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

In re DAMEION BROWN,
on Habeas Corpus.

H037327

(Santa Clara County
Super. Ct. No. 158336)

INTRODUCTION

Dameion Brown was convicted in January 1993 after jury trial of torturing his daughter D. (Pen. Code, § 206),¹ and endangering the health of his daughter Y. and his son Da. (§ 273a, subd. (a)(1)). He was sentenced in February 1993 to prison for life with the possibility of parole. Following a subsequent parole hearing on October 14, 2010, the Board of Parole Hearings (the Board) found Brown not suitable for parole. On July 25, 2011, the superior court granted Brown’s petition for writ of habeas corpus and directed the Board to conduct a new parole hearing within 95 days. The warden where Brown is incarcerated (the Warden) filed an appeal and a petition for writ of supersedeas requesting a stay of the superior court’s order. On October 7, 2011, we granted the Warden’s petition for writ of supersedeas. For the reasons stated below, we will reverse the superior court’s July 25, 2011 order and remand the matter to the superior court with directions to deny the petition for writ of habeas corpus.

¹ All further statutory references are to the Penal Code.

BACKGROUND

Brown's Social and Criminal History

Brown was born in December 1967 in Tennessee, one of 12 children. He graduated from high school, and worked as a fast food manager and as a bank clerk. He came to California in August 1988. At the time of the commitment offenses, Brown was unemployed, he had no criminal history either as a juvenile or as an adult, he did not use alcohol or drugs, he was married to his first wife Dierdre, and they had five children. Brown and Dierdre divorced in 1998, and defendant married his second wife, Danielle, a former correctional officer, in March 2005. That marriage was still intact at the time of the 2010 parole hearing. In addition, Brown keeps in contact with his family in Tennessee, and several members of Brown's family submitted letters to the Board in support of his request for parole. Da. and Y. were present at the Board's hearing, and they both spoke on Brown's behalf.

The Commitment Offenses

On the morning of June 8, 1992, paramedics responded to a 911 call by Dierdre and took three-year-old D. to the hospital. The most serious problem the paramedics noted was that D. was breathing only about four times a minute. One paramedic observed that D. was posturing in a type of seizure activity. She was placed on a respirator at the hospital; her blood tests showed a lack of oxygen and it was determined that she likely suffered brain damage due to oxygen deprivation. Since there was little evidence that D. had inhaled water, it was likely that she had been suffocated in a different way.

D.'s skin was burned off in places on her buttocks and below her knees. She had second degree burns in those areas. The burns below her knees were sock-like, dip-type burns. The burns on her buttocks appeared as though hot water had been run over them, more on the left side than on the right. The soles of her feet were not burned, as though she had been standing on something cooler than the hot water. Her left inner thigh was

burned in spots, but not her right thigh. Some of the scars from the burns will never disappear.

In addition, D.'s shoulders were not symmetrical. Her right shoulder was more pliable, as though it had been dislocated in the prior week. She had recent and older whip marks, some of which were still bleeding. The marks were on her lower abdomen, buttocks, waist, chest, under her armpits, the underside of her arm, and the back of her calves. The back of her head was moist when she was first brought to the hospital. It got progressively wetter instead of drier. It blistered up, clear fluid oozed out, and the scalp got boggy and swollen. Her hair was done in little cornrows and, by the next morning, the cornrows fell out in clumps, as though pulled out by the roots. A CAT scan revealed no deep head injury.

Three of Brown's other children were examined on June 8, 1992, by doctors and nurses. Two of the other children also had recent marks and injuries. Da., then five years old, had whip marks on his chest and the front of his legs, among other places. Y., then two years old, had grab marks on her arms, scars down her back, buttocks and legs, and a belt-like loop on her chest.

Brown admitted at his trial that he started whipping his children when they turned two years old, and that he did not think that that was too young to be whipped. Brown also admitted that he had held D.'s arms up while he hit her.²

D. is now permanently and extensively disabled and disfigured. She is not able to speak or to respond to questions in any manner. Her only communication is through facial expressions and screaming. She lives in a group home, and a team of people provide daily services and make major decisions for her.

² The facts of the commitment offense are taken from this court's opinion in defendant's appeal from his conviction (*People v. Brown* (Jan. 23, 1995, H010919) [nonpub. opn.]), which was attached as an exhibit to the Warden's return to the superior court's order to show cause.

