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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re WOODROW WILLCOXON,

on Habeas Corpus.

H036224
(Santa Clara County
Super. Ct. No. 62211)

I. STATEMENT OF CASE

In 2009, the Parole Board (Board) denied parole to defendant Woodrow Willcoxon. Willcoxon filed a petition for a writ of habeas corpus in the superior court challenging the denial. The court granted the petition, vacated the Board's decision, and directed it to conduct a new parole hearing within 30 days.

On appeal from the order (Pen. Code, § 1507), respondent James A. Yates, Warden at Pleasant Valley State Prison in Coalinga, claims the court erred in vacating the Board's decision. He further claims that even if the Board's decision was defective, the court erred in ordering a hearing within 30 days.¹

We conclude that the court erred in granting Willcoxon's writ petition and direct it to enter a new order denying the petition.

¹ This court granted a stay of the superior court's order.

Although the habeas petition challenges the decision by the Board, the respondent is the warden of the prison where Willcoxon is incarcerated. (Pen. Code, § 1477.) Hereafter, we treat the Board as the respondent.

All unspecified statutory references are to the Penal Code.

II. BACKGROUND

To assist in determining whether the Board properly denied parole, we first summarize the record that was before the Board.

A. Willcoxon's Offenses²

On December 29, 1975, Willcoxon entered the St. Thomas Village market and demanded money at gun point. The owner put money in a bag and surrendered it. As Willcoxon left, a customer walked in, and Willcoxon immediately ordered him to the ground. Willcoxon thought the people were watching him leave and fired his gun at the door above their heads.

On January 16, 1976, just after midnight, Willcoxon, who was on parole, got into a verbal altercation with Roosevelt Evans at the Disco Odyssey. Willcoxon invited Evans outside to settle their dispute. Once outside, Willcoxon drew a handgun and shot Evans in the stomach. Evans staggered backward, and Willcoxon shot him five or six more times, killing him. One of those shots went astray and injured a third person named Pena.

Willcoxon was convicted of first degree murder, assault with a deadly weapon, and robbery. He was sentenced to an indeterminate term of seven years to life for the murder with a consecutive 10-year firearm enhancement and concurrent 10-year terms for the assault and robbery convictions.

B. Personal and Criminal History

Willcoxon was born in 1947 in San Jose. His parents divorced when he was five, and he lived in a series of foster homes until he was 14 and returned to live with his mother. His father and mother had each remarried, his mother three times. She died in

² At Willcoxon's hearing, the Board incorporated by reference the summary of his offenses in its 2002 report and read it into the record. Our summary simply reiterates the Board's version of the offenses.

1979. He lived in a series of foster homes after that. He has one biological sister and three half-siblings.

Willcoxon stopped formal schooling after the fourth grade. He experienced a number of head traumas during his childhood and late teens. Between the ages of eight and 18, he got into fights, carried a knife for protection, shoplifted, vandalized property, and ran away from home. At eight, he set fire to a vehicle. At nine, he was committed to a mental hospital for observation because of uncontrollable temper and behavioral problems. At 12, he was committed to the CYA for seven months because he was beyond control. After a furlough, he was detained for threatening a man with a knife, running away, and theft. He was then sent to the Nelles School for Boys. Shortly after his release, he threatened his grandparents with a knife. At 14, he ran away, stole a car, and while fleeing got into an accident that killed a five-year-old boy. He was committed to CYA for four years for escape, auto theft, and second-degree murder. During that term, he displayed grossly inappropriate behavior and tried to escape twice.

As an adult, Willcoxon committed two armed robberies and was sent to prison in 1967. He was released and later re-imprisoned in 1971 for assault with a deadly weapon. While on parole, he committed the underlying offenses.

C. Institutional Record and Programming

Willcoxon has been incarcerated for over 34 years. During that time, he has received 25 “115” disciplinary citations for serious rule violations or misconduct ranging from disobedience to fighting, theft, and rape. He also has 30 “128” disciplinary counseling citations.³ Since his last parole hearing in 2006, he received one “115” citation and some “128” citations.

³ Minor misconduct in prison is documented on a “CDC Form 128-A”; more serious misconduct or violations of the law are documented on a “CDC Form 115.” (Cal. Code Regs., tit. 15, § 3312.)

