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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MICHAEL ADAMAR on Habeas Corpus.	B223279 (Los Angeles County Super. Ct. No. BH006554)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Peter P. Espinoza, Judge. Petition granted.

Richard Darington Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Phillip Lindsay, Supervising Deputy Attorney General, Amy M. Roebuck and Jennifer Cano, Deputy Attorneys General, for Respondent.

On June 6, 1996, a jury convicted petitioner Michael Adamar of second degree murder and assault by means of force likely to produce great bodily injury. The jury also found that Adamar personally used a knife in the commission of the murder. The trial court sentenced him to an indeterminate term of 18 years to life. At Adamar's initial parole hearing, conducted on January 16, 2009, the Board of Parole Hearings (Board) denied parole. Adamar filed a petition for a writ of habeas corpus contending that the Board's decision violated due process because it was not supported by evidence demonstrating that he would currently be a danger to the public if released on parole. We agree with Adamar and grant the petition.

BACKGROUND

A. Commitment Offense

The trial record, viewed in the light most favorable to the judgment, reveals the following: Adamar was a member of a tagging crew called DYP. On the night of October 22, 1994, Adamar, then 18 years old, attended a flyer party with other DYP members. Fourteen-year-old Jose Chavez and other members of a dancing or party crew known as the Layzees also attended the party, as did other party crews and a group of Cal State Northridge students calling themselves PGA. Juan Salvador was a member of the latter group. At some point during the party, members of the various "crews" present, including the DYP and the Layzees, shouted out the names of their groups. Chavez yelled, "Fuck DYP." This apparently elicited no retaliation.

Later, Chavez approached Ovando Ramos and another person outside the party and stated, "Fuck DYP." Ramos replied that he was not from DYP, and Chavez retorted, "Fuck where you are from." Ramos struck Chavez, who fell to the ground just as a group of DYP members who had left the party returned in cars and on foot. They had been alerted by DYP member Eric Hornquist, who approached them as they stood near their cars and told them that one of the Layzees was saying "fuck DYP" and "fucking" with Hornquist's brother. Several members of the DYP group, including Adamar and his codefendant Brian James, said, "Let's go fuck 'em up," meaning they should go back and

fight the culprits. Adamar, James, and the rest of the DYP group returned to the party's location by car. They arrived just as Ramos struck Chavez.

Adamar, James, Michael Sperling, and Tremaine Bargeman got out of their cars and joined in, punching and kicking Chavez. Chavez lost consciousness. Salvador intervened by jumping on Sperling, and the DYP group, including Adamar and James, began punching and kicking Salvador. James stabbed Salvador on the left side of the ribcage while several other people, including Adamar, continued to punch and kick Salvador. A couple of people shouted out "DYP" during the assault. A crowd including members of the Layzees and the PGA began to approach. Bargeman pointed a gun at the crowd and told them to stay back. Adamar was behind Salvador and stabbed him in the shoulder area of his back. Salvador died of multiple stab wounds. The medical examiner classified two of the three stab wounds to Salvador's back and the stab wound to his left ribcage as potentially fatal. Adamar got into a car with other members of DYP. Someone asked him, "Did you shank him?" Adamar replied, "Yeah," or "Yeah. I shanked him." Adamar was sentenced to an indeterminate term of 18 years to life with credit for 730 days.

As stated, our summary of the commitment offense is based upon the trial record in Adamar's appeal, B104284. It must be noted that the appellate opinion included factually unsupported descriptions of the circumstances attending the offenses. For example, the opinion stated that Adamar boasted that he "shanked" the victim. Our examination of the reporter's transcript of Adamar's trial reveals no testimony that Adamar's tone of voice or any other circumstance suggested that his response when asked if he shanked Salvador was a boast. Another factually unsupported statement is the following: "While the group chanted 'DYP,' Adamar and James stabbed Salvador with their knives, killing him." In actuality, three witnesses heard one person or "a couple" of people shout "DYP" at some point during the assault on Salvador. It is inaccurate to characterize an isolated shout or two at some point during an assault as "chanting" during the stabbing. With the filing of this opinion, the Board, Governor, Attorney General, and

any psychologist or psychiatrist evaluating Adamar for parole suitability are on notice that they cannot rely upon the appellate opinion filed October 17, 1997, in case number B104284 as an accurate portrayal of the commitment offense. They should instead rely upon the description of the offense set forth in this opinion.

At his parole hearing, Adamar explained that he "was in a street fight" and "was fighting Jose Chavez and heard my friend, Mike Sperling, former friend, Mike Sperling . . . being beat up by Juan Salvador, I ran over there, and I looked at the house, and there [were] more Layzees coming out of the house, so my rational thought was hey, I need to get Mike up out of here because we're outnumbered, and the fastest way I thought I could do it was maybe stabbing him in the shoulder, where I did, in the right shoulder to get some reaction to move him. Instead of pushing him." Adamar continued, "[M]y mind wasn't there. My rational thoughts weren't there at the time. I felt that, you know, if you don't get out of here, man, we're probably — we're obviously going to be victims, going to be beat up." Adamar stated, "I just wanted to get him off my friend," "but what I should have done was pushed him or even tackled him or something in that nature . . . ."

The Board grilled Adamar over differences between his account of the crimes and that set forth in the appellate opinion, including whether he boasted about stabbing Salvador. It also challenged him about a contention raised by appellate counsel on appeal (challenging the trial court's refusal to include among the heat of passion instructions it gave an additional instruction defining the types of emotions that could constitute heat of passion), asking why "[i]n the appellate decision you [*sic*] indicated that you felt this crime was done in the heat of passion." Adamar responded that although he did not know much about law, he thought a street fight qualified as heat of passion.

Adamar told the Board he always had difficulty expressing himself, and was having problems explaining his feelings about his crimes. But he reiterated that he took full responsibility for his actions.

B. Social History

Adamar was born on November 22, 1975, in Southern California. He told Donna Robinson, Ph.D., who prepared the September 24, 2008 psychological evaluation for Adamar's 2009 parole hearing, that his parents were "upper-middle-class" and were always employed and remained "happily married" at the time of the Adamar-Robinson interview. His mother has a college degree and his father is a carpenter. Adamar has a younger sister. He told Robinson he had always had, and still maintained, loving, caring and supportive relationships with both parents, his sister, and "other relatives." Adamar reported no violence, child abuse, or alcohol abuse in his family.

Adamar was diagnosed with dyslexia at some point in his childhood. He required tutors and special education classes, and received "mostly Cs, sometimes, Bs, and once in a while a D." He told Robinson he was never suspended or expelled from school and did not have excessive absences. He was a high school senior at the time of the commitment offenses and "completed his high school diploma in 1995 while housed in the Los Angeles County Jail."

Adamar played numerous team sports from an early age. In high school, he played varsity football.

Adamar had no juvenile record. In June of 1994 he was convicted of vandalism and placed on summary probation on conditions that included serving 70 days in jail. Adamar told the probation officer this conviction related to his tagging activity. Adamar told Robinson he and 10 or 11 friends formed DYP when he was 16. He enjoyed driving past his artwork and seeing how long his tagging signature would remain before it was removed. Robinson further reported that Adamar "described feeling drawn to the 'rush' of painting 'billboards, freeways, and businesses.' He stated that he was trying to find 'fame' for himself and rather enjoyed having people question his signature (Who?) on his tagging projects. He described this activity as an escape from 'boredom.'" Robinson opined, "[I]t was apparent that Mr. Adamar was drawn to the thrill and excitement of going out at night to participate in tagging activities." She characterized Adamar's

explanation that they did not tag homes as "[n]otable" "minimization of this activity." Adamar told Robinson that he was no longer in contact with any of his former tagging crew friends or with James. Adamar's best friend at the time of the offense was not a member of DYP and is now a police officer. Robinson considered this "[n]otable." Adamar told the Board he got involved with tagging because "I was living that edge. I was—you know, I wanted to fit in with taggers, something that it—you know, I started getting involved with . . . ." Adamar acknowledged that taggers were "[t]he wrong choice of friends . . . ."

C. Prison Record

The California Department of Corrections and Rehabilitation (formerly the Department of Corrections) received Adamar on July 19, 1996, when he was 22. Prison authorities disciplined Adamar for misconduct on a total of three occasions: in March of 1997 for participating in a sit-down strike, in July of 1998 for willfully obstructing a peace officer, and in November of 2000 for manufacturing alcohol. Adamar told the Board that a fear of being attacked by "the whites" caused him to participate in the 1997 and 1998 incidents, which involved many inmates. His act of obstruction was to board up windows. The alcohol in the 2000 incident was made by and belonged to Adamar's cellmate. Adamar said, "I knew it was in there, so I take responsibility for, you know, but it wasn't mine." Adamar also received one "counseling chrono" (a file notation without disciplinary consequences) in February of 2008 for failing to report to work. This incident also stemmed from collective action by a number of inmates who were attempting to obtain a self-help or therapy program for lifers. After prison staff at various levels ignored their repeated requests for help, a group of inmates decided not to go to breakfast. A sergeant then locked them in the gym, which precluded them from going to their work assignments.

Adamar was working on an associate degree in business management and had completed approximately 31 units of college course work through distance learning courses provided by Coastline Community College and Palo Verde College.

Adamar completed vocational training in auto body repair and silk screening. He had also received training in building maintenance and forklift operation. At the time of the parole hearing, he was waiting to take a test to complete his forklift operation certificate. He received "laudatory chronos" from his auto body repair and silk screening instructors. The latter "commended [Adamar's] excellent conduct and hard work." According to Robinson's report, Adamar received above average performance ratings in these vocational programs. At the time of the parole hearing, Adamar had worked in the prison industries program making detergent and bar soap for about 18 months. His supervisors in that program wrote three letters in 2008 praising Adamar for hard work, exemplary performance, and professional conduct. One of the letters noted that he established an "inmate safety committee." In April of 2009, his supervisor in the prison industries program rated him "exceptional" in teamwork, participation, and learning ability and "above average" in all other categories. The supervisor noted he was "clearly an asset to PIA [prison industries authority]." Adamar had also worked in the prison dining room, as a porter, in building maintenance, and in yard cleanup. According to Robinson's report, Adamar "typically" received average performance ratings in these assignments.

Adamar had never been referred for or received any type of mental health services. He had undertaken and completed several self-help and therapeutic courses on topics, including anger management, conflict resolution, alternatives to violence, success strategies, and employment skills. He also completed the "Friends Outside Parenting Program" and participated in the "Happy Hats for Kids Project."

Adamar also received three "laudatory chronos" in April of 2007 "stating that he was respectful to staff and inmaates [*sic*] and that he demonstrated a positive attitude, as well as[] being a hard worker and showing a willingness to help others." In January of 2008 he received two more "laudatory chronos" "commenting on his positive attitude, his courtesy and respect towards staff and fellow inmates, and his willingness to work and help whenever needed."

Robinson's report noted that Adamar had never been involved in any conflict with other inmates or staff, had never initiated any aggressive behavior toward others while incarcerated, and had not affiliated with any "violent gangs" in or out of prison. She further reported that "records reflected no outbursts of uncontrolled anger or impulsivity at any time in 10 years, suggesting that Mr. Adamar has a fairly well mastered sense of self-control."

D. Parole Plans

Adamar planned to reside either with his parents in Granada Hills or with his grandmother in Riverside. The Board received letters from Adamar's parents and grandmother confirming that Adamar was welcome to live with these relatives. Adamar's sister also wrote to the Board offering to let him live with her in Virginia.

Adamar had no confirmed job offers, but he told both Robinson and the Board that he believed his father would be able to get him a job in construction. The Board received a letter from a senior human resources manager with the County of Los Angeles offering "job assistance."

Robinson's psychological evaluation noted that Adamar had obtained marketable skills in auto body repair, silk screening, and operating a forklift, but he expressed uncertainty about how he could obtain a job on the outside while he remained incarcerated. Robinson characterized Adamar's short-term residential plan as "possible," but his "plans for employment and eventual self-sufficiency were not at all developed."

E. Mental Health Evaluation and Insight Into Offense

Robinson's psychological evaluation reported that Adamar did not suffer from any mental illnesses or personality disorders. She opined, "[T]he absence of a major mental illness combined with his consistent discipline to acquire skills for self-improvement are viewed as protective factors against recidivism" and "concluded that there is no reason to believe that Mr. Adamar's current mental status places him at risk for violence or re-offense. Moreover, his record of no serious rules violations for the past eight years and only one incident for a minor infraction represents a positive prognosis for continued self-

control and non-violence." She also wrote, "The records reflected no outbursts of uncontrolled anger or impulsivity at any time in 10 years, suggesting that Mr. Adamar has a fairly well mastered sense of self-control."

She nevertheless opined, "While Mr. Adamar admits his guilt in fighting with the first victim and stabbing the second victim, he displayed limited insight into the causative factors of his behavior in the life crime. Aspects of his account simply did not square with his behavior in the life crime. For example, he cannot explain what influenced his decision to carry a weapon 'for the first time' on the evening of the life crime. Neither can he find any explanation for using a weapon to defend his friend when a less violent method would have likely rendered the same outcome. He is likely correct that he was consumed with the emotions of the moment, which probably impaired his judgment. Nonetheless, it was this evaluator's opinion that he has much work to do in order to take full responsibility for all of his behaviors, which contributed to the death of another individual."

To assess Adamar's potential for violence if released on parole, Robinson used "an empirically based approach" consisting of "two separate assessment guides": the "Psychopathy Check List Revised" (PCL-R) and the "History-Clinical-Risk Management-20" (HCR-20). Adamar's score on the PCL-R was "**low**," which meant that he showed a lower risk of violence "than approximately 90 percent" of North American male offenders.

On the HCR-20, Adamar ranked as a "low-moderate" risk for recidivism "in the specific context of his current clinical presentation and the parole plans that have been offered, to date." Robinson noted, "Historical items assessed with this instrument are static in nature and therefore, impossible to change." Adamar's historic factors included his violent commitment offense, his prior conduct "victimizing others" by tagging, and his probationary status at the time of the commitment offense. Robinson wrote, "With regard to *Clinical* risk factors for violent behavior, Mr. Adamar displays one of the predictive factors for recidivism: a lack of insight. It did not appear that Mr. Adamar had

any significant insight into the elements in his personality structure that contributed to his behavior in the life crime and to prior and repetitive acts of vandalism. Rather, he attributed his behavior to 'poor influences and wanting to fit in.' This did not appear to be consistent with his childhood and adolescent history. Rather, he has demonstrated a long-standing attraction to activities that result in an adrenaline 'rush' and an inability to exercise better judgment when captivated by circumstances that promote that sensation. [¶] On the other hand, he related no negative or antisocial attitudes during this evaluation and his history indicated that he has remained emotionally and behaviorally stable across his incarceration. He has participated in self-help groups and has upgraded both vocationally and educationally, which indicated that he has been responsive to the treatment that has been recommended."

With respect to "risk management" factors of the HCR-20, Robinson "noted some concerns": "Mr. Adamar's plans for residence with his parents seemed feasible . . . . His plans for employment (and long-term residential plans), however, were not at all developed or verified. Currently, he has no prospects of employment in the community and little understanding of how to initiate that process from prison. He will also likely require transportation to some prospective job site." Robinson continued, "Mr. Adamar has never lived in the community as a self-sufficient adult. His transition from the highly structured nature of the prison milieu to the free community can be expected to be stressful for him and exacerbated by his need to traverse additional challenges such as acquiring independent living skills as an adult. Additionally it can be expected that his exposure to the potentially destabilizing affects [*sic*] of alcohol, drugs, and peers that are involved in antisocial behaviors can be expected to increase in the community. [¶] Fortunately, it appears that Mr. Adamar enjoys a high level of family support that will assist him in negotiating these reentry challenges. Additionally, he has no history of alcohol and/or substance abuse . . . and he has voiced a commitment to remain abstinent. His behavior while in custody suggested that he has been able to follow the expected rules of the institution."

Robinson opined that Adamar "presents as a relatively **Low-Moderate** risk for dangerous behavior if released on parole." She explained, "His risk level was impacted primarily by his lack of insight into all of the causative behaviors of the life crime, his history of victimizing the community through repeated acts of vandalism as an adolescent, and his relatively insufficient parole plans at the time of this evaluation."

Although Robinson did not make a recommendation regarding Adamar's suitability for parole, she included the following in the conclusion to her report: "Although he admits guilt for the life crime, he displayed little insight into the things within himself that contributed to his behavior in the life crime. Rather, he blames external factors such as 'bad influences' from peers. He has much to do to gain insight into his own personality dynamics that contributed to his poor choices, both preceding and during the life crime."

F. District Attorney's Position on Parole

Los Angeles County Deputy District Attorney Robert Budman informed the Board that his office opposed parole. He cited Adamar's lack of "insight into the causative factors which caused him number one, to become involved with a group of taggers, which in my estimation was a gang, and he really has not accepted responsibility for the crimes."

G. Board's Decision

The Board denied Adamar parole for seven years after concluding that he was "not suitable for parole because he poses a present risk of danger to society or a threat to public safety if released from prison." The Board explained that it chose a seven-year period under "the new regulations of Prop 9" because "the panel feels that perhaps seven years would be clear and convincing evidence that you would need to come back before a panel within seven years."

The Board set forth four factors in explaining its unsuitability finding: the commitment offense, Adamar's lack of insight, his prison disciplinary history, and his lack of a job offer.

With respect to the commitment offense, the Board noted that there were multiple victims, it "was a rat pack attack," it stemmed from "gang mentality and culture," victim Salvador was "not even a member of any group—he was a college student over there visiting his girlfriend," the offense was committed "in a dispassionate and calculated manner," and "both victims were abused because they were both attacked by a group, outnumbered."

With respect to Adamar's purported lack of insight, the Board told Adamar, "You need to learn the insights into the causative factors that led you to do this, and even though you have indicated that you really want to do that, and you've taken some courses, we really don't feel that you really have gone through a self-examination portion of what it's going to require you to do that, and that's one of the reasons for the length of the denial that we talked about." The Board continued, "[I]t's got to be something that would make you, one, want to disobey your parents and go out at night to do the tagging, and then secondly, why would it be necessary that you would go to the extremes to stab somebody to rescue a friend when there were so many of you around? There were only two of you—I mean two of them and so many other people that were part of your tagging group there beating on these two individuals. So those are the things that you really need to take a good, strong look at because what is going to keep you if you don't know what caused those triggers from you [*sic*] to do the same thing again?" The Board noted that Robinson's report "was not totally supportive" and that her "overall risk assessment" of Adamar "was primarily due to your lack of insight into all of the causative behaviors of your life crime, by [*sic*] history of victimizing the community through repeated acts of vandalism as an adolescent, and your relative [*sic*] insignificant parole plans at the time." The Board noted that the final factor had changed.

The Board also seemingly based its "lack of insight" conclusion upon differences between Adamar's account of the offenses and that set forth in the appellate opinion. The Board specifically mentioned Adamar's statement that he did not know anything about a gun and encouraged him "to go back and take a good, strong look at what the appellate

decision said as well as what's in the reports so that you'll be able to understand why it's important that you know and learn the causative factors that led you to do this."

The Board also relied upon "lack of insight" to neutralize or minimize the favorable factor of remorse: "On your remorse you indicated that you take full responsibility for the crime, and although we see that there is some remorse there, the panel's not convinced that you truly understand the nature and magnitude of the offense because you don't have the insight into why you did it, and until you do that, it's very hard for you to really determine remorse; however, we will go on record to say that you did write letters to the victim [*sic*] asking for them—telling them how sorry you was [*sic*], but again, until you really understand the magnitude of the crime, it's going to be—I mean the nature and why you did it, that's going to be something that you need to work on."

In reference to Adamar's prison disciplinary record, the Board said, "The other thing is that—concerning your current mental state, the fact that you seem to be putting yourself in situations where you're getting these 115s [disciplinary actions], you know."

The Board characterized Adamar's parole plans as "adequate in the way of residence" but it noted that, although he had marketable skills, he had no job offers.

The Board acknowledged that Adamar had no history of alcohol or substance abuse, yet it strongly urged that he become involved with a 12-step program, such as Alcoholics Anonymous or Narcotics Anonymous. It further recommended that he remain free of discipline, complete his degree, and "participate in self-help so that you can learn the causative factors that led you to get involved with this crime . . . ."

H. Habeas Corpus Proceedings

Adamar filed a petition for a writ of habeas corpus in Los Angeles County Superior Court on December 14, 2009 (No. BH006554). The court denied the petition, stating that it found some evidence to support the Board's finding that Adamar "currently presents an unreasonable risk of danger to society and is, therefore, not suitable for release on parole." The court explained, "The Board heavily weighed the Petitioner's

2008 psychological assessment which determined that the Petitioner presents a 'low-moderate' risk of dangerousness. Though this conclusion was partially informed [*sic*] by the Petitioner's history of violent criminality, the psychologist also considered the Petitioner's more recent behavior and mental state. Given the gravity of the commitment offense and the triviality of the motive for the murder (gang retaliation), the Board concluded that even a 'moderate' risk that the Petitioner would return to similar violence in the free community was an unreasonable one." The trial court found "[t]he psychologist's clinical assessment" constituted "'some evidence' to support that conclusion." The trial court also rejected Adamar's ex post facto challenge to the Board's retrospective application of 2008 amendments to Penal Code section 3041.5, subdivision (b)(3) to deny Adamar a new hearing for seven years.

Adamar then filed a petition for a writ of habeas corpus in this court. We requested opposition, issued an order to show cause, and appointed counsel to represent Adamar. The Attorney General filed a return with exhibits, Adamar filed a traverse, and the matter was argued on December 14, 2010.

DISCUSSION

Adamar contends that the Board's finding that he was unsuitable for parole violated his right to due process.

A. The Applicable Law

Penal Code section 3041, subdivision (b) "provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction. [Citation.] 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 enumerated in [California Code of Regulations, title 15,] section 2402 of the regulations, that the prisoner is unsuitable for parole. [Citation.] 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." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654 (*Rosenkrantz*).) In short, "parole is the rule, rather than the exception" (*In re Smith* (2003) 114 Cal.App.4th 343, 366), and every inmate has a liberty interest in parole that is protected by California's due process clause (*Rosenkrantz*, at p. 660).

California Code of Regulations, title 15, section 2402 applies to inmates whose commitment offenses occurred on or after November 8, 1978. Subdivision (b) directs the Board to consider "[a]ll relevant, reliable information available to the panel" including "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." (Cal. Code Regs., tit. 15, § 2402, subd. (b).) Subdivision (c) sets forth a nonexclusive list of circumstances tending to show unsuitability for parole, including an especially heinous, atrocious or cruel manner of perpetrating the commitment offense; a previous record of violence; an unstable social history; commission of sadistic sexual offenses; a lengthy history of severe mental problems related to the offense; and the commission of serious misconduct while incarcerated. (*Id.*, § 2402, subd. (c).) Subdivision (d) sets forth a nonexclusive list of circumstances tending to show suitability for parole, including the absence of a juvenile record, a reasonably stable social history, signs of remorse, significant life stress as a cause of the commitment offense, battered woman syndrome, absence of a significant history of violent crime, the inmate's age, realistic plans for the future or marketable skills, and activities during incarceration indicating "an enhanced ability to function within the law upon release." (*Id.*, § 2402, subd. (d).) These factors govern both the Board's decision and the Governor's review of the Board's decision to grant parole. (*Rosenkrantz*, *supra*, 29 Cal.4th at pp. 660–661.)

"[T]he Penal Code and corresponding regulations establish that the 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' under the statute and corresponding regulations involves an assessment of an inmate's *current* dangerousness. As noted above, a parole release decision authorizes the Board (and the Governor) 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.' [Citation.] These factors are designed to guide an assessment of the inmate's threat to society, *if released*, and hence could not logically relate to anything but the threat *currently* posed by the inmate." (*Id*. at pp. 1205–1206.)

The Board has broad discretion in deciding whether to grant parole. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.) "Resolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the Board." (*Id.* at p. 656.) "But the statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at p. 1211.) "[U]nder the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative of the determination that a prisoner remains a danger to the public. 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." (*Id*. at p. 1212.) "[A]lthough the Board and the Governor 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." (*Id*. at p. 1214.) "At some point, however, when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness." (*Id*. at p. 1219.)

An inmate who is denied parole is entitled to judicial review of the decision "to ensure that the decision reflects 'an individualized consideration of the specified criteria' and is not 'arbitrary and capricious.'" (*Lawrence, supra*, 44 Cal.4th at p. 1205.) "[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." (*Id.* at p. 1212.) Although this standard is deferential, it is not toothless. (*Id*. at p. 1210.) "'[D]ue 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." (*Ibid.*)

B. Analysis of the Board's Decision

1. Commitment Offense

The first of the four factors the Board cited in support of its decision to deny Adamar parole was the nature of the commitment offense. The Board's unwitting reliance upon the inaccuracies contained in the appellate opinion and the apparent significance to the Board of differences between Adamar's account of what occurred and the flawed appellate opinion would serve, without more, to undermine the Board's reliance upon this factor. But the Board also mischaracterized the offense and misapplied

the pertinent regulation. First, it characterized the commitment offense as "dispassionate and calculated." California Code of Regulations, title 15, section 2402, subdivision (c)(1)(B) states the pertinent factor: "The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder." It is clear from the record that Salvador's murder and the assault on Chavez occurred in the course of a street brawl between members of rival groups after a member of one group (victim Chavez) insulted Adamar's group. According to Robinson, Adamar was likely "consumed with the emotions of the moment, which probably impaired his judgment." The trial court's decision to instruct upon heat of passion demonstrates that it found substantial evidence that Adamar acted under the influence of strong emotions. Under no reasonable, good faith view can the crimes be deemed dispassionate or calculated. The events evolved rapidly and the crimes were a response to the evolving circumstances. The nature of Adamar's conviction—*second degree murder*, that is, an unlawful killing of a human being with malice aforethought, but without the additional elements of premeditation and deliberation—further demonstrates that the crimes were neither dispassionate nor calculated. (*In re Moses* (2010) 182 Cal.App.4th 1279, 1302 [verdict of second degree murder undermined Governor's characterization of murder as calculated and dispassionate].)

Second, the Board stated that "both victims were abused because they were both attacked by a group, outnumbered." The regulation states, in pertinent parts, "The prisoner committed the offense in an especially heinous, atrocious or cruel manner" where, among other possible factors, "[t]he victim was abused, defiled or mutilated during or after the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(C).) The participation of persons other than Adamar in the attacks on Chavez and Salvador has no tendency to show that *Adamar* committed the offense in an especially heinous, atrocious or cruel manner. Adamar's suitability or unsuitability for parole must be determined on the basis of his own conduct, not that of other participants in the street brawl. In addition, an attack by a group does not constitute a type of "abuse" that makes Adamar's

commission of the offense especially heinous, atrocious, or cruel. Given the purpose of including this factor within California Code of Regulations, title 15, section 2402, subdivision (c)(1)—showing that the commitment offense was especially heinous, atrocious, or cruel—and the inclusion of "mutilated" and "defiled" in the same subdivision as "abused," we conclude that "abuse" of the victim means the infliction of undue cruelty or violence over and above the acts causing death, such as purposeful infliction of physical pain or psychological suffering. Neither the participation of others nor a lopsided fight constitute such abuse.

Finally, although the Board correctly noted that there were multiple victims, under the circumstances, it is doubtful that the mere existence of this factor shows that Adamar committed the offenses in an especially heinous, atrocious, or cruel manner. Apparently, neither Chavez nor anyone else other than Salvador suffered any great bodily injury.

Even apart from the nonexistent and dubious evidentiary support for the Board's characterization of the commitment offenses as especially heinous, atrocious, or cruel, the Board failed to articulate any "rational nexus between those facts and current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at p. 1227.) The Board may have thought it stated such a nexus through its "lack of insight" assertion, which we will address separately. A review of the entire pre- and postincarceration record shows that the commitment offenses constituted the one and only known incident of violence in Adamar's history. These offenses appeared to be an aberration stemming from circumstances unlikely to recur. (*Id.* at p. 1226.) Adamar's only prior criminal offense consisted of damaging property by tagging. He has never been involved in any conflicts with other inmates or staff, has never behaved aggressively toward anyone while in prison, has no mental or personality disorders, is not associated with any violent groups, and has furthered his education and acquired vocational skills while in prison. His prison disciplinary record is minimal, and none of the incidents involved any actual or threatened violence or aggression. He has not been disciplined by prison authorities for 10 years. The commitment offenses occurred 16 years ago, when Adamar was 18. He is now 35.

The Board's mere recitation of aspects of the murder fails to provide "some evidence" that Adamar currently poses a danger to the public if released on parole.

2. Insight

The second and seemingly most significant reason for the Board's decision to deny parole was its belief that Adamar lacked insight into the factors that caused his behavior in both the commitment offense and tagging. This belief apparently stemmed primarily from Robinson's psychological evaluation, but also appeared to be based upon differences between Adamar's account of offenses and that set forth in the appellate opinion. As noted, the appellate opinion set forth an inaccurate version of the offense. It is thus unsurprising that Adamar's account differs from the appellate opinion. The account of the offense that Adamar gave the Board is supported by the trial record, included all material facts that were necessarily or presumably within his own knowledge, and did not attempt to deflect responsibility or minimize his culpability. Given the chaotic and rapidly evolving events that gave rise to the commitment offenses, it is also unsurprising that Adamar did not know that one of his fellow DYP members drew a gun to keep the crowd back. We fail to see how Adamar's ignorance of this detail has any relevance to the sole issue before the Board: Adamar's current dangerousness to the public, if released on parole. Certainly, no adverse inference about Adamar's current dangerousness can be based upon whether another person decided—without Adamar's request or direction—to draw a gun to keep other people away.

We now turn to the remaining aspects of the Board's and Robinson's assessment that Adamar lacked insight. Although "lack of insight" is not mentioned in the regulations as a factor showing unsuitability for parole, it "has become a standard reason after *Lawrence* and [*In re*] *Shaputis* [(2008) 44 Cal.4th 1241], so much so that it is [*sic*] has been dubbed the '"new talisman"' for denying parole." (*In re Macias* (2010) 189 Cal.App.4th 1326, 1342 (*Macias*).) "[A] 'lack of insight' into past criminal conduct can reflect an inability to recognize the circumstances, forces, and impulses that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to

those circumstances and, if confronted by them again, would likely react in a similar way." (*Macias*, at p. 1342.) "Accordingly, the inmate's 'lack of insight' can provide a logical nexus between the gravity of a commitment offense and a finding of current dangerousness." (*Ibid*.) But, while insight is valuable, "we question whether anyone can ever fully comprehend the myriad circumstances, feelings, and current and historical forces that motivate conduct, let alone past misconduct. We also question whether anyone can ever adequately articulate the complexity and consequences of past misconduct and atone for it to the satisfaction of everyone. Indeed, the California Supreme Court has recognized 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.' (*Shaputis*, *supra*, 44 Cal.4th at p. 1260, fn. 18.) In our view, moreover, one always remains vulnerable to a charge that he or she lacks sufficient insight into some aspect of past misconduct even after meaningful self-reflection and expressions of remorse." (*Macias*, at pp. 1342–1343.) A finding that an inmate lacks insight is inherently vague and subjective. (*Id.* at p. 1343) "[A]lthough a 'lack of insight' may describe some failure to acknowledge and accept an undeniable fact about one's conduct, it can also be shorthand for subjective perceptions based on intuition or undefined criteria that are impossible to refute." (*Ibid*.)

The court in *Macias*, *supra*, 189 Cal.App.4th 1326, compared cases affirming and reversing a denial of parole based upon a lack of insight and distilled several important principles. Cases affirming a denial of parole based upon a lack of insight involved "a factual discrepancy between the undisputed, or at least compelling, evidence of the inmate's conduct and its causes and the inmate's own version of them. That discrepancy involved highly material, if not elemental, aspects of the commitment offense, such as the requisite acts, the mental elements, and motivation. Thus, the inmate's version demonstrated not only a failure to acknowledge his or her misconduct but also an effort to minimize (or even deny) it and mitigate his or her mental state or culpability despite

strong evidence to the contrary. Also in these cases, there was little, or no, psychological evidence or expert testimony to contradict a finding that the inmate lacked insight, and in some cases, there was a failure by the inmate to engage in meaningful rehabilitative programming or and [*sic*] a demonstrable inability to benefit from it. [¶] In short, what all of these cases have in common is an inmate who manifested a blindness concerning the nature of his or her conduct and/or the very pressures, circumstances, and impulses that triggered it. The finding that the inmate lacked insight was based on a factually identifiable deficiency in perception and understanding, the deficiency involved an aspect of the criminal conduct or its causes that was significant, and the deficiency by itself or together with the commitment offense had some rational tendency to show that the inmate currently posed an unreasonable risk of danger." (*Id*. at p. 1345.)

In re Shaputis, supra, 44 Cal.4th 1241, illustrates this type of case. Shaputis had a history of committing violent acts upon two wives and his children. He was also "a problem drinker with a history of violence when drunk," and had been drinking heavily the night that he murdered his second wife. (*Id*. at pp. 1246–1248.) In his parole hearings, Shaputis characterized himself as a mellow drinker, claimed that he shot his wife accidentally, found his daughter's allegations of rape, incest, and domestic violence inexplicable, and, when asked if he had a problem in the way he treated women, he said he did not, but he guessed he "had a problem then." (*Id.* at pp. 1248–1249, 1252.) Notably, Shaputis intended to live with his third wife if paroled, thereby placing himself in circumstances similar to those in which he had in the past behaved violently toward women. (*Id.* at p. 1252.) The Board "reluctantly" found Shaputis suitable for parole, but the Governor reversed this decision. (*Id*. at pp. 1252–1253.) The Supreme Court found that the record supported the Governor's determinations that (1) the crime was especially aggravated and the aggravated nature of the offense indicated that Shaputis posed a current risk to public safety, and (2) "although petitioner has stated that his conduct was 'wrong,' and he feels some remorse for the crime, he has failed to gain insight or understanding into either his violent conduct or his commission of the commitment

offense." (*Id*. at pp. 1259–1260.) With respect to the lack of insight, the court explained, "Evidence concerning the nature of the weapon, the location of ammunition found at the crime scene, and petitioner's statement that he had a 'little fight' with his wife support the view that he killed his wife intentionally, but as the record also demonstrates, petitioner *still* claims the shooting was an *accident.* This claim, considered with evidence of petitioner's history of domestic abuse and recent psychological reports reflecting that his character remains unchanged and that he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming,' all provide some evidence in support of the Governor's conclusion that petitioner remains dangerous and is unsuitable for parole." (*Id.* at p. 1260, fn. omitted.)

Macias, *supra*, 189 Cal.App.4th 1326, also reviewed cases reversing a denial of parole based upon a lack of insight and concluded that "where undisputed evidence shows that the inmate has acknowledged the material aspects of his or her conduct and offense, shown an understanding of its causes, and demonstrated remorse, the Board's mere refusal to accept such evidence is not itself a rational or sufficient basis upon which to conclude that the inmate lacks insight, let alone that he or she remains currently dangerous." (*Id.* at p. 1347.)

Here, Adamar fully acknowledged that he beat Chavez and stabbed Salvador. He did not attempt to minimize or deny his conduct or mitigate his mental state or culpability in any way that contradicted the evidence. He correctly noted that his codefendant also inflicted a fatal stab wound to Salvador and plausibly explained that he was trying to get Salvador off of Sperling and was not thinking rationally. Even Robinson admitted that Adamar "is likely correct that he was consumed with the emotions of the moment, which probably impaired his judgment." Adamar acknowledged that his conduct was a poor decision and that he should have pushed or "tackled" Salvador to attempt to free Sperling. The record demonstrates that Adamar, Chavez, Salvador, and others were engaged in a street brawl. Adamar's claims regarding his mental state and motivation are entirely

consistent with the record, entirely plausible—especially in light of Adamar's youth at the time of the offenses—and do not reflect a lack of insight.

There were no material factual discrepancies between the evidentiary record and Adamar's own account of his conduct and its causes. As noted, some of the Board's (and perhaps Robinson's) conclusions that such discrepancies existed stemmed from reliance upon the factually inaccurate appellate opinion. And, as noted, Adamar's ignorance of whether one of his friends pointed a gun at a crowd is neither surprising, given that he was engaged with Chavez and Salvador, nor material to Adamar's culpability or current dangerousness.

It appears that the "lack of insight" conclusion by Robinson and the Board is equivalent to a "mere refusal to accept" evidence that Adamar "has acknowledged the material aspects of his . . . conduct and offense, shown an understanding of its causes, and demonstrated remorse." (*Macias, supra,* 189 Cal.App.4th at p. 1347.) Unlike the circumstances in *Shaputis,* the record before us demonstrates neither the type nor degree of lack of insight or failure to accept responsibility that would support an inference that Adamar will present a danger to the public if released on parole. Although the Board wondered, in essence, what would prevent Adamar from "do[ing] the same thing again," the simple answer is that Adamar committed these crimes under "stress arising from circumstances not likely to recur." (*Lawrence, supra,* 44 Cal.4th at p. 1226.) The circumstances are not likely to recur because Adamar has matured, reflected upon the nature and consequences of his conduct—as well as the irrationality of his conduct and alternatives he could have pursued—and undertaken extensive rehabilitative efforts that include conflict and anger management courses. His prison record indicates, as Robinson acknowledged, "that Mr. Adamar has a fairly well mastered sense of self-control," and this "represents a positive prognosis for continued self-control and non-violence."

The Board's and Robinson's reliance upon Adamar's purported lack of insight into his prior tagging activities is also misplaced. Although an inmate's past criminal history is part of the information the Board should consider (Cal. Code Regs., tit. 15, § 2402,

subd. (b)), prior offenses that are neither violent nor sexual and sadistic are not a circumstance showing unsuitability. (Cal. Code Regs., tit. 15, § 2402, subd. (c).) Tagging, while a costly criminal nuisance, does not in itself endanger the life of any member of the public. It follows that a conclusion that Adamar lacks sufficient insight into why he tagged cannot "provide a logical nexus between the gravity of [the] commitment offense and a finding of current dangerousness." (*Macias, supra*, 189 Cal.App.4th at p. 1342.)

3. Prison Disciplinary History

The Board also cited Adamar's prison disciplinary history, which, as we have noted, was minimal, did not involve violence or aggression, and ended, as far as the record before us reveals, 10 years ago. Nothing about Adamar's behavior in prison—including his disciplinary history—indicates he poses a current danger to the public if released on parole.

4. Lack of a Job Offer

Although the Board was careful to say that the regulations did not require Adamar to have a job before he was found suitable for parole, the emphasis placed upon this factor indicates it played a role in the Board's unsuitability finding. The pertinent regulation phrases the factor as follows: "The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release." (Cal. Code Regs., tit. 15, § 2402, subd. (d)(8).) Here, the Board found Adamar's residential plans "adequate," and it found that he had marketable skills. Nothing more was required. We note that during the current recession, with so very many people unemployed, it would be a remarkable feat for Adamar to obtain a job offer while he is incarcerated and does not have a release date.

5. Robinson's report

Finally, Robinson rated Adamar's risk of violence as "low" on one assessment guide and "low-moderate" on the other. Her explanation of the latter rating revealed that the rating for historical factors is impossible to change, and the ratings on the clinical and

risk factors were based upon her conclusions that Adamar's parole plans were inadequate and that he lacked sufficient insight into the commitment offenses and tagging. As we have explained, his parole plans are not inadequate and we find the "lack of insight" conclusion unfounded. Thus, nothing in the psychological evaluation constitutes some evidence that Adamar poses a current danger to the public if released on parole.

6. Conclusion

For all of these reasons, we conclude that the Board's findings that Adamar remains a public safety risk at age 35, more than 16 years after the commitment offense, lack any evidentiary support. Accordingly, we grant his petition for a writ of habeas corpus.

Given our disposition, we need not address Adamar's ex post facto challenge to the Board's retrospective application of 2008 amendments to Penal Code section 3041.5, subdivision (b)(3).

DISPOSITION

The petition for a writ of habeas corpus is granted, and the Board of Parole Hearings's decision is hereby vacated. The Board is directed to conduct a new parole-suitability hearing consistent with due process and *In re Prather* (2010) 50 Cal.4th 238.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.