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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

ROBERT DE LA BARCENA

on Habeas Corpus.

B202315 c/w B203772

(Los Angeles County
Super. Ct. Nos. A780648,
BH004439, BH004847)

PETITIONS for a writ of habeas corpus following orders of the Superior Court of Los Angeles County, Peter Espinoza and Steven R. Van Sicklen, Judges. Petitions granted.

Robert De La Barcena, in pro. per., Michael Satris and Marilee Marshall, under appointments by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Heather Bushman, Jennifer A. Neill and Lora Fox Martin, Deputy Attorneys General, for Respondent.

In 1988, Robert De La Barcena was sentenced to an indeterminate prison term of 15 years to life for second degree murder, plus two years for using a firearm.¹ In separate proceedings in 2006 and 2007, the Board of Parole Hearings (Board) found De La Barcena unsuitable for parole. De La Barcena has filed petitions for writs of habeas corpus regarding each decision, and because, for purposes of this court's review, nothing changed in the interim, we hereby consolidate the cases for decision. As neither decision is supported by "some evidence," we grant the petitions as prayed.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. Commitment Offense

On November 29, 1985, De La Barcena and three other members of the El Sureño gang were driving around in an area frequented by the Highland Boys gang. De La Barcena's group approached a group of five men. De La Barcena, then age 16, jumped out of the vehicle and shot into the group. Manuel Delrio was struck twice by gunfire and died. De La Barcena continued shooting at the other four men. A bullet grazed one of the men. De La Barcena's fellow gang members were heard yelling to him from the van to get back in the vehicle. Witnesses at the scene identified De La Barcena as a classmate and subsequently identified him from a school yearbook photo. De La Barcena was arrested the next day and charged with murder.

B. Social History

De La Barcena was born in Los Angeles in 1969, the third of four children (he has four older half-siblings from his mother's prior marriage). He maintained a close relationship with his father until his father died several years ago and remains close to his

¹ The two-year sentence was stayed "pending completion of the sentence on Count 1 at which time the stay is to become permanent."

mother. At the time of his arrest, De La Barcena was in 10th grade at Wilson High School. He has no employment history.

De La Barcena married his longtime girlfriend, Sherry, after he was incarcerated, in 1993. He regards his wife's son as his stepson and states he gets along well with him.

Prior to the commitment offense, De La Barcena's contacts with law enforcement consisted of an arrest for possession of a dangerous weapon (Pen. Code, § 12020, subd. (a)), namely, a dagger. He also was arrested and placed on juvenile home probation for possession of cocaine. (Health & Saf. Code, § 11350.) He has no adult record.

At the time of the commitment offense, De La Barcena was a gang member. He occasionally experimented with cocaine and PCP and reports that he used marijuana and alcohol.

C. Prison Record

De La Barcena was received at the Department of Corrections in April 1988. He has the very low classification score of 19 and a Medium A custody rating.

As for his disciplinary record in prison, De La Barcena has had three nonviolent "CDC 115"² rule violations. One disciplinary was for excessive contact with a visitor (his wife); the other was for obtaining an angel tattoo (not gang-related). The most recent was in 2000 for contraband, which he explained was for taking some wires to hook up a speaker in his cell. He has had four "CDC 128-A"³ citations, the most recent in 2000. Three of the four 128's were for excessive contact with a visitor; the fourth was for failure to report to work.

² A "CDC 115" documents misconduct believed to be a violation of law or is otherwise not minor in nature. (See Cal. Code Regs., tit. 15, § 3312, subd. (a)(3); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

³ A "CDC 128-A" documents incidents of minor misconduct. (See Cal. Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray, supra*, 151 Cal.App.4th at p. 389.)

De La Barcena has upgraded vocationally while incarcerated. At the Herman G. Stark Youth Training Center,⁴ De La Barcena received his certification in automotive body repair and painting. He worked for a year and a half in Vocational Welding, two years in the Engineering Shop, five years at the Prison Industries Wood Furniture Factory, has experience in "all aspects of the automobile," basic knowledge of welding tools and procedures, basic knowledge of upkeep of buildings and structures, and knowledge and ability in handling hand-powered tools. He has also served as a bilingual interpreter for staff and inmates.