Brown's Conduct While Incarcerated

Brown has been housed at the state prison in Solano County under Medium-A custody with a minimum classification score of 19, which the Board stated was "very good." His most recent prior parole hearing was in November of 2008, at which time the Board gave him "a two-year denial." Since that time he has completed several self-help activities, including: Going for the Gold (February 2009); a domestic violence course (July 2009); Emotional Awareness/Emotional Healing (August 2009); Jewish Bible studies (April, July, and October 2009, and January 2010); a 13-week parenting class (August 2010); and a 10-week peer-administered overcoming extreme anger self-help course (September 2010). In January 2010, he completed the office-services-related technologies course and was placed on the vocational fiber optics and vocational industrial electronics waiting list. Most recently, he was assigned as a tutor for GED students.

While in custody, Brown has received seven serious CDC 115s and five administrative 128As. The most recent 128A was in 2003. The most recent 115s were in November 2007 and May 2008, both of which were for unauthorized possession of a cell phone. He has been "disciplinary-free" since that time.

Brown's Parole Plans

Brown plans to reside with Danielle, who lives in Sacramento and has stable employment. Danielle has three grandchildren who were between the ages of two and five at the time of the Board's hearing. As a county social worker, Danielle is a "mandated reporter" who must report all known child and elder abuse. Brown has an offer of employment help from the Northern California Construction Training building trades pre-apprenticeship program.

Brown's Psychological Evaluation

Brown's most recent psychological evaluation was completed in April 2010 by Dr. Christina Reynoso. Dr. Reynoso noted that Brown has a total TABE (Test of Adult

Basic Education) score of 12.9, as of November 2006. In discussing Brown's institutional history and programming, Dr. Reynoso stated: "While it is noted that Mr. Brown has not perpetrated any acts of violence, he has displayed an attitude condoning rule defiance as noted by two relatively recent disciplinary actions for possession of a cell phone. He has however not received any additional disciplinary actions since his last parole consideration hearing (11/13/08)."

Brown told Dr. Reynoso that he admitted abusing his children, "which I now know is considered torture." Dr. Reynoso found that Brown "has repeatedly refuted medical findings suggesting that he placed the victim under hot water or suffocate[ed] her. His rendition of the life crime has been consistent over the years. While it is again noted that he refutes important aspects of the crime as outlined by the treating physician, Mr. Brown attributed his daughter's serious injury to his negligence." "When asked to describe the factors leading up to the repeated abuse of his children, especially the victim of the life crime, Mr. Brown noted that he had very little understanding of how to raise children and little understanding [of] their specific needs." "He noted that he was particularly prideful and it was difficult for him to admit his 'ignorance' and was 'too proud' to ask for help." "In looking back, he believes he could have avoided this crime by getting professional help in hopes of gaining greater understanding in child development." "Mr. Brown's verbal expressions of remorse appeared sincere. More specifically, when asked about how he feels about how his actions impacted the lives of his children, he stated, 'I feel horrible. No matter what I accomplish, I will never be whole because I took away their innocence.' "

To assess Brown's risk of violent recidivism, Dr. Reynoso used "recognized assessment tools:" the Psychopathy Check List – Revised (PCL-R); the Historical – Clinical – Risk Management – 20 (HCR-20); and the Level of Service/Case Management Inventory (LS/CMI). Brown's PCL-R score placed him in "the *low* range of clinical construct of psychopathy." Although he demonstrated poor decision-making processes,

poor impulse control, and a callous disregard for his children, as evidenced by the repeated abuse of his children over time, he has been able to demonstrate fairly good behavioral control within a controlled environment. Brown's overall score using the HCR-20 placed him in the low-risk category for violent recidivism. Brown's total score using the LS/CMI placed him within the low range of risk for general recidivism. Dr. Reynoso concluded that "Mr. Brown's risk of violent recidivism would undoubtedly *increase* if he found himself unable to cope with stress, faced financial burdens or was unable to meet the demands inherent in family life. [¶] He could *decrease* his risk of violent re-offense by continuing to abide by the rules set forth by the institution, continuing to attend a number of self-help therapies focusing on parenting, anger management, conflict resolution and the study of child development and behavior." "Although he has matured considerably during his incarceration, it is still unclear[] whether or not he has fully come to grips with the actual aspects of the crime or if he has learned the skills necessary to deal with undue stress in the future."

The Board's Hearing and Decision

At the October 14, 2010 hearing, Brown exercised his right to not speak about the commitment offense. Regarding the two most recent 115s, Brown stated that his cell mate claimed the phone involved in the 2007 115, which was found under Brown's bunk, and that somebody else owned the phone involved in the 2008 115, but he did possess it.

When asked by the Board what he was accepting responsibility for, defendant responded: "I'm accepting responsibility for, what I consider, providing a tortuous life for my children and for all of the injuries inflicted upon each and every one of them. All harm done to them came from me. I was directly responsible for it, and of that I'm clear."

"I have a very thorough understanding now that simply because I was not an alcoholic or alcohol user or drug user or robber or burglar, . . . I was still committing crime, and I didn't understand that, and my crimes were pretty much like the

businessman, who is a pillar of the community and goes home and beats his wife. These things were hidden, and I didn't believe, at the time, that these things were wrong because I felt that I was a parent, and it was my responsibility to make certain that I whipped them into shape, so to speak. I had no skills. What's different now is I understand that those were crimes and I do have skills. I've engrossed myself completely in learning the manners in which a child is best developed, and I understand that it is not through violence, that it is not through bullying. It is not through imposing my will. I learned that it is through encouragement. It is through safe guidance that a child becomes the type of adult that I was seeking to raise. I am much older now than I was then. I have a firm understanding of the pressures of stress, how to identify my stressors and how to respond accordingly to stressors when things don't go right for you."

"I do understand that I took far more than simply innocence from my children. I do understand that I committed the crime of torture against my children. I do understand that those things were my problem and my problem alone. They did nothing to warrant that." "I understand that I had an issue with trying to control things in my home. I understand that it was far beyond rational in the ways that I was doing it. I understand that everything that goes wrong doesn't say that there is something wrong with the person. Some things just are." "I understand that I do have to make amends the rest of my life. I've apologized to my children, continuously, and I always will, because, as long as I live, it will always be left to me because of the crimes that I've committed against my children."

The Board concluded that Brown was not yet suitable for parole because he currently posed an unreasonable risk of danger if released from prison. The Board stated that it was "a three-year denial, which is currently the minimum period of denial that is available to the [Board]." The Board based its decision on Brown's "serious misconduct in prison," the commitment offenses, his past mental state, and his past and present attitude, particularly that he "continue[s] to maintain a version that is in stark

inconsistency with the medical findings that are replete in the record.” The Board also considered the fact that Brown had no prior criminality; the fact that his social history was somewhat stable, other than his lack of parenting skills; that the psychological report was generally favorable; that his parole plans were to live with his wife; and that there was opposition from the representative from the Santa Clara County district attorney’s office. The Board concluded that “on balance, the circumstance that makes [Brown] unsuitable for parole . . . outweigh the positive aspects” of his case.

Regarding Brown’s most recent misconduct while incarcerated, the Board stated: “[I]f your testimony rings true today with respect to the one from 2007, there certainly wasn’t a lesson learned because, approximately six months later, you have one that you’ve owned up to today. . . . [T]he 115s . . . provide what the [Board] feels is our nexus as to your current dangerousness, and that is your inability to abide by the rules of the institution, as an indicator and predictor as to your ability to follow the laws of society. And the [Board] feels that a longer period of observation is needed to solidify your gains, particularly in the area of impulse control. Certainly have no doubt the [Board] feels that cell phone infractions are among the more serious rule violation reports. They certainly impact the safety and security of the institution. The [Board] is familiar with their use to facilitate an escape from Avenal. They were used to coordinate the riot at Chino, and there are instances where they’ve been used to facilitate drug dealing and institutional gang activity, so we do find any cell phone violation to be very serious.”

The Board found that the commitment offenses “were committed in an especially heinous, atrocious and cruel manner. We had multiple victims attacked, one being severely injured in separate incidents. The offenses were carried out in a very dispassionate manner. The victim, D., certainly was abused and mutilated over a period of time, and . . . the offenses were carried out in a manner demonstrating an exceptionally callous disregard for human suffering, and certainly the motive for the crimes is so very trivial in relationship to the offenses and their magnitude and impact on all parties

concerned. What we're speaking of, specifically, is the ongoing abuse of three of your children, culminating in the June 8, 1992, incident in which your daughter, D., was admitted to a hospital, suffering severe burns to her feet, ankles and lower extremities and buttocks and also the fact that there was some severe brain damage as a result of suffocation, and it was noted by the examining physicians that it was not associated with water, such as drowning, since there was none found in the victim's lungs. And the [Board] also noted that other children, Da. and Y., also were the recipients of the whip marks and beatings that were inflicted."

The Board recommended that Brown remain discipline-free, that he participate in any self-help available to him, that he cooperate with the clinician if he is afforded another psychological evaluation, and that he update his parole plans. "The critical parts of that, . . . when you come back next time, you're going to have sufficient distance between you and that 115. . . . [W]hen you come back, it won't be there, certainly don't get any more."

The Superior Court Proceedings

On April 11, 2011, Brown filed a petition for writ of habeas corpus in the superior court. He contended in relevant part that there was no evidence to support the Board's conclusion that his disciplinary actions in 2007 and 2008 for possession of a cell phone created a nexus to current dangerousness, or to support the Board's conclusion that the commitment offense demonstrates that he is currently dangerous. The court issued an order to show cause on May 13, 2011, stating that Brown "has engaged in appropriate programming, has a favorable psychological evaluation, has demonstrated insight and remorse, and has refrained from any rules violations since the denial of parole in 2008. Because [Brown] has done all that the Board asked of him in the time since his previous hearing, the Board may have abused its discretion by denying him parole at this time."

On June 17, 2011, the Warden filed a return to the order to show cause, arguing in part that, "the Board relied on Brown's serious misconduct in prison, his failure to accept

culpability for his actions during the commitment offense, and the severity of the commitment offense. Because the Board articulated why Brown is not suitable for release, this Court should uphold the Board's decision to deny him parole." Brown filed his denial (traverse) on July 11, 2011, contending that "there is no evidence that [he] is currently dangerous. He has never been disciplined for a violent or drug-related offense during his 17 years of incarceration, and was disciplinary free for ten years prior to the cell phone violation, and he has developed insight into his past behavior and been deemed a low risk for violence by every psychologist that has evaluated him."

On July 25, 2011, the superior court filed its order granting Brown's petition for writ of habeas corpus and ordering that he be afforded a new hearing within 95 days. "This case is problematic because in 2010 a Board panel decided to deny [Brown] parole for three years, based on the same reasons a different panel, in 2008 denied [him] parole for only 2 years. That reason was [Brown's] two 115s, one in 2007[,] the other in 2008, for possessing a cell phone. The 2010 [Board] stated this was its 'first consideration against suitability' and the only one [it] stated had a 'nexus' to its decision. [¶] The Board's inconsistency tends to indicate that one of the two panels abused its discretion. In 2008[, Brown] was told his prospects were generally good[,] however he needed to 'get some distance behind you' regarding the cell phone possessions. The fact that the Board then gave him a two year denial indicates [its] belief that two years was sufficient 'distance' given [Brown's] prior favorable behavior and assuming he would not violate the rules again. For the next two year[s, Brown] continued to program and did not receive any further write-ups. Yet on this improved record the 2010 [Board] denied him parole because he did not have 'sufficient distance between you and that 115.' As a quasi-judicial body . . . it should be hoped that the Board would not issue arbitrary and capriciously contradictory opinions. [¶] Weighing heavily against the 2010 Board's decision (thus tending to show that it was this [Board] that abused its discretion) was [Brown's] most recent 'Comprehensive Risk Assessment' written by a Forensic

Psychologist who was fully aware of the cell phone possessions. Her professional opinion was that, on each of the three standardized assessment tools, and overall, [Brown] ‘presents a *low* risk for violence in the free community.’ [¶] The Forensic Psychologist’s conclusion that the cell phone possessions do not presently make [Brown] dangerous appears sound. The behavior in question was nonviolent. Indeed [Brown], now twelve years past his MEPD [minimum eligible parole date], has no violent write-ups of any kind. The Board’s anecdotal remarks that cell phones had been used by other inmates for criminal purposes was not relevant because the rule that each inmate is to receive ‘individualized consideration’ means that the misdeeds of others are not imputed to [Brown]. Examining the individual circumstances of [Brown’s] 115s, it appears that, with a desire only to make personal calls, [Brown] succumbed to the ready temptation around him. It is by now well known that there is a ‘cell phone epidemic’ within the CDC. In the past five years over 20,000 cell phones have been confiscated in California prisons. . . . [Brown’s] weakness and lapse of judgment fully justified the punishment associated with the 115s he received. And in 2008 it justified his parole denial for two additional years even though at that time [Brown] was 9 years past his MEPD. However, it does not presently indicate dangerousness and justify another 3 years of incarceration given his otherwise favorable record. [¶] The Board appears to have believed that even a nonviolent 115 justifies continuous parole denials on the theory that an inmate’s failure to follow all prison rules automatically translates into an inability to follow laws upon release. . . . However, . . . recent authority of *In re Prather* (2010) 50 Cal.4th 238, contradicts this. . . . [¶] For the above reasons the Board’s actions in this case did not comport with due process and [its] decision is vacated.”

The Warden filed a notice of appeal from the superior court’s order of July 25, 2011, on September 7, 2011. On October 7, 2011, we granted the Warden’s petition for writ of supersedeas and stayed, pending this appeal, enforcement of the superior court’s order.

DISCUSSION

The Parties' Contentions

The Warden contends that, “[i]n denying parole, the Board relied on two disciplinary reports Brown received in 2007 and 2008 for possessing cellular telephones, his attitude toward the commitment offense, and the gravity of the crime.” “Even though a jury found his actions to be deliberate, Brown continues to insist that his daughter’s permanent retardation resulted from a genuine accident and not his intentional punishment of the toddler for her bad behavior. Moreover, Brown’s insistence to illicitly possess a second cellular telephone only six months after getting caught for possessing the first one demonstrates his lingering impulse-control issues. As a result, some evidence supports the Board’s determination that Brown remains a current risk to the public.” The Warden further contends that, “[i]n granting habeas relief, the superior court erroneously concluded that the Board did not rely on Brown’s attitude toward the crime as a basis to deny parole. Also, the superior court improperly reweighed the evidence, rejected the Board’s rational inferences, and independently decided that Brown’s possession of cell phones two and three years ago was no longer relevant to the public-safety determination. Therefore, this Court should reverse the superior court’s order.”

Brown contends that “[t]he superior court properly held that the Board’s decision in 2010 to deny [him] parole based on 2007 and 2008 cell phone possession disciplinary infractions was arbitrary because the Board had already denied parole for two years ‘to “get some distance behind you” regarding the cell phone possessions.’ The most recent psychological evaluation, taking into consideration the 2007 and 2008 infractions, determined that [he] poses a low risk of future violence. Therefore, the superior court properly . . . determine[d] that [his] dated, non-violent disciplinary infractions in and of themselves do not support a parole denial of an additional three years because there is not a nexus between the infractions and [his] current dangerousness. Accordingly, this court

should affirm the superior court's order that the Board should conduct a new parole hearing because the Board did not apply the correct legal principles in making its decision and because there was no evidence that [he] is currently dangerous.”

Judicial Review of Parole Unsuitability Decisions

“The granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals *as soon as possible* and alleviate the cost of maintaining them in custodial facilities. [Citations.] Release on parole is said to be the rule, rather than the exception [citations] and the Board is required to set a release date unless it determines that ‘the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration’ (Pen. Code, § 3041, subd. (b).)”
(*In re Vasquez* (2009) 170 Cal.App.4th 370, 379-380.)

The general standard for a parole suitability decision is that “a life prisoner shall be found unsuitable for and denied parole if in the judgment of the [Board] the prisoner will pose an unreasonable risk of danger to society if released from prison.” (Cal. Code Regs., tit. 15, § 2402, subd. (a).)³ “[T]he judicial branch is authorized to review the factual basis of a decision of the Board 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 Board supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision’s consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner’s petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law.”

³ All further regulation references are to title 15 of the California Code of Regulations.

(*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 (*Rosenkrantz*); *In re Dannenberg* (2009) 173 Cal.App.4th 237, 246.) “A reviewing court independently reviews the record if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely upon documentary evidence. [Citation.]” (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192; *In re Criscione* (2009) 180 Cal.App.4th 1446, 1458.)

In making a determination of parole suitability, the Board must consider “[a]ll relevant, reliable information,” such as the nature of the commitment offense including behavior before, during, and after the crime, and the prisoner’s social history, mental state, criminal record, attitude towards the crime, and parole plans. (Regs., § 2402, subd. (b).) Circumstances tending to indicate unsuitability for parole include that the inmate: (1) committed the offense in an especially heinous, atrocious or cruel manner; (2) has a previous record of violence or assaultive behavior; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while incarcerated. (*Id.*, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (*Id.*, subd. (b).)

Circumstances tending to indicate suitability for parole include that the inmate: (1) does not have a juvenile record; (2) has a stable social history; (3) has shown signs of remorse; (4) committed his or her crime as a result of significant stress in his life, especially if the stress had built up over a long period of time; (5) committed the crime as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release; and (9) has participated in institutional activities that indicate an enhanced ability to function within the law upon release. (Regs., § 2402, subd. (d).)

“[T]he foregoing circumstances ‘are set forth as general guidelines; 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., § 2402, subds. (c), (d).) “Moreover, even if new evidence of [the inmate’s] conduct, mental state, or parole plans does not, standing alone, support a determination that [the inmate] currently is dangerous, it certainly is conceivable that new evidence as to any of these factors might be probative when considered in light of other existing evidence in the record.” (*In re Prather, supra*, 50 Cal.4th at p. 256.) “[P]arole release decisions concern an inmate’s anticipation or hope of freedom, and entail the Board’s attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.” (*Rosenkrantz, supra*, at p. 655.) “ ‘Although a prisoner is not entitled to have his term fixed at less than maximum or to receive parole, he is entitled to have his application for these benefits “duly considered” ’ based upon an individualized consideration of all relevant factors.” (*Ibid.*)

“ ‘[I]n evaluating a parole-suitability determination by either the Board or the Governor, a reviewing court focuses upon “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 . . . [or] merely some evidence suggesting the existence of a statutory factor of unsuitability.’ ” (*In re Shaputis* (2011) 53 Cal.4th 192, 209 (*Shaputis II*); *In re Prather, supra*, 50 Cal.4th at pp. 251-252.) “Under 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 II, supra*, 53 Cal.4th at p. 212; *In re Shaputis* (2008) 44 Cal.4th 1241, 1258 (*Shaputis I*).

“It is settled that under the ‘some evidence’ standard, ‘[o]nly a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board or] the Governor. . . . It is irrelevant that a court might determine that evidence in the record tending to establish

suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the . . . decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court’s review is limited to ascertaining whether there is some evidence in the record that supports the . . . decision.’ [Citations.]” (*Shaputis II, supra*, 53 Cal.4th at p. 210; *Rosenkrantz, supra*, 29 Cal.4th at p. 677; see also *In re Rodriguez* (2011) 199 Cal.App.4th 1158, 1166-1167.) “Any relevant evidence that supports the parole authority’s determination is sufficient to satisfy the ‘some evidence’ standard.” (*Shaputis II, supra*, 53 Cal.4th at p. 214.)

“The parole regulations specify that ‘[a] prisoner may refuse to discuss the facts of the crime *in which instance a decision shall be made based on the other information available* and the refusal shall not be held against the prisoner.’ (Cal. Code Regs., tit. 15, § 2236, italics added.)” (*Shaputis II, supra*, 53 Cal.4th at pp. 211-212, fn. omitted.)

Thus, an inmate need not admit his guilt or change his story to be found suitable for parole by the Board. (*In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491.) However, the Board may consider the inmate’s failure to take full responsibility for past violence and his lack of insight into his behavior when determining that the circumstances of the inmate’s commitment offense and violent background continue to be probative to the issue of his current dangerousness. (*Shaputis I, supra*, 44 Cal.4th at p. 1261, fn. 20.)

“The Board’s consideration of ‘other information’ is not limited to recent information the inmate has chosen to present. Nor does the Board hold a refusal to discuss the crime against the inmate when it weighs the credibility of such information against other evidence in the record. In determining whether an inmate may safely be paroled, it is legitimate for the Board to take into account that the record pertaining to the inmate’s current state of mind is incomplete, and to rely on other sources of information. An inmate who refuses to interact with the Board at a parole hearing deprives the Board of a critical means of evaluating the risk to public safety that a grant of parole would entail.

In such a case, the Board must take the record as it finds it.” (*Shaputis II, supra*, 53 Cal.4th at p. 212.)

“[T]he fundamental consideration in parole decisions is public safety. . . .” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 (*Lawrence*)). “[T]he core determination of ‘public safety’ . . . involves an assessment of an inmate’s *current* dangerousness.” (*Ibid.*) “[U]nder the some evidence standard, a reviewing court reviews the *merits* of the Board’s . . . decision, and is not bound to affirm a parole decision merely because the Board . . . has adhered to procedural safeguards. . . . This standard is unquestionably deferential, but certainly is not toothless, and ‘due consideration’ of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*Id.* at p. 1210; see also *Shaputis II, supra*, 53 Cal.4th at p. 214.)

“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 those factors interrelate to support a conclusion of current dangerousness to the public.” (*Lawrence, supra*, 44 Cal.4th at p. 1212.) “Accordingly, when a court reviews a decision of the Board . . . , the relevant inquiry is whether some evidence supports the *decision* of the Board . . . that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]” (*Ibid.*; see also *Shaputis II, supra*, 53 Cal.4th at pp. 209-210.)

“[A]lthough the Board . . . may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his or her

commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety.” (*Lawrence, supra*, 44 Cal.4th at p. 1214.) “In some cases, such as those in which the inmate has failed to make efforts toward rehabilitation, has continued to engage in criminal conduct postincarceration, or has shown a lack of insight or remorse, the aggravated circumstances of the commitment offense may well continue to provide ‘some evidence’ of current dangerousness even decades after commission of the offense.” (*Id.* at p. 1228.) “Absent affirmative evidence of a change in the prisoner’s demeanor and mental state, the circumstances of the commitment offense may continue to be probative of the prisoner’s dangerousness for some time in the future.” (*Id.* at p. 1219.)

“[T]he relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate’s psychological or mental attitude.” (*Lawrence, supra*, 44 Cal.4th at p. 1221; *Shaputis I, supra*, 44 Cal.4th at pp. 1254-1255.) “In sum, the Board . . . may base a denial-of-parole decision upon the circumstances of the offense, . . . 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” (*Lawrence, supra*, 44 Cal.4th at p. 1221; *Shaputis I, supra*, 44 Cal.4th at p. 1255.)

“The regulations do not use the term ‘insight,’ but they direct the Board to consider the inmate’s ‘past and present attitude toward the crime’ (Regs., § 2402, subd. (b)) and ‘the presence of remorse,’ expressly including indications that the inmate ‘understands the nature and magnitude of the offense’ (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of ‘insight.’ ” (*Shaputis II*, *supra*, 53 Cal.4th at p. 218.) “In *Lawrence*, we observed that ‘changes in a prisoner’s maturity, understanding, and mental state’ are ‘highly probative . . . of current dangerousness.’ [Citation.] In *Shaputis I*, we held that [the] petitioner’s failure to ‘gain insight or understanding into either his violent conduct or his commission of the commitment offense’ supported a denial of parole. [Citation.] Thus, we have 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.]” (*Shaputis II*, *supra*, at p. 218.) Accordingly, the Board is entitled to look beyond an inmate’s expressions of remorse and willingness to be accountable and examine the inmate’s current mental state and attitude about the commitment offense to determine whether there is a truthful appreciation for the wrongfulness of the act. (*Ibid.*)

Analysis of the Board’s Decision

Here, the Board concluded that Brown currently posed an unreasonable risk of danger if released from prison, relying on his “serious misconduct in prison,” the commitment offenses, his past mental state, and his past and present attitude, particularly that he “continue[s] to maintain a version that is in stark inconsistency with the medical findings that are replete in the record.” “Thus, in applying the legal principles set forth above, we must decide whether ‘some evidence’ supports the Board’s reliance on these factors to deny [Brown] parole. [Citation.]” (*In re Shippman* (2010) 185 Cal.App.4th 446, 456.)

We find that there is some evidence to support the Board's reliance, in part, on the "aggravated circumstances of the commitment offense" as a basis for its decision denying Brown parole. (*Lawrence, supra*, 44 Cal.4th at p. 1214; see also *In re Morrall* (2002) 102 Cal.App.4th 280, 301 [upon individualized consideration, the particular circumstances of an inmate's commitment offense may be a basis for finding the inmate unsuitable for parole].) The record shows that Brown not only caused his three-year-old daughter D. to suffer second degree burns on the lower part of her body and permanent brain damage consistent with holding her under hot water while somehow suffocating her, he also caused her to suffer a head injury that resulted in her hair falling out in clumps the next day. Brown also had a prior history of whipping D. and two of her young siblings, leaving marks on them. Some of the marks on D. were still bleeding when she was admitted into the hospital for her burns and head injury, and she also had a shoulder injury that was consistent with Brown's admitted conduct of holding her up by her arm while he whipped her.

However, even if there is some evidence to support the finding that Brown's torture of his three-year-old daughter was committed in a cruel and callous manner (Regs., § 2402, subd. (c)(1)(D)), such reason would provide "some evidence" to support the ultimate conclusion and denial of parole here only if there were other facts in the record, such as the inmate's current demeanor and mental state, to provide a "rational nexus" for concluding his offense continues to be predictive of current dangerousness. (*Lawrence, supra*, 44 Cal.4th at p. 1213.) As the *Lawrence* court stated, "the mere existence of a regulatory factor establishing unsuitability does not necessarily constitute 'some evidence' that the parolee's release unreasonably endangers public safety." (*Id.* at p. 1225.) Accordingly, we must examine the other factors the Board relied upon.

The Board also found that Brown's past mental state, and his past and present attitude, particularly that he "continue[s] to maintain a version that is in stark inconsistency with the medical findings that are replete in the record," in conjunction

with the other factors, indicated that he posed an unreasonable risk of danger if released. “Some evidence” in the record supports this finding. Dr. Reynoso found that although Brown states that he accepts responsibility for repeatedly abusing his children, he has “repeatedly refuted medical findings suggesting that he placed the victim under hot water or suffocate[ed] her. His rendition of the life crime has been consistent over the years. While it is again noted that he refutes important aspects of the crime as outlined by the treating physician, Mr. Brown attributed his daughter’s serious injury to his negligence.” The Board was entitled to look beyond Brown’s expressions of remorse and his stated willingness to be accountable and examine his present mental state and attitude about the commitment offense in order to determine that his claim of negligence demonstrates that there is not a truthful appreciation for the wrongfulness of his acts. (*Shaputis II, supra*, 53 Cal.4th at pp. 218-219.) That Brown stated to the Board that he is accepting responsibility for the commitment offense does not lessen the fact that he maintained to Dr. Reynoso that the offense was the result of his negligence. Brown’s statements to Dr. Reynoso, considered together with evidence of his history of violence against three of his children, and his statement that he now understands that *all* of this conduct constitutes torture, provide some evidence in support of the Board’s conclusion that Brown does not have a truthful appreciation for the *specific* wrongs he committed against D. and therefore remains dangerous and unsuitable for parole. (*Shaputis I, supra*, 44 Cal.4th at p. 1260.)

The Board stated that it gave “greater weight to the misconduct while incarcerated” than it did to Brown’s commitment offenses, and that this misconduct provided a “nexus” between the past offense and Brown’s “current dangerousness.” The Board specifically found that the conduct underlying Brown’s two most recent 115s showed Brown’s “inability to abide by the rules of the institution, as an indicator and predictor as to [his] ability to follow the laws of society.” Some evidence in the record supports this finding. Brown received both most recent 115s because he was found to be in unauthorized possession of a cell phone. While the unauthorized possession of a cell

phone by a state prison inmate does not at this time constitute criminal conduct, it is a serious rule violation because it constitutes a “breach of or hazard to facility security.” (Regs., § 3315, subd. (a)(2)(B).) The first cell phone was found in Brown’s bunk, but he claimed that it belonged to his cell mate. Nevertheless, after Brown was disciplined for possessing that cell phone, six months later he admittedly possessed another cell phone. Dr. Reynoso found that this “displayed an attitude condoning rule defiance.” The Board found that it showed that “there certainly wasn’t a lesson learned.” The Board was entitled to rely on this evidence “to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.” (*Rosenkrantz, supra*, 29 Cal.4th at p. 655.) “Does [Brown’s] inability to follow an express direction to comply with the rules of the institution provide *some* current evidence that, when released, [he] will be unable to follow society’s laws? It does.” (*In re Reed* (2009) 171 Cal.App.4th 1071, 1085, fn. omitted.) And, we must uphold the Board’s interpretation of the evidence as reasonable, “in the sense that it is not arbitrary, and reflects due consideration of the relevant factors.” (*Shaputis II, supra*, 53 Cal.4th at p. 212.) Accordingly, there is “some evidence” in the record to support the Board’s finding that Brown’s recent serious misconduct while incarcerated demonstrated, in conjunction with the other factors the Board outlined, that Brown still posed an unreasonable risk of danger if released. (*In re Reed, supra*, 171 Cal.App.4th at p. 1085.)

Lastly, we note that fact that the 2010 Board gave Brown a three-year denial, whereas the 2008 Board gave him a two-year denial, does not support a finding that the 2010 Board abused its discretion. In 2008, section 3041.5 provided for a *maximum* of two-year denials for non-murderer life prisoners. (Former § 3041.5, subd. (b)(2)(A); Stats. 1994, ch. 560.) Currently, section 3041.5 provides for a *minimum* of three-year denials. (§ 3041.5, subd. (b)(3)(C).) The 2008 Board did not tell Brown that he would be found suitable for parole absent further misconduct; it merely stated, as did the 2010 Board, that Brown needed to put some distance between him and the incidents of

misconduct. Accordingly, Brown has not shown that the 2010 Board abused its discretion in giving him a three-year denial.⁴

DISPOSITION

The order of July 25, 2011, granting the petition for writ of habeas corpus is reversed, and the matter is remanded to the superior court with directions to deny the petition.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

⁴ As the superior court's order to show cause did not address Brown's claim in his petition for writ of habeas corpus filed there that the amendments to section 3041.5 violate the ex post facto clauses of the federal and California Constitutions, Brown's claim, which he renews here, is not properly before us in this appeal. (See *People v. Duvall* (1995) 9 Cal.4th 464, 475 [limiting the issues of the OSC is an implicit determination that the petition failed to state a prima facie case with respect to other claims].)

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.