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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re GILBERT CORONEL, on Habeas Corpus.	H037166 (Santa Clara County Super. Ct. No. 113003)

Gilbert Coronel is serving a 15-year to life sentence for his 1988 conviction by plea for the second degree murder of a 20-year-old woman. Coronel and his cohort surreptitiously induced the woman and her friend to ingest PCP in order to have sex with them, and the woman died of an overdose. In June 2010, after he had been incarcerated for some 22 years, the Board of Parole Hearings determined that Coronel was not yet suitable for parole, essentially finding that he was not forthcoming with information and had not "come to grips" with his crime. But the record reflects that during those 22 years, Coronel received just three violations for serious misconduct, the last one in 2003, and none of these violations involved violence or drugs. Additionally, in 2008, a psychologist noted that Coronel had "programmed exceptionally well," and his psychological evaluation that year generally rated his risk of future violence in the low range, though an evaluation in 2010, which the Board acknowledged to be procedurally flawed, elevated his threat level to the low-to-moderate range. The superior court granted Coronel's petition for writ of habeas corpus, vacating the Board's decision and directing it to conduct a new hearing "in accordance with due process."

Acting Warden William Knipp appeals from that order.[1] His sole argument for reversal is that because the Board found Coronel to be "deceitful," as the Warden puts it, the Board's unsuitability determination is judicially unassailable without regard to whether the record contains some evidence of current dangerousness. This contention lacks merit. Although the record here might give rise to a legitimate concern about Coronel's lack of candor on particular collateral matters discussed at the hearing, there is no articulated rational nexus between his asserted lack of credibility on these matters and the determination that he is currently dangerous. Nor does the record expose reasoning by the Board that would support such a nexus.

We accordingly conclude that the Board's decision to deny parole fails to meet due process standards, primarily because the Board failed to articulate a nexus between the factors cited in support of its decision to deny parole and a conclusion of current dangerousness, as compelled by *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and its companion case, *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis I*). Moreover, after a review of the entire record, we are unable to ascertain any reasoning that illuminates a rational nexus between the factors cited by the Board in its decision and a conclusion that Coronel is currently dangerous. While a demonstrated lack of insight into the factors that led to the commitment offense could favor an unsuitability finding in a particular case, it is not enough for the Board to conclude, without either evidentiary support or a nexus to current dangerousness, that a prisoner has failed to "come to grips" with his crime or the factors that led to it.

We will affirm the trial court's grant of a writ of habeas corpus and remand the matter for a new suitability hearing to be conducted in accordance with due process.

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[1] Although the habeas corpus petition concerns the actions of the Board, the proper respondent is the warden of the prison where Coronel is incarcerated. (Pen. Code § 1477.)

STATEMENT OF THE CASE

I. *Coronel's Background*

Coronel was born in Oakland in 1963, the sixth of eight children. His parents divorced when he was 14 years old and his father returned to Mexico. Coronel's mother left him to live with his older siblings. He was placed in remedial classes as a child but dropped out of school sometime between the seventh and ninth grades and began working to support himself. Without parental support, Coronel "ran wild" and did not learn social skills before his incarceration. One of his brothers has spent time in prison, but Coronel, who was already in prison at that time, responded to a question during the Board hearing that he did not know the charge of which his brother was convicted other than it "had to do with money."

According to cognitive testing done when Coronel was in county jail before his sentencing in 1988, he was classified as "illiterate and was functioning in the Mild Range of Mental Retardation." Since his incarceration, Coronel has applied himself to "making substantial educational gains" and overcoming his learning disability, earning his GED in 1991 and "attending classes for college." A Test of Adult Basic Education (TABE) was administered in 1998 and Coronel received "a total [Grade Point Level of] 12.9." The "Developmental Disability Program record" in 2002 reported that he was categorized within "Normal Cognitive Functioning."

Coronel has no criminal history as a juvenile. As an adult, he had a misdemeanor conviction in 1983 for obstructing a police officer. He was also arrested on three occasions: in 1982 for assault with a deadly weapon—a bottle—but the charge was dismissed the following year;[2] in 1983 for trespassing, but that charge was dismissed as well; and in 1984 for using a false identification, which was also dismissed.

[2] According to Coronel, he threw a bottle across the street into some bushes but there were people standing nearby at the time, leading to the charge.

With respect to drug and alcohol use, Coronel began drinking alcohol at around 13 or 14 years old. In 2005, he described himself as an alcoholic and by then knew "that he c[ould not] drink again and plan[ned] to maintain his abstinence if paroled." He has also used marijuana and PCP and tried cocaine sometime just before his arrest for the life crime in 1986.

Coronel married once while in prison in the mid-1990's but divorced a year or two later. Documentation in his prison file indicates that he has no children, or at least is unaware of having fathered any.

II. *The Commitment Offense and Prior Parole Hearings*

On October 7, 1986, Coronel and his codefendant, Raymond Macias, met up with two young women, 20-year old Darlene Sotelo and her friend Debby Galvan.[3] The men asked the women if they wanted to go to a party. The women accepted and got into Macias's car with him and Coronel; they were provided with sodas to drink. Debby Galvan testified at the preliminary hearing that the women drank from their drinks and began to feel dizzy and disoriented, as if they had been drugged. The four eventually wound up at Galvan's apartment in Sunnyvale. Coronel brought out some white powder, arranged four lines of the powder on a mirror or picture, and presented the women with what Coronel said was cocaine but was actually PCP. He lied about the drug because he and Macias intended the women to have reduced inhibitions or to become incapacitated by ingestion of the drug so the men could have sex with them. Each of the women ingested two lines of the drug, after which Macias and Sotelo went outside and got into a car to have sexual intercourse. Macias then left Sotelo in the car to get dressed. Meanwhile, Coronel and Galvan had sexual intercourse in Galvan's apartment. The men

[3] Ms. Galvan's name is alternately spelled "Debbie" and "Debby" in the record. We will use "Debby" as that is how she herself appears to spell her name.

left the apartment sometime that night, with Galvan passed out in the apartment and Sotelo in the car outside.

A day or two later, Galvan awoke in her apartment and went outside. The manager of the apartment complex came in contact with her and observed that she appeared to be disoriented, intoxicated, and incoherent. Galvan's stepfather arrived with her brother and they took Galvan to see a doctor, who concluded that she was under the influence of a large dose of PCP and had been sexually assaulted. It took days or weeks for Galvan to return to normal. She could not remember very much about what had happened that night with Macias and Coronel but she told police and later testified at the preliminary hearing that she had been forced to consume the drug and after she did, Coronel had beaten her. A dentist who saw her two weeks later noted that she had chipped teeth that could have come "from blows to the mouth or the region around the face" within the prior six months to a year.

Sotelo was also not heard from after the night she and Galvan met up with Macias and Coronel. Three days later, on October 10, 1986, her partially clad, dead body was found in the car outside of Galvan's apartment where Sotelo had sex with Macias. It was determined by the medical examiner that she had died from a PCP overdose. Macias and Coronel did not learn of Sotelo's death until days later.

Police investigated Sotelo's death and came to the conclusion that Coronel and Macias had been involved and had on an earlier occasion tricked two other women, a mother and daughter, into taking PCP by telling them that the drug being ingested was cocaine. The men had sex with those women as well after the women became incapacitated from the drug. About a week after Sotelo's death, Macias and Coronel were arrested and charged with murder, two counts of rape by administration of a controlled substance, and two counts of selling or offering to sell a controlled substance.

Coronel maintained from the beginning that Galvan and Sotelo had taken the drug voluntarily, thinking it was cocaine as they had been led to believe. But he "admitted that

he was 'selfish' and that he had 'drugged the girls to loosen them up,' so that he and [Macias] could have sex with them." He also denied having beaten either victim or "forcing sex" with Galvan. In terms of the victims having been beaten, the autopsy report for Sotelo noted only a small area of bruising on her right hip. And the doctor who examined Galvan days after the crime observed only a sprained thumb and two contusions the size of a thumb on the inside of her knee, with no other evidence of trauma, including around her face or jaw. But others who saw Galvan after the crime said that she appeared to have been beaten about the face or that her mouth was swollen.

