaputis I*, *Prather*, and *Shaputis II* all confirmed the continued viability of the regulations as the mandatory starting point in any parole suitability determination. (*Shaputis II*, *supra*, 53 Cal.4th at p. 209, fn. 5 [affirming the body of statutes and regulations that generally govern parole suitability determinations]; *Prather*, *supra*, 50 Cal.4th at pp. 249-251 [same]; *Shaputis I*, *supra*, 44 Cal.4th at pp. 1256-1258, fn. 13 [same]; *Lawrence*, *supra*, 44 Cal.4th at pp. 1201-1203 [same].) Of course, per *Lawrence*, any parole suitability determination must proceed from a finding that regulatory factors are present in a given case to the question of “how those factors interrelate to support a conclusion of current dangerousness to the public.” (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.)

Moreover, Sousa makes this suggestion of the regulations’ staleness by contending, contrary to the record here, that the Board relied on the existence of these factors “in and of themselves” without relating them to other circumstances in such a way

so as to draw a rational nexus between the life crimes and Sousa's current dangerousness. We reject this characterization of the record.

Contrary to Sousa's contention, the Board here did not cite the commitment offenses, or the circumstances surrounding them, in isolation, instead relating them directly to several other factors tending toward unsuitability. The Board began this discussion by citing to Sousa's juvenile criminal history, which is also static and immutable but which the Board characterized as involving the same theme as the life crimes—thievery and stealing. The Board then cited that the life crimes were committed while Sousa was on probation, which together with his many disciplinary violations in prison through the year 2004—the last one also involving theft just five years before the hearing—illustrated a continuing pattern of his inability to follow the rules and laws of society, thereby increasing his current threat level. (*In re Reed* (2009) 171 Cal.App.4th 1071, 1085 (*Reed*) [inmate's inability to follow institutional rules provides some current evidence that the inmate will likewise be unable to follow society's laws if released].) The Board even emphasized that it put great weight on Sousa's 2004 disciplinary violation in relating the life crimes to his perceived current dangerousness. Because of his age and the length of his incarceration when he stole the boots from the laundry in 2004, his initial denial of the act, and the negative consequences of it, the Board concluded that the violation illustrated Sousa's continued poor judgment and impulse control, and his lack of respect or understanding for rules and laws or the moral principles behind them, all of which qualities were similarly evidenced by his commission of the life crimes some 26 years before, as noted by the 2009 psychological evaluation.

The Board further cited the 2009 evaluation for its conclusion that Sousa lacked insight into the causative factors leading him to commit the life crimes and that he lacked remorse, as expressed by his failure to grasp the impact of the crimes on the victims. From this failure to understand what internal forces led him to commit the life crimes and to empathize with the victims of those crimes, the Board concluded that Sousa would be

less likely to be deterred from general criminality upon release, a conclusion that was supported by the 2009 evaluator's opinion that although Sousa's risk of violence in the free community was rated as low, his risk of general recidivism was still rated in the higher, moderate range. This conclusion remains supported by some evidence in the record even if that record also contains Sousa's expressions that his lengthy incarceration would deter him from further criminality. It was the Board, not a court, which had the authority to give weight and credence to different aspects of the record. (*Shaputis II, supra*, 53 Cal.4th at p. 199; *In re Lazor* (2009) 172 Cal.App.4th 1185, 1198-1199.)

While the Board did not use the word "nexus" in its decision, its conclusion that Sousa remains a current threat based on the life crimes, as expressly interrelated with these several other specific factors that are supported in the record, clearly revealed the Board's reasoning and established the required rational nexus. All that *Lawrence* requires is that the record provide some evidence in support of the Board's conclusion that the life crime is related to the inmate's current dangerousness and that the reasoning behind the conclusion be apparent. (*In re Criscione* (2009) 180 Cal.App.4th 1446, 1461; *Lawrence, supra*, 44 Cal.4th at p. 1210.) The whole point of *Lawrence* was that the Board's mere recitation of a fact, without somehow showing how the fact could be linked or connected to the ultimate finding of current dangerousness, is insufficient to support an unsuitability determination. *Lawrence* simply clarified: "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how these factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence, supra*, 44 Cal.4th at p. 1212.) Here, the Board's reasoning revealed that it was appropriately connecting different factors in the record, including the life crimes, with its determination of current dangerousness.

