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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re EMILIO SANCHEZ, on Habeas Corpus.	B235472 (Los Angeles County Super. Ct. No. BH007935)

PETITION for writ of habeas corpus. Patricia M. Schnegg, Judge. Writ denied.

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

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Phillip Lindsay and Amy M. Roebuck, Deputy Attorneys General, for Respondent.

Petitioner Emilio Sanchez challenges former Governor Arnold Schwarzenegger's reversal of a decision by the Board of Parole Hearings (Board) finding him suitable for release on parole. We conclude there was a modicum of evidence to support the Governor's conclusion that Sanchez was unsuitable for release because he posed an unreasonable risk to public safety. Accordingly, we deny Sanchez's petition for a writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Procedural history.*

Sanchez was convicted by a jury of second degree murder in April 1992. He was sentenced to a term of 15 years to life in prison, plus a four-year enhancement for personal use of a firearm, for a total of 19 years to life. (Pen. Code, § 187, subd. (a), former § 12022.5.) Sanchez was committed to the California Department of Corrections on April 28, 1992, and his minimum parole eligibility date was February 9, 2004. On April 28, 2010, at his fifth subsequent parole hearing, the Board found him suitable for parole. He was, at that time, 54 years old and had been incarcerated for approximately 19 years.

On September 23, 2010, former Governor Schwarzenegger reversed the Board's suitability finding. The Governor recognized that Sanchez had made "some creditable gains in prison." However, the Governor concluded that the nature of the commitment offense, Sanchez's purported lack of insight into the crime, and Sanchez's participation in a prison work stoppage indicated his release posed an unreasonable risk to public safety.

Sanchez challenged the Governor's reversal in a petition for a writ of habeas corpus brought in the superior court, which was denied. He then petitioned this court for relief contending, inter alia, that the Governor's reversal was not supported by "some evidence." We issued an order to show cause and ordered that counsel be appointed for Sanchez.

2. *The commitment offense.*

a. *Official version of the crime.*

The Board adopted the facts of the commitment offense as set forth in our unpublished opinion affirming Sanchez's conviction (*People v. Sanchez* (Apr. 19, 1994, B067764), as follows. On the evening of April 17, 1991, Sanchez, who was 35 years old, patronized the Fireside Lounge. Victim Mitchell Sias, Frank Littlebear, and their friends were present as well. During the evening Sanchez met Darlene Melendez, with whom he had not previously been acquainted; they danced. In the early morning hours of April 18, Melendez and her friend Rita Tena rode with Sanchez to a party on Coke Avenue. Sias, Littlebear, and their friend Ruben Banuelos attended the party as well. At the party, Sanchez and Melendez exchanged telephone numbers. Melendez went outside and talked with Banuelos for approximately 10 minutes. When she returned to the party, Sanchez was leaving. He asked how Melendez would get home. She replied that she would go with Tena. Sanchez stated he believed she was going home with Banuelos. Melendez denied it. Sanchez and Melendez "went back and forth on this theme a couple of times." (*Id*. at pp. 3-5.)

According to Melendez, at that point Banuelos, Littlebear, and Sias "approached from behind." They asked Melendez what was happening. She replied that nothing was happening and "everything was all right." (*People v. Sanchez, supra,* B067764, at p. 5.) Sensing "some tension," however, she walked away and called for Tena. As Melendez walked across the street, someone said, " ' "He's got a gun." ' " (*Ibid*.) Melendez hid behind a parked car. She heard scuffling and gunshots. She then observed Sanchez standing up by his car; she begged him to put the gun down. Sanchez looked at Melendez, raised his hand, and fired more shots. He then drove away. (*Id*. at pp. 5-6.)

According to the harmonized testimony of Banuelos and Littlebear, as they and Sias were leaving the party they observed Sanchez arguing with Melendez. The trio crossed the street to see what was happening. Banuelos asked Melendez if there was a problem. She said no. Banuelos then asked Sanchez the same question; he replied, " 'No, there is no fucking problem' " and added, " ' "but you're going to have one." ' "

(*People v. Sanchez, supra,* B067764, at pp. 4, 6.) Banuelos "concluded that there was a problem." Sias also asked if there was a problem. Sanchez then pulled out a gun and fired twice in the space between Sias and Banuelos, stating, " 'Yeah, I got a fucking problem now.' " (*Id*. at p. 6.) Littlebear backed away and Banuelos ran across the street, but Sias stayed put and argued with Sanchez. Sias called Sanchez names. Sias and Sanchez began pushing each other and struggling, and Sias tried to grab the gun. The men pushed each other toward a van parked on the street. Sanchez pushed Sias into a curb, causing Sias to fall. As Sias was leaning on his elbow and attempting to get up, Sanchez shot him from a distance of a few feet, hitting him in the chest. Sanchez then pointed the gun at Banuelos, who froze. Sanchez walked toward his car, and Banuelos grabbed Sias. Sanchez again pointed the gun at Banuelos before driving off. (*Id*. at pp. 6-7.) Sias was considerably shorter and smaller than Sanchez. No one else in the group was armed, and no one other than Sias had struck Sanchez. (*Id*. at pp. 4, 7.)

Although Sias was initially expected to survive, he died within a few hours. (*People v. Sanchez, supra,* B067764, at pp. 8, 11.) Sanchez was subsequently arrested and his residence searched. Inside officers found a police scanner tuned to the frequency used by the local police department, and evidence that Sanchez had dyed and cut his hair. (*Id*. at p. 8.)

The trajectory of the bullet that killed Sias was consistent with Sias being shot while on the ground in a partial sitting position, trying to get up. (*People v. Sanchez, supra,* B067764, at p. 16.) The bullet trajectory was also consistent with the shooter lying supine on the ground, with the decedent standing over the shooter, bent at the waist with his hand on the shooter's chest, while hitting the shooter with his right hand. (*Id*. at pp. 16-17.)

According to a neighbor who testified for the defense, in the early morning hours of April 18, the left side of Sanchez's face was badly swollen. (*People v. Sanchez, supra,* B067764, at p. 12.)

b. *Sanchez's account of the crime.*

Sanchez's statements to police, given shortly after his arrest, were consistent with his trial testimony, as follows. Sanchez went to the party on Coke Avenue with Melendez. As he was leaving, she called him back. When he went to speak to her**,** Banuelos, Littlebear, Sias, and two or three of their friends surrounded Sanchez and Melendez. The men "made fists" and asked what the problem was. Both Sanchez and Melendez replied that there was no problem. Sanchez began to argue, and one of the men tried to hit him. He pushed one of them, and the group came toward him. Sanchez pulled out a pistol and backed towards his car, intending to leave. The group of men, with Sias in the front and Littlebear and Banuelos behind, tried to tackle Sanchez. Sanchez discharged the pistol twice in the air to scare them. Banuelos and Littlebear stayed back but Sias came forward and tried to grab the gun. Sanchez attempted to hit Sias but missed. Sias grabbed Sanchez and punched him in the face with something; another person also may have hit Sanchez. Sanchez fell to the ground. He held the gun in his left hand, because his right hand had been injured years before and he was unable to use it. (*People v. Sanchez, supra,* B067764, at pp. 12-13.) Sias continued to try to obtain the gun, while two other persons kicked Sanchez as he lay on his back. Sias bent over Sanchez and hit him, while keeping one hand on the gun. The gun discharged as Sanchez and Sias struggled for it. Sanchez did not intend to shoot or kill Sias. (*Ibid*.) Sanchez then left the party, disposed of the gun and bullets, had his hair cut, shaved his mustache, and dyed his hair black. (*Id*. at p. 10.)

Sanchez discussed the facts of the crime with a prison psychologist who evaluated him in 2008, a life prisoner evaluator who interviewed him in 2010, and the Board at the 2010 hearing. Sanchez's account of the crime has remained constant over the years. He has consistently maintained that he fired warning shots to scare the assailants away, and that the gun discharged accidentally while he and Sias struggled over it.

3. *2008 Psychological evaluation.*

The 2008 psychological evaluation determined that overall, Sanchez presented "a low risk of recidivism and violent reoffense if released to a free community, assuming

there is no abuse of alcohol and/or drugs." Sanchez had normal cognitive functioning and average intelligence. He did not suffer from a personality disorder, mental or emotional problems, or a substance abuse disorder.

Sanchez had maintained a pattern of pro-social behavior since his incarceration in 1992; maintained steady job assignments when available; consistently participated in self-help groups and educational opportunities, including taking college courses; had earned vocational certificates; had developed realistic parole plans; and had participated in rehabilitation efforts addressing the causative factors of his life crime. Further, he had "maintained a consistent pattern of self-control, as indicated by the absence of any rules violations" since 1993, apart from participating in a 2003 work stoppage.

As to Sanchez's insight and attitude toward the crime, the 2008 evaluation stated: "While Mr. Sanchez admitted his guilt in the life crime and has programmed fairly well, it was evident that he attributes partial blame to the victim for instigating a physical confrontation and failing to back away after alleged warning shots were fired. . . . His identification of those affected by the crime was limited to himself and his family. He did not, for example, include the victim's family members as those impacted by his actions. Neither did he state that it would have been more responsible to leave a loaded weapon in a safer place while awaiting a friend's potential purchase of a weapon." Nonetheless, the psychologist opined that Sanchez has "exhibited credible remorse for his victim."

One of the assessment guides used as a component of the risk analysis was the "History-Clinical-Risk-20" (the HCR-20). In discussing the HCR-20, the psychologist observed, "given that he partially blames the victim for his current offense, there is an ongoing minimization or explaining away of his behaviors. A lack of insight correlates with recidivism." Elsewhere in the same evaluation the psychologist commented, "The discrepancy between his account of the life crime and that in the [probation report] and court records could be better integrated by Mr. Sanchez, *although this does not relate directly to a risk of recidivism*." (Italics added.)

4. *Sanchez's expressions of remorse and insight.*

Sanchez expressed remorse for the shooting to the psychologist in 2008, stating that he was "very sorry for many reasons," had simply intended to scare the victim, "never meant for this to happen," and "nothing could ever be worth that kind of loss." He explained that he pulled the gun to scare the victim because he "could not defend himself," presumably because of his paralyzed arm. He recognized that he was "to blame" and should not have had a gun. Sanchez also stated the victim was " 'not innocent' " and had powder burns on his hands. Sanchez believed he should have been found guilty of involuntary manslaughter or a similar crime, not murder, because he "was trying to defend himself." He explained, "To me it was more of self-defense. It's not in my heart to cause what happened."

At the 2010 hearing, Sanchez described his increased understanding of the factors that caused the crime. His written statement, read into the record, stated: " 'Whether or not I was over Mitchell Sias or he was over me makes no difference whatsoever. I am the only one responsible for what occurred because I was the only person at the party with a gun and the only person who used a gun at the party.' " " 'I should never have referred to the crime as an accident realizing all the wrong things I did that led up to the horrible crime I committed that impacted so many lives in such a negative manner.' " He recognized that it was irresponsible to fire the warning shots, which could have hit someone. Sanchez had come to understand that he had had aggression and anger bottled up inside, likely due to his experience of racism as a child. As a result, he had wanted to be "macho" and did not "want[] to be pushed around or told what to do" by Sias and the others. Sanchez had also realized that the shooting occurred because he was scared. In prison he had learned to deal with many "different personalities" and people. Through talking to the younger inmates, and attempting to steer them to a better path, he had "learned more now of how to get myself out of these situations." Sanchez explained he had learned to handle his anger by stopping and studying the situation and thinking things through. If the same situation arose again, he would not defend himself and would not pick up a gun.

Sanchez had also come to realize that Sias probably believed he (Sias) was acting in self defense. Sanchez stated: "I felt that I was defending myself at the time. But, you know, I realize that he was probably doing the same thing. He was . . . probably thinking he has to protect himself also. . . . And I believe that he probably believed he was protecting his friends also at the same time I'm believing I need this to protect myself."

Sanchez explained he was ashamed of the crime and had wished to "not make myself seem as much to blame in the beginning" but "after a while . . . I started realizing . . . all the things I was to blame for." He recognized that "there's a lot of victims" including his family, his children, and the victim's family. When asked what he considered the biggest mistake of his life, Sanchez replied, "what I did to his mother and his family." Sanchez affirmed that, at the time of the 2010 hearing, he did not view his actions as a "crime of self defense" and did not blame the victim "in any way."

5. *Criminal and social history.*

Sanchez had no juvenile or adult criminal history other than the life crime. He had been arrested three times prior to the life offense, but never prosecuted. His family history was stable. He had graduated from high school prior to his incarceration. Sanchez remained in contact with his family members. He had been diagnosed with epilepsy as a child, and lost the use of his right arm after he fell through a sliding glass door at the age of 17. He had never been a member of a street or prison gang.

6. *Record while incarcerated.*

Since being incarcerated in 1992, Sanchez had received two CDC 115's: one in May 1993 for "inmate manufactured wine (pruno)" and another in May 2003 for participating in a work stoppage.[1] He had received no CDC 128A's.[2]

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[1] A "CDC 115" refers to a rules violation report that documents misconduct that is believed to be a violation of law or is not minor in nature. (*In re Roderick* (2007) 154 Cal.App.4th 242, 249, fn. 3; Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

[2] A "Custodial Counseling Chrono" (CDC Form 128-A) documents minor misconduct and counseling provided for it. (*In re Roderick, supra,* 154 Cal.App.4th at

Sanchez received positive evaluations from mental health and correctional professionals over the years. The 2008 psychological evaluation stated that his lack of significant prison discipline "demonstrat[ed] that he is able to abide by the rules and regulations of the institution," suggesting "that he will also be able to comply with the terms and conditions of his parole." Sanchez's "GAF score" was 85, signifying he was functioning well within the prison environment. He held the lowest possible custody level for a life term prisoner, "medium A." There was no documentation that Sanchez had had any interpersonal conflicts with staff or peers while incarcerated.

At the time of the hearing, Sanchez was working as a porter. He had also worked in the prison furniture shop. He had obtained vocational certifications in landscaping, horticulture, and motor vehicle refrigerant recovery. He had consistently attended Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) for years. He had completed or participated in a variety of self-help programs.[3] A deputy commissioner noted, at the 2010 hearing, that Sanchez's file was "thick" with documentation of his self-help activities. He was also attending college classes, and was only a few units short of being certified as a substance abuse counselor. He was commended for his participation in the "Angel Tree 2006 Project" and an Easter basket program for needy children.

7. *Parole plans.*

Sanchez presented letters indicating he had offers of employment, housing, and support should he be released.

DISCUSSION

1. *Standard of review and applicable legal principles.*

"The essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety." (*In re Shaputis* (2011) 53 Cal.4th 192, 220

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p. 269, fn. 23; *In re Smith* (2003) 109 Cal.App.4th 489, 505; Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).)

[3] Those programs included Alternatives to Violence; Understanding Borderline Personality Disorders; Life Skills Series for Inmates and Parolees From the Inside Out; Anger Management; Co-Occurring Disorders Series; and various Biblical workshops.

(*Shaputis II*). "Under the framework established by legislation and initiative measure, the Board is given initial responsibility to determine whether a life prisoner may safely be paroled." (*Id.* at p. 215.) 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, unless it determines that public safety requires a lengthier period of incarceration. (Pen. Code, § 3041, subd. (b); *In re Lawrence* (2008) 44 Cal.4th 1181, 1204 (*Lawrence*); *In re Shaputis* (2008) 44 Cal.4th 1241, 1256 (*Shaputis I*); *In re Shippman* (2010) 185 Cal.App.4th 446, 454.) Release on parole is the rule, rather than the exception. (*Lawrence, supra,* at p. 1204; *In re Jackson* (2011) 193 Cal.App.4th 1376, 1384; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1486.)

When the Board determines an inmate convicted of murder is suitable for parole, the Governor has the constitutional authority to conduct a de novo review of the Board's decision. (Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2; *Shaputis II, supra,* 53 Cal.4th at pp. 215, 221; *Lawrence, supra,* 44 Cal.4th at p. 1203; *In re Ross* (2010) 185 Cal.App.4th 636, 638.) In conducting this review, the Governor is required to consider the same factors considered by the Board, which are specified by regulation. (Cal. Const., art. V, § 8, subd. (b); *Shaputis II, supra,* at p. 215; *Lawrence, supra,* at p. 1204; Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) The Governor has discretion to be " 'more stringent or cautious' " than the Board in determining whether a defendant poses an unreasonable public safety risk. (*Shaputis I, supra,* 44 Cal.4th at p. 1258; *In re Prather* (2010) 50 Cal.4th 238, 257, fn. 12.)

When evaluating a parole suitability determination by either the Board or the Governor, " 'a reviewing court focuses upon "some evidence" supporting the core statutory determination that a prisoner remains a current threat to public safety—not merely "some evidence" supporting the Board's or the Governor's characterization of facts contained in the record. . . . [T]he 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.' [Citations.]" (*Shaputis II, supra,* 53 Cal.4th at p. 209; *In re Prather, supra,* 50 Cal.4th at pp. 251-252; *Lawrence, supra,* 44 Cal.4th at p. 1191.)

As our Supreme Court has recently emphasized, the "some evidence" standard is extremely deferential. (*Shaputis II, supra,* 53 Cal.4th at pp. 198-199.) "The executive decision of the Board or the Governor is upheld unless it is arbitrary or procedurally flawed." (*Id.* at p. 221.) "Whether to grant parole to an inmate serving an indeterminate sentence is a decision vested in the executive branch, under our state Constitution and statutes. The scope of judicial review is limited" and "narrower in scope than appellate review of a lower court's judgment." (*Id.* at pp. 198-199, 215.) The "some evidence" standard is intended to serve the interests of due process by guarding against arbitrary or capricious parole decisions without overriding or controlling the exercise of executive discretion. (*Id.* at p. 199.) 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. (*Id.* at p. 212.) Review under the "some evidence" standard "is *more deferential* than substantial evidence review, and may be satisfied by a lesser evidentiary showing." (*Id.* at p. 210, italics in original.) Only a modicum of evidence is required. (*Ibid.*; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 (*Rosenkrantz*); *Lawrence, supra,* 44 Cal.4th at p. 1204.) On the other hand, the standard " 'certainly is not toothless' " and must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights. (*Shaputis II, supra,* at p. 215; *Lawrence, supra,* 44 Cal.4th at p. 1210.)

Resolution of conflicts in the evidence and the weight to be given the evidence are matters for the Board or Governor, not a reviewing court. The precise manner in which the specified factors are considered and balanced lies within the discretion of the Board or Governor. It is irrelevant that a court might determine the evidence tending to establish suitability outweighs contrary evidence. (*Shaputis II, supra,* 53 Cal.4th at p. 210; *Rosenkrantz, supra,* 29 Cal.4th at p. 677; *Lawrence, supra,* 44 Cal.4th at p. 1204.) It is not the court's role "to decide *which* evidence in the record is convincing. [Citation.] Only when the evidence reflecting the inmate's present risk to public safety leads to but

one conclusion may a court overturn a contrary decision by the Board or the Governor." (*Shaputis II, supra,* at p. 211.)[4]

2. *The Governor's decision was supported by a modicum of evidence.*

With the foregoing principles in mind, and applying the highly deferential standard of review reiterated in *Shaputis II,* we conclude the Governor's reversal of the Board's suitability finding was supported by a bare modicum of the evidence. It is undisputed that the majority of the applicable factors tend to show Sanchez is suitable for parole. He does not have a prior record of violence; he has suffered no other convictions, either as a juvenile or an adult; he has a history of reasonably stable social relationships with others; he does not now, nor did he in the past, suffer from mental or substance abuse problems; he has not committed sexual offenses; he has shown remorse; his age, 54 at the 2010 parole hearing, reduces the likelihood of recidivism; he has made realistic plans for release; and he has engaged in institutional activities suggesting an enhanced ability to function within the law upon release. (See Cal. Code Regs., tit. 15, § 2402,

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[4] When discussing the applicable standard of review, *Shaputis II* held that the appellate court had in that case misconstrued the "some evidence" standard "by stating that the factors relied upon to find an inmate unsuitable for parole must be 'demonstrably shown by evidence in the record.' " (*Shaputis II, supra,* 53 Cal.4th at p. 209.) *Shaputis II* explained: "*To the extent the adverb 'demonstrably' suggests a reviewing court is free to determine whether the evidence establishes the existence of a particular factor,* or that anything other than 'some evidence' is required to support a finding by the Board or the Governor, *this formulation was erroneous*. We have never used such terminology in connection with review of parole decisions." (*Id.* at pp. 209-210, italics added.) The court went on to contrast the "demonstrable reality test" with the less stringent substantial evidence test. (*Id.* at p. 210 & fn. 7.) Obviously, in determining whether "some evidence" exists supporting a conclusion the inmate is currently dangerous, a reviewing court necessarily examines whether there is a modicum of evidence supporting the suitability factors cited by the parole authority. (See *Lawrence, supra,* 44 Cal.4th at pp. 1222-1223 [holding that the Governor's conclusion the inmate showed insufficient remorse was unsupported by the evidence].) Accordingly, we do not read the italicized language to mean that an appellate court is precluded from examining the record for evidence supporting the relevant suitability and unsuitability factors.

subds. (c), (d).) His 2008 psychological evaluation stated he presented a low risk of recidivism and violent reoffense if released.

The Governor pointed to three aspects of the record in finding Sanchez's release would pose an unreasonable risk of danger: the nature of the offense; his prison disciplinary history; and his lack of insight.[5] We examine these factors in turn.

a. *Nature of the commitment offense.*

The Governor concluded the murder was "especially heinous because it involved multiple victims. . . . Sanchez fired two shots over the heads of Banuelos, Littlebear, and Sias. After Sias reached for the gun, a struggle ensued. During the struggle, Sias fell to the ground. As Sias was trying to get back up, Sanchez coldly pointed the gun at him and fired. As stated by the [Board] during Sanchez's 2008 parole consideration hearing, the offense was a 'tragic, senseless murder of an individual that was done in a brutal and vicious manner . . . .' "

That the defendant "committed the offense in an especially heinous, atrocious or cruel manner" tends to establish parole unsuitability. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).) The relevant regulation specifies various factors that may establish heinousness: (1) multiple victims were attacked, injured or killed in the same or separate incidents; (2) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (3) the victim was abused, defiled or mutilated during or after the offense; (4) the offense was carried out in a manner which demonstrates an

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[5] The Governor's reversal also noted the possibility that "Sanchez may have been involved in other illegal activity prior to the life offense." The Governor noted a sheriff's report indicated that when Sanchez's residence was searched, officers found a marijuana plant, marijuana seeds, a plastic bag containing two ounces of a white substance resembling methamphetamine, and two guns (a .32-caliber Derringer pistol and a .357 Magnum pistol). While the Governor mentioned these suspicions, he did not rely on them as a basis for his reversal. Sanchez was never charged, arrested for, or convicted of any crime related to the items found in his residence. The parole authority's decisions must be supported by some evidence, "not merely by a hunch or intuition." (*Lawrence, supra,* 44 Cal.4th at p. 1213.) In any event, it is difficult to see how possession of these items in 1991, 19 years before the hearing, could indicate current dangerousness in the absence of further information.

exceptionally callous disregard for human suffering; and (5) the motive for the crime is inexplicable or very trivial in relation to the offense. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(A)-(E).)

The only factor possibly present here is the first, that multiple victims were attacked. Considering the whole record in the light most favorable to the Governor's decision, as we must (*Shaputis II, supra,* 53 Cal.4th at p. 214), there is arguably a modicum of evidence supporting the conclusion that Sanchez committed the murder in an especially heinous, atrocious or cruel manner. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).) Sanchez did not injure or kill more than one person, nor does it appear that he targeted more than one individual. However, he fired shots between, or over the heads of, both Sias and Banuelos, which was undeniably reckless. In that sense, multiple victims were attacked. The circumstance that multiple victims were attacked is a factor that tends to support a finding the murder was especially heinous. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(A).) Given the extremely deferential standard of review of the Governor's decision (*Shaputis II, supra,* at pp. 198-199), we cannot say his conclusion that the crime was especially heinous is unsupported by a modicum of evidence.

Of course, "mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Lawrence, supra,* 44 Cal.4th at p. 1227.) The "aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post[-] incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative [to] the statutory determination of a continuing threat to public safety." (*Lawrence, supra,* at p. 1214.)

b. *Disciplinary history*

The Governor also pointed to Sanchez's prison disciplinary history as a basis for his decision. The Governor explained: "I am also troubled that Sanchez recently

displayed an unwillingness or inability to conform his conduct to prison rules. As noted above, he required discipline for participating in a work stoppage. The fact that Sanchez engaged in misconduct so recently . . . demonstrates that he is not yet ready to conform his conduct within society's laws or comply with the conditions of parole[,]" indicating "Sanchez continues to present a danger to the community if released at this time."

The Governor's conclusion on this point was arbitrary and unsupported by "some evidence." At the time of the 2010 parole suitability hearing, Sanchez had been incarcerated for approximately 19 years. During that period, he was disciplined exactly twice: once in 1993 and once in 2003. He was never disciplined for any infraction involving violence. He never received a "CDC 128A" for minor misconduct.

In May 1993 Sanchez received a "CDC 115" for being in possession of inmate-manufactured wine. This infraction occurred approximately 17 years before the 2010 hearing. There is no evidence in the record that Sanchez currently has, or ever had, a substance abuse problem. It is undisputed that he has consistently attended AA and NA for years.[6] Under these circumstances, the 1993 incident simply cannot demonstrate *current* dangerousness, nor does the Governor suggest otherwise.

In May 2003 Sanchez was disciplined for participating in a work stoppage. Although the Governor characterized this incident as "recent," in fact it occurred approximately seven years before the 2010 hearing. The record demonstrates that hundreds of inmates participated in the work stoppage and all were issued CDC 115 violations as a result. As the Deputy Commissioner explained at the hearing: "The Board is well aware that was some 800 inmates [were] written up for that work strike issue. The lifers basically were told they would be injured or beaten . . . if they went to work. Those that did go to work did get injured, at least some of them did. Some

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[6] Although Sanchez has never suffered from drug or alcohol addiction, he hopes to become a drug counselor upon release and found participation in AA and NA helpful in that regard.

seriously. So we kind of set aside the significance of that 115. We recognize it's in your file, but we don't give it the weight we would normally give something like that."

The fact an inmate has engaged in serious institutional misconduct while incarcerated may be a circumstance tending to indicate unsuitability for parole. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(6).) The Governor has discretion to be more stringent or cautious than the Board in determining whether a defendant poses an unreasonable public safety risk. (*Shaputis I, supra,* 44 Cal.4th at p. 1258; *In re Prather, supra,* 50 Cal.4th at p. 257, fn. 12.) But the Governor's reliance on the work-stoppage incident as evidence Sanchez is currently unable or unwilling to comply with the law or parole conditions is arbitrary. The record does not suggest Sanchez was in any way responsible for instigating the prisoner action. Refusal to participate in the work stoppage apparently exposed an inmate to the very real risk of violence from other inmates. Thus, the 2003 rules violation arose from a dangerous and highly unusual situation which was not of Sanchez's making. Even applying the highly deferential standard of review emphasized in *Shaputis II,* it cannot be rationally inferred from this incident that Sanchez is currently unable or unwilling to conform his conduct to societal norms or parole conditions. (See *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110 [fact inmate once participated in a work strike did not support the conclusion that he posed a threat to public safety], disapproved on other grounds in *In re Prather, supra,* 50 Cal.4th 238.) Nothing else in the record suggests Sanchez is unable or unwilling to conform to prison rules, parole conditions, or the law if released. To the contrary, the prison psychologist opined that Sanchez's minimal disciplinary history demonstrated his maintenance of a "consistent pattern of self-control," indicated he "is able to abide by the rules and regulations of the institution," and suggested he will "be able to comply with the terms and conditions of his parole." Issuance of the 2003 CDC 115 for participation in the work stoppage does not provide any evidence that Sanchez's release would pose an unreasonable danger to society.

c. *Insight.*

The third factor cited in support of the Governor's reversal was Sanchez's lack of "adequate insight into his role in the life offense." The Governor explained that, although Sanchez "says he accepts responsibility for his actions," he told his 2008 mental health evaluator that "he was essentially acting in self-defense when he murdered Sias." Sanchez still maintained, when speaking to a life prisoner evaluator in 2010, that the victim and four other men attacked him; he used the gun to scare them away; and the gun fired accidentally when the victim tried to wrest it from him. The Governor also noted the opinion of the 2008 mental health evaluator that, while Sanchez recognized he should not have had a gun and was to blame for the victim's death, "it is evident that [Sanchez] attributes partial blame to the victim for instigating a physical confrontation." Based upon these facts, the Governor reasoned: "Sanchez's continued efforts to minimize his actions in the life offense by denying his murderous intentions in shooting the victim at close range as the man was trying to get up indicate that he has not yet gained sufficient insight into or accepted full responsibility for the murder. His lack of insight renders the life crime still relevant to my determination that Sanchez continues to pose a current, unreasonable risk to public safety because he cannot ensure that he will not commit similar crimes in the future if he does not completely understand and accept full responsibility for his offense."

Recognizing that "lack of insight has played an increasingly prominent part in parole decisions," *Shaputis II* "offer[ed] some general guidance to the Courts of Appeal on [the issue of] inmates' lack of insight as a parole unsuitability factor." (*Shaputis II, supra,* 53 Cal.4th at p. 200.) An inmate's level of insight, *Shaputis II* reasoned, is "well within the scope of the parole regulations," which direct the parole authority to consider the inmate's past and present attitude toward the crime, expressions of remorse, and all relevant, reliable information that bears on the prisoner's suitability for release. (*Id.* at p. 218.) " '[C]hanges in a prisoner's maturity, understanding, and mental state' are 'highly probative . . . of current dangerousness.' [Citation.]" (*Ibid.*; *Lawrence, supra,* 44 Cal.4th at p. 1220.) 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." (*Shaputis II, supra,* at p. 218.) An inmate's "[p]ast criminal conduct and current attitudes toward that conduct may both be significant predictors of an inmate's future behavior should parole be granted." (*Id.* at p. 219.) *Shaputis II* found it "noteworthy" that "lack of insight pertains to the inmate's current state of mind, unlike the circumstances of the commitment offense, the factor primarily at issue in *Lawrence*. [Citation.] Thus, insight bears more immediately on the ultimate question of the present risk to public safety posed by the inmate's release." (*Ibid*.) Of course, "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.]" (*Ibid*.)

Neither the Board nor the Governor may condition parole on an inmate's admission of guilt. (Pen. Code, § 5011, subd. (b) ["The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed"]; *In re Twinn* (2010) 190 Cal.App.4th 447, 466-467; *In re Palermo, supra,* 171 Cal.App.4th at p. 1110; Cal. Code Regs., tit. 15, § 2236 ["The board shall not require an admission of guilt to any crime for which the prisoner was committed"].) Moreover, "an inmate need not agree [with] or adopt the official version of a crime in order to demonstrate insight and remorse." (*In re Twinn, supra,* at p. 466; *In re Palermo, supra,* at p. 1112.)

Section 5011 is inapplicable, however, where the inmate does not deny guilt. (*Shaputis II, supra,* 53 Cal.4th at p. 216.) For example, in *Shaputis II*, the inmate admitted shooting his wife and was convicted of murder, but maintained that the shooting was an accident. (*Id.* at pp. 202-203, 208.) He contended that the Board's denial of parole based on his lack of insight violated due process because, had he denied guilt altogether, he could not have been found unsuitable on that basis. (*Id.* at p. 215.) *Shaputis II* rejected this contention. The court explained: "Petitioner does not deny his guilt, so [Penal Code section 5011] has no application here." (*Shaputis II, supra,* at

p. 216.)[7] *Shaputis* also observed: "It may be that when a denial of guilt is the *only* evidence of an inmate's lack of insight, and the denial is plausible, parole may not be denied on that basis. (See *In re Jackson* (2011) 193 Cal.App.4th 1376, 1389-1391 [], discussing cases.) That question is not before us. We note, however, that an *implausible* denial of guilt may support a finding of current dangerousness, without in any sense requiring the inmate to admit guilt as a condition of parole. In such a case it is not the failure to admit guilt that reflects a lack of insight, but the fact that the denial is factually unsupported or otherwise lacking in credibility." (*Shaputis II*, *supra,* at p. 216.)

The questions before us, then, are (1) whether Sanchez's account of the crime is implausible; and (2) if so, whether his continued refusal to adopt the official version demonstrates his release would pose a current danger to the community.

Where an inmate's account is plausible and not physically impossible, courts have found contradictions between it and the official version do not support a finding of current dangerousness. In *In re Palermo, supra,* 171 Cal.App.4th 1096, for example, the Board denied parole based in part on the inmate's continued insistence the shooting was an accident. He maintained he unintentionally shot his girlfriend while foolishly playing with a gun he believed to be unloaded. (*Id*. at pp. 1110-1111.) He presented considerable expert evidence in support of his theory. Circumstantial evidence presented by the People, on the other hand, suggested the shooting was intentional. There were no witnesses to the crime. *Palermo* reasoned that the inmate's version of the shooting "was not physically impossible and did not strain credulity such that his denial of an intentional killing was delusional, dishonest, or irrational. . . . [The inmate] accepted 'full responsibility' for his crime and expressed complete remorse; he participated effectively in rehabilitative programs while in prison; and the psychologists who evaluated him opined that he did not represent a risk of danger to the public if released on parole.

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[7] Shaputis admitted firing a gun in his wife's direction, but contended he did not aim at her or know the gun was loaded. (*Shaputis II*, *supra,* 53 Cal.4th at pp. 202-203, 213.) Here, in contrast, Sanchez completely denied firing the fatal shot at the victim, which in our view amounts to a denial of guilt.

Under these circumstances, his continuing insistence that the killing was the unintentional result of his foolish conduct (a claim which is not necessarily inconsistent with the evidence) does *not* support the Board's finding that he remains a danger to public safety." (*Id*. at p. 1112.)

In *In re Jackson, supra,* 193 Cal.App.4th 1376, the inmate denied shooting his former girlfriend, maintaining that another man she was seeing committed the murder. The People's case was primarily circumstantial. The only eyewitness was so far away from the nighttime shooting that he could not identify the defendant with certainty. We concluded the Board's decision to deny parole, based on the inmate's lack of insight, violated Penal Code section 5011. (*In re Jackson, supra,* at p. 1391.) We also found it "important to recognize that . . . this is not a case where the inmate's version of the crime was physically impossible or strained credulity. While there was certainly substantial evidence to support the [murder conviction], Jackson's denial of that allegation is not necessarily inconsistent with the evidence." (*Ibid.*) In light of the inmate's acceptance of responsibility, favorable psychological report, and favorable prison record, "Jackson's continuing insistence that he did not shoot and kill [the victim] does not support the Board's finding that he remains a danger to public safety." (*Ibid.*; see also *In re Twinn, supra,* 190 Cal.App.4th at pp. 467-468 [where inmate's denials that he used particular weapons, and that he did not intend to kill the victim, were not incompatible with the evidence presented at trial, his statements did not support a finding of lack of insight].)

In contrast, where the inmate's version of the crime is implausible or contradicted by physical evidence, courts have not hesitated to find a lack of insight. In *Shaputis II,* for example, the inmate was convicted of murdering his second wife after he shot her in the neck from close range after an alcohol-fueled argument. (*Shaputis II, supra,* 53 Cal.4th at pp. 201-202.) He maintained the shooting was an accident, despite forensic evidence that the gun could not have been fired accidentally; the hammer had to be manually cocked and a transfer bar prevented accidental discharge. (*Id.* at pp. 201-203, 212-213.) Shaputis "claimed that he thought the gun was unloaded, without explaining the open box of ammunition nearby. He has insisted he did not know his wife was in the

way, without explaining how he could have overlooked her presence only a foot or two away." (*Id.* at p. 213.) He did not plausibly explain why he waited an hour before calling for help. (*Ibid.*) The shooting was the "culmination of years of domestic abuse" toward both his first and second wives and his daughters, which included the infliction of repeated and serious injuries to the victim and the rape of his teenage daughter. (*Id.* at p. 199.) Nevertheless, Shaputis denied he had a problem in the way he treated women. (*Id.* at p. 204.) These facts, among others, provided evidence Shaputis lacked insight into the causes of his behavior. (*Id.* at pp. 216-217.) His lack of insight, coupled with, inter alia, his long history of domestic violence, supported a finding of current dangerousness. (*Ibid.*)

In *In re McClendon* (2003) 113 Cal.App.4th 315, the inmate arrived near midnight at the home of his estranged wife, wearing rubber gloves and carrying a loaded handgun, a wrench, and a bottle of industrial acid. He barged into the house, aimed the gun at his wife, and shot her in the head. He then attempted to shoot a man who had been sitting with the victim, but when the gun jammed he struck him several times with the wrench instead. (*Id.* at pp. 319-320.) The inmate maintained that the shooting was unintentional. His claim that the killing was unplanned and unintentional, in the face of overwhelming evidence to the contrary, was some evidence of his lack of insight and resultant dangerousness. (*Id.* at p. 32l-323; see also *In re Smith* (2009) 171 Cal.App.4th 1631, 1638-1639 [Governor reasonably concluded, based on inmate's confession and a witness's trial testimony, that she initiated and was the principal aggressor in attack on her toddler daughter; inmate's minimization of her role demonstrated lack of insight and was predictive of current dangerousness]; *In re Taplett* (2010) 188 Cal.App.4th 440, 450 [where inmate pleaded to second degree murder but continued to deny she had the intent to kill, and her description of the circumstances leading to the murder differed markedly from the facts as related by other witnesses, evidence supported Governor's conclusion she lacked insight].)

Considering the foregoing authorities, there is a modicum of evidence supporting the Governor's conclusion that Sanchez lacks insight into the crime. To be sure, this case

is unlike *Shaputis II* or *McClendon;* Sanchez's account does not conflict with the physical evidence, nor is it patently false or farfetched. The shooting could well have occurred as Sanchez described; given the undisputed facts surrounding the incident, his account does not, on its face, strain credulity. The defense presented evidence that Sanchez's face was badly swollen the morning of the crime, corroborating his account that he had been punched. (*People v. Sanchez, supra,* B067764, at p. 12.) The bullet trajectory was consistent with both Sanchez's and the eyewitnesses' divergent accounts of the shooting. (*Id*. at pp. 16-17.) Sanchez's account of how the shooting happened has remained largely consistent over the years, from when he first spoke to police through the 2010 parole hearing.

However, unlike in *Palermo* and *Jackson,* and similar to *Smith* and *Taplett,* Sanchez's account was directly contradicted in crucial respects by eyewitnesses to the crime. The witnesses' statements that Sanchez aimed and shot at Sias from a standing position, while Sias was on the ground, were irreconcilable with Sanchez's account that the gun fired accidentally while he was on the ground with Sias on top of him. This contradiction does not concern a trivial or inconsequential point; it goes to the heart of the crime. It is the role of the Governor, not this court, to weigh the evidence and resolve conflicts therein. (*Shaputis II, supra,* 53 Cal.4th at p. 210.) Sanchez's version was rejected by the jury, and the Governor was not required to credit it. (*In re Criscione* (2009) 180 Cal.App.4th 1446, 1458; *In re Smith, supra,* 171 Cal.App.4th at p. 1638.) The discrepancy between Sanchez's and the eyewitnesses' accounts of the crime therefore provided a modicum of evidence from which the Governor could conclude Sanchez's explanation was implausible and strained credulity.[8]

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[8] Sanchez argues that the Governor, who was not present at the hearing and was therefore not in a position to judge his demeanor and credibility, was required to accept the Board's determination that he was honest. This argument lacks merit. The Governor did not base his conclusion on observations of Sanchez at the hearing, but on the discrepancy between Sanchez's account and the evidence presented at trial as set forth in our unpublished opinion affirming Sanchez's conviction. (*People v. Sanchez, supra,* B067764.)

The question remains whether Sanchez's consistent denials that he aimed and shot at the victim rationally indicate current dangerousness. An inmate's "failure to accept a version of the facts is not evidence in and of itself" that the inmate currently poses a danger to public safety. (*In re Twinn, supra,* 190 Cal.App.4th at p. 467.) On the other hand, an implausible denial of guilt may support a finding of current dangerousness, without violating Penal Code section 5011. (*Shaputis II, supra,* 53 Cal.4th at p. 216.) Factual discrepancies regarding material and important aspects of the crime may well suggest a lack of insight or acceptance of responsibility, which in turn may suggest current dangerousness. (See *In re Taplett, supra,* 188 Cal.App.4th 440 [inmate's "failure to accept the full extent of her responsibility for the murder . . . renders the circumstances of that offense relevant to her current level of dangerousness," providing "some evidence" to support the Governor's reversal of the Board's grant of parole]; *Shaputis I, supra,* 44 Cal.4th at pp. 1260; *In re Rozzo* (2009) 172 Cal.App.4th 40, 61-63; *In re Smith, supra,* 171 Cal.App.4th at pp. 1638-1639; *In re McClendon, supra,* 113 Cal.App.4th at p. 322.)

Undoubtedly, the majority of the evidence in the record here suggests Sanchez's rejection of the official version of the crime does not indicate he currently presents an unreasonable risk of danger if released. At the 2010 parole hearing he affirmed his current understanding that he was *not* acting in self-defense when he shot Sias, and no longer blames the victim. He credibly articulated his remorse, as well as his increased understanding of the attitudes and factors that led him to commit the crime. He expressed insight into the victim's likely perception of the circumstances at the time of the murder. The psychologist opined in 2008 that the discrepancy between Sanchez's account of the crime and that in the court records did "not directly relate to a risk of recidivism." The psychologist observed that Sanchez had demonstrated a consistent pattern of self control, indicating he would be able to follow the law and his parole conditions. The record revealed no documented interpersonal conflicts with either staff or peers. Sanchez had participated in rehabilitation efforts aimed at addressing the causative factors of the crime. The crime appears to have been a single, aberrant episode. The most recent

psychological report found he presented a low risk of violent reoffense. Moreover, the only factors tending to show current dangerousness are the minimally aggravated nature of the crime and lack of insight.

However, it "is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole" (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 677; *Lawrence, supra,* 44 Cal.4th at p. 1204), nor is it this court's role to decide which evidence in the record is convincing. (*Shaputis II, supra,* 53 Cal.4th at p. 211.) "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 those circumstances and, if confronted by them again, would likely react in a similar way. [Citations.] Thus, an inmate's 'lack of insight' can provide a logical nexus between the gravity of commitment offense and a finding of current dangerousness." (*In re Rodriguez* (2011) 193 Cal.App.4th 85, 98.) We cannot say the inference drawn by the Governor—that Sanchez's refusal to accept responsibility for intentionally shooting the victim shows he is still dangerous—is unreasonable as a matter of law. (See *In re Smith, supra,* 171 Cal.App.4th at p. 1639.) The Governor's decision reflects due consideration of the specified factors. Given the exceptionally deferential standard of review (see *Shaputis II, supra,* at pp. 198-199, 209-210, 212, 215, 221), the reversal is supported by a modicum of the evidence. We are therefore compelled to deny the petition for a writ of habeas corpus.

DISPOSITION

The petition for a writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.