De La Barcena has maintained a full time work assignment while assigned to the PIA Wood Furniture Factory. His work reports show average to exceptional grades for 2005 through 2007. He has also worked as a porter in Textiles and as a maintenance mechanic. His 2007 Life Prisoner Evaluation Report (LPER) states that he earned satisfactory to above average work grades per his supervisor's report dated March 1, 2002. "During the quarter period, 3/1/06 to [sic] the prisoner earned above average to exceptional grades" on supervisors' reports dated August 1, 2006, November 1, 2006, and February 2007. The supervisor commented: "De La Barcena continues to work in the drawer production area of Shop II, with little supervision. He is at the top of his pay number and continues his good work habits. He received an additional 7 prior CDC 128B training certificates dated January 9, 2002 [not documented in his last 2002 Board report] on the proper operation and safety procedures of the abrasive edge sander, clamp carrier/glue equipment, ladders, portable power tool equipment, hand tools, fire safety and portable hand router. The prisoner has learned all areas of the drawer department and is an above average worker. An "A" number is justified at this time."

De La Barcena has upgraded educationally as well. While at the Youth Training Center, De La Barcena completed the GED requirements in 1989 and the required credits for his high school diploma in 1990. De La Barcena received a certificate in November

⁴ De La Barcena was confined at the Youth Training Center for four years before he was transferred to an adult facility.

2003 for a correspondence Bible course in which he earned a grade of 98 percent. He also received six certificates of achievement from the Emergency Management Institute (EMI) — Independent Study Correspondence Program in emergency preparation; radiological emergency management; animals in disaster, community planning; animals in disaster, awareness and preparedness; mitigation for homeowners; and livestock in disaster, earning six academic credits.

De La Barcena has participated in numerous therapy and self-help activities. In addition to participating in Alcoholic Anonymous from the beginning of his incarceration, De La Barcena successfully completed a 13-week Impact workshop, and successfully completed a lecture series in anger management. He received certificates of appreciation for his participation in the prison's 2003 and 2004 Teddy Bear Drives.

De La Barcena has fully paid his restitution fine.

D. Psychological Evaluation and Insight Into Offense⁵

De La Barcena has submitted several psychological evaluations. In 1998, the psychologist diagnosed De La Barcena on AXIS I as having “Adult antisocial behavior, improved” and “Cocaine abuse, in institutional remission.” De La Barcena had no contributory personality or physical disorder on AXIS II or III, respectively. At that point, De La Barcena had no CDC-115's. The psychologist estimated that his violence potential was below average relative to the inmate population. The psychologist did not address De La Barcena's potential for violence as compared to the general population.

By the time of the 2000 psychological evaluation, De La Barcena was 31 years old and had been married seven years. At that point, his parole plans included living with his wife and working with a family friend who had offered him a job fixing cars. The psychologist stated his prognosis for community living appeared to be good. The

⁵ As the Supreme Court recently stated, “Petitioner's psychological reports map the path of . . . rehabilitation.” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1194.)

psychologist's diagnostic impressions were the same as the 1998 evaluation except on AXIS I; the psychologist found De La Barcena had no contributory clinical disorder.

The psychologist reviewed the commitment offense with De La Barcena, who "insightfully described how he was unduly influenced by his community surroundings and was trying to impress fellow gang members, noting: 'They were my role models.' This inmate showed good insight as to the undue influence of the former gang members upon him and appears to have gained independence. He also showed good empathy towards the victim and seemed genuinely penitent for his crime."

Assessing De La Barcena's dangerousness, the psychologist considered, on the one hand, that De La Barcena had been gang-affiliated as a juvenile and was arrested at age 15 for possessing cocaine and a concealed weapon. Within prison, he had received two CDC-115's, one for fighting (1991) and one for receiving a tattoo (1999). He had also received three CDC-128's, the last in 1999. The psychologist weighed these factors against the fact that De La Barcena did not currently appear to be involved in gangs and had not had a disciplinary for violence in eight years. "Also, he was very young at the time of the instant offense, i.e., 16 years of age, and he seems to have matured greatly during his 14 years of incarceration within [the California Department of Corrections], to have profited from the structured environment. He has also gained valuable work skills in repairing cars." The psychologist assessed De La Barcena's dangerousness relative to the Level II inmate population to be below average, and if released to the community, "to be no more than the average citizen in the community." Additionally, "[t]here are no significant risk factors which may be precursors to violence for this individual." The psychologist found De La Barcena to be competent and responsible for his behavior and to have the capacity to abide by institutional standards. He had no mental disorder that required treatment, and he did not appear to have a drug or alcohol problem.