We accordingly reject Sousa's various challenges to the Board's use of the life crimes, which were aggravated by the fact that multiple victims were involved, to reach

its unsuitability determination. The Board did not use the crimes, or the circumstances surrounding them, in isolation, and they were interrelated with other cited factors that are also supported in the record to make them probative of current dangerousness.

*B. Other Factors*

*a. Criminal and Juvenile History*

In denying parole, the Board specifically cited Sousa's criminal history as a juvenile, noting that this history, like the life crimes and his 2004 disciplinary violation, involved theft offenses and were part of a pattern of stealing. The Board further observed that Sousa was on parole when he committed the life crimes and had failed prior attempts at rehabilitation, referencing his two CYA commitments. These facts, particularly in combination with the 2004 violation, indicated to the Board that Sousa continued to evidence an inability to abide by the rules and laws of society, "which makes [him] an unreasonable risk of danger today."

Under the regulations, the Board must specifically consider criminal history, whether or not violent, as well as all other relevant, reliable information bearing on suitability, and what "alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (Regs., tit. 15, § 2402, subd. (b).) Thus, the Board was entitled to consider these cited facts, all of which find support in the record, and the Board was free to assign weight to this various evidence, and to balance it, in its discretion, in order to form a conclusion that was probative of current dangerousness. What is more, consistently with the dictates of *Lawrence*, the Board properly interrelated more current and dynamic factors with Sousa's static and immutable criminal history as a juvenile and previous failed attempts at rehabilitation so as to make the latter probative of his current dangerousness.

Sousa contends that the Board should have considered that his juvenile record of burglaries and attempted burglary did not involve violence as a factor favoring suitability, citing section 2402, subdivision (d)(1) of the regulations. But this section provides that a

circumstance tending to indicate suitability is when a “prisoner does not have a record of assaulting others as a juvenile or committing crimes *with a potential of personal harm to victims.*” (Italics added.) What crimes do or do not have this potential is not specified but, as the Warden points out, burglary does appear to be the sort of crime that has the potential to harm victims if someone is inside a residence when the burglary occurs. The record includes no factual information about Sousa’s juvenile burglaries but we think it is logical to conclude that they inherently had this potential, and that the Board was in a position to consider Sousa’s juvenile criminal history, combined with other specified factors, as favoring a determination of Sousa’s current dangerousness and, therefore, parole unsuitability.

b. *Institutional Behavior*

The Board cited Sousa’s post-incarceration misconduct, including his multiple violations for drugs, his felony conviction for marijuana possession, and especially his 2004 disciplinary violation for theft as factors favoring unsuitability. As noted, the Board related the 2004 theft as a more current and dynamic factor to Sousa’s immutable commitment offenses and juvenile criminal history, making them probative of his current dangerousness because of the dominant pattern of thievery these facts collectively illustrated to the Board. Further, the Board cited the 2004 violation as being indicative of what it suggested was Sousa’s chronic inability to follow the rules and laws of society, increasing his threat level if released. The Board also cited Sousa’s history of drug use and drug violations in connection with what it considered to be a minimally developed relapse prevention plan, observing that relapse into addiction is not an uncommon reaction to stress, which Sousa would undoubtedly face upon being released into the community after such a lengthy incarceration, despite his lack of appreciation for this fact. All of these cited factors are supported by some evidence in the record. And the Board is authorized by regulation to consider as favoring unsuitability that a prisoner has

engaged in “serious misconduct in prison.” (Regs., tit. 15, § 2402, subd. (c)(6).) The Board was therefore justified in relying on Sousa’s institutional misconduct as it did.