Willcoxon's last "115" citation involved an incident with Ms. J. Stenner, his supervisor at the library where he was working as a clerk. In her incident report, Ms. Stenner accused Willcoxon of threatening her. She said she found him in possession of a stack of computer paper labels and ordered him to return them to the law library. However, he became loud and argumentative. She ordered him to hand them over. With an angry and aggressive thrust, he swung his arm around, and she took the labels. She felt unsafe and afraid. Willcoxon left but in a loud and angry voice said, "You stupid bitch."

At an administrative hearing, Willcoxon denied threatening Ms. Stenner. He accused her of initiating the confrontation by loudly demanding that he give her the labels without first letting him explain himself and then grabbing some of them from him. He turned and walked away, and as he did, he said, "What a stupid bitch." There were other inmates around who heard him, but he did not realize he had spoken loud enough for her to hear. He explained that at the time he was upset because of his stepmother's impending death, and for this reason, he angrily responded to Ms. Stenner without thinking. He thought she misunderstood his response and took it out of context. He did not intend for her to hear him call her a stupid bitch.

The hearing officer found that although Ms. Stenner may have felt threatened by Willcoxon, there was no evidence to support a finding that he had threatened her. Nevertheless, the officer found Willcoxon guilty of the lesser offense of deliberate disrespect intending to humiliate or demean, which by reason of its intensity or context created the potential for violence that could escalate to mass disruptive conduct by other inmates.⁴

⁴ Ms. Stenner alleged that Willcoxon had demonstrated similar behavior on prior occasions for which she had issued "128" citations and counseled him, but he remained unreceptive. However, the hearing officer found that Willcoxon had not been aware of the prior citations and had not been counseled before the incident. The hearing officer considered this to be a mitigating factor.

On the positive side, Willcoxon completed his high schooling and took some college level courses and obtained a certificate of completion from the Family Radio School of the Bible. He also completed two vocational training programs: industrial silk screening and janitorial services. His work assignments included work as a janitor, photographer, fingerprinter, yard crew member, porter, laundry crew member, scullery crew member, library clerk, vocational office clerk, chapel clerk, garment assembler, cook, and warehouseman.

Willcoxon participated in voluntary individual therapy between 1991 and 1995 with different therapists. He also participated in a number of self-help programs concerning anger management, substance abuse, and conflict resolution.

While incarcerated, Willcoxon married twice. The first marriage lasted under two years; the second lasted 10 years.

D. Parole Reports and Psychological Evaluations

Kurt Kuekes, Ph.D, prepared a psychological evaluation for the 2009 parole hearing that focused on Willcoxon's risk of future violence, the significance of substance abuse in the commission of his offenses, his ability to refrain from using those substances upon release, his insight into his offenses and their underlying causes, and his current gang status.

Dr. Kuekes reviewed the nine previous psychological evaluations from 1983 through 2003 and concurred with the diagnosis in most of them of antisocial and narcissistic personality disorders. In the last report in 2003, the psychological evaluator concluded that Willcoxon posed a very high risk of future violence and opined that he was an extremely dangerous man. Dr. Kuekes opined that Willcoxon had demonstrated improvement in both of his disorders.

Dr. Kuekes did not find substance abuse to be a factor in the commission of the underlying offenses, and Willcoxon reported that he rarely drank or used drugs and had not done so when he committed his offenses. In prison, he had maintained his sobriety.

Dr. Kuekes noted that Willcoxon had had significant difficulty controlling his behavior and impulses before being incarcerated; and in prison, he had displayed inconsistent judgment and impulse control. However, it appeared that over time, he had improved in these areas and with additional self-help would continue to do so.

Dr. Kuekes opined that Willcoxon had only limited insight into his inappropriate criminal behavior leading up to and including his murder. “Instead of acknowledging the inappropriateness of a parolee possessing a gun and the inappropriateness and recklessness of his discharging a firearm as he did, Mr. Willcoxon continues to purport that he was acting in self-defense when he fired seven shots from his Luger handgun at the victim.”

To help evaluate future risk, Dr. Kuekes administered two empirical tests for risk of future violence—the Psychopathy Check List-Revised (PCL-R) and the History-Clinical-Risk Management-20 (HCR-20)—and one empirical test for risk of recidivism—the Level of Service/Case Management Inventory (LS/CMI).

