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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re MANOLO ABUNDO TOLENTINO
on Habeas Corpus.

A132302

I. INTRODUCTION

At a hearing on August 9, 2010, the Board of Parole Hearings (Board) issued a three-year denial of parole for Manolo Abundo Tolentino, and he now petitions for writ of habeas corpus to overturn that decision. We issued an order to show cause and, having now considered the matter fully, deny the relief sought.

II. BACKGROUND

A. *General History and Prison Progress*

Tolentino was born in 1967 in the Philippines, came to this country with his father in 1980 on a green card but never completed his citizenship papers, and, if released from prison, stands to be deported to the Philippines, where he has strong family support, both parents, and multiple job and residence options. He never married or fathered children, and he has a support letter from the Philippine Consulate General in San Francisco.

Tolentino killed Alvin Parayno in 1994 and was sentenced to 15 years to life on his plea of guilty to second degree murder, with a gun-use enhancement dismissed. The Board issued a four-year denial of parole at his first hearing, in 2006, and this time, when he was 43 years old, a three-year denial. He had been discipline free throughout his incarceration, entered prison with a general education degree and adult high school

diploma, and during custody availed himself of courses, accumulating since 2001 a sheaf of certificates in subjects ranging from personal and transitional skills, to substance abuse, and a 2009 certificate in vocational janitorial services. He won praise for peer leadership, attitude and work performance in his vocational studies, and praise for longtime and continuing work in culinary assignments.

Tolentino's only juvenile record was an arrest for taking his parents' car without their consent, but the murder of Parayno came after years of arrests and convictions as an adult for illegal firearms and assault, some associated with drug use. He was convicted in 1989 of vehicle theft and evading an officer, had misdemeanor convictions in 1994 for brandishing a firearm and public fighting, and was on unsupervised probation in Solano and Napa Counties at the time of the murder. His last conviction was for an altercation with an employee in October 1994 at a veteran's home, which cost Tolentino a janitorial job he had held there since 1991. He explained at the current Board hearing that the 1989 convictions resulted from him being pulled over with others for speeding on motorcycles and him trying to evade police by fleeing on his motorcycle. The other 1994 conviction followed an arrest for assault with a firearm, terrorist threat, exhibiting a deadly weapon and battery, all stemming from a fight he had with his girlfriend. They had pushed each other, and he pointed a pistol at her as they struggled over car keys. He was high, and she was trying to "do the right thing" by keeping him from driving off.

Tolentino also explained some arrests that did not result in convictions. There were four in 1988: one for assault with a deadly weapon resulted from a fight that broke out "involving the people I was with"; one for possession of a switchblade was due to a knife his friend had; one for exhibiting a deadly weapon was for a knife being displayed in a group he was hanging around with at a park; and one for auto theft was for driving away in his girlfriend's car without letting her know. He could not recall why a warrant issued for receiving stolen property in 1990, but a receiving-stolen-property *charge* later that year resulted from a friend coming over to his apartment on a stolen motorcycle.

B. *The Murder*

1. Offense summary. Tolentino's guilty plea obviated the need for trial, and the board relied on an offense summary from a presentence report that, in turn, credited a Vallejo Police Department crime report and "Court transcripts provided by the District Attorney's office." Our record lacks the referenced "Court transcripts" (see part III.C., *post*), but the summary is essentially as follows:

Around 8:00 a.m. on Christmas Day 1994, police were dispatched regarding a shooting at the Vallejo home of Ariel Nebalasca. They found the victim, Alvin Parayno, in the garage, dead from a single gunshot to the head. According to witnesses, Bayani Morales had arrived there around 2:00 a.m., and Parayno, Morales's friend, had arrived two hours later and was with Gabriel Neyra. Around 5:00 a.m., the witnesses heard the voice of their friend Aurora Dial outside, asking for someone to open the door. Morales went to the door, with Parayno behind him, but when Morales saw Tolentino outside, he ran upstairs and hid in a master bedroom, knowing that Tolentino was looking for him. He told Nebalasca that someone was at the front door, and Nebalasca went downstairs.

From his hiding place upstairs, Morales heard Tolentino shouting in a mixture of English and Tagalog. Tolentino called Parayno a son of a bitch, told him not to lie, and asked where Morales was. The downstairs witnesses, now evidently in the garage, saw that Tolentino entered in an agitated state with a revolver, and saw him "unload and reload the revolver" as he spoke threateningly to Parayno, whom he suspected of hiding Morales. Tolentino told Parayno, "What if I shoot you now?" and pointed the gun at him and then the others as he spoke. The witnesses urged Tolentino to put the gun down, but it soon went off and struck Parayno in the right temple. Tolentino "apparently" said: " 'Oh my God. Oh shit. I didn't mean to do it.' " He left with Neyra and was arrested in Yountville, near his mother's home, around 10:00 a.m.

2. Tolentino's pre-2010 accounts. The presentence report states: "[Tolentino] acknowledges accidentally shooting the victim with the revolver. He states that he went to the Nebalasca residence to contact Bayani Morales to 'scare him.' He states that he did not intend to shoot anyone." In a handwritten account appended to the report,

Tolentino said he went to the house with Aurora Dial and Glenn David “looking for” Morales. “I confronted [Parayno] & I demanded the whereabouts of [Morales]. The victim denied that he knew where [Morales] was. I drew a revolver hoping it would scare the victim into telling me the truth, but it didn’t. I took all the bullets out of the revolver except for the 2 that was left in the revolver’s cylinder. I locked the cylinder into the chamber, pulled the hammer back & held the revolver up against my hip as I leaned against a wall. Words were exchanged between the victim & I when the revolver went off. I was startled as I jumped back, I couldn’t believe that the gun went off & I had shot [Parayno]. I started crying & I remember saying I didn’t mean it. Even though [Parayno] [and] I weren’t close friends I think I could’ve simply just talk to him without using a firearm. I ask myself the same question everyday as to why I carried the gun & used it to take someone’s life.”

Tolentino’s account as recited in a life prisoner report for his 2006 parole hearing was this: “I went to the house of Ariel Nebalasca along with two other individuals. The reason we went there was to look for Bayani Morales, who happened to owe money to the people I was with. When [Nebalasca] answered the door I asked him if [Morales] was there and he said ‘no.’ I remember drawing a revolver when I entered the house. I opened the cylinder and dumped all the bullets in my hand. Just as we entered the garage I closed the cylinder of the revolver and pulled the hammer back. As soon as I saw [Parayno] I asked him where I could find [Morales]. He said he didn’t know and, that’s when I began accusing him of lying. I became very angry and began raising my voice, threatening [Parayno]. I remember it was during this time that I pulled the trigger and the gun went off. I saw [him] get hit in the head as I jumped back. I opened the revolver’s cylinder and saw that there were two bullets left inside. I remember going into shock as [Parayno] laid on the floor bleeding. I remember someone pulling my arm and telling me to leave. [¶] I ran out of the house along with the two individuals I was with and drove to their house. I drove to my parents[’] house and told everyone what had happened. My family advised me to surrender and confess my crime. I was apprehended about a mile away from home.” Tolentino gave no new account for his 2010 life prisoner report.

C. Psychological Evaluation

Tolentino had briefly discussed the murder this way with a psychologist for an evaluation in 2006: “He stated that he came into the house, which was dark, and emptied the cartridges out of the gun. He thought that the gun was unloaded. While asking for [Morales], he waved the gun towards the victim, demanding to know where he was, and the gun went off.”

The 2010 evaluation was far more extensive. It stated that Tolentino believed his handwritten account from 2006 remained accurate. According to Tolentino: “[I]t was ‘all drugs . . . it was all motivated by drugs, whether it was consumption, drugs being dealt, or drugs being lent and expected to pay back. Drugs were all the motivation.’ ” He said he used alcohol only “two times in my life,” in his early 20’s. He regularly used marijuana and methamphetamine in his twenties, stopping while working at the veterans’ home. Then between the ages of 26 and the murder, he used methamphetamine daily, spending about \$150 a day on it. He did not hold a job after that, but his parents supported him.

The evaluation added that, when asked about the presentence report stating that there were still two bullets left in the chamber, Tolentino “acknowledged, ‘I was lying my butt off, was trying to make it look like an accident . . . told the Commissioners during my first hearing that . . . I dumped all the bullets out.’ He explained that, when he entered the house, he entered through the kitchen and it was a dark room. He stated that he thought he dumped all the bullets out. [He] explained that he cocked the hammer of the gun ‘to make Alvin [Parayno] believe there were bullets in there’ and ‘to threaten him.’ [¶] Mr. Tolentino admitted that he deliberately pulled the trigger of the gun, stating, ‘It was not an accident. I pulled the trigger.’ However, he maintained that he did not know there were any bullets left in the chamber of the gun. When asked why he pulled the trigger on what he believed was an empty gun, Mr. Tolentino stated[:] ‘At the time, I didn’t know, to be honest with you. I have no explanation for it.’ ”

The evaluation noted that Tolentino had not directly indicated before whether he was under the influence of drugs during the murder, but did so this time. Tolentino said

he “used ‘a couple hundred dollars worth, about twenty-four hours’ prior to” the murder and was “still under the influence of methamphetamine” at the time. When asked what kind of influence he thought the drug had on him during the crime, he explained: “ ‘It just completely changed me into a monster. The decisions I was making. My thought process was completely different. I absolutely didn’t care about anything or anybody at the time.’ ” He had no violations for substance-related behavior while incarcerated and denied use of inmate-manufactured alcohol or illicit substances, yet the evaluation cautioned: “Alleged sobriety in a controlled environment for an extended period of time is not synonymous with continued abstinence in the free community. It should also be noted that any opinions regarding the inmate refraining from future substance use in an uncontrolled environment are subjective and speculative in nature, and should be viewed with this limitation in mind.”

On mental health, the evaluation reported no history of psychiatric treatment beyond Tolentino having had a single session with a practitioner over administrative proceedings for his job loss at the veterans home. It stated: “A prior psychological evaluation (by Dr. Melvin Macomber) speculated that Mr. Tolentino does not pose any more risk to society than the average citizen in the community. It should be noted that Dr. Macomber’s evaluation utilized the LSI-R, a risk assessment tool which evolved into the more current LS/CMI (which has been utilized in the current evaluation). That instrument does not require a licensed psychologist for administration. However, LSI-R and LS/CMI are measures that address[] risk of future criminality *in general*, rather than violence per se. Utilizing formalized, standardized measures increases the accuracy of risk assessment prediction and offers a view of risk factors from [the] perspective of both static (or unchanging) and dynamic (changing and highly variable) factors. A violence risk assessment conducted utilizing both static and dynamic variables, with a balance of clinical judgment and actuarial measures to [form] an opinion, helps to provide a more robust clinical assessment.”

The evaluation used several components to assess Tolentino’s violence potential in the free community. (1) An absence of significant features of psychopathy placed him

“within the low range of clinical construct of psychopathy” under a PCL-R test. (2) He was “in the moderate risk category for violent recidivism” as measured by an HCR-20 test. Factors of increased risk included a criminal history of aggression/ violence beginning at a young age, a substance abuse/dependence problem, and a history of failure on supervised release. This was balanced against “no predictive factors” in the “more current and dynamic domain,” “limited concern” based on realistic and reasonable plans for parole and extensive support among family or friends who appeared to lack criminal histories, and “a strong likelihood” that he would experience stress as he readjusted to societal expectations and the reality of having spent little to no time in the community as an adult on a fully independent basis. (3) He fell within “the medium range of general recidivism risk” as measured by the LS/CMI test. Factors were his criminal history, association with antisocial companions/peers, plus upgraded vocational training, which could help insulate him from a risk of poverty, relapse and return to prior maladaptive coping skills.

Finally, that violence potential, his ability to refrain from alcohol and drug abuse when released, and his extent of exploration of the commitment offense and coming to terms with its underlying causes, presented a “LOW-MODERATE RISK” for violence in the free community. Tolentino could decrease his risk of violence if he continued to abstain from substance abuse and aggressive behavior.

Tolentino had written a letter of apology to the victim’s family and had long expressed remorse for the killing.

The evaluation said this about Tolentino’s insight and self-assessment: “[He] presented himself as an inmate who has matured and learned from his past mistakes. He talked about his previous antisocial outlook in life and the intense role drugs had in his life at that time. [He] repeatedly talked about how he unnecessarily involved someone else in conflict, and the reality that he unnecessarily involved himself in someone else’s conflict because of the promise that he would be paid with drugs. [He] acknowledged that he did not consider the seriousness of his actions, including using a gun in a threatening manner. He was able to discuss the loss of life experienced by the victim and

those around him, and the unfortunate reality that the victim was an innocent bystander who got shot for absolutely no reason at all.”

D. 2010 Hearing

The Board hearing of August 9, 2010, was before Presiding Commissioner Mike Prizmich and Deputy Commissioner Jan Enloe. Tolentino, represented by counsel John Stringer, gave sworn testimony, and Solano County Deputy District Attorney Irene Chew represented the People. The hearing thoroughly explored, with Tolentino’s input, the materials before the Board, but we will focus on those of particular consequence to the habeas corpus arguments.

The crime. Glenn David and Aurora Dial were friends of Tolentino’s, and they had been “partying all day,” smoking methamphetamine. Tolentino had been “up on a run” for probably 24 hours. Morales, also a friend of Tolentino’s, owed David and Dial drug money, and Tolentino volunteered to help them collect it, understanding that he would get some methamphetamine in return. He never knew how much he would get or how much money Morales owed. Dial drove Tolentino and David to the house, and she and David went up to the house with Tolentino. Nebalasca answered the door, and Neyra and Morales were in the garage. Tolentino confronted Parayno immediately, trying to get him to say where Morales was. Tolentino shot Parayno in the head, from about 10 feet away, and Parayno went down. Panic broke out. David took the gun from him, and they left, apparently without calling for medical help.

Tolentino later told his family about it, and they urged him to surrender. He had known the 30-year-old victim personally, had nothing against him, but had seen him with Morales before. Tolentino would come to learn that Parayno had a wife and children. He learned at the police station that Parayno was dead.

Tolentino maintained that the shooting was an “accident,” despite saying that he deliberately pulled the trigger. The gun was a .357 magnum revolver, he said, that he got from David before entering the house that morning. He had never used that particular gun before but had used others like it. He knew it was loaded because, when David gave it to him, he opened the cylinder and saw six rounds (“bullets”).

Tolentino was later asked about the tension between his idea of an “accident,” his telling the psychologist at the evaluation that it was *not* an accident since he deliberately pulled the trigger, and his having no idea why he would pull the trigger on an empty gun. He tried to explained: “After [Parayno] was shot, we left the residence and we went to Glenn David’s house. We were all trying to come up with a story to try to make it look like an accident. As you can see just how stupid it was, us even saying that I unloaded and loaded the gun. I don’t know what we were thinking at the time, when we tried to make up the story that it was an accident. The truth of the matter is, when I entered the residence of Ariel Nebalasca, I moved Aurora Dial out of the way and entered first, because I did not want anyone to see what I was doing. I entered through the garage and I drew the revolver, opened the cylinder and dumped the bullets into my hand as fast as I could. When I entered into the garage, I saw [Parayno] sitting there, and that’s when I pulled the hammer back, because I wanted him to get the impression that the gun was loaded.”

Asked to clarify the accident/no accident nature of his account, he added: “When the gun fired [and hit Parayno], no one bumped me to cause the gun to go off. My finger was on the trigger. I was the one who pulled the trigger and the gun went off. That’s when I was surprised when it fired, because I thought I had dumped all the bullets out just prior to entering into the garage.” He said he had put the dumped rounds into his pocket.

His explanation of ineffectually trying to dump all rounds out of the cylinder highlighted longstanding information, since the presentence report of 1995, that people inside the house saw him unload “and re-load” the gun before firing. His explanation—evidently made for the first time at this hearing—was that he never did reload the gun but made up that detail with David to make it sound like an accident. This exchange between Commissioner Prizmich and Tolentino captures the evident surprise of this twist in the account:

“[Q] Let me get this clear. Are you saying that you did not reload it?”

“[A] I did not.

“[Q] All right. So, but the witnesses said you did. Why do you think? Why is there a difference there, do you think?”

“[A] After the shooting, I went to Glenn David’s house. We were trying to figure out what to say to the police. This is the story that we came up with to try to tell them.

“[Q] But these are witnesses that saw this, not Glenn David and you, that saw you load and unload the gun, right?”

“[A] Yes.

“[Q] So why?”

“[A] They were the very same people that tried to say the same thing.

“[Q] So you guys were all saying the same thing, that you loaded and unloaded the gun?”

“[A] Yes, when we spoke to the police.

“[Q] You’re saying you didn’t load the gun.

“[A] I did not, I did not reload the gun, Sir.”

This mention of fabricating a story also raised concern about the psychological evaluation having him say: “ ‘I was lying my butt off, was trying to make it look like an accident . . . *told the Commissioners during my first hearing* that . . . I dumped all the bullets out.’ ” (Italics added.) Tolentino now said he did *not* lie to the Board, only to police and probation. As for the “reload” part of the story making no sense for a claim of accident, he said: “To be honest with you, we were so strung out on drugs, a lot of the things we did just didn’t make any sense. The stories we would say, the stories we would try to come up with. We were just trying to come up with a story. . . . [¶] I know it doesn’t make any sense.”

Seemingly implicit in Tolentino’s explanation of plural “witnesses” seeing him reload the gun was that David *and Dial* had to be involved. He did not know whether either one had been charged in the case, but when asked, “Did they testify against you?” said: “Pretty much. They pointed everything to me.”

Drug abuse/lifestyle. A major concern at the hearing was Tolentino’s descent into drug abuse, criminal companionship, and violence. He conceded being raised in a

supportive family that had no such problems, and said in a prepared statement: “When I committed this crime, it was for absolutely senseless reasons. I was selfish, arrogant, and a drug addict at the time. I didn’t care about anything or anyone but myself. My self-destructive lifestyle and drug addiction made it easy for me to be very thoughtless and callous toward others. I am horrified and I am ashamed” He conceded (despite an early statement that he used guns to hunt and never against people) that he carried handguns for “protection” during his drug use days, and that he had been convicted for brandishing a firearm at a girlfriend. Asked why he led that life, he said that, while he should have known better, “At the time, it just seemed like it was fun to me.” If paroled, he planned to listen to his family, work as much as he could, save money, choose carefully those with whom he socialized, and stay away from those who wanted to just hang out or drink—“tell them that I have other, better things to do.”

Tolentino had taken substance abuse classes, remained drug free throughout his incarceration, and was participating in narcotics anonymous (NA). He said he currently had a fellow inmate as a sponsor with whom to speak. Asked if he had one for after his release, he said he would go to Dr. Christine Rodange, at a Philippines rehabilitation center, for help when he needed it.

E. The Decision

Presiding Commissioner Prizmich announced the panel’s decision to deny parole for three years due to an unreasonable risk of danger or threat to public safety. He gave a detailed explanation, and Commissioner Enloe added brief concurring remarks. Prizmich lauded Tolentino’s solid family support, “good”/“outstanding” parole plans, “very good” institutional adjustment, and “more than adequate” institutional behavior, but voiced interrelated concerns about the murder, the role of Tolentino’s drug use, his criminal history, the extent of his insight since then—particularly his characterization of the killing as an “accident”—his need for further self-help program work, and room for improvement in a psychological evaluation that would take place before the next hearing.

Prizmich began: “[The psychological evaluation is] higher than we’re comfortable with at this point, but not only that, there are some comments in there . . . that insight is

developing. And that's what we see here today. We would encourage you to continue going to your self-help program."¹ He continued: "I'm not sure whether you understand it, or whether you have difficulty with the language, but when [I] asked today, 'Was this an accident?' You said, no. . . . And then we went back. And we went over it all, to try to figure out just where your mind was in all this. This was a crime that made no sense at all. You weren't a party to any of this, and you were utilized by your crime partners to achieve their end. And you happily went along with it. And we do note that your prior criminal history, both the arrests and non-arrests, which I think is where that psychological evaluation wasn't as positive, because they looked at that as well." Referring again to further work and evaluation, he said: "[W]hat you've got to do and come to grips with, is total and complete responsibility, with no ambiguity at all with regard to what you did. You were the responsible party. You were the one that went in there. Whether you unloaded the gun and loaded the gun, or whatever the deal was. You were the one that shot this man. And you did so in the head. Fortunately for him, he died rather quickly. But his family was left, . . . and as you have articulated, was left with determining what to do for the rest of their lives, when such a tragedy occurred. And your family is, as well. You are indeed correct. The shame that you brought upon yourself and your family for those actions will be long lasting. . . . And we were left a little bit confused as to where you're at with your insight into this crime. Just how much responsibility you take."²

Prizmich further stressed: "There's no question, when you place yourself in this kind of situation, arm yourself, which is something that you were used to doing, for whatever reason before, but you were arming yourself. And then point a weapon of that

¹ He later remarked: "Not only that you scored high [in the psychological evaluation], but it does show some more work can be utilized, it was page 13, I believe, can be utilized to improve your lot. And we encourage you to do that."

² The commissioner later remarked: "Your insight into this crime, we were left with a question in our mind as to how thoroughly you take responsibility. After a lot of questioning. I mean, it shouldn't be that much questioning. You should jump right out with what your responsibility is."

nature at somebody and try to scare them even more, and pull the trigger, as you admit, and shoot. You're responsible, no matter what your intentions were. It doesn't matter whether you intended to shoot anybody or not. You got convicted of a murder in the second degree, you got a 15 years to life [term]. So you've got to come to grips, in no uncertainty at all, with everything that you've done. There cannot be any commentary with regard to, well, it might have been an accident, or it could have been, or I did this, or. You did it."

Tying in the self-help work, the commissioner added. "The other thing that we were concerned with, and what we want to see from you, is a direct connection with regard to your self-help programming and that being a part of your everyday life. What we want to see is, I'm almost, absolutely sure that a doctor in the Philippines is not going to spend the time with you that a sponsor in AA or NA would. That's almost a daily working kind of thing. I would encourage you to have your family, and I know they can do it, determine where the AA meetings are in the Philippines that are close enough for you to attend and do the kinds of things to let us know that you intend to continue going to AA. Because that seems to have worked for you here. Getting a sponsor, getting one identified, if you can. That sometimes doesn't happen, but it is helpful. Because what that tells us is that is part of your concrete plan to stay sober. Your life back then was spinning out of control. And I can see where some of this stuff happened, in terms of you getting wrapped up in it. Because you're not a tough guy. I've seen tough guys, and you're not one of them. I think you were making believe, and you ended up killing a guy. Trying to be a big shot to someone that, you had no business doing that. And I would encourage you to do the kind of self-help programming in AA with a sponsor here that is reflected, when you talk to us about your parole plans, that AA is a firm part of it. I simply have a real difficult time understanding how a doctor who has her own practice back in the Philippines would be able to devote the kind of time that a sponsor does."

Commissioner Enloe said she agreed with everything her colleague had just said and encouraged Tolentino to pay particular attention to his comments "to be able to set goals within yourself so that you know that you can come back at a future hearing with

all the I's dotted, the T's crossed" "[H]opefully," she said, "you will have delved into the crime itself a little further, your insight issues [so] that you'll be able to demonstrate to the next panel that you are suitable for parole."

F. Superior Court Review

Tolentino petitioned the Solano County Superior Court for writ of habeas corpus, and Judge Donna L. Stashyn denied the petition by an order of May 2, 2011. Finding "some evidence" to support the parole denial, the court cited in particular contradictory statements about the offense that cast doubt on whether Tolentino had insight into the offense and truly accepted responsibility for it.

III. DISCUSSION

A. Legal Criteria

Factors applied by the Board to assess parole suitability are listed in title 15, section 2402 of California Code of Regulations.³ They are general guidelines, the importance of which, singly or in combination, are left to the judgment of the panel. (*In re Prather* (2010) 50 Cal.4th 238, 249-250), and they are not exclusive. They expressly require consideration of all relevant, reliable information bearing on the prisoner's suitability for release (Regs., § 2402, subd. (b)), and thus allow consideration of "the inmate's insight into not just the commitment offense, but also his or her other antisocial behavior" (*In re Shaputis* (2011) 53 Cal.4th 192, 219 (*Shaputis II*)).

We apply the "some evidence" test to review a Board (or Governor's) decision. This "is *more deferential* than substantial evidence review, and may be satisfied by a lesser evidentiary showing. [Citation.] [¶] . . . [O]nly 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 or] the Governor. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of [the Board or] the Governor It is irrelevant that a court

³ All further references to Regulations are to title 15 of the California Code of Regulations.

might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the . . . 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 . . . decision.’ [Citations.]” (*Shaputis II, supra*, 53 Cal.4th at p. 210.)

Tolentino does not appear to seriously argue that factors favoring his suitability were ignored (e.g., *In re Young* (2012) 204 Cal.App.4th 288, 304-306 (*Young*)), only that factors cited by the Board for *unsuitability* lacked support or a sufficient nexus to whether he would have been unreasonably dangerous if released. Having already discussed the background evidence pertinent to *undisputed* factors, we will not burden this opinion with a further discourse on them.

“While the evidence supporting a parole unsuitability finding must be probative of the inmate’s current dangerousness, it is not for the reviewing court 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. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process. [Citation.]” (*Shaputis II, supra*, 53 Cal.4th at p. 211.)

B. “Some Evidence” Supports the Parole Denial

Tolentino’s briefing sometimes blurs disparate components of his arguments, but we address them in the following order, rejecting his various challenges and finding that some evidence indeed supports the denial of parole.

1. Gravity of the Offense. The aggravated nature of a commitment crime, even though based on immutable circumstances, may alone provide some evidence of current dangerousness as long as the record also establishes that something in the inmate’s pre- or postincarceration history, or current demeanor or mental state, including poor insight, indicates a continuing threat to public safety. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1214, 1228 (*Lawrence*); *Young, supra*, 204 Cal.App.4th at pp. 318-319.) The parties

agree on this in principle, but Tolentino seems to dispute at the start that the murder here can be characterized as aggravated or egregious so as to justify *any* further Board reliance on it. He states at one point that he “does not deny nor dispute the egregiously aggravated nature of his past criminality or his complete responsibility for the callous murder of Mr. Parayno,” but falls short of conceding that, other past criminality aside, *this murder* was more egregious or callous than most.

Whatever might be said about whether this second degree murder surpasses the norm in the usual measures of callousness or brutality (Regs., § 2402, subds. (c)(1)(B)-(D)), it squarely fits an unsuitability factor that “[t]he motive for the crime is inexplicable or very trivial in relation to the offense.” (Regs., § 2404, subd. (c)(1)(E).) Much of the Board hearing was focused, in essence, on that chilling concern, and the inexplicable and very trivial nature of this murder is what makes it especially horrifying. Tolentino killed Parayno, an unarmed man he barely knew and who was not the man who owed drug money to David and Dial. Tolentino himself had no beef with Parayno, and Parayno did nothing to bring violence upon himself beyond not telling a drug-hyped, gun-wielding home invader that the man he demanded to see was hiding upstairs. Tolentino also injected himself into the situation, volunteering to intimidate a casual friend (Morales) for a mere unspoken understanding that his methamphetamine-using cohorts would give him an unspecified amount of the drug to continue a “run” that had already lasted about 24 hours. In other words, this murder was about as inexplicable and trivial as a murder can be. Tolentino agreed below. He told the Board in his closing statement that the killing was “for absolutely senseless reasons,” that he was “horrified” by it, and that he had “no excuses.”

2. *Inconsistencies, Insight, and Recidivism.* Tolentino assails the Board’s reliance on inconsistencies in his account, lack of adequate insight, and recidivism risk. We address those claims under a single heading because they are inextricably interrelated in this case and bear on both current dangerousness and continued reliance on the facts of the commitment offense.

To summarize, we read the decision as based on doubt about the safety of releasing Tolentino given the inexplicable nature of the murder, its purely drug-based motivation, its occurrence following a years-long spiral into criminality and violence, a haunting concession by Tolentino that the drug use turned him into a “monster” who cared nothing about others, a psychological evaluation that discerned an improving but still low-to-moderate risk of violent recidivism, report warnings that abstinence from drugs while in custody does not reliably translate to abstinence in the free community, some concern about his drug-management plans upon release, factual inconsistencies in his still-emerging account, and notions of “accident” suggesting that he was still coming to grips with the full extent of his responsibility for the murder.

Notable inconsistencies in Tolentino’s accounts of the shooting included: pulling the trigger deliberately, not by accident, yet calling the shooting an accident because he did not mean to shoot anyone and thought he had dumped all rounds from the cylinder; saying he only used guns to hunt, not against people, but conceding that he used to carry guns for protection and had a conviction for brandishing a gun at a girlfriend; saying he held the cocked gun at his hip, then saying he waved it around; saying that decades-old information that witnesses saw him unload *and reload* the gun came from his cohorts (i.e., the “witnesses”) and was a lie the three of them made up, whereas he had never before mentioned this, despite its potentially impeaching effect on his accident claim; and saying to a psychologist, “I was lying my butt off . . . trying to make it look like an accident” during his first parole hearing, but then saying at the current hearing that he only lied to the police and probation, not to the first panel.

One can—and Tolentino does—reason that those inconsistencies may be explained or deemed insignificant individually, but it is their *combined* effect in this case that makes them hard to dismiss, and therefore a basis for concluding that Tolentino’s account of the shooting was still a work in progress. We also bear in mind, as we would even under more stringent review standards, that the panel had the unique opportunity to assess the significance of these inconsistencies by observing Tolentino’s demeanor as he discussed them. (See generally *Shaputis II, supra*, 53 Cal.4th at p. 215 [“When . . . the

parole authority declines to give credence to certain evidence, a reviewing court may not interfere unless that determination lacks any rational basis and is merely arbitrary”].)