Sousa challenges this reliance, contending that the Board “grossly overstated the connection between a relatively remote, impulsive act of theft of a pair of boots” and the commitment offenses of kidnap for robbery with the use of a gun, and characterizing any commonality between these acts, as well as any inference of current dangerousness that may be drawn from their commonality, as unreasonable. Further, he observes that none of his disciplinary violations involved violence. He does acknowledge the impulsive nature of the 2004 violation while downplaying its significance and denying that it shows an ongoing problem with impulsivity, citing psychological reports to the effect that he had more recently overcome this problem. And he contends that the Board’s emphasis on his past drug use ignored his more recent 10-year sobriety, which, he contends, should have led to the conclusion that his drug-use history “has receded into insignificance.” In sum, he challenges that there is any “meaningful” evidence of current dangerousness to be drawn from his documented institutional misconduct and past history of drug use and addiction.

As we see it, Sousa is in essence attacking the weight the Board gave to these factors and the manner in which the Board balanced them with other factors to draw conclusions, something that, as was brought home so forcefully in *Shaputis II*, a court is not authorized to interfere with, regardless of how or whether it might have viewed the same evidence differently. (*Shaputis II, supra*, 53 Cal.4th at p. 210 [per *Rosenkrantz, Lawrence*, and *Shaputis I*, under some evidence standard, only a modicum of evidence is required; conflicts in the evidence are resolved in favor of the parole authority’s decision and the manner in which the specified factors bearing on suitability are considered and balanced are within that authority’s discretion, regardless of whether a reviewing court concludes that evidence favoring suitability outweighs other evidence].) Moreover, disciplinary violations need not involve violence for them to be considered “serious” and

therefore tending to favor unsuitability. (*Gray, supra*, 151 Cal.App.4th at p. 389 [serious CDC violations are for misconduct involving a violation of law or that not minor in nature]; Regs., tit. 15, § 2402, subd. (c)(6).) Further, any failure to follow institutional rules may itself be considered an antisocial act, tending toward unsuitability. It is not necessary that disciplinary violations involve violence in order to have this tendency. (*Reed, supra*, 171 Cal.App.4th at p. 1082.) And while a conclusion in a psychological report must be considered, it does not bind the Board or dictate its decision regarding suitability, especially in the face of what might be considered contrary evidence in the record. (*In re Lazor, supra*, 172 Cal.App.4th at p. 1202; *In re Rozzo* (2009) 172 Cal.App.4th 40, 62.)

Sousa disagrees with the Board's characterization of the 2009 psychological evaluation's conclusion about his impulsivity, contending that the reference was to past acts, not current ones, and pointing to the same report's observations about his more positive and recent gains in making choices and evaluating his actions. But the report's observation that Sousa "can be said to act in 'impulsive ways' " does incorporate Sousa's 2004 disciplinary violation, even though the report also notes behavioral improvement since then. And it was within the Board's discretion to consider the 2004 violation just five years before the hearing as more current than remote in time, given the context and totality of the record.

The same is true about the manner in which the Board viewed Sousa's past history of drug use in combination with what it considered to be a poorly developed relapse prevention plan, Sousa's poor awareness of pressures he would face on the outside, and his lack of a marketable skill. This combination of factors signaled to the Board that a past history of drug use and addiction was probative of current risk, and it was within the Board's prerogative to weigh and balance the evidence in that manner.

c. *Lack of Insight*

The regulations direct the Board to consider an inmate's "past and present mental

state” and “past and present attitude toward[s]” the life crime in the suitability determination. (Regs., tit. 15, § 2402, subd. (b).) They further provide that an inmate’s signs of remorse for the crime favor suitability. (*Id.*, at subd. (d)(3).) And it is now well established that what might be deemed an inmate’s level of “ ‘insight,’ ” as reflected by “ ‘changes in a prisoner’s maturity, understanding, and mental state’ are ‘highly probative . . . of current dangerousness.’ (*Lawrence, supra*, 44 Cal.4th at p. 1220.)” (*Shaputis II, supra*, 53 Cal.4th at p. 218.) Indeed, the high court has “expressly recognized that the presence or absence of insight is a significant factor in determining whether there is a ‘rational nexus’ between the inmate’s dangerous past behavior and the threat the inmate currently poses to public safety.’ [Citations.]” (*Ibid.*) Accordingly, “the inmate’s insight into not just the commitment offense, but also his or her other antisocial behavior, is a proper consideration.” (*Id.* at p. 219.)