On the PCL-R test, Willcoxon’s score put him in the “high” future risk category. Dr. Kuekes explained that the test is based on an inmate’s lifetime history rather than more recent behavior alone. Willcoxon’s score was very high because he repeatedly had failed on parole and conditional releases, had a history of juvenile delinquency, had exhibited poor behavioral control, and had demonstrated callousness and lack of empathy. Other factors that elevated his risk score were his promiscuity, his boredom, his glibness, his moderate levels of remorse and guilt, his shallow affect, his manipulative behavior, his pathological lying, his lack of realistic long term goals, his irresponsibility, and his failure to accept responsibility for his own actions. On the other hand, certain factors kept his score from being even higher, namely, his lack of a grandiose sense of self, his lack of a parasitic lifestyle, and his lack of excessive short-term marital relationships.

On the HCR-20 test, Willcoxon scored “within the lower end of the ‘Moderate’ range for violent recidivism.” This test looks at three categories of risk factors: historical, clinical, and risk management. The historical category focuses on an inmate’s past behavior. Because of Willcoxon’s troubled, criminal, and violent background, he warranted a high level of concern, but not as high as it would have been had he had a significant history of substance abuse or mental illness. In the clinical category, he warranted only a moderate level of concern due to his lack of insight, history of being unresponsive to treatment, impulsivity, and negative attitudes. In the risk management category, Willcoxon scored a “lower to moderate level of concern” because it was likely he would encounter stressful situations and be exposed to destabilizing situations, his parole plans “lack[ed] some degree of feasibility,” and he would probably have difficulty complying with the conditions of parole.

On the LS/CMI inventory which focuses more on the risk of recidivism in general and not just risk of violent behavior, Willcoxon scored in the medium range. His score was elevated because he had been incarcerated so many times, had criminal friends, had been violent both in and out of prison, and had previously failed when released into the community. However, his education, good work ethic, ability to interact with co-workers and supervisors, decreasing antisocial attitudes, sobriety, and somewhat recent programming kept his score from being higher.

In sum, Dr. Kuekes concluded that Willcoxon’s risk of violent recidivism “falls within the *mid-to-upper range of the ‘Moderate’ range.*” (Emphasis in original.) He opined that the risk would increase with substance abuse, association with criminal peers, estrangement from his support system, possession of weapons, and failure to engage in constructive activity. Conversely, the risk would decrease if he remained clean and sober, surrounded himself with supportive friends and family members, got a job or attended school, and became involved in constructive social activities.

E. The Parole Hearing

1. Testimony

At the hearing, Willcoxon expressed regret and remorse for having killed Evans and harmed Pena and for causing the victims and their families to suffer fear and pain. He said that during the robbery, he did not intend to harm anyone and fired his gun above the victims' heads just to scare and warn them.

Concerning the murder, he explained that he went to the club for a job interview. Evans, whom he had seen at lunch a few days before, approached and asked why Willcoxon was looking for him. Willcoxon said he was mistaking him for someone else. Evans then invaded Willcoxon's space, which made Willcoxon nervous, scared, and angry. He told Evans to move back, put his hand on his pants, and said he had a gun that shoots nine times. Evans said he could handle it and reached toward his own back pocket. Willcoxon felt that he might shoot Evans. Then the bouncer appeared. Willcoxon said he was leaving and asked him to keep Evans there. The bouncer told Willcoxon he did not have to leave and offered Evans a free drink, which Evans left to get. A short time later, Evans returned with a glass in his hand and started arguing with Willcoxon. The bouncer returned, and Willcoxon again asked him to hold Evans so he could leave. Willcoxon left and walked down the street. He heard footsteps behind him, he turned, and saw Evans coming toward him with his hand raised. He thought Evans had a knife and was about to attack him. Angry that Evans was trying to hurt him and afraid, Willcoxon drew his gun and fired once. He thought he missed. Still angry, he fired several more times.

