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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re

RONNIE BARELA,

on

Habeas Corpus.

B220206

(Los Angeles County  
Super. Ct. No. BH005717)

APPEAL from an order of the Superior Court of Los Angeles County,  
Peter Paul Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney  
General, Julie A. Malone and Linnea D. Piazza, Deputy Attorneys General, for  
Plaintiff and Appellant.

Marilee Marshall & Associates, Inc. and Marilee Marshall for Defendant and  
Respondent.

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This is an appeal from an order of the superior court granting a petition for writ of habeas corpus filed by Ronnie Barela, a state prisoner. The superior court: (1) ordered Governor Arnold Schwarzenegger to vacate his reversal of a 2006 decision of the Board of Parole Hearings (the Board) which granted Barela parole; (2) reinstated the 2006 decision of the Board; and, (3) ordered Barela released in accordance with the parole date the Board previously had calculated. We affirm the order of the superior court.

### **FACTS AND PROCEDURAL BACKGROUND**

#### *1. Barela's criminal history prior to the commitment offense.*

Barela's criminal history commenced in 1977 at the age of 14 years with an arrest for possession of marijuana for which he was counseled and released. In September of 1978, he was arrested for being drunk in public; a juvenile dependency was filed but dismissed. In November of 1978, at the age of 15 years, Barela was arrested for attempted murder and assault with a deadly weapon. He was declared a ward of the juvenile court and was ordered committed to the California Youth Authority. The charge subsequently was reduced to assault with a deadly weapon. Barela was paroled on August 13, 1980.

#### *2. The commitment offense.*

On January 17, 1981, at the age of 17 years and while he remained on parole, Barela got into an argument with a rival gang member at a party at the home of 15-year-old Donna Ramirez. Charles Ramirez, the father of Donna Ramirez, asked Barela to leave the party. Barela produced a handgun and, when Charles Ramirez again asked Barela to leave, Barela shot him twice in the chest, killing him. As Barela fled the scene, he fired the handgun twice at witnesses who chased him. Barela was found unfit to be treated as a juvenile. He pleaded guilty to second degree murder and attempted murder and admitted the personal use of a firearm in the commission of both offenses. (Pen. Code, §§ 187, 664/187, 12022.5, subd. (a).) Barela was sentenced to 17 years to life in state prison for second degree murder with a concurrent term of 11 years for attempted murder with the personal use of a firearm.

3. *Proceedings prior to In re Lawrence (2008) 44 Cal.4th 1181.*

On September 13, 2006, after six previous denials of parole, the Board found Barela suitable for parole.

On February 8, 2007, the Governor reversed the Board's grant of parole. The Governor noted Barela was disciplined nine times for rules violations including smuggling unauthorized paperwork, stimulants and sedatives, soliciting a personal photo from staff, disobeying orders, possession of an unauthorized television, manufacture/possession of alcohol, possession of a stabbing weapon, conspiracy to falsify records and being absent from his assignment. He was also counseled 10 times for minor misconduct, most recently in 1997.

The Governor indicated he had considered "various positive factors" in reviewing Barela's suitability for parole. The Governor noted Barela had severed his gang ties years ago and had made efforts in prison to enhance his ability to function within the law on release. He earned a GED in 1987 and an AA degree in 1989. He completed vocational training in dry cleaning work, had held numerous institutional jobs and had worked in the Prison Industries Authority. He participated in self-help and therapy programs, including Alcoholics Anonymous, Narcotics Anonymous, Rational Behavior Training, Self-esteem and Assertiveness Training, Communication Skills and Conflicts/Anger Lifelong Management. Additionally, Barela maintained seemingly solid relationships with supportive family and friends, he received favorable evaluations from various correctional and mental health professionals over the years and has made plans upon his release to live with family and work in Los Angeles County, the county of his last legal residence.

Despite these positive factors, the Governor found the commitment offense especially heinous because Barela attacked multiple victims and his motive was trivial in relation to the magnitude of his crime. The Governor found Barela's prior juvenile record "equally unacceptable." Regarding Barela's arrest for attempted murder at the age of 15 years, the Governor noted the probation report indicated Barela shot a man several times. Barela told his 1998 mental health evaluator the victim was a rival gang

member who “came at me in a threatening way . . . and had been calling me names.” Also, Barela admitted to the probation officer assigned to the commitment offense that he smoked marijuana daily and he used cocaine, LSD and PCP prior to the commitment offense. Barela also told the 2006 Board that he was drunk and “probably” under the influence of marijuana at the time of the commitment offense.