Those inconsistencies, of course, support an inference that Tolentino lacked adequate insight into the commitment offense, and lack of insight in turn provides a rational nexus between the facts of that offense and current dangerousness under the some-evidence standard. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260.) Thus, while the record contains much that is positive about Tolentino having accepted sole responsibility for the murder—i.e., not blaming anyone else—the several inconsistencies do cast some doubt on the extent of his acceptance of responsibility.⁴

Tolentino next assails Board reliance on the psychological evaluation’s overall risk assessment as being in the low-to-moderate range. In his view, the riskier end of that range was off limits because it factored in his pre-murder criminal history, consisting of immutable facts assertedly lacking a rational nexus to his current dangerousness. He stresses in particular that the 2006 evaluation discerned that, *currently*, he displayed “‘no predictive factors for recidivism.’”

To repeat some of what we set out earlier in part II.C. of this opinion: The risk assessments rested on more than an immutable criminal record: He was “in the moderate risk category for violent recidivism” as measured by one test that factored in a criminal history of aggression and violence from a young age, a substance abuse/dependence problem, and a history of failure on supervised release. This was balanced against “no predictive factors” in the “more current and dynamic domain,” “limited concern” based on realistic and reasonable plans for parole and extensive support among family or friends who appeared to lack criminal histories, and “a strong likelihood” that he would experience stress as he readjusted to societal expectations and the reality of having spent little to no time in the community as an adult on a fully independent basis. He fell within “the medium range of general recidivism risk” as measured by another test, factors being

⁴ Tolentino assumes that the Board doubted the extent of his remorse about the murder, but we find no reliance on lack of remorse, nor any doubt in the panel’s comments on that subject.

his criminal history, association with antisocial companions, plus upgraded vocational training, which could help insulate him from poverty, relapse, and return to prior maladaptive coping skills. Finally, that violence potential, his ability to refrain from alcohol and drug abuse when released, and his extent of exploring the commitment offense and coming to terms with its underlying causes, presented a “LOW-MODERATE RISK” for violence in the free community. Clearly, more went into the overall assessment of low-to-moderate risk than just immutable factors, although those factors were of course deemed important in the overall risk assessment. We therefore see no arbitrariness in the Board’s reliance on the overall risk assessment level.

In summary, some evidence supports the parole denial based on the factors just explored. This leaves no need to explore Tolentino’s claim of no support for reliance on him having an inadequate NA sponsor or any other aspect of his relapse prevention plan.

3. *Rational Nexus to Current Dangerousness.* Tolentino faults the Board for not articulating a rational nexus between its various concerns and his *current* dangerousness. While we agree that concerns lacking a rational nexus to the crucial question of current dangerousness are inadequate to pass as “some evidence” (*Shaputis II, supra*, 53 Cal.4th at pp. 217, 219), “nothing in the requirement that a parole denial be accompanied by a ‘statement of . . . reasons’ demands that the parole authority comprehensively marshal the evidentiary support for it reasons. [Citation.]” (*Id.* at p. 214, fn. 11.)

Also, our discussion in the previous section shows support in the record that the Board’s concerns were interrelated and solidly tied to current dangerousness. Tolentino’s efforts to attack some of those concerns in isolation rather than in the aggregate are, moreover, unpersuasive and, in effect, an attempt to have us reweigh the concerns and rebalance them more favorably to him. We cannot do so consistent with the deferential “modicum of evidence” review. (*Shaputis II, supra*, 53 Cal.4th at pp. 210-211.)

4. “*Unsworn Testimony.*” Tolentino assumes that there was no preliminary hearing or other *sworn* testimony backing the presentence report’s offense summary, for he states in his traverse: “Many of the factual matters were never litigated or resolved and the witnesses were not placed under oath.” From this premise, he “affirmatively

allege[s] that the Board’s reliance on unverified witness statements to support their belief that [he] knew the gun was loaded is evidence that he fails to accept responsibility for the commitment [offense] and is therefore an unreasonable risk of danger is a violation of due process. (*In re Weider* (2006) 145 Cal.App.4th 570.)” In a similar vein, he urges: “The Board’s insistence that [he] admit to their version violates his rights protected by” Penal Code section 5011, and contends that “factual disputes” warrant an evidentiary hearing.

The citation to *In re Weider, supra*, 145 Cal.App.4th 570, as support for a due process violation in this context is puzzling, for the case did not apparently involve Board reliance on unsworn testimony. Indeed, Tolentino cites no authority that the Board must rely only on sworn testimony, and we know of none. Rather, the Board’s obligation is “to consider the full record in making a parole-suitability determination” (*In re Prather, supra*, 50 Cal.4th at p. 244)—that is, all relevant, reliable information bearing on the inmate’s suitability for release (Regs., § 2402, subd. (b)), and much of that information is not sworn. Plus, of course, not all unsworn statements are unreliable.

But, in any event, an evidentiary hearing is warranted on habeas corpus only when the return and traverse reveal that entitlement to relief hinges on the resolution of factual disputes (*People v. Romero* (1994) 8 Cal.4th 728, 739-740), and that is not the case here. The term “Court transcripts” in the presentence report logically implies sworn testimony, and Tolentino does not explain why we should give the term any different meaning on this record. The same term is used later in the report to state, “Court transcripts reveal at least one witness stating that the defendant seldom was without a gun.” Thus, it is not an isolated term, and Tolentino, of course, cannot contest the weapon use since he ultimately conceded at the hearing that he did carry guns during his time as a drug user leading up to the murder.

Thus, nothing in the record suggests that the “Court transcripts” were not sworn testimony; nor did Tolentino or his counsel suggest otherwise. Tolentino’s position was not that they were unreliable because unsworn, but that the reference to him reloading the gun after emptying it was—sworn or not—*a lie*. Not only that, but he identified the two

witnesses as his friend David (and implicitly Dial as well), saying that the reloading idea was a story he and David concocted after the shooting in an inept effort to make it sound like an accident. That, incidentally, answers Tolentino's complaint now that the testimony was "unverified"; he himself verified, under oath, that the witnesses were his cohorts from that night. He never disputed that the reloading story was told. He conceded it and said that he helped dream up the story.

This leaves the claim that "the Board's reliance on unverified witness statements to support their belief that [Tolentino] knew the gun was loaded is evidence that he fails to accept responsibility for the commitment and is therefore an unreasonable risk of danger The Board's insistence that [Tolentino] admit to their version violates his rights protected by [Penal Code section] 5011." Penal Code section 5011, subdivision (b), provides: "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."

The argument fails on this record. First, of course, Tolentino admitted his guilt of this crime many decades ago by plea, not from any pressure by the Board, and admitted his guilt again at the latest parole hearing. Second, while case law may extend the reach of the statute to potential protection against the Board conditioning parole on acceptance of every bit of evidence in the record contrary to an inmate's version (see discussion in *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110-1112), we are not yet at that point. There is only a *potential* conflict right now between the offense summary saying witnesses saw Tolentino unload *and reload* the gun, and Tolentino's explanation that the witnesses were his cohorts reciting a lie that he helped them devise. We do not read the Board decision as resting mainly or even substantially on such a conflict. Rather, what seems to have troubled the panel was that Tolentino never offered this account before, thus contributing to an impression that his insight and acceptance of responsibility rested on shifting sands. Neither panel member expressed disbelief of Tolentino's account.⁵

⁵ The law is unsettled, but *Shaputis II*, *supra*, 53 Cal.4th 192, counsels at page 216: "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. [Citation.]

Thus, there is no “factual dispute” to be resolved by a hearing at this point, let alone a dispute on which a grant or denial of habeas corpus hinges. The two “accounts” may or may not prove to be at odds, depending perhaps on evidence not in the current record but, for now, it is premature to say that parole is being conditioned on Tolentino amending or abandoning his newly-disclosed account.

5. Age, Individualized Consideration, and Predisposition to Deny Parole.

Tolentino offers perfunctory claims that the Board failed to consider his age/maturation, failed to give his case “individualized consideration,” and was “predisposed” to deny him parole. These claims appear as *allegations* in his traverse and the incorporated petition, but we see no serious *argument* to support them.

Age or maturation is a factor that can bear on suitability for parole (Regs., § 2402, subd. (d)(7) [prisoner’s present age reduces the probability of recidivism]), but Tolentino seems to rely entirely on the fact that this was not something expressly mentioned in the Board’s decision. He does not show error. The decision maker’s duty is to give reasons for *denying* parole, a duty that does not require a detailed analysis of every parole suitability factor (*In re McClendon* (2003) 113 Cal.App.4th 315, 323; *In re Elkins* (2006) 144 Cal.App.4th 475, 492, fn. 4 (*Elkins*)), and the Board here did not rely on *lack* of age or maturity to *deny* parole. Tolentino’s age was also clear from the record (*Elkins, supra*, 144 Cal.App.4th at p. 493, fn. 4) and surely from his testimony before the Board. At 43 years old, he was far younger than the 68-year-old in a case he cites, where age alone arguably reduced the inmate’s probability of recidivism. (*In re Criscione* (2009) 173 Cal.App.4th 60, 76-77.) Tolentino cites nothing from the record indicating that his 43 years significantly reduced his risk of recidivism. (Cf. *Elkins, supra*, at p. 493, fn. 4 [same observation for a 47-year-old inmate].)

... 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.”

As for the asserted predisposition of the Board to deny parole, individualized consideration of all factors, rather than predisposition, is required. But like the inmate in another case from our division, Tolentino “cites no authority that a [Board’s] decision must specify in detail every pertinent fact relied upon.” (*Elkins, supra*, 144 Cal.App.4th at p. 492, fn. 4, citing *Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, 15.) The record also shows a long and probing hearing in which the panel carefully explored with Tolentino nearly every pertinent factor—for and against his release. There is simply no basis for assuming that the panel was “predisposed” to deny him parole.

IV. DISPOSITION

The petition for habeas corpus is denied.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.