Willcoxon acknowledged that initially he had claimed that he acted in self-defense. However, he said that through therapy, he had come to know that the crime was not self-defense because he had created the circumstances that led to the killing. He explained that he was a rebellious, incorrigible youth, who did not get along with his parents, had no respect for authority, and wanted to be a gangster. His youthful anger led

him to prison, where that anger got further distorted. After his release from prison, and at the time of the killing, he was having difficulty adjusting to life. He still had a gangster mentality and was frustrated because he had no money, no place to live, and no job. He said he should not have gone to the club looking for work and should not have brought a handgun or even had one. There, he encountered Evans, who also had anger issues. Instead of defusing the situation, he let their confrontation escalate, he let his anger get out of control, and he irrationally directed all of his anger and frustrations at Evans, who unfortunately happened to be there.

Willcoxon said that after a rough period of adjustment upon his return to prison, he started looking at his past, examining his actions, and questioning his anger. Having admitted that he was an emotional, out-of-control person, he started changing his ways, and through self-help programming, he believed that he had finally brought his long history of anger and violence to an end. He can now identify the stressors that triggered his angry and irrational thinking and behavior. He had also learned the value of self-examination and the ability to release his angry energy in a constructive way through logical thinking and non-destructive activities. Thus although he can still make mistakes that might lead to violence, the number had diminished over the years, and he had been able to de-escalate potentially troublesome situations and avoid violent conduct for the last 24 years.

Concerning his institutional programming, Willcoxon noted that he had continued his Christian fellowship and completed various self-help programs focused on parenting, conflict and managing emotions. The Board acknowledged this continued self-help programming, his jobs and vocational training, his custody level, and the positive

“chronos” for good work and substance abuse programming that he had previously received. However, it noted that he had not received any positive “chronos” after 2007.⁵

Willcoxon discussed the “115” citation he received for disrespect toward Ms. Stenner. He saw no similarity between that incident and the murder because he had not been angry at Ms. Stenner. He said that he had argued with her many times before, and if he had known that this time she would take it so personally, he would not have argued with her and let the situation to escalate. He further explained that he was upset that day because he had heard that his stepmother was dying. He acknowledged that it was irresponsible of him to lose his temper and composure, but he pointed out that he simply walked away from Ms. Stenner. He admitted making a comment about her, but he said he did so because he was angry at the situation and not at her. Moreover, he said he did not intend for her to hear him or think that she would.

Willcoxon outlined his parole plans if released. He had a pre-acceptance letter from Victory Outreach, where he would be around socially positive, noncriminal adults. He planned to continue his college education and get a counseling certificate. Because of his heart condition, he believed that he would qualify for state and federal support and food stamps. He also had letters from friends, family, and others offering financial, residential, and/or employment assistance.

2. The Board’s Decision

The Board denied parole for three years. It explained that it had weighed the various suitability and unsuitability factors identified in the regulations that govern parole determinations and had based its decision primarily on “current” factors rather than historical factors that Willcoxon could not change, such as his criminal background and commitment offense.

⁵ When the Board last denied parole in 2006, it recommended that he get no disciplinary citations, reduce his custody level, continue self-help programming, and earn positive “chronos.”

That said, the Board found that the commitment offense was especially heinous, atrocious, and cruel. It noted that there were multiple victims, one intentionally killed, the other recklessly injured. It faulted Willcoxon for not mentioning the injured Pena. It also found that Willcoxon's robbery demonstrated similarly violent and armed recklessness, and fortunately no one was injured.

The Board found that the killing was calculated in that Willcoxon, who was armed, invited Evans outside to settle a dispute, shot him in the stomach, and then callously shot him several more times. The Board did not know what, if anything, motivated Willcoxon to murder Evans, but it noted that he claimed to have acted in self-defense.

The Board based its finding that Willcoxon would pose an unreasonable risk of danger if released on his testimony. The Board questioned Willcoxon's credibility and sincerity because of the discrepancy between the official and Willcoxon's versions of the murder.

The Board found that Willcoxon's attitude toward the robbery minimized the gravity of his conduct. It noted his previous explanation that he did not intend to shoot anyone but fired over their heads just to warn or scare them. This indicated to the Board that he thought firing the shots was acceptable behavior, and this attitude toward the shooting showed a lack of insight into the recklessness of his conduct. The Board found that Willcoxon similarly minimized the recklessness of the shooting at the club. It again said he failed to mention the injured Pena. And notwithstanding his acceptance of full responsibility for Evans's death, his version of the shooting implicitly placed some of the blame on Evans himself. The Board also noted that Willcoxon said he shot Evans because he was angry at him but later said that he was acting from a more generalized anger and frustration at his circumstances. The Board found that this explanation reflected a lack of insight into the causes of the incident.