In the 2006 mental health evaluation, the diagnostic impression on AXES I through III remained unchanged. De La Barcena's "Global Assessment of Functioning" or "GAF" score was 90 (out of 100). The psychologist noted that De La Barcena "has been making good use of his institutional time. He has accomplished three trades while

in custody. He has obtained certificates in vocational welding, vocational auto body paint and vocational auto body repair. He has also worked in the Soledad Structural Engineer's Shop, which he stated was a very good learning experience. He now is employed by PIA Wood Furniture Factory at Soledad."

Reviewing the life crime with the psychologist, De La Barcena "accept[ed] total responsibility for the commitment offense." When he was first arrested, he blamed a crime partner for the shooting, "[h]e stated that he was young and frightened at that time[,] . . . [h]e now states that he was the shooter[,] . . . that he is very sorry for this offense." De La Barcena told the psychologist he wished he could change things and noted that the commitment offense "was a very dumb and stupid thing to do." He stated that, "[a]t that time, he was influenced by his negative community values and the older fellow gang members that he wanted to impress." The psychologist observed that De La Barcena had "normal feelings of concern and empathy for others, and he does have a feeling of sorrow and remorse at the victim's death[, which] appear[s] to be sincere and genuine." De La Barcena also stated that he planned to become involved with high risk youth through his wife's church in Los Angeles, to "talk[] to them, and explain[] to them the consequences that will occur in their lives if they become involved in peer pressure, look up to delinquents as a role model, or engage in any antisocial or criminal activities."

The psychologist assessed De La Barcena's dangerousness in the institution and in the community. With respect to the former, the psychologist remarked that De La Barcena had remained free from any (violent) disciplinaries for 16 years.

Acknowledging that De La Barcena was a gang member at age 16, "he has disassociated himself from any gang involvement while in prison[,] . . . has never been involved in any riots, possession of weapons, assaults on others or other disciplinaries that indicate gang involvement." The psychologist found De La Barcena's potential for dangerous behavior in comparison to other inmates was below average.

As for De La Barcena's potential for dangerous behavior in the community, the psychologist reported that De La Barcena had "grown and matured over his 20 years of incarceration. He has spent more time in prison than he has spent in the community. He

has strong Christian values at this point in his life. He is very aware of right and wrong, and he strives to behave in a way that will please God and man.”

The psychologist administered the “Level of Service Inventory-Revised” assessment instrument⁶ to De La Barcena, who obtained a score of 2.7 “cumulative frequency” for prison inmates: “This means that if 100 men were released on parole, he would do better than 97 of them.” The psychologist explained that De La Barcena’s score indicated “a very low risk level” and that, “[a]s a result, he poses no more of a danger to society than the average citizen in the community.” The psychologist further stated there were “no significant risk factors in this case.”

Finally, in the observations/comments/recommendations section of the report, the psychologist stated the following: “There are no mental or emotional problems in this case that would interfere with parole planning. This inmate has a very supportive wife. Also, his [wife] has faithfully visited him and supported him during his 20 years in prison. He also has a large, supportive family in the community. He has residence available with his wife as well as with his other family members. He has job offers in the community. He has excellent vocational skills. Maintaining employment in this case will not be a problem. *The prognosis for successful adjustment in the community in this case is excellent.*”

De La Barcena expressed his feelings in a letter he wrote to the victim’s wife, which was read into the record at De La Barcena’s 2006 parole board hearing:⁷ “I’m writing first to say how sorry I am for the pain and suffering that I’ve caused you and

⁶ “Built upon a social learning theory of criminal conduct, the LSI-R comprises 54 risk/need items that sample common domains relevant to correctional clients[,] . . . includ[ing]: criminal history, education/employment, finances, family/marital, accommodations, leisure/recreation, companions, alcohol/drug, emotional/personal and attitude/orientation In terms of application, the LSI-R is one of the most widely used correctional assessment instruments in North America.” (Simourd et al., *Changing Criminogenic Risk/Need Factors: A Prelude to Recidivism Reduction* (2006) vol. 31, No. 3, Corrections Compendium 6, 8.)

⁷ It is unclear whether he sent the letter.

your children. I know that nothing I say or do could make up for what I took away, but I want you to know that I think of you and wish that I could take back what I did. I realize my actions affected many people's lives: you, your family, and my own as well. I see the hurt in my mother's eyes when she visits me, and I can only imagine what you must feel. At the time this happened, I was a boy of 16 who was lost and without direction. I allowed myself to be influenced by a gang I was sorry I was involved with. . . . [T]his, by no means — excuses what I did. I am just sorry that I was not strong enough to resist the peer pressure. During these 20 years, I've gained insight into what led me to the life of gangs and influence that they had on my young mind. [I]t is . . . my hope one day to be able to become a mentor and [be] a positive role model to at-risk youth. I will do everything in my power to discourage them from making the same mistakes I did. If I can keep them from destroying their lives or that of others, I might in some ways make amends for the life I once lived. Once again I'm truly sorry."

E. Parole Plans

De La Barcena plans to reside with his wife, Sherry De La Barcena, in the El Sereno area of Los Angeles. He has an offer from Eddie's Body Shop in El Sereno to be a painting assistant, with starting pay of \$18.50 per hour. His secondary plan is to work for the Resource Center of El Sereno. He will have full access to his wife's 2003 Toyota Camry. He hopes to have his own paint and body business one day.

De La Barcena's brother-in-law wrote that he would be willing to be a mentor and to give De La Barcena support and financial stability and to help him reenter society, including giving him full time work in his daycare business.

De La Barcena provided letters of support from two correctional officers in support of his parole. According to the parole hearing transcript, Officer Sterling wrote: "It's my belief that he would be a good candidate [for parole] mainly for two reasons. First, he has expressed to me on numerous occasions his remorse for the crime, realizes his actions affected so many people, [I] truly believe that he is sincere in his remorse. Second, just as important in my opinion, [he] has a strong desire to help the youth today

stay away from gang involvement and [from] using drugs. He shared with me how both these factors played a role in his life, causing so much sorrow. His want to help our youth should be seriously considered in your deliberations, and I believe that he can help children from making the same serious mistakes he did as a child, and he was a child. Today, after 20 years of incarceration, he's turned his life around. [K]eeping him in prison would be a waste."

Correctional Officer Vucina wrote: "I've learned about his past; how he grew up; his crime, which he has remorse for; plans for the future, plans on living with his wife, Sherr[y], who, by the way, has stood by this inmate since the beginning of his 20 years in prison; as well as having plans to work in the auto body field, which the inmate is certified for; wants to join his wife at the local church. Through my observations and conversations, the inmate [indiscernible] opinion that he would be a good candidate for parole. I have witnessed [] this inmate changed for the better, emotionally, physically, and socially. I believe his feelings of remorse are sincere."

De La Barcena stated that he planned to participate in the church his wife attended and in 12-step programs through the Resource Center to keep himself from reverting to alcohol or drugs.

F. District Attorney's Position on Parole

The District Attorney opposed parole.

G. The Board's Decisions

1. 2006

On April 28, 2006, the Board found De La Barcena unsuitable for parole and would "pose an unreasonable risk of danger to society or a threat to public safety if released from prison." The presiding commissioner explained: "We're going to base this based primarily on the fact of the crime." He added: "The crime was — is — *the only thing you have to worry about at this point in time*, because I'm going to say a lot of good things about you here." He stated the crime was cold and callous and that De La Barcena, "a 16-year-old kid" was "just out of control." De La Barcena's offense

“demonstrates an exceptionally callous disregard for human suffering, and the crime itself was unexplainable, inexplicable.” He cited De La Barcena’s gang activity “and some narcotics and some drinking and that sort of thing that led up to this.” The commissioner further noted that De La Barcena was on probation when he committed the offense.

At the same time, the commissioner said, “We see a different guy today, don’t we?” He stated that De La Barcena’s “bumps in the road” (his 115’s) were nonviolent. De La Barcena received above average and exceptional work reports. “Everywhere I went through here, your behavior in the workplace has been good, at least good, and higher than that in most cases. So you’re doing really well there.” The commissioner continued: “We’re particularly impressed with AA and your knowledge of AA. It’s not just going, but you sound like you participate and you’re working the steps. The letter that you wrote to the victim’s wife, we’re particularly impressed with that as well. That was good.”

The presiding commissioner asked De La Barcena more about the letter to the victim’s wife, why it had been hard for him to write. De La Barcena responded: “Because . . . I was trying to figure out a way to write it and not open up them old wounds or — because I know that if she ever did read it, that’s what it would do; and I tried to make her see that I really am sorry for what I did.” He added that writing the letter “really put [him] in touch with what she must be feeling.”

The commissioner listed De La Barcena’s efforts while in prison: “In your institutional behavior you’ve had Anger Management; Worksite Safety; Impact; you’ve been involved with the Set Free course from the Prison Ministries; Gang Awareness in CYA; Epsilon Substance Abuse Program in CYA; you got your GED; your high school diploma; you got a certificate (indiscernible) taking class for MADD; you’re active — active as you can be — your wife is particularly active, which makes you active, in Victory Outreach; and FEMA program. You’ve done a lot of things. We were also particularly impressed with your resume. . . .” He cited the positive assessment in the most recent psychological report. He complimented De La Barcena’s parole plans:

“[a]bsolutely outstanding.” The commissioner added that having the Resource Center in the neighborhood should also help De La Barcena. He concluded by telling De La Barcena to continue doing what he was doing: “stay discipline free, continue your programming, and continue your AA, continue working your 12-Steps, continue to pray, earn positive chronos. . . .” “You did a great job.”

2. 2007

On March 7, 2007, the Board of Parole Hearings again found De La Barcena unsuitable for parole. The presiding commissioner cited the fact there were multiple victims, a trivial motivation, and innocent victims. In addition, De La Barcena committed the crime while he was on probation. The Board appreciated all of De La Barcena’s efforts, but “by life’s value system, what we call a moral compass, you had none when you committed this crime. You’re building one now that’s going to be the foundation for the rest of your life. And we’d like some more time for you to complete that moral compass before you’re put back out on the streets with nobody else watching you. . . . [¶] . . . We like to see that gains that you’ve made and the insights and the maturity that you’ve made sustained for a longer period of time before we’re satisfied that your moral compass that you’re building is set to guide you in the right way.” The presiding commissioner urged De La Barcena to “[r]ead books on relationships[,] . . . [r]ead more about Anger Management and violence. . . .” The Board also ordered a new psychological evaluation “because we like the psychologist to tell us more about you in regard to your violence potential in the free community” In addition, “we also want to see the full extent that you’ve explored the commitment offense and . . . come to terms with the underlying causes.”

H. The Habeas Corpus Proceedings

1. 2006 Board Denial

De La Barcena challenged the 2006 parole denial in the Los Angeles Superior Court by petition for a writ of habeas corpus, which that court denied on August 20, 2007. His petition for a writ of habeas corpus was filed in this court on September 24,

2007. We issued an order to show cause, appointed counsel, and set a briefing schedule, which we then stayed pending the California Supreme Court's decisions in *In re Lawrence, supra*, 44 Cal.4th 1181, and *In re Shaputis* (2008) 44 Cal.4th 1241. We vacated the stay on September 25, 2008.

2. 2007 Board Denial

De La Barcena challenged the 2007 parole denial in the Los Angeles Superior Court by petition for a writ of habeas corpus, which that court denied on September 18, 2007. His petition for a writ of habeas corpus was filed in this court on November 28, 2007. We issued an order to show cause, appointed counsel, and set a briefing schedule, which we then stayed pending the California Supreme Court's decisions in *In re Lawrence, supra*, 44 Cal.4th 1181, and *In re Shaputis, supra*, 44 Cal.4th 1241. We vacated the stay on October 28, 2008.

DISCUSSION

De La Barcena contends there was no evidence at either hearing that he poses a current threat to public safety. We agree.

A. Governing Law

The purpose of parole is to help prisoners “reintegrate into society as constructive individuals as soon as they are able,” without being confined for the full term of their sentence. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477 [92 S.Ct. 2593].) Although a prisoner has no constitutional or inherent right to be conditionally released before the expiration of his sentence (*Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, 7 [99 S.Ct. 2100]), in this state, Penal Code section 3041 creates in every inmate a cognizable liberty interest in parole, and that interest is protected by the procedural safeguards of the due process clause. (*In re Lawrence, supra*, 44 Cal.4th at p. 1205 [“petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate’s due process right ‘cannot exist in any practical sense

without a remedy against its abrogation],” quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664; *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 914-915.)⁸

Section 3041, subdivision (b), establishes a presumption that parole will be the rule, rather than the exception, providing that the Board “shall 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 for this individual, and that a parole date, therefore, cannot be fixed.” (See *Board of Pardons v. Allen* (1987) 482 U.S. 369, 377-378 [107 S.Ct. 2415] [unless designated findings made, parole generally presumed to be available].) “[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1211; *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846, 850 [section 3041 vests “California prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause”].)

When assessing whether a life prisoner will pose an unreasonable risk of danger to society if released from prison, the panel considers all relevant, reliable information available on a case-by-case basis. The regulations provide a nonexclusive list of circumstances tending to show suitability or unsuitability for release. (Cal. Code Regs.,

⁸ All references to section 3041 are to that section of the Penal Code. Section 3041, subdivision (a), provides as relevant: “One year prior to the inmate’s minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. 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.”

tit. 15, § 2402, subds. (c) and (d).⁹ Factors tending to indicate suitability include (1) the absence of a juvenile record, (2) a stable social history, (3) signs of remorse, (4) the motivation for the crime was significant life stress, (5) battered woman syndrome, (6) no significant history of violent crime, (7) the inmate's age, (8) realistic plans for the future, and (9) institutional behavior. (§ 2402, subd. (d).) Circumstances tending to show unsuitability include (1) the commitment offense was committed "in an especially heinous, atrocious or cruel manner,"¹⁰ (2) a previous record of violence, (3) an unstable social history, (4) sadistic sexual offenses, (5) psychological factors, and (6) serious misconduct while incarcerated. (§ 2402, subd. (c).) "In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety." (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.)

The "core determination" thus "involves an assessment of an inmate's *current* dangerousness." (*In re Lawrence, supra*, 44 Cal.4th at p. 1205, emphasis in original.) The Board is authorized "to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.'" (*In re Lawrence, supra*, 44 Cal.4th at pp. 1205-1206, quoting *In re Rosenkrantz, supra*, 29 Cal.4th at p. 655.) "[I]n directing the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate's threat to public

⁹ Regulation references are to Title 15 of the California Code of Regulations unless otherwise indicated.

¹⁰ The regulation specifies the factors to be considered in determining whether the offense was committed in an especially heinous, atrocious or cruel manner as: "[¶] (A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense." (§ 2402, subd. (c)(1).)

safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1219.) As a result, the “statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1211.) The Board can, of course, rely on the aggravated circumstances of the commitment offense as a reason for finding an inmate unsuitable for parole; however, “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 post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his . . . commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1214, emphasis in original.)

In *Lawrence*, 44 Cal.4th at page 1212, our Supreme Court clarified the applicable standard of review: “[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.” (Emphasis in original.) The standard is “unquestionably deferential,” and “limited to ascertaining whether there is some evidence in the record that supports the [Board’s] decision.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1210.) Nonetheless, the standard “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.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1210.) Our inquiry thus 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.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1221, emphasis in original.) The Board must articulate a “rational nexus” between the facts of the commitment offense and the inmate’s current threat to public safety. (*In re Lawrence, supra*, 44 Cal.4th at pp. 1226-1227.)

In *Lawrence*, the petitioner murdered her lover’s wife in 1971 and remained a fugitive until 1982, when she voluntarily surrendered to the police. (*In re Lawrence, supra*, 44 Cal.4th at pp. 1192-1193.) A jury found her guilty of first degree murder, and she was sentenced to life imprisonment with the possibility of parole. (*Id.* at pp. 1193-1194.) Although her early psychological evaluations diagnosed Lawrence as narcissistic and stated she displayed signs of various personality disorders, after 1993, the evaluations uniformly concluded that she no longer represented a significant danger to society. (*Id.* at pp. 1194-1195.) While in prison, she was occasionally late to appointments or job assignments, but was otherwise discipline-free. She participated in many volunteer and charitable programs, and earned her bachelor’s degree. (*Ibid.*)

Beginning in 1994, the Board found Lawrence suitable for parole four times, and on each occasion, the then-current Governor rejected the Board’s decision. (*In re Lawrence, supra*, 44 Cal.4th at pp. 1196-1197.) The fourth rejection occurred in 2006, when the Governor determined that the petitioner was unsuitable for parole due to the circumstances of her crime and the early psychological evaluations. (*Id.* at pp. 1199-1200.) Applying the applicable standard of review to the Governor’s decision, our Supreme Court concluded that there was no evidence to support a determination that Lawrence remained a threat to public safety, in view of her “extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole, as well as the favorable discretionary decisions of the Board.” (*Id.* at p. 1226.)

B. Analysis

As in *Lawrence*, the unsuitability decision here was based solely on the commitment offense. In 2006, the Board determined the commitment offense had been committed with exceptionally callous disregard for human life for an inexplicable or trivial reason, and De La Barcena was on probation at the time. Reliance on the aggravated circumstances of the commitment offense as a factor in finding an inmate unsuitable for parole is proper, but there must also be “something in the prisoner’s pre- or post-incarceration history or his or her current demeanor and mental state, indicat[ing] that the implications regarding the prisoner’s dangerousness that derive from his . . . commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1214.) Not only is that “something” missing from the Board’s 2006 decision, but the record establishes the contrary, that is, that *nothing* in De La Barcena’s pre- or post-incarceration history or his current demeanor and mental state support a prediction of *current* dangerousness. The Board failed to offer a single reason why De La Barcena remained a public safety risk, 21 years after the commitment offense, let alone “establish[ed] a rational nexus between those factors and the necessary basis for the ultimate decision — the determination of current dangerousness.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1210.) In a case such as this, “in which the record is replete with evidence establishing petitioner’s rehabilitation, insight, remorse, and psychological health, and devoid of any evidence supporting a finding that [he] continues to pose a threat to public safety — petitioner’s due process and statutory rights were violated by the [Board’s] reliance upon the immutable and unchangeable circumstances of [his] commitment offense” in denying him parole. (*In re Lawrence, supra*, 44 Cal.4th at p. 1227.) We conclude that, just as in *Lawrence*, there was no evidence in the record to establish that De La Barcena’s parole currently poses a threat to public safety, and his rights were violated by the Board’s reliance solely upon the circumstances of his commitment offense.

The Board's denial of parole in 2007 is similarly defective. There, the Board cited the aspects of the commitment offense that made it especially heinous, atrocious and cruel. It did not, however, explain how the immutable and unchanging factors of a 22-year-old offense made De La Barcena a threat to public safety today. If anything, the Board added a novel consideration to justify finding him unsuitable for parole: an incomplete "moral compass." Giving mere lip service to the mental health evaluation, the Board ignored perhaps the single piece of evidence most relevant to its consideration — the expert's assessment of De La Barcena's current threat to public safety. In any event, this Board, like the one convened in 2006, failed to conduct the assessment our Supreme Court has held is required. Even if it had, there was no evidence in the record to establish that De La Barcena's parole currently poses a threat to public safety. The Board plainly violated De La Barcena's rights.

DISPOSITION

The petitions for writs of habeas corpus are granted. The Board is directed to find De La Barcena suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new evidence of De La Barcena's conduct in prison subsequent to his 2007 parole hearing supports a determination that he currently poses an unreasonable risk of danger to society if released on parole. In the interests of justice and to prevent frustration of the relief granted, this decision shall be final as to this court five days after it is filed. (Cal. Rules of Court, rule 8.387(b)(3)(A); *In re Gaul* (2009) 170 Cal.App.4th 20, 41.)

NOT TO BE PUBLISHED

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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