After being bound over for trial, Coronel was convicted by plea of second degree murder on April 12, 1988. All other charges were dismissed with a "Harvey waiver to the extent that any parole board can consider the dismissed counts for purposes of setting parole dates." Coronel was sentenced on July 20, 1988, to 15 years to life in prison.[4]

Coronel began his incarceration for the commitment offense in August 1988. He was first eligible for parole in October 1996. The June 2010 hearing that is the subject of this appeal was one of Coronel's subsequent parole hearings. It followed one in 2009, which also resulted in a denial. But Coronel challenged the 2009 decision by a prior petition for habeas corpus. The trial court granted relief, remanded the matter, and ordered a new hearing, which took place in June 2010, and led to the instant proceeding.

III. *Coronel's Relationship to Debby Galvan and Andrew Galvan*

Debby Galvan initiated contact with Coronel and sought to visit him in 2005 as part of a "victim/offender reconciliation process." The Visiting Questionnaire she filled out said she was "best friends" with Coronel and identified her minor son, Andrew

[4] Coronel's codefendant, Macias, also pleaded to second degree murder. He, too, has been in the cycle of receiving repeated parole denials and litigating them. We addressed the question of an inmate's "insight" as affecting current dangerousness in *In re Macias* (2010) 189 Cal.App.4th 1326, in which review was granted and later dismissed in the wake of *In re Shaputis* (2011) 53 Cal.4th 192 *(Shaputis II)*.

Galvan, as Coronel's "godson" and her minor daughter as his "goddaughter." Her visitor's pass identified her and her son as Coronel's "fiancé and son" and correspondence from Galvan's probation officer approving the visit identified Coronel as Galvan's boyfriend. After requesting to appear at two prior parole hearings but failing to show up, Galvan appeared as a witness at Coronel's parole hearing in 2005. On that occasion, she recanted her prior testimony that she had been forced to ingest drugs. She said she initially lied because she did not want her mother to know that she had taken drugs voluntarily. She had confided the truth about that night only to her stepfather. After his death, she wanted to set the record straight. She wrote two letters to the Board in 2008 to the same effect. She said that by then she had accepted Coronel's apologies and had forgiven him. She wanted to move on with her life and she supported his release.

In 2006, Coronel sought permission to communicate with a juvenile in CYA custody. The youth was identified as Andrew Galvan. His birth certificate indicates he was born on July 30, 1988, nearly two years after Coronel's arrest for the life crime, that his mother is Debby Galvan, and that his father is Romeo Hernandez. Yet Coronel submitted paperwork to request approval to correspond with Andrew Galvan, stating that he (Coronel) was the youth's father, notwithstanding the birth certificate showing Romeo Hernandez as the father and other prison documentation to the effect that Coronel had no children. When asked about this discrepancy during the 2010 Board hearing, Coronel said he may or may not be the father—he didn't know—but his counselor, not he, wrote this paternity information on the correspondence request form. Other than that, Coronel refused to discuss the matter at the hearing "because it doesn't involve the crime. [Andrew Galvan] doesn't involve this incident." And when asked by one of the commissioners whether Andrew Galvan was related to the victim, Debby Galvan, he said, "No."

Debby Galvan is apparently related to members of Nuestra Familia, a violent gang that operates both in and outside of prison. Over the course of Coronel's incarceration, he has been targeted by members of this gang because his crime involved Debby Galvan. He was relocated and placed in protective housing after having been attacked multiple times.

IV. *Coronel's Behavior in Prison*

A. *Work and Self-Help*

During his 22 years of incarceration, Coronel has participated in self-help programming and other activities, and he worked as a porter and in various jobs in the kitchen, receiving satisfactory work reports. He also worked in vocational welding and received a certificate relative to the care and use of refrigerants. The self-help programming he received included, but is not limited to, the One Day at a Time program, Narcotics Anonymous activities, substance abuse groups, a stress management group, anger management groups, lifer's group, grief and loss group, rational behavior therapy group, and a Christian 12-step recovery program for which he received a laudatory chrono. He also received a laudatory chrono for participation in a program on Victim Impact, part of the Victim Awareness Offender program. He further participated in "extensive individual therapy sessions to address factors related to his life crime." A psychological evaluation in 2008 noted that Coronel has "programmed exceptionally well" and characterized him as "relatively exceptional" for the "obvious dedication he has made to institutional programs."

B. *Discipline*

Coronel received three CDC form 115 rule violations[5] over the course of his incarceration, the last one in 2003 for failing to cooperate with an instructor. He received

[5] A CDC 115 rules violation documents serious misconduct that is a violation of law or otherwise not minor in nature. (*In re Gray* (2007) 151 Cal.App.4th 379, 389; Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

one in 2002 for disobeying a direct order, and one in 1992 for showing disrespect to prison staff.

Coronel also received eight CDC form 128A violations[6] for infractions or lesser misconduct, the last one in 2009 for refusing direction from staff. On this occasion, Coronel had been assigned to sweep in the dining room but was directed by a correctional officer to wipe tables when it unexpectedly became necessary to seat a group of inmates in the course of a shift. According to Coronel, he informed the officer that he was assigned to sweeping, not wiping, so he would first have to head in the opposite direction to exchange the broom for a rag, but the officer misunderstood his explanation as a refusal to wipe and wrote him up. The other minor violations included failure to comply with grooming standards in 2003; failure to report to work in 2003; failure to bring identification to class in 2003; failure to report to work in 2002; failure to report to work in 2000; unauthorized presence in class in 1999; and telephone misuse in 1989. He explained to the psychological evaluator in 2008 that many of his disciplinary infractions were related to his repeatedly being attacked in prison. He was never sure when attacks would come, leading to his being " 'distracted in (his) duties' or afraid to follow rules when doing so could increase his risk."

V. *Psychological Assessments*

As far as the record shows, Coronel was psychologically assessed six times during 22 years of incarceration. These evaluations can be characterized as generally showing progress over time in terms of Coronel's insight into his crime, its effect on others, and the level of risk posed if Coronel were to return to free society.

[6] A CDC 128 rules violation, otherwise known as a Custodial Counseling Chrono, documents minor misconduct and counseling provided for it. (*In re Roderick* (2007) 154 Cal.App.4th 242, 269, fn. 23 (*Roderick*); Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).)

The most recent psychological evaluation in the record is dated June 23, 2010. Coronel's counsel objected to the Board's consideration of this report on the basis that Coronel did not receive sufficient notice that the evaluation would take place and on that date, he had a previously scheduled meeting with his attorney and was also being relocated within the prison. Coronel consequently declined to speak with the psychologist, who produced his report without an interview by simply relying on the contents of previous evaluations and Coronel's file.

The 2010 evaluation largely repeated what was contained in prior evaluations. Due to Coronel's refusal to be interviewed, the report did not address his current mental status, insight and self-assessment, updated drug and alcohol abuse history and ability to refrain from future use of these substances in free society. The report nevertheless diagnosed him—based on a review of his record alone—with "Polysubstance Dependence, With Psychological Dependence, in a Controlled Environment" on Axis I and, provisionally, with "Antisocial Personality Disorder" on Axis II. Similarly, based on a review of his record alone and not on any newly administered assessment instruments, he was rated as a low to moderate risk for future sexual offenses and the same for violence in the free community.

The previous psychological report was done in 2008. The evaluator noted that Coronel initially appeared anxious and that his answers to questions, though largely consistent with his record, were lacking in detail. She attributed this to his having been attacked on four previous occasions in two different prisons, leading to his being careful and guarded. But he was observed as being "grounded, mature, and forthright" and noted to have participated in "exceptional programming" over many years "with numerous laudatory chronos and some repeated programs." With regard to the crime, he expressed that he was "sorry" that Sotelo had died and understood that his crime was "selfish," explaining that he "didn't even think about other people then." He described his most significant change since his incarceration as having learned "to think about why [the

crime] happened" and knowing "it will never happen again." He said of Sotelo that "[s]he was a person—a human being [who] died because of this. I didn't mean for it to happen, but that doesn't bring her back." The evaluator concluded that Coronel "had obviously done work to develop his insight into the crime and the factors surrounding and contributing to it."

Coronel was diagnosed in 2008 as having a non-specified learning disorder and Polysubstance Dependence on Axis I, no diagnosis or condition on Axis II, and a history of "victimization while incarcerated" on Axis IV. The evaluator noted that "some persons with a history of criminal activity may be considered Antisocial" on Axis II, but Coronel "did not appear to meet the diagnostic threshold for this label."

Also in 2008, Coronel was assessed for his risk of future violence in the community using two instruments, the PCL-R (Psychopathy Check List-Revised) and the HCR-20 (History-Clinical-Risk Management-20). In addition, the LS/CMI (Level of Service/Case Management Inventory) was utilized for assessment of general risk for recidivism, as opposed to violence per se. And because the commitment offense included a sex crime, the Static-99 was used to assess Coronel's risk of sexual violence recidivism.

On the PCL-R, Coronel's risk level was assessed "in the Low range." The same is true of the HCR-20, where "his score placed him in the Low range." Similarly, Coronel's score on the LS/CMI index placed him "as a low risk for general recidivism when compared to other inmates." On the Static-99, Coronel was placed at "moderate risk for sexual violence recidivism and reconviction." Thus, overall, Coronel was estimated by the evaluator to pose a *low* likelihood of becoming involved in a violent offense if released. But she placed his "risk for sexual offense recidivism/reconviction . . . in the *moderate* range," and offered that "since this is based entirely on unchanging factors, his risk level, as measured on this instrument, will not change over time regardless of the number of years in prison."

Regarding Coronel's "psycho-sexual problems," he was noted in 2008 to have "acknowledged a history of sexual aggression, including the life crime. He admitted 'selfishness' and had worked to identify the underlying poor social skills or dangerousness involved in sex crimes. He has worked consistently and productively throughout his incarceration to come to terms with his psycho-sexual issues, and has apparently done so to the best of his ability." Concerning what might be described as Coronel's insight into the underlying causes of the commitment offense, he was noted to have reported his "selfish[ness]" and to have consistently expressed remorse. Still, the evaluator concluded that he did not express "an understanding of the dangerousness of PCP or of the violent violation that occurred when he offered that substance to others who may not have used it if they had known what he was offering them." He nevertheless "appeared to have insight into the factors that led up to the controlling offense and the impact … on his life and the lives of others. He has expressed substantial and steady insight regarding his life crime."

Coronel was also evaluated in 2005. His "programming remained exceptionally strong and his insight with regard to substance abuse had increased, to the point that the evaluator opined, 'He demonstrates understanding of the twelve step program at a level indicative of actual practice.' [Coronel] was thought to be at a Low risk level and to have the ability to reintegrate to the community without significant difficulty. The evaluator then noted that the offense had occurred [in 1986], and that [Coronel] 'had come to terms with the issues involved, and seems to have changed.' "

Coronel described to the evaluator in 2005 how without much guidance from his parents, his earlier lifestyle was concerned with " 'running around' with the 'boys' in the neighborhood" and how he had gotten caught up in the " 'drug and girls' " lifestyle. He described himself back then as being "very self-centered and … only interested in satisfying his desires. He did not think about the consequences and did not care if he hurt others in the process." With regard to the crime, he said that he had left Galvan

unconscious on the bed after they had sex and he did not know that Sotelo was dead or in danger out in the car. "He reported that the possibility that the victims had overdosed never crossed his mind. He gave this as an example of how impaired his judgment was at that time." He "fully accepts his role in the crime and how disturbed his thinking and lifestyle were. . . . He said that he is a different person now and has worked hard to change himself. He said that he no longer thinks of himself first and tries to resolve conflict through humility and positivity. As evidence of this, he stated that he was attacked on two separate occasions in 2000 and 2001, and did not fight back."

The 2005, 2008, and 2010 assessments were different from his 2001 assessment, which reflected less insight into his crime and more anxiety about his personal safety. "In 2001, [Coronel's] file was described as 'replete with laudatory chronos' and his anxiety was first observed. The evaluator . . . noted that [Coronel] had been the victim of two attacks during that time. Although 'vague' in replies, the evaluator suspected that [Coronel] was exhibiting fears of retaliation." Coronel was described as "hypervigilant" and said that he " 'always keeps an eye on what's going on' " and was in "constant fear of harm" because of the Nuestra Familia attacks on him. The evaluator noted that these attacks were documented and provided "a rationale for [Coronel's] anxiety and suspiciousness."

Still, his "responses and presentation were vague, guarded and evasive" and "considerable probing and requests for clarification were necessary," especially when discussing the crime, of which he presented a sanitized version. Coronel was described in 2001 as "a rather insecure, yet self-centered, individual who evinced a sense of entitlement and who demanded attention of others and who would become upset when his demands weren't met. Also, it is likely that he tended to deny responsibility for his actions and to project blame for his problems on others, a personality characteristic he continued to manifest." He was evaluated to be in need of further extensive psychotherapy to address his denial of culpability and insensitivity toward the victims.

He was diagnosed in 2001 with Polysubstance Abuse on Axis I, in long term remission, and with Personality Disorder, Not Otherwise Specified, with narcissistic traits, along with Antisocial Behavior, on Axis II.

"In 1998, [Coronel] was noted to have made 'continued progress in self understanding.' His judgment at that time was described as 'sound, with consistently competent and responsible behavior.' " His violence risk potential was assessed as "somewhat below average relative to this inmate population." He was described as showing "some insight" into the commitment offense. He was diagnosed with alcohol and polysubstance abuse, both in institutional remission, on Axis I and with the need to "rule out" antisocial personality disorder on Axis II.

"In 1995, [Coronel] was noted to be making progress[.] . . . [I]n the past he had 'not thought about responsibility for [his] actions. Now [he thinks] about what [he] did.' He continued to have especially strong programming and had earned his GED. He was noted as 'emotionally stable, though intellectually . . . somewhat limited.' His progress was noted as above average." And he was perceived as "sincere about his rehabilitation" and as making "gradual progress" in that regard. He was diagnosed with alcohol and polysubstance abuse, both in institutional remission, on Axis I, with sociopathic traits and with the need to "rule out" antisocial personality disorder on Axis II. Although he was evaluated as benefitting from a structured environment, he was assessed at high risk in the community for a "return to substance abuse and related sociopathic behavior." Still, his violence potential was then estimated to be below average.

"In his first evaluation in 1991, [Coronel] had strong programming but lack of insight into his life crime; he was described as 'naïve and simple minded,' especially with regard to his problem-solving skills. He was directed to further explore the issues surrounding substance abuse and criminality, and aggressive sexuality." While he acknowledged that drugging someone to have sex with them could be a crime, he maintained that Sotelo's death was not on purpose but an "accident." He was unable to

explain his involvement in the scheme of drugging females to have sex with them, and said that he got nothing out of it and did not enjoy it. He thinks that he perhaps did it "because he lacked respect for others."

VI. *Parole Plans*

If paroled, Coronel planned to live in transitional housing in Fremont, the focus of which is the 12-step program. This housing was arranged by Coronel's family. His sister also alternatively offered to have Coronel live with her and her family in Tracy. A brother and his wife also offered to have Coronel live at their house, which is a group home. Other family members also wrote letters offering various types of support to Coronel were he to be released. In addition, Coronel presented a letter from a childhood friend offering him employment in Newark as a welder or sheet metal worker. He had another offer of employment from a trucking company in Hayward, arranged through a member of his family. The position involved commercial and residential moving operations.

VII. *The Parole Board Hearing and Decision*

The hearing took place on June 28, 2010. Coronel declined to discuss the crime, as was his right. The panel discussed with Coronel the above matters apart from the crime. This was followed by questions to Coronel from the attending Deputy District Attorney, who objected to him being paroled. Coronel's counsel argued for his release and Coronel himself gave a statement in which he apologized to the victims and their families, attributing his conduct to his life then being "surrounded by drugs, selfishness, callousness, evilness and hatefulness." He expressed responsibility for the crime, and for what he had "done to other women and their families, for looking at women as sex objects for [his] gratification and [for not] looking at them as human beings, . . . for the death [he had] caused and the hurt that [he] put Ms. Galvan and both families through, for the lifestyle [he] once lived and the ignorant person [he once] was." He discussed how he now lives his life to make amends and be a better person and how during the 24 years

of his incarceration, he had made educational and vocational strides. He discussed his self-help efforts and the fact that none of his disciplinary violations involved violence or substance abuse.

After deliberating, the Board panel announced its decision that Coronel was not yet suitable for parole and would pose an unreasonable safety risk if released. The panel first offered that it "did not weigh . . . virtually at all" the 2010 psychological report, agreeing with Coronel "that it was hastily put together," suggesting that regular "procedures" were not followed and that it was not "handled as well as it" could have been. But the panel nonetheless later cited that report as a basis to deny parole for its returning diagnosis of antisocial personality disorder. The panel also cited the moderate risk rating in the Static-99 measuring risk of sexual violence recidivism in the 2008 psychological evaluation, finding that rating "problematic" in spite of the report's overall assessment of Coronel's threat level as low. The Board further cited the commitment offense as "horribl[e]" and emphasized the "coldness" inherent in the "incredible" "planning" of it. The panel expressed its view that Coronel "minimized," "trivialized," or "didn't recognize as thoroughly as he should" that someone died as a result of his crime, referencing the 2008 psychological evaluation's comment that he did not demonstrate an understanding of the dangerousness of PCP or the violence done to a person who unknowingly ingests it. The Board then stated, some seven times, that Coronel had not "come to grips" with the crime and didn't "really get[] it." In support of this conclusion, the Board also cited that Coronel "seem[ed] very standoffish" and not forthcoming with information during the hearing.

As further support for his not having "come to grips," the Board cited that in response to the question as to why Coronel's brother had been incarcerated, Coronel had merely said that the crime involved "money," without further elaboration. And it cited his description of the ultimately dismissed assault-with-a-deadly-weapon offense, i.e., how in 1982 he had thrown a bottle in some bushes near a crowd, as wanting, suggesting

that Coronel's factual version of the event was not credible and that the true facts must have been much worse to warrant such a charge.

The panel further expressed concern that Coronel had apparently tried to make contact with Debby Galvan's son, Andrew Galvan, finding their shared surname to be too coincidental for them not to be related, as Coronel had stated. The panel said that it had read Debby Galvan's letter recanting the version of the crime that she had testified to at Coronel's preliminary hearing. But they didn't give much weight to the letter in light of how long it took Galvan to "come to grips with a new version" of the crime and the ongoing issues in prison between Coronel and Galvan's family members, i.e., Nuestra Familia gang members. The panel offered that "there were remedies for her comments" and "that's to go back to Court and deal with it." The panel also concluded that Coronel's version of the crime had changed over time, but it didn't say how.

The panel further characterized the disciplinary violations that Coronel had received—"disobeying orders and disrespect for staff"—as emblematic of an attitude that "didn't speak well of" him. They described Coronel as "somewhat evasive" concerning his 2009 form 128A violation (the refusal to wipe a table) and described his explanation of the incident as not "mak[ing] any sense."

In sum, based on Coronel's abbreviated description of his brother's crime; his description of his 1982, but later dismissed, assault-with-a-deadly weapon charge; his attempt to make contact with Andrew Galvan and his related assertion that Andrew was not related to Debby Galvan; his explanation for his 2009 disciplinary infraction; and aspects of the 2008 and the discounted 2010 psychological evaluations, the panel did not get the sense that Coronel had "come to grips with the crime" and was as "safe a risk as [he] could be, [or] should be for the community." Coronel was advised to clear up the "mystery" concerning Andrew Galvan and his parentage before Coronel's next parole hearing in two years. The panel further advised that in terms of Coronel's suitability for

parole, "a number of questions have been raised that need clarification" and that "a search for the truth [was] in order."

VIII. *Coronel's Habeas Proceeding and the Trial Court's Order*

On January 3, 2011, Coronel filed his petition for writ of habeas corpus in the trial court. On February 7, 2011, the court issued its order to show cause. The Warden filed a return to the order to show cause. Coronel joined the Warden's return with a traverse.

On June 27, 2011, the trial court issued its order granting the petition, vacating the Board's decision and directing the Board to conduct a new hearing "in accordance with due process."[7] The court observed that the Board had "used the phrases 'come to grips' or 'coming to grips' seven times" in its decision to deny parole, which the court interpreted as an asserted lack of insight. The court, citing *In re Ryner* (2011) 196 Cal.App.4th 533 (*Ryner*), concluded that the Board's decision in this respect was so vague and subjective that it failed to satisfy the demands of due process. The court further concluded that the Board had indirectly violated Penal Code section 5011[8] and section 2236 of title 15 of the California Code of Regulations[9] by penalizing Coronel for exercising his right not to discuss the crime or admit guilt. (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1023 (*McDonald*); *In re Jackson* (2011) 193 Cal.App.4th 1376, 1391 (*Jackson*); *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110 (*Palermo*); *In re Aguilar*

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[7] The court directed the new hearing to be held within 95 days, which direction was stayed by our September 8, 2011 order granting the Warden's petition for writ of supersedeas.

[8] Further unspecified statutory references are to the Penal Code. Section 5011, subdivision (b) provides that the Board "shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed."

[9] Further references to the regulations or "Regs." are to title 15 of the California Code of Regulations. The parole regulations specify that "[a] prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner." (Regs., tit. 15, § 2236.)

(2008) 168 Cal.App.4th 1479, 1491 (*Aguilar*).) Specifically, the court cited the Board's comments to the effect that unless Coronel discussed the crime, there was insufficient information from which to conclude that he had "come to grips" with it.

The Warden timely appealed.

DISCUSSION

I. *Appealability and Contention on Appeal*

The Warden properly appeals from a final order of the superior court made upon the return of a writ of habeas corpus under section 1507. The asserted basis of the trial court's error is the Warden's contention that the Board can deny parole based upon an inmate's deceitful testimony, which in this case it identified as Coronel's testimony at the hearing characterized as evasive or less than forthcoming in several respects.

"When a superior court grants relief on a petition for [writ of] habeas corpus without an evidentiary hearing, as happened here, the question presented on appeal is a question of law, which the appellate court reviews de novo. [Citation.] A reviewing court independently reviews the record if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely upon documentary evidence. ([*Rosenkrantz*], *supra*, 29 Cal.4th at p. 677.)" (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192 (*Lazor*).)

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

A. *Parole Board Decisions*

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

§§ 2281, 2402.) The overarching consideration in the suitability determination, and the one that is prescribed by statute, is whether the inmate is currently a threat to public safety. " '[P] arole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.' [Citations.]" (*Lawrence, supra*, 44 Cal.4th at p. 1204.)

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

Section 2402 of the regulations sets forth the factors that the Board is required to consider and balance in the parole-suitability determination. (*Rosenkrantz, supra,* at p. 667.*)* These factors, as " 'general guidelines,' " are illustrative rather than exclusive, and " 'the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board].' " (*Rosenkrantz, supra,* 29 Cal.4th at p. 654; Regs., tit. 15, § 2402, subs. (c) & (d).) "[T]he fundamental consideration in parole decisions is public safety," and, therefore, "the core determination of 'public safety' . . . involves an assessment of an inmate's *current* dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1205.)

While the Board's discretion in parole suitability determinations is very broad, it is not complete or absolute. In exercising its discretion, the Board is constrained by the procedures specified by statute.[10] And its analysis "requires more than rote recitation of

[10] "These procedures include that the Board must 'separately *state* reasons for its decision to grant or deny parole' (§ 3041, subd. (e)(3), italics added), and that '[a]t any hearing the presiding hearing officer shall state his or her findings and supporting reasons

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." (*Lawrence, supra,* 44 Cal.4th at p. 1210.) *Lawrence* requires that the record provide "some evidence" in support of the Board's conclusion that a cited factor is related to the inmate's current dangerousness. If this nexus is not specifically articulated, a parole denial may still be upheld if the reasoning behind the conclusion of current dangerousness is apparent. (*In re Criscione* (2009) 180 Cal.App.4th 1446, 1461; *Lawrence, supra,* 44 Cal.4th at p. 1210.) But the Board's mere recitation of a fact, without somehow showing how the fact could be linked or connected to the ultimate finding of current dangerousness, is insufficient to support an unsuitability determination. "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how these factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence, supra*, 44 Cal.4th at p. 1212.) The Board "must determine whether a particular fact is probative of the central issue of current dangerousness when considered in light of the full record." (*In re Prather* (2010) 50 Cal.4th 238, 255 (*Prather*).)

B. *Judicial Review*

The statutory and regulatory frameworks for parole suitability decisions "establish that the decision to grant or deny parole is committed entirely to the judgment and discretion of the Board. . . ." (*Prather, supra,* 50 Cal.4th at p. 251.) After the Board renders a parole decision, article V, section 8 of the California Constitution provides the Governor with the authority to review that decision, and affirm, modify, or reverse it on the basis of the same factors that the Board is required to consider. (*Lawrence, supra*, 44

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on the record.' (§ 3042, subd. (c), italics added.)" (*In re Morganti* (2012) 204 Cal.App.4th 904, 912, fn. 3 (*Morganti*).)

Cal.4th at pp. 1203-1204, fn. 9; Pen. Code § 3401.2.) Accordingly, parole decisions lie fundamentally within the province of the executive branch.

It follows that judicial review of the Board's (or the Governor's) decisions concerning parole suitability is quite circumscribed. First, "the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) "Due process of law requires that this decision be supported by some evidence in the record. Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. . . . As long as the [Board's] decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision." (*Rosenkrantz, supra*, at pp. 676-677; see also *Shaputis II, supra*, 53 Cal.4th at p. 210; *Lawrence, supra*, 44 Cal.4th at p. 1204; *Shaputis I, supra*, 44 Cal.4th at pp. 1260-1261.)

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

statutes is whether the inmate currently poses a threat to public safety, and because the inmate's due process interest in parole mandates a meaningful review of a decision denying parole, the proper articulation of the standard of review is whether there exists 'some evidence' demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability." (*Prather, supra*, 50 Cal.4th at pp. 251-252.)

Shaputis II clarified that the Board's decision must be "upheld unless it is arbitrary or procedurally flawed." (*Shaputis II*, *supra*, 53 Cal.4th at p. 221.) The case does not specifically define what is meant by "procedurally flawed." But elsewhere, the opinion states that "[u]nder the 'some evidence' standard of review, the parole authority's interpretation of the evidence must be upheld if it is reasonable, in the sense that it is not arbitrary, and reflects due consideration of the relevant factors." (*Ibid.*) Under this standard, we "are to ensure that the Board's 'analysis of the public safety risk entailed in a grant of parole is based on a modicum of evidence, not mere guesswork. (*Shaputis II*, [*supra*, 53 Cal.4th] at p. 219.) We review not only the evidence specified by the Board, but the entire record to determine whether this modicum of evidence exists, and look for a 'rational nexus between the evidence and the ultimate determination of current dangerousness.' (*Shaputis II*, at p. 221.) We do not reweigh the evidence. (*Ibid.*)" (*In re Young* (2012) 204 Cal.App.4th 288, 304 (*Young*); *Morganti*, *supra*, 204 Cal.App.4th at p. 917.) "Nonetheless, as Justice Liu points out in his concurrence in *Shaputis II*, we 'examine[] the rationality of the parole authority's decision, an inquiry that properly focuses on the authority's reasoning, including the evidence cited by the authority in support of [that] reasoning.' (*Shaputis II, supra*, 53 Cal.4th at p. 225 (conc. opn. of Liu, J.).)" (*Young*, *supra*, 204 Cal.App.4th at p. 304, fn. 13.) In other words, "the factual basis of a decision by the Board denying parole must be premised upon some evidence relevant to the factors the Board is required to consider." (*Rosenkrantz, supra*, 29 Cal.4th at p. 663.) '[T]he focus of judicial review is on the rationality of the Board's . . .

decision—not only the ultimate conclusion of current dangerousness but also the evidence and reasoning on which the Board or Governor actually relied to reach that conclusion." (*Shaputis II, supra*, 53 Cal.4th at p. 223 (conc. opn. of Liu, J.).)

"Thus, *Shaputis II* and the Supreme Court opinions on which it relies make clear that we are to review the Board's decision to ensure that it satisfies two due process imperatives. . . . We must determine whether the Board's decision reflects due consideration of all relevant statutory factors and, if it does, whether its analysis is supported by a modicum of evidence in the record, not mere guesswork, that is rationally indicative of current dangerousness." (*Young, supra*, 204 Cal.App.4th at p. 304.)

Shaputis II summarized five fundamental principles governing our review of parole decisions; we find that summary useful here: "1. The essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety. [¶] 2. That question is posed first to the Board and then to the Governor, who draw their answers from the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior. [¶] 3. The inmate has a right to decline to participate in psychological evaluation and in the hearing itself. That decision may not be held against the inmate. Equally, however, it may not limit the Board or the Governor in their evaluation of all the evidence. [¶] 4. Judicial review is conducted under the highly deferential 'some evidence' standard. The executive decision of the Board or the Governor is upheld unless it is arbitrary or procedurally flawed. The court reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision. [¶] 5. The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence." (*Shaputis II, supra*, 53 Cal.4th at pp. 220-221.)

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

III. *The Cited Factors Lack a Rational Nexus to Current Dangerousness*

In framing this appeal in his opening brief, the Warden does not contend that a rational nexus exists between the Board's cited factors and a conclusion of Coronel's current dangerousness. Instead, he posits the sole issue on appeal as: "When the Board identifies an inmate's deceitful testimony, must a reviewing court uphold the Board's finding that he is unsuitable for release to parole?" This approach is problematic in two particular respects.

First, while the Board at times characterized Coronel as "standoffish," "glossing over things," and not forthcoming with information, it did not ever directly or affirmatively accuse him of deceit or lying. Nor did the Board specifically identify his asserted "deceit" as a factor in support of parole unsuitability, instead only suggesting that questions had been raised that "need[ed] clarification" and that "a search for the truth" was in order for his next hearing. Second, and more importantly, as was made clear in *Lawrence* and reaffirmed in *Shaputis II*, the existence or not of some evidence of a particular factor, such as lack of credibility, cited in support of parole unsuitability is not the focus of judicial review of parole decisions. Rather, we look for " 'whether there exists "some evidence" demonstrating that an inmate poses a current threat to public safety. . . . (*Lawrence, supra*, 44 Cal.4th at p. 1191.)' [Citation.]" (*Shaputis, II, supra*, 53 Cal.4th at p. 209.)

As the Warden has not identified some evidence in the record of current dangerousness, or contended that Coronel's asserted lack of credibility in and of itself demonstrates current dangerousness in some way, his briefing on appeal is unhelpful to his cause. We will nonetheless discharge our duty as a reviewing court to engage in

"some evidence" review of the Board's decision to deny parole based on the entire record.

In support of its parole denial, the Board cited six factors: the commitment offense; the antisocial-personality-disorder diagnosis in the discounted 2010 psychological evaluation; the moderate risk rating reflected in the Static-99 instrument in the 2008 psychological evaluation; the comment in the 2008 evaluation that Coronel did not express an understanding of the dangerousness of PCP or the seriousness of providing the drug to someone under false pretenses; the omission from the same report of further exploration of Coronel's "selfishness" as a root cause of the crime; and the panel's assessment, based generally on his perceived evasiveness or failure to be forthcoming with information on particular topics, that Coronel had not "come to grips" with the crime. We, like the trial court, will interpret this latter factor, the meaning of which is vague at best, as a conclusion that Coronel lacks insight into the causative factors that led to the crime.[11] The Board also noted that Coronel's version of the crime had changed over time, and that it gave little weight to Galvan's recantation.

While the Board stated a conclusion that Coronel would pose an unreasonable risk of danger if released, it did not articulate a rational nexus between any of the cited factors and this conclusion. Nor is such a nexus apparent to us from a review of the entire record.

A. *The First Factor—The Commitment Offense*

The Board cited this factor without reference to the regulatory factors that establish a crime as particularly heinous, atrocious, or cruel (Regs., tit. 15, § 2402, subd.

[11] As we observe below in section III D, while the regulations do not use the term "insight," they do direct the Board to consider the inmate's "past and present attitude toward the crime" (regs., § 2402, subd. (b)) and "the presence of remorse," expressly including indications that the inmate "understands the nature and magnitude of the offense" (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of "insight." (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

(c)(1)), but described it as horrible and referenced its "incredible" planning and "coldness." Per *Lawrence*, "although the Board and the Governor may rely on the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at pp. 1214, 1210, 1227, italics deleted; see also *Shaputis I, supra,* 44 Cal.4th at pp. 1254-1255.)

Accordingly, even attributing heinousness to the crime, this event alone as a static, historic fact, is not a basis for parole denial unless there is an evidence-based rational nexus between the offense and present behavior. Something about the crime must interrelate with other dynamic factors to make it relevant to the pivotal issue of *current* dangerousness. We therefore turn to the other factors cited by the Board.

B. *The Second Factor—2010 Psychological Evaluation*

The Board began its decision by stating that it "did not weigh [the 2010 psychological evaluation] virtually at all," observing that it was "hastily put together," lacking in established procedures, "not handled as well as it could" have been, "just too rushed," and not "the most stellar job" in "terms of notification and what not." Moreover, Coronel was not interviewed for that evaluation, which expressly rested only on prior evaluations and Coronel's file. Nevertheless, in support of its denial, the Board cited that evaluation's diagnosis of anti-social personality disorder, something not present in the previous 2008 evaluation. It said, "[a]nd then the newest [2010 evaluation], the one that we're not counting, finds that you have that again. So something is wrong."

Based on its own assessment of the procedural flaws surrounding the 2010 evaluation, especially the conclusions made there in the conceded absence of an interview with Coronel or an evaluation of his current mental status, we find the Board's reliance on the report's antisocial-personality-disorder diagnosis to be so unreliable as to be arbitrary or capricious and to reflect a lack of individualized consideration. First, the Board was required by regulation to consider Coronel's "past and present mental state" in its parole suitability decision. (Regs., tit. 15, § 2402, subd. (b).) But more pointedly, the Board cannot discount the fairness of the procedures surrounding the evaluation and indicate that it is consequently giving the report virtually no weight while at the same time relying on one of the report's diagnoses in order to support a finding of current dangerousness. We accordingly conclude that because of the acknowledged, inherent unreliability of this psychological evaluation, and its consequent lack of basis in fact, it cannot reasonably constitute some evidence to support a conclusion of current dangerousness or provide a rational nexus to that conclusion.

C. *The Third, Fourth and Fifth Factors—The 2008 Psychological Evaluation*

The Board cited three aspects of the 2008 psychological evaluation in support of its parole denial. The first was the evaluator's perception that although Coronel evidenced "substantial and steady" insight into his crime, he did not express a full understanding of the dangerousness of PCP or of the degree of violation that occurred when persons unknowingly ingested that substance. Based in part on this perception, the Board concluded that Coronel had not "come to grips [as] thoroughly as [he] could or should to make [him] a safe risk." The Board also noted that although the evaluation reflected that Coronel had attributed the crime to his own "selfishness," the report did not contain to the Board's satisfaction a more specific "explanation or an exploration" that Coronel understood "what selfishness led to the rape and murder." As both of these perceived deficiencies seemingly concern Coronel's level of insight about the crime, we

will address these aspects of the 2008 psychological evaluation below in our discussion of the sixth factor—lack of insight.

The third aspect of the 2008 psychological evaluation that the Board cited was its moderate risk rating in the Static-99 assessment tool, measuring the risk of sexual violence recidivism, which the panel found "problematic." But, as the evaluator noted, "since this is based entirely on unchanging factors, [Coronel's] risk level, as measured on the instrument, will not change over time regardless of the number of years in prison." The panel appeared to doubt this qualifying statement from the evaluator, generally offering that it was "very unusual because a lot of people work their way out of that despite the record."

The Board's reliance on this single elevated risk rating on one assessment tool, which was among other ratings as measured by different instruments, all of which were low, and an overall low-risk rating in the same report, is arbitrary and unreasonable. First, as the evaluator noted, she gave the moderate rating on the Static-99 with the proviso that it reflected only static, historical factors. According to her, because of this, the rating would never change regardless of the length of time served or, presumably, the progress toward rehabilitation. Yet the Board plucked the rating out from the entire report, elevating it over the other low-risk ratings contained therein, some of which reflected dynamic factors, while disregarding the evaluator's qualifying proviso and offering no reasonable justification for doing so. The general perception that other "people work their way out of" a moderate rating on the same assessment tool is an arbitrary reason for rejecting the evaluator's own description *in this case* about how she administered the tool or interpreted the result when evaluating Coronel, and one that lacks individualized consideration. The elevated rating loses its meaning and evidentiary value when taken outside the context in which the evaluator so specifically and deliberately placed it.

Moreover, because as calculated by the evaluator, Coronel's Static-99 moderate risk rating was "based entirely on unchanging factors," it cannot, by itself, be probative of *current* dangerousness. It is an immutable fact, like the commitment offense or an inmate's criminal history. After *Lawrence*, such facts cannot alone be probative of this ultimate conclusion. The record must also establish that some other dynamic factor or factors interrelate with the static factor to render it probative of current dangerousness. (*Lawrence, supra*, 44 Cal.4th at p. 1214; see also *Shaputis I, supra*, 44 Cal.4th at pp. 1254-1255.) Accordingly, the single moderate risk rating on the Static-99 in 2008 is not some evidence of current dangerousness. Nor does it provide a rational nexus to that conclusion.

D. *The Sixth Factor—Lack of Insight or Failure to "Come to Grips"*

In support of its decision, the Board cited that Coronel had "minimized," "trivialized," or "didn't recognize as thoroughly as [he] should" that someone had died as a result of the crime, referencing the 2008 psychological evaluator's comment that Coronel did not express an understanding of the dangerousness of PCP or the seriousness of the violation suffered when one is given that drug under false pretenses.

As noted, the Board also cited that although the 2008 psychological evaluation reflected that Coronel attributed the crime to his own selfishness, it did not contain a more specific "explanation or an exploration" that he understood "what selfishness led to the rape and murder." And the Board cited that Coronel's version of the crime had changed over time, and that it had given little weight to Galvan's partial recantation, which supported what Coronel had always maintained—that she and Sotelo had not been forced to consume PCP, albeit under the false premise that the substance was cocaine. And, finally, the Board expressed, some seven times, that Coronel had failed to "come to grips" with the crime or aspects of it. The Board appeared to base this observation on what it perceived as Coronel's "standoffishness" or failure to be forthcoming with information on other, unrelated topics. As evidence of this, the Board referenced:

1) Coronel's failure to describe the crime for which his brother was incarcerated other than that it had to do with "money;" 2) his perceived sanitized factual description of his dismissed 1982 assault-with-a-deadly-weapon charge; 3) his denial that Andrew Galvan, whom he requested to contact in CYA, was related to the victim Debby Galvan and his "questionable" identification of Andrew Galvan as his son in the contact-request form; and 4) his "somewhat evasive" description of the events leading to his 2009 form 128A counseling chrono for refusing direction from staff.

While the Board did not couch any of these matters as a "lack of insight," it appears that this term, cited so frequently before our courts as a basis to deny parole, is what the Board meant. As noted, a "lack of insight," a phrase discussed in *Shaputis I* (*Shaputis II, supra*, 53 Cal.4th at p. 217), is not expressly a statutory or regulatory factor for determining an inmate's suitability for parole. But the regulations direct the Board to consider an inmate's "past and present mental state" and "past and present attitude towards" the life crime in the suitability determination. (Regs., tit. 15, § 2402, subd. (b).) They also include indications that the inmate "understands the nature and magnitude of the offense," and they provide that an inmate's signs of remorse for the crime favor suitability. (*Id*., at subd. (d)(3).)

It is also now well established that what might be deemed an inmate's level of "insight," as reflected by " 'changes in a prisoner's maturity, understanding, and mental state' are 'highly probative … of current dangerousness.' (*Lawrence, supra*, 44 Cal.4th at p. 1220.)" (*Shaputis II, supra*, 53 Cal.4th at p. 218.) "As *Shaputis [I]* illustrates, a 'lack of insight' into past criminal conduct can reflect an inability to recognize the circumstances that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to the circumstances and, if confronted by them again, would likely react in a similar way. [Citations.]" (*Ryner, supra*, 196 Cal.App.4th at p. 547, citing *Shaputis I, supra*, 44 Cal.4th at pp. 1260, 1261, fn. 20; *Lawrence, supra,* 44 Cal.4th at pp. 1214, 1228 and *Lazor, supra*, 172 Cal.App.4th at p. 1202.) "Thus . . . the presence

or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety.' [Citation.]" (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

Nevertheless, the high court continues to acknowledge that " 'expressions of insight and remorse will vary from prisoner to prisoner and … there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior.' [Citation.]" (*Shaputis II, supra,* 53 Cal.4th at p. 219, fn. 12.) And it is established that "lack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness. [Citation.]" (*Id*. at p. 219.) But, because the presence or absence of insight pertains to the inmate's *current* state of mind, this factor may bear more immediately than some others on the ultimate question of the present risk to public safety posed by the inmate's release. (*Ibid.,* italics added*)*

Still, evidence that an inmate lacks insight into the causes or circumstances of the commitment offense is indicative of current dangerousness "only if it shows a *material* deficiency in an inmate's understanding and acceptance of responsibility for the crime." (*Ryner, supra,* 196 Cal.App.4th at p. 548, fn. omitted; *Shaputis II, supra,* 53 Cal.4th at pp. 226-230, conc. opn. of J. Liu [some evidence of lack of insight into past criminal behavior does not necessarily translate to some evidence of current dangerousness].) Put another way, "the finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense has some rational tendency to show that the inmate currently poses an unreasonable risk of danger." (*Ryner, supra,* 196 Cal.App.4th at pp. 548-549.) Thus, "[a]ccepting as we must, that an inmate's insufficient understanding is a factor that may show him to be unsuitable for parole, it is not enough to establish that the inmate's insight is deficient in some specific way."

(*Morganti*, *supra*, 204 Cal.App.4th at p. 923.) There must be, in addition, some connection between the cited deficiency and the conclusion of current dangerousness. (*Ibid*.)

None of the matters cited by the Board that might be said to relate to Coronel's level of insight about the crime or its causative factors—his so called failure to "come to grips"—rise to a level of material deficiency. And several are not supported by the record. In addition, the Board did not articulate with respect to any one of them a rational nexus to current dangerousness. Nor are we able to ascertain from the record the Board's reasoning that would suggest such a nexus.

Addressing first what the Board took from the 2008 psychological evaluation, it concluded that Coronel had "minimized," "trivialized," or didn't recognize as thoroughly as he should that someone had died as a result of his crime. This conclusion was drawn from the evaluator's statement that Coronel had not expressed an understanding of the dangerousness of PCP or the seriousness of the violation he had committed by providing the drug under false pretenses. But the Board's conclusion does not logically follow from the evaluator's statement, and is not supported in the record.

Moreover, the evaluator's statement comes amidst others reflecting that Coronel was "sorry" that Sotelo had died, and that he didn't mean for it to happen, while recognizing that his regret would not "bring her back." The evaluator specifically concluded that Coronel "had obviously done work to develop his insight into the crime and its causative factors" and that he understood the crime's "impact . . . on his life and the lives of others." Thus, neither the evaluator's cited statement, nor anything else in the record, provide some evidence that Coronel minimized or trivialized the crime or his responsibility for it, or that he did not fully recognize that Sotelo had died because of it. And the evaluator's statement about Coronel's lack of understanding of the dangerousness of PCP or the seriousness of providing the drug under false pretenses, taken at face value, is not in any event some evidence of current dangerousness in light of

the whole record. "Where, as here, 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." (*Ryner, supra,* 196 Cal.App.4th at p. 549.)

Further, with reference to the 2008 psychological evaluation, the Board acknowledged that Coronel had attributed the crime to his own selfishness, but it was unsatisfied that the report did not contain a more specific "explanation or an exploration" that he understood "what selfishness led to the rape and murder." We read this perceived shortcoming—itself lacking clarity—as a criticism of the report's content rather than of the manner in which, or the degree to which, Coronel had expressed this attribution of his own selfishness to the evaluator.

But even assuming that the perceived deficiency related to Coronel's level of understanding or insight, this would again be belied by what the report establishes—that Coronel had developed an understanding of "the factors surrounding and contributing to" the crime. And there is nothing in the record to suggest that he either lacked or needed to further develop a more detailed understanding of what aspect of his "selfishness" led to the crime in order for him to have attained sufficient insight into its causative factors. While the Board may reject the conclusions of a psychological evaluation, it may not do so based on "a hunch or intuition" (*Lawrence, supra,* 44 Cal.4th at p. 1213) or mere "guesswork." (*Young, supra,* 204 Cal.App.4th at pp. 308, 312.) Instead, where psychological evaluations indicate that an inmate poses a low risk of danger, the "Board must point to evidence from which it is reasonable to infer that an inmate's lack of insight reveals a danger undetected or underestimated in the psychological reports." (*Shaputis II, supra,* 53 Cal.4th at p. 228 (conc. opn. of Liu, J.), citing *Roderick, supra,* 154 Cal.App.4th at pp. 271-272; *Young, supra,* 204 Cal.App.4th at p. 312.) In sum, the

Board's dissatisfaction with the 2008 psychological evaluation's depth or content concerning Coronel's acknowledged selfishness as a root cause of the crime is not some evidence that he lacked sufficient insight. Nor is it probative of his current dangerousness.

Concerning the Board's assertion that Coronel's version of the crime has changed over time, we find no evidence of this in the record. On the contrary, he has always maintained that he and Macias provided Galvan and Sotelo with PCP while telling them it was cocaine, with the purpose of having sex with the incapacitated women, which purpose was accomplished. He has consistently denied having beaten either of the women or having sexually forced himself on Galvan.

Although Galvan initially testified that she was forced to consume the drug, and that she was beaten thereafter, she partially retracted this version of the crime in 2005, admitting that she had previously lied about being forced to ingest drugs. As to Coronel having beaten the women, the preliminary hearing testimony was that Sotelo had sustained only a small area of bruising on her right hip. And the doctor who treated Galvan two days after the crime testified that apart from the sexual assault, she had a sprained thumb and two bruises the size of a thumb on the inside of her knee, with no further evidence of trauma. Granted, this was disputed, but Coronel's consistent version of the crime is not "physically impossible and [it does] not strain credulity" such that the Board is free to wholly discredit his account of events as a justification to deny parole, particularly in light of Galvan's partial retraction that is in accord with Coronel's own version. (*In re Hunter* (2012) 205 Cal.App.4th 1529, 1539-1540 (*Hunter*); *In re Twinn* (2010) 190 Cal.App.4th 447, 467-468 [inmate's denials about use of particular weapons and intention to kill victim were not incompatible with trial evidence, and thus did not support a lack of insight]; *Palermo, supra,* 171 Cal.App.4th at p. 1112 [denial of guilt that is delusional, dishonest, or irrational bears on current dangerousness], disapproved on another ground in *Prather, supra*, 50 Cal.4th at p. 252; *In re Pugh* (2012) 205

Cal.App.4th 260, 266-273; *Jackson*, *supra*, 193 Cal.App.4th at pp. 1388-1391; *McDonald, supra,* 189 Cal.App.4th at p. 1018.)

This is distinguished from cases upholding the conclusion that an inmate lacks insight based on discrepancies between his or her account of the crime and the record. (See, e.g., *Shaputis I, supra*, 44 Cal.4th at pp. 1246-1247, 1248, 1260 [conclusion that Shaputis remained a threat based in part on disbelief that victim's death was accidental, which was contradicted by the record]; *Shaputis II, supra*, 53 Cal.4th at pp. 212-213, 216 [implausible denial of guilt may support finding of current dangerousness]; *In re Taplett* (2010) 188 Cal.App.4th 440, 450 [upholding parole denial where there was specific evidence that inmate's version of crime was inaccurate]; *In re Smith* (2009) 171 Cal.App.4th 1631, 1638-1639 [same]; *In re McClendon* (2003) 113 Cal.App.4th 315, 321-323 [same].)

Thus, with respect to the Board's citation of Coronel's changing version of the crime as supporting his unsuitability for parole, "we do not reweigh the significance of the evidence considered by the Board, but simply find no evidence in the record that supports the Board's conclusion." (*Hunter, supra*, 205 Cal.App.4th at p. 1540.) Nothing about Coronel's consistent and corroborated version of the crime reflects a lack of insight or furnishes a rational nexus to current dangerousness.

Finally, we reach the Board's most oft cited reason for its unsuitability finding—that Coronel had failed to "come to grips" with the crime or aspects of it. We first observe that this expression is so vague as to lack meaning in the context of parole denial in which due process concerns are present. The Board is bound by statute to state its reasons for an unsuitability finding (§§ 3041, subd. (e), 3042, subd. (c)), but this opaque expression hardly informs an inmate of the specific ways in which he or she is deemed unsuitable and consequently what he or she must do in order to overcome an unsuitability finding. As we have observed, the phrase "lack of insight" is problematic enough in terms of its inherent vagueness. And the very concept can lend itself to "subjective

perceptions based on intuition or undefined criteria that are impossible to refute." (*Ryner, supra*, 196 Cal.App.4th at p. 548.) But an asserted failure to "come to grips" defies all clarity and precision for due process purposes, no matter how many times it was repeated in the Board's decision.

As noted earlier, the Board based its conclusion that Coronel had not "come to grips" on what it perceived as his "standoffishness" or failure to be forthcoming with information on topics unrelated to the crime itself. In this respect, the Board referenced Coronel's brother's crime, Coronel's description of the facts leading to his 1982 assault charge, his handling of issues relating to Andrew Galvan, and his "somewhat evasive" description of the events leading to his 2009 128A counseling chrono. But as also noted, "[t]he parole regulations specify that '[a] prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner.' ([Regs.,] tit. 15, § 2236, italics [omitted].)" (*Shaputis II, supra*, 53 Cal.4th at pp. 211-212, fn. omitted.) Thus, an inmate need not admit guilt or change his or her story to be found suitable for parole. (*Aguilar, supra*, 168 Cal.App.4th at p. 1491.) That said, the Board may consider the inmate's failure to take full responsibility for past violence and his or her own lack of insight into his or her behavior when determining that the circumstances of the commitment offense and a violent background continue to be probative to the issue of current dangerousness. (*Shaputis I, supra*, 44 Cal.4th at p. 1261, fn. 20.) "The Board's consideration of 'other information' is not limited to recent information the inmate has chosen to present. Nor does the Board hold a refusal to discuss the crime against the inmate when it weighs the credibility of such information against other evidence in the record. In determining whether an inmate may safely be paroled, it is legitimate for the Board to take into account that the record pertaining to the inmate's current state of mind is incomplete, and to rely on other sources of information. An inmate who refuses to interact with the Board at a parole hearing deprives the Board of a critical means of evaluating the risk to public

safety that a grant of parole would entail. In such a case, the Board must take the record as it finds it." (*Shaputis II, supra*, 53 Cal.4th at p. 212.)

Accordingly, the Board is entitled to look beyond an inmate's expressions of remorse and willingness to be accountable, and to examine the inmate's mental state and attitude about the commitment offense to determine whether there is a truthful appreciation for the wrongfulness of the act. (*Shaputis II, supra*, 53 Cal.4th at p. 218.) And credibility, too, is relevant to the question of insight. (*In re Lee* (2006) 143 Cal.App.4th 1400, 1414-1414.) But the other evidence to which the Board resorts must be relevant to the inmate's mental state and attitude about the crime in order to bear on the question of his or her appreciation of its wrongfulness, and in turn to bear on the ultimate issue of current dangerousness. Collateral factors or matters not related to the question of an inmate's insight into the crime, or its causes, do not bear on these questions or determinations.

None of the four cited matters from which the Board concluded that Coronel's evasiveness or standoffishness translated to his failure to "come to grips" is related to the crime itself or to his level of insight about the crime or its causative factors. Whether he knew of, or was forthcoming about, the specific crime of which his brother was convicted, or of the facts underlying that conviction apart from his brother's having obtained money, is irrelevant to Coronel's insight about his own crime or his current dangerousness. The same is true of Coronel's factual description of his 1982 charge for assault with a deadly weapon, which was dismissed the following year. It is well within the range of possibilities that this charge indeed did arise from his having thrown a bottle into the bushes near a crowd, which factual basis may have led to the dismissal in the first place. The Board's rejection of this proffered scenario is based on nothing but speculation and hunch.

The Board legitimately questioned Coronel's account of the events leading to his 2009 128A counseling chrono. "Recent discipline may provide a basis for denying

parole. [Citations.] But prison discipline, like any other parole unsuitability factor, 'supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness.' (*Shaputis II, supra*, 53 Cal.4th at p. 219.) Not every breach of prison rules provides rational support for a finding of unsuitability. (See, e.g., *Palermo, supra*, 171 Cal.App.4th at p. 1110 ["Nothing in the record supports a conclusion that [an inmate] poses a threat to public safety because he once engaged in the unauthorized use of a copy machine, once participated in a work strike, and once was found in possession of a fan stolen by his roommate."].)" (*Hunter, supra*, 205 Cal.App.4th at p. 1543.) Coronel's explanation for what led to him being written up for refusing to wipe tables while sweeping in the dining room does not display a lack of insight about his crime or its causative factors or a mental state that is rationally probative of his current dangerousness. The violation was minor in nature and Coronel acknowledged that even accepting his version of events, it was his poor communication to the officer that led to what he described as a misunderstanding. There is nothing about this incident, or about Coronel's disciplinary history in general—none of which involved violence or substance abuse—that suggests a lack of insight or that provides a rational nexus to current dangerousness.

We acknowledge that Coronel's evasive handling of the issues surrounding Andrew Galvan and his parentage raise legitimate questions or concerns about Coronel's intentions. But the record also suggests that Coronel had a history of being hypersensitive, guarded, and cautious, especially about matters concerning Debby Galvan, given the attacks Coronel suffered in prison by members of her family or related members of Nuestra Familia. And it is undisputed that Debby Galvan initiated contact with Coronel beginning in 2005, that she partially recanted her initial testimony about the crime, that she described the relationship between Coronel and her children as quasi-familial, and that she put in issue the character of her own relationship with Coronel. Given this context, there may be a benign explanation for Coronel's evasiveness. It is not

within our purview to speculate, but the record does not reveal that Coronel's described lack of candor on the matter of Andrew Galvan was shown by the Board to demonstrate a lack of insight or to bear on current dangerousness.

In sum, all four of the matters cited as examples of Coronel's failure to "come to grips" are collateral to the crime or to his insight about the crime or its causative factors. And, as presented on this record, none of them bear on Coronel's level of insight in any material way. The Board did not attempt to rationally connect these disparate matters to a lack of insight, and it failed to articulate any rational nexus between the matters, Coronel's discussion of them, and the ultimate issue of his current dangerousness.

CONCLUSION OF SOME EVIDENCE REVIEW

Based on the entire record, we conclude that none of the factors cited by the Board in support of its parole unsuitability determination constitute some evidence of Coronel's current dangerousness. Nor do they provide a rational nexus to that conclusion, something the Board failed to articulate. After careful review of the law and the record, we remain convinced that under the deferential standard of review reaffirmed in *Shaputis II*, the Board's decision in this case fails to withstand scrutiny.

DISPOSITION

The order granting Coronel's petition for writ of habeas corpus is affirmed. The Board's 2010 decision to deny parole is vacated and the Board is directed to conduct a new hearing in accordance with due process within 90 days of finality of this opinion.

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Márquez, J.

WE CONCUR:

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Rushing, P.J.

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Premo, J.

Trial Court:	Santa Clara County Superior Court No.: 113003
Trial Judge:	The Honorable Rise Jones Pichon
Attorney for Defendant and Respondent Gilbert Coronel:	Traci S. Mason under appointment by the Court of Appeal for Appellant
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