The Board found that Willcoxon exhibited the same mentality during the incident that led to his recent “115” citation. Although that incident occurred in 2006, the Board considered it recent because, after so many years in prison, Willcoxon should not have received any such citations. The Board further found that the citation confirmed Dr. Kuekes’s observation that Willcoxon had displayed inconsistent judgment and impulse control in prison. In that regard, the Board noted Willcoxon’s statements to the effect that he was upset about his stepmother’s condition, he lost his temper with Ms. Stenner, he did not know how to control it or when to stop expressing it, and yet he claimed that his angry comment was not aimed at her but at the situation. The Board observed that as a result of this “115” Willcoxon was considered a threat and transferred to another facility.

The Board also found that despite his lengthy incarceration, Willcoxon had done nothing to demonstrate his remorse and make amends toward the victims of his criminal conduct. In this regard, the Board considered his self-help programming to be sporadic and noted that it had increased only during the last few years.

Last, the Board considered Willcoxon’s parole plans to be weak. Although he had viable residence plans at Victory Outreach, his job skills needed to be updated, and his plans to get a counseling certificate did not represent a currently marketable skill.

In sum, the Board found that the circumstances tending to show unsuitability for parole outweighed those favoring parole. Based on the evidence before it, the Board concluded that Willcoxon currently posed an unreasonable risk of harm if released.

F. Superior Court’s Ruling

In vacating the Board’s decision, the superior court found that the Board employed an erroneous weighing-of-factors analysis to deny parole and failed to articulate a nexus between the unsuitability factors and its finding that he was currently dangerous.

III. LEGAL FRAMEWORK FOR PAROLE DECISIONS

Section 3041 and title 15 of the California Code of Regulations govern the Board's parole decisions.⁶ Under the statute, the Board is required to set a parole release date one year before an inmate's minimum eligible parole release date unless it "determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the *public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." (§ 3041, subd. (b), italics added.) Thus, "the fundamental consideration in parole decisions is public safety," and, therefore, "the core determination of 'public safety' . . . involves an assessment of an inmate's *current* dangerousness." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 (*Lawrence*).

A decision by the Board concerning whether to grant parole is inherently subjective. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)). Nevertheless, the Board is guided by a number of objective suitability and unsuitability factors enumerated in section 3041 and the Board's regulations. (Regs., §§ 2281, 2402; *In re Prather* (2010) 50 Cal.4th 238, 249 (*Prather*)).⁷ In making a determination, the Board must consider "[a]ll relevant, reliable information" concerning suitability for parole, such as the nature of the commitment offense including behavior before, during, and after the

⁶ All further unspecified references to the Regulations (or Regs.) are to title 15 of the California Code of Regulations.

⁷ Section 2402 of the Regulations provides parole consideration criteria and guidelines for murders committed on or after November 8, 1978. For murders committed before that date, section 2281 of the regulations applies. However, the sections are identical. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1256, fn. 13 (*Shaputis I*)). Because Willcoxon committed his murder before 1978, we cite the regulatory guidelines set forth in section 2281.

crime; the inmate's social history; mental state; criminal record; attitude towards the crime; and parole plans. (Regs., § 2281, subd. (b).)

Unsuitability factors include: the inmate (1) committed the offense in a particularly heinous, atrocious, or cruel manner⁸; (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (Regs., § 2281, subd. (c).) Suitability factors include: the inmate (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (Regs., § 2281, subd. (d).)

These factors are “general guidelines,” illustrative rather than exclusive, and “the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the Board.” (*Rosenkrantz, supra*, 29 Cal.4th at p. 654.) However, in exercising their discretion, the Board *must* give individualized consideration of the specified criteria as applied to a particular inmate. (*Id.* at pp. 676-677.) Moreover,

⁸ Factors that support the finding the crime was committed “in an especially heinous, atrocious or cruel manner” (Regs., § 2281, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

“[i]t is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.” (*Lawrence, supra*, 44 Cal.4th at p. 1212.) Thus, “ ‘due consideration’ of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*Id.* at p. 1210.) Accordingly, when the Board denies parole, there must be evidence to support the findings concerning unsuitability, and it must articulate a rational connection between its findings and the ultimate conclusion that the inmate is currently dangerous.