Nevertheless, the Supreme Court continues to acknowledge that “ ‘expressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior.’ [Citation.]” (*Shaputis II, supra*, 53 Cal.4th at p. 219, fn. 12.) “[L]ack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate’s current dangerousness. [Citation.]” (*Id.* at p. 219.) But, because the presence or absence of insight pertains to the inmate’s current state of mind, this factor bears more immediately than some others on the ultimate question of the present risk to public safety posed by the inmate’s release. (*Ibid.*; but see *id.* at pp. 226-230 (conc. opn. of Lui, J.) [some evidence of lack of insight into past criminal behavior does not necessarily translate to some evidence of current dangerousness, citing, e.g., *In re Roderick* (2007) 154 Cal.App.4th 242, 248-251, 271-272 and *Ryner, supra*, 196 Cal.App.4th at pp. 548-549, and emphasizing need for individualized consideration on case by case basis].)

Based on the 2009 psychological evaluation, which, as noted, the Board viewed as “not totally supportive of release,” as well as the prior 2008 evaluation, the Board considered Sousa to have a complete lack of insight into his past substance abuse, the stresses he would potentially face in the community that might trigger a relapse, and the relationship between relapse and recidivism. This lack of understanding combined, as the Board saw it, with only a minimally developed relapse prevention plan, to increase Sousa’s current level of risk to public safety. Both the 2008 and 2009 psychological evaluations noted that Sousa lacked a relapse prevention plan, while also acknowledging that he had apparently not used drugs for some 10 years. But the latter report recommended that he develop such a plan, and, as noted, he submitted one at the 2009 hearing. The plan itself is not in the record but the Board considered it not very well developed and minimal at best, noting that it did not include a sponsor or an indication of an AA or NA meeting schedule in any possible locale to which Sousa might be paroled.

Sousa does not challenge the Board’s finding that he lacked insight into his substance abuse history, how his past addiction might be activated by the stresses he could face once on the outside, and the relationship between relapse and recidivism, contending only that his 10-year sobriety and lack of a current drug problem have “receded [that addiction history] into insignificance.” Again, the significance of Sousa’s undisputed history of drug abuse and the weight to assign to this factor, as interrelated with others, in the parole suitability equation is up to the Board to decide, based on the whole record. Accordingly, the finding of Sousa’s lack of insight into his past substance abuse and how that might affect his potential to re-offend stands, and it is a factor that rationally tends toward unsuitability.

What Sousa does challenge is the Board’s related finding about the inadequacy of his relapse prevention plan, a fact that made his lack of insight concerning his past substance abuse and the potential for relapse as affecting recidivism more probative of current dangerousness. He does not address the perceived deficiency of the lack of a

sponsor in his proposed plan. He challenges only the aspect of the finding related to the absence of reference to an organized and structured meeting schedule of an organization such as AA or NA in all sites to which he might be paroled, including Portugal due to the likelihood of his deportation. He contends that this perceived deficiency is akin to parole plans, observing that an inmate facing likely deportation need not necessarily have specific, detailed, and “fail-safe” plans in two different countries, only “ ‘realistic’ ” plans, relying on *In re Andrade* (2006) 141 Cal.App.4th 807, 817. But we see the Board’s perception of the inadequacy of Sousa’s relapse prevention plan not as an absence of specific plans in different locations but, rather, as an expression of Sousa’s general lack of insight into the *need* for him, as a recovering addict, to actively participate in an organized and structured support system as an aid to preventing relapse and increased recidivism as a result, as recommended by the 2009 evaluator. Viewed this way, Sousa’s arguments against the finding of an inadequate relapse prevention plan miss the point, particularly in the context of the entire record reflecting his lack of a realistic assessment of the pressures he might face in the community and his notion that he will avoid substance abuse in the future simply because he intends to.

The Board also cited Sousa’s lack of insight into why he committed the life crimes and the impact of the crimes on his victims, equating this to a lack of remorse. The panel reasoned that his failure to understand victim impact translated to a current threat because a lack of empathy toward victims would naturally make one less likely to be deterred from future criminality. As part of this point, the panel offered speculation about Sousa’s victims still being traumatized and living in fear as a result of the crimes. Though Sousa rightly challenges this speculation as having no evidentiary support in the record, this challenge does not undermine the Board’s point that a lack of insight about the causative factors leading him to commit the crimes and a lack of remorse or understanding of the plight of his victims, which do find support in the record, are relevant to an assessment of Sousa’s current dangerousness.

Sousa posits that his documented desire to avoid prison in the future is a parallel deterrent to later criminality, sufficient to overcome a perceived lack of remorse or victim-impact understanding. While it may be true that avoiding criminal consequences is a deterrent, Sousa could still reduce his threat level further, as noted by the 2009 evaluator, by “carefully consider[ing] how his actions affected others, in addition to remaining focused on the negative consequences to himself.” This is some evidence that Sousa’s lack of insight about victim impact was probative of a current threat to public safety, even if his desire to avoid criminal consequences was better developed than at the time of the crime and, in 2009, was “not seen as a significant factor influencing [Sousa’s] probability of engaging in future violence.”

d. *Marketable Skills and a Vocation as Part of Parole Plans*

The Board also cited that Sousa had not learned a vocation or acquired marketable skills in order to become well employed upon release. This deficiency, along with what the Board perceived as Sousa’s lack of awareness of the pressures he would face and his poor impulse control, as well as his need to make a living without resorting to crime, combined to raise Sousa’s current threat level. These same factors also contributed, in the Board’s view, to Sousa’s commission of the life crimes years before.

There is some evidence in the record that Sousa lacked marketable job skills and had not learned a skilled vocation. Whether an inmate has developed marketable skills is a consideration in the parole suitability determination. (Regs., tit. 15, § 2402, subd. (d)(8); *In re Powell* (2010) 188 Cal.App.4<sup>th</sup> 1530, 1543; *Reed, supra*, 171 Cal.App.4<sup>th</sup> at pp. 1081-1082 [maintaining employment is important to a parolee’s success].) As we have already addressed, based on Sousa’s 2004 disciplinary violation there was some evidence from which the Board could rationally conclude that he retained a tendency to act impulsively, even if only on occasion. In addition, the 2009 psychological evaluation documented that Sousa could not identify “stressors or difficulties he expected to face in the free community,” that he felt it would not be difficult to “ ‘[g]o to work then go

home,’ ” and that work would not be hard to find simply because “ ‘[he had] a good head on [his] shoulders,’ ” all of which reflected to the Board that Sousa was naïve or unaware of the realities he would face on the outside. Thus, the Board’s assessment that Sousa’s lack of marketable skills, combined with these other factors, increased his threat level is supported by some evidence in the record.

Sousa challenges the Board’s reliance on his lack of marketable skills by pointing out that he had a job offer if he were to be paroled in California and that his brother would help him find work if he were to be deported to Portugal. In view of the INS hold, however, it is very likely that Sousa will be deported upon release; and, even if his brother were committed to helping him find employment in Portugal, that prospect would be much more successful and likely to provide Sousa with a living if he were to develop marketable skills or a vocation. Accordingly, this challenge does not overcome the existence of some evidence to support the Board’s reliance on this factor in reaching a conclusion of current dangerousness and a consequent denial of parole.

### C. *Conclusion of Some Evidence Review*

We have concluded that the record contains some evidence to support the Board’s denial of parole. There is a rational nexus between the primary factors cited by the Board, including the commitment offenses, and a conclusion of current dangerousness. Indeed, the Board’s decision here reflects, in compliance with *Lawrence*, that it interrelated the factors it relied upon to render all of them, even those that are immutable and static, probative of current dangerousness. Given the deferential scope of our judicial review and the need to find only a “modicum” of evidence to support the Board’s decision, we conclude, based on the foregoing determinations, that the trial court erred in granting Sousa’s petition and in directing the Board to conduct a new hearing.

DISPOSITION

The order granting Sousa's habeas petition is reversed and the Board's 2009 decision denying parole is reinstated.

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Walsh, J.\*

WE CONCUR:

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Rushing, P.J.

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Elia, J.

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