The Governor concluded that, after 26 years of incarceration, Barela had made “some creditable gains in prison, including accepting responsibility for his actions and expressing remorse.” However, the Governor concluded the negative factors outweighed the positive ones and found Barela’s release would pose an unreasonable risk of danger to society.

On August 20, 2007, Barela filed a petition for writ of habeas corpus in the superior court challenging the Governor’s February 2007 reversal. On October 29, 2007, the superior court denied the petition. On April 17, 2008, this court denied Barela’s petition for writ of habeas corpus. On December 10, 2008, the California Supreme Court denied Barela’s petition for writ of habeas corpus without prejudice to the filing of a petition for writ of habeas corpus in the trial court, citing *In re Lawrence* (2008) 44 Cal.4th 1181.

4. *Proceedings after In re Lawrence (2008) 44 Cal.4th 1181.*

On January 9, 2009, Barela again filed a petition for writ of habeas corpus in the superior court challenging the Governor’s 2007 reversal. The superior court issued an order to show cause.

a. *The Warden’s return on the order to show cause.*

The Warden’s return requested denial of Barela’s petition. The Warden noted that on June 1, 2009, while Barela’s instant challenge to the Governor’s 2007 reversal was pending, the Governor reversed a 2009 decision of the Board granting Barela parole. The Warden attached a copy of the Governor’s 2009 reversal to the return. It indicates the Governor reversed the Board’s 2009 decision to grant the Barela parole based on the nature of the commitment offense, Barela’s history of violent crime and Barela’s lack of understanding of his vulnerability to future alcohol and drug abuse.

Regarding Barela's history of violent crime, the Governor pointed out Barela had been committed to the California Youth Authority for assault with a deadly weapon prior to the commitment offense and Barela was released on parole five months before the commitment offense. Nonetheless, Barela choose to shoot at a man who was only trying to break up a fight in his home. Barela was aware of the consequences of his criminal conduct and had numerous previous opportunities to correct his criminal behavior but did not. Also, Barela violated prison rules by using and possessing drugs and alcohol and disobeying other prison rules as recently as 2001.

Regarding Barela's lack of insight into his substance abuse problem, the Governor relied on a 2008 mental health evaluation presented to the Board in connection with the Board's 2009 decision to grant Barela parole. Although the evaluator rated Barela an overall low risk of becoming involved in a violent offense, "the evaluator noted [Barela] has only a 'partial relapse prevention plan for maintaining abstinence from alcohol and drugs.'" The Governor's 2009 reversal stated: "The 2008 mental health evaluator concluded that Barela's relapse prevention plan is 'incomplete because [Barela] could not foresee any circumstances that could increase his risk for relapse' and that 'without understanding his vulnerability to risk for future alcohol and drug abuse due to his history, his risk for future use is greater.'" The evaluator's comments indicate that Barela still lacks significant insight into his substance abuse problem and that he is still at risk of resuming substance abuse if released to the community. Given that Barela was under the influence of drugs and alcohol when he perpetrated the life crime, his mental health evaluator's assessment that he remains at a higher risk for relapse because he lacks understanding of his vulnerability to future alcohol and drug abuse indicates that Barela still poses a risk of danger to society."

The Governor concluded Barela's release on parole would pose an unreasonable risk of danger to the public at this time. The Warden argued that, because the Governor had reviewed Barela's suitability for parole within the confines

of *Lawrence* and had concluded he still poses an unreasonable risk of danger to society, Barela's petition should be denied.

b. *Barela's traverse.*

In his traverse, Barela noted the Governor's 2009 reversal was not properly before the superior court and was the subject of a subsequent petition for writ of habeas corpus.

c. *The superior court's order granting Barela's petition.*

On September 30, 2009, the superior court granted Barela's petition for writ of habeas corpus finding the record did not contain *some evidence* to support the Governor's determination Barela currently presented an unreasonable risk of danger to society. (*In re Lawrence, supra*, 44 Cal.4th at pp. 1205-1206.) The superior court noted that, at Barela's last parole suitability hearing, Barela presented a positive psychological report and viable parole plans and showed that he maintains strong ties with his family and friends in the community. The Board found Barela accepted responsibility for his role in the commitment offense and understood the nature and magnitude of his participation in the crime. The superior court noted that although the Governor agreed Barela had made progress in prison, the Governor reversed the Board's finding of suitability based on the commitment offense and Barela's past criminal record. The superior court agreed the commitment offense was especially heinous, atrocious or cruel because it was committed against multiple victims and the motive for the act was trivial. However, the superior court found the Governor had failed to address how Barela's participation in the commitment offense reflects he is a current danger to society. "Therefore, although the Governor's findings regarding the facts of the offense are supported by evidence in the record, absent a rational nexus between those facts and current dangerousness, those findings do not provide some evidence of [Barela's] current unsuitability. (*In re Lawrence, supra*, 44 Cal.4th at p. 1227.)"

The superior court also agreed Barela had an extensive criminal record for the two years prior to the commitment offense as a result of his gang involvement.

However, the Governor failed to articulate how Barela's prior criminal record indicates he is a current danger to society. The superior court noted that while in prison Barela renounced gang affiliation and had worked hard in self-help programming to address his prior criminal and gang behavior. The superior court concluded the passage of time and Barela's institutional behavior supported a grant of parole at this time. The superior court ordered the Governor to vacate the reversal of the Board's grant of parole.

*d. The Warden's request for amendment.*

On October 23, 2009, the Warden requested amendment of the superior court's order with respect to the remedy or, in the alternative, a stay of the order. The Warden requested judicial notice of the Governor's 2009 reversal. The Warden asserted that in the 2009 reversal, the Governor added to the previously stated grounds for reversal the unfavorable aspects of the 2008 psychological report which indicated Barela's lack of understanding of his vulnerability to risk for future alcohol and drug abuse increased his risk for future use and increased his danger to society. The Warden concluded the Governor had articulated a nexus between Barela's prior history and his current risk of danger to society. The Warden asked the superior court to allow the Governor to reconsider the matter.

On November 2, 2009, the superior court denied the Governor's request for amendment of the judgment without comment on the 2008 evaluation or the Governor's consideration of it.

*e. The Warden appeals the order of the superior court.*

On November 10, 2009, the Warden appealed the superior court's order granting Barela's petition for writ of habeas corpus. This court thereafter granted a petition for writ of supersedeas and stayed the September 30, 2009 order of the superior court pending appeal.

## **CONTENTIONS**

The Warden contends the remedy for a due process violation is to provide the process due. Thus, the matter must be remanded for reconsideration by the Governor

in order to preserve the separation of powers between the executive and the judicial branches and to afford the Governor an opportunity to articulate his decision within the confines of *Lawrence*. The Warden further asserts remand to the Governor in this case would not amount to an idle act because there is new evidence implicating Barela's current risk of danger to society.

## DISCUSSION

### 1. *Applicable legal principles.*

Pursuant to Penal Code section 3041, subdivision (a), the Board shall normally set a parole release date one year prior to an inmate's minimum eligible parole release date, in a manner providing uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public. (*In re Lawrence, supra*, 44 Cal.4th at p. 1202.) Release on parole is the rule, rather than the exception. (*Id.* at p. 1204.) A parole release date must be set unless the Board determines public safety requires a lengthier period of incarceration. (Pen. Code, § 3041, subd. (b); *In re Lawrence, supra*, at p. 1204.)

In determining suitability for parole, the Board must consider certain factors specified by regulation. (*In re Lawrence, supra*, 44 Cal.4th at p. 1202; Cal. Code Regs., tit. 15, § 2402, subs. (c), (d).)<sup>1</sup> These factors are general guidelines and all

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<sup>1</sup> Circumstances tending to establish unsuitability for parole include that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison or jail. (Cal. Code Regs., tit. 15, § 2402, subd. (c); *In re Lawrence, supra*, 44 Cal.4th at p. 1202, fn. 7.)

Circumstances tending to show suitability for parole include that the inmate (1) does not have a juvenile record of assaulting others or committing crimes with the potential of personal harm to victims; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life, especially if the stress built up over a long period; (5) committed the crime as a result of Battered Woman Syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic



reliable, relevant information must be considered. (Cal. Code Regs., tit. 15, § 2402, subd. (b); *In re Lawrence*, at p. 1203.) The overarching consideration is public safety. (*In re Lawrence*, at p. 1210.)

Under article V, section 8, subdivision (b) of the California Constitution and Penal Code section 3041.2, the Governor has the right to review the Board's parole suitability decisions relating to an inmate sentenced to an indeterminate prison term based upon a murder conviction. Although the Governor is required to review the same factors as the Board, the Governor undertakes an independent, de novo review of the inmate's suitability for parole. (Cal. Const., art. V, § 8, subd. (b); *In re Rosenkrantz* (2002) 29 Cal.4th 616, 660-661.)

*Lawrence* clarified that when reviewing a decision relating to a prisoner's current suitability for parole, the decision of the Board or the Governor that the inmate constitutes a current threat to public safety is reviewed to determine whether *some evidence* supports that conclusion and "not merely whether some evidence confirms the existence of certain factual findings." (*In re Lawrence, supra*, 44 Cal.4th at p. 1212.) *Lawrence* explained the standard for judicial review, although "unquestionably deferential, [is] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision – the determination of current dangerousness." (*Id.* at p. 1210.)

Further, "although . . . 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

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plans for release, or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities suggesting an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d); *In re Lawrence, supra*, 44 Cal.4th at p. 1203, fn. 8.)

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 to the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra*, 44 Cal.4th at p. 1214.)

"[T]he 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 relevant inquiry is "whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*Id.* at p. 1221.)

Accordingly, " 'the relevant inquiry for a reviewing court is . . . whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor.' " (*In re Shaputis* (2008) 44 Cal.4th 1241, 1255.) A reviewing court "will affirm the Governor's interpretation of the evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors." (*Id.* at p. 1258.) Because the superior court's decision was based solely upon documentary evidence, we independently review its ruling. (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

## 2. *Review of the Board's 2006 grant of parole.*

The Warden contends the matter must be remanded for reconsideration by the Governor in order to preserve the separation of powers between the executive and the judicial branches and to permit the Governor to exercise his obligation to ensure the safety and security of the public. The Warden also notes the Governor's decision predated the California Supreme Court's decision in *In re Lawrence, supra*, 44 Cal.4th

1181, which significantly changed the standard of review for parole decisions. Under these circumstances, the appropriate remedy is remand to the Governor to afford the Governor an opportunity to articulate his decision within the confines of *Lawrence*. (*In re Ross* (2009) 170 Cal.App.4th 1490, 1513 [remanding to Governor to reconsider matter consistent with *Lawrence*]; *In re Criscione* (2009) 173 Cal.App.4th 60, 74-75, 77 [remanding to Board for reconsideration under *Lawrence* and *Shaputis*].)

The Governor acknowledges several Courts of Appeal, including this Court, have held the proper remedy is to vacate the gubernatorial parole decision and to reinstate the Board's grant of parole. (*In re Masoner* (2009) 179 Cal.App.4th 1531, 1538; see also, *In re Loesch* (2010) 183 Cal.App.4th 150, 162-163; *In re Moses* (2010) 182 Cal.App.4th 1279, 1313-1314; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491-1492; *In re Vasquez* (2009) 170 Cal.App.4th 370, 386-387; *In re Burdan* (2008) 169 Cal.App.4th 18, 39.) However, the Governor wishes to preserve for review his claim the proper remedy is remand to the Governor with directions to proceed in accordance with due process.

As conceded by the Warden, we rejected the Governor's arguments in *In re Masoner, supra*, 179 Cal.App.4th at p. 1541. Here, putting aside the 2008 mental health evaluation, the Governor essentially concedes there is no evidence supporting the Governor's reversal of the Board's decision granting Barela parole. Consequently, the appropriate result upon review of the Board's 2006 grant of parole is to affirm the order of the superior court reinstating the Board's decision without remanding the matter to the Governor.<sup>2</sup>

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<sup>2</sup> The California Supreme Court has granted review in two cases concerning the proper remedy when a court finds the *Board's* decision denying parole is unsupported by some evidence. (*In re Prather* (Apr. 28, 2009, B211805 [nonpub. opn.]), review granted July 29, 2009, S172903; *In re Molina* (Apr. 16, 2009, B208705 [nonpub. opn.]), review granted July 29, 2009, S173260.)

The Warden's arguments aimed at avoiding this result are not persuasive. The Warden's citation to *In re Carr* (1995) 38 Cal.App.4th 209, *In re Love* (1974) 11 Cal.3d 179, *In re Ruzicka* (1991) 230 Cal.App.3d 595, and *In re Bowers* (1974) 40 Cal.App.3d 359, does not assist his position. The due process violations in those cases involved the alleged failure to provide the inmate certain documents or a hearing in the first instance. The appropriate remedy was to provide the documents or the hearing. (See *In re Love, supra*, at p. 185, [remedy for failure to provide inmate a confidential report before his parole revocation hearing was to provide the report and a new revocation hearing]; *In re Ruzicka, supra*, at pp. 602-604 [remedy for failure to provide inmate a copy of a decision to retain him on parole was to provide a copy of the decision]; *In re Bowers, supra*, at p. 362 [remedy for failure to hold prerevocation hearing was to vacate the revocation decision and conduct a prerevocation hearing]; *In re Carr, supra*, at p. 218 [remedy for failure to hold annual parole discharge review would be to provide annual hearing].) Here, Barela was denied parole without *some evidence* in the record that he remains a danger to society and simply remanding to the Governor would provide no meaningful remedy.

Thus, and again putting aside the Governor's reliance on the 2008 mental health evaluation which we address below, allowing the Governor an unlimited number of reviews of the Board's parole decision would violate a prisoner's due process rights and render the writ of habeas corpus meaningless. (*In re Masoner, supra*, 179 Cal.App.4th at p. 1539.)

*In re Ross, supra*, 170 Cal.App.4th at pp. 1512-1513, does not assist the Governor. In that case, the trial court *denied* a prisoner's petition for a writ of habeas corpus, finding some evidence in the record to support the Governor's decision to reverse the Board's grant of parole. (*Id.* at p. 1496.) The prisoner filed a petition for a writ of habeas corpus in the Court of Appeal. (*Id.* at pp. 1496-1497.) While the petition was pending in the appellate court, the Supreme Court issued its decision in *In re Lawrence, supra*, 44 Cal.4th 1181. Applying the standard of review articulated in *Lawrence*, *Ross* agreed with the trial court that the Governor's decision was

supported by some evidence. (*In re Ross, supra*, at pp. 1497, 1504-1505, 1510-1512.) *Ross* concluded, however, that the Governor’s “written decision [was] flawed” because it did not contain “a more explicit ‘articulation of a rational nexus between th[e] facts and current dangerousness,’ ” as required by *Lawrence*. (*Id.* at p. 1497.) Accordingly, the appellate court remanded to the Governor to permit him to articulate that “nexus” and to clarify whether he had relied on troubling evidence regarding the prisoner’s mental state. (*Id.* at pp. 1498, 1513-1515.) Unlike *Ross*, in this case the trial court found *no* evidence in the record to support the Governor’s decision.

The Warden’s reliance on *In re Criscione, supra*, 173 Cal.App.4th 60, similarly is misplaced. There, the *Board* did not articulate any nexus between the factors upon which it relied and its conclusion the prisoner posed a current risk of danger to society. (*Id.* at pp. 74-75, 77.)

In sum, the proper remedy in this case is to reinstate the order of the superior court.

3. *The Governor’s reliance on the 2008 mental health evaluation does not alter this result.*

The Warden contends remand to the Governor would not be an idle act in this case because there is new evidence regarding Barela’s current risk of danger to society in the form of the 2008 mental health evaluation, relied upon by the Governor in the 2009 reversal of the Board’s grant of parole. The 2008 evaluation notes Barela’s inability to “foresee any circumstances that could increase his risk of relapse” increases his risk for future alcohol and drug abuse. Thus, remand to the Governor for further consideration is not an idle act in that the Governor has identified Barela’s lack of insight into the possibility of relapse into substance abuse as a factor that demonstrates current dangerousness.

As noted in *In re Calderon* (2010) 184 Cal.App.4th 670, before the filing of *In re Lawrence, supra*, 44 Cal.4th 1181, and its companion case, *In re Shaputis, supra*, 44 Cal.4th 1241, virtually all decisions of the Board and the Governor denying parole relied primarily on the gravity of the commitment offense. (*In re Lawrence, supra*, at p. 1206.) After *Lawrence* and *Shaputis*, “the denial of parole now seems usually based, at least in part, upon the inmate’s asserted ‘lack of insight’ in some respect, which has become the new talisman.” (*In re Calderon, supra*, at p. 689.)

*Calderon* attributed the “intensified interest in this very subjective factor” to *Shaputis*, which upheld the Governor’s reversal of an award of parole based on the gravity of the commitment offense coupled with concern about the inmate’s “lack of insight into the murder and into the years of domestic violence that preceded it.” (*In re Shaputis, supra*, 44 Cal.4th at p. 1258.) *Calderon* noted “lack of insight” is not among the factors indicative of unsuitability for parole specified in the sentencing regulations. Further, “lack of insight” demonstrates unsuitability for parole “only to the extent that it is both (1) demonstrably shown by the record and (2) rationally indicative of the inmate’s current dangerousness.” (*In re Calderon, supra*, 184 Cal.App.4th at p. 690.)

Both factors were present in *Shaputis*. As stated in *Calderon*: “Despite powerful evidence he killed his wife intentionally, Shaputis still claimed the shooting was accidental. In addition to his unjustified denial of personal responsibility, a recent psychological assessment explained why Shaputis ‘seemed to have “limited . . . insight” regarding his antisocial behavior and the circumstance that his history of alcohol abuse was closely associated with his history of domestic violence.’ [Citation.]” (*In re Calderon, supra*, 184 Cal.App.4th at p. 690.)”

This case does not present a similar situation. Indeed, the Governor's conclusion Barela currently is dangerous due to his inability to "foresee any circumstances that could increase his risk of relapse" into substance abuse ignores Barela's consistent participation in 12-step programs and Barela's longstanding commitment to sobriety, which is essentially uncontradicted in the record.

We note numerous cases, including *In re Calderon, supra*, 184 Cal.App.4th 670, have rejected reliance by the Board or the Governor on an inmate's asserted lack of insight as a justification for denying parole where the record lacked evidence to support such a finding. (E.g., *In re Dannenberg, supra*, 173 Cal.App.4th at p. 255; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110-1112; *In re Rico* (2009) 171 Cal.App.4th 659, 678-679; *In re Singler* (2008) 169 Cal.App.4th 1227, 1241; *In re Roderick* (2007) 154 Cal.App.4th 242, 271-272.)

*In re Smith* (2003) 114 Cal.App.4th 343, 372, is particularly instructive. *Smith* noted past alcohol or drug abuse "does not constitute some evidence that [an inmate] might start using drugs and become violent again, and therefore that he *currently* poses an unreasonable risk of danger without further treatment. Indeed, if [an inmate's] past use of drugs did invariably establish his unsuitability, then the Governor could deny parole for the rest of [that inmate's] life based on this immutable factor, without regard to or consideration of subsequent circumstances and evidence indicating that he has no current desire for drugs and that there is little current likelihood of drug relapse, let alone a return to violent conduct as a result of it." (*In re Smith, supra*, at p. 372.)

We agree with the reasoning of these cases and find it applicable here. Consequently, and assuming for the sake of discussion the Governor's 2009 reversal properly is before this court, we conclude the record provides no rational basis upon which to conclude Barela's asserted inability to "foresee any circumstances that could increase his risk of relapse" into drug abuse renders him currently dangerous. (*In re Lawrence, supra*, 44 Cal.4th at p. 1227; *In re Loersch* (2010) 183 Cal.App.4th 150, 163-164.)

## **DISPOSITION**

The order of the superior court dated September 30, 2009, which granted Barela's petition for writ of habeas corpus, reinstated the Board's 2006 decision granting Barela parole, vacated the Governor's February 8, 2007 reversal of the Board's decision and ordered Barela released from prison in accordance with the parole date calculated by the Board is affirmed. The stay of the superior court's order is lifted. In the interests of justice, this opinion shall be final as to this court immediately upon filing. (Cal. Rules of Court, rule 8.490(b)(3).)

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.