IV. STANDARD OF REVIEW

Judicial review is available to review decisions rendered by the Board (or the Governor) denying parole (or reversing a grant of parole). (*Lawrence, supra*, 44 Cal.4th at p. 1203; *Rosenkrantz, supra*, 29 Cal.4th at p. 664.) The standard of review applied by a superior court in evaluating a parole-suitability determination is whether “some evidence” supports the core statutory determination that a prisoner remains a current threat to public safety. (*Shaputis I, supra*, 44 Cal.4th at p. 1254.) The superior court’s review of a decision to deny parole by the Board is deferential. (*Lawrence, supra*, 44 Cal.4th at pp. 1204, 1210.)

Under the “some evidence” standard, only a modicum of evidence is required to uphold a decision regarding suitability for parole. (*In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*); *Rosenkrantz, supra*, 29 Cal.4th at p. 677.) It is not for the reviewing court to decide which evidence in the record is convincing. (*Shaputis II, supra*, 53 Cal.4th at p. 211.) Thus, the court may not independently resolve conflicts in the evidence, determine the weight to be given the evidence, or decide the manner in which the specified factors relevant to parole suitability are to be considered and balanced because those are matters exclusively within the discretion of the Board Governor. (*Shaputis I,*

supra, 44 Cal.4th at p. 1260; *Rosenkrantz, supra*, 29 Cal.4th at p. 677; *In re Scott* (2004) 119 Cal.App.4th 871, 899 (*Scott*)). Indeed, “[i]t 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.” (*Rosenkrantz, supra*, at p. 677.)

While the standard of review is deferential, it is not “toothless” and “ ‘must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights’ [citation], it must not operate so as to ‘impermissibly shift the ultimate discretionary decision of parole suitability from the executive branch to the judicial branch’ [citation].” (*Shaputis II, supra*, 53 Cal.4th at p. 215.)

When a superior court grants relief on a petition for habeas corpus without an evidentiary hearing, the question presented on appeal is a question of law, which we review de novo.⁹ (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192.)

V. DISCUSSION

In denying parole, the Board noted Willcoxon’s unstable social history, his criminal background, and his commitment offense and the robbery. It found that he minimized and lacked insight into the commitment offense and robbery. It cited Dr. Kuekes’s opinion that Willcoxon had shown inconsistent judgment and poor impulse control in prison. And it noted his misconduct in prison, especially the 2006 “115” citation for deliberate disrespect.

A. Immutable Circumstances

The aggravated nature of a commitment offense, an inmate’s prior criminal history, and his or her unstable social background are all among the factors listed in the

⁹ In a lengthy order, the trial court found that the Board erred in weighing suitability factors against unsuitability factors and failing to articulate a nexus between unsuitability factors and its ultimate conclusion that Willcoxon was currently dangerous.

Because we independently review the Board’s determination, we need not discuss the court’s findings and conclusions. It suffices to say that we disagree with its analysis.

Regulations that tend to show unsuitability for parole. (Regs., § 2281, subd. (c)(1), (2) & (3).)

Courts have recognized that almost all murders can be considered aggravated, that is, “heinous,” “atrocious,” or “cruel.” (Regs., § 2281, subd. (c)(1); e.g., *In re Weider* (2006) 145 Cal.App.4th 570, 587; *In re Lee* (2006) 143 Cal.App.4th 1400, 1410; *In re Smith* (2003) 114 Cal.App.4th 343, 366; see *Lawrence, supra*, 44 Cal.4th at pp. 1218-1219.) Nevertheless, in this case, it is undisputed that Willcoxon’s commitment offense involved multiple victims. (See Regs., § 2281, subd. (c)(1)(A).) Moreover, according to the Board’s version of the offense, Willcoxon invited Evans outside to settle a dispute and immediately shot him, first in the stomach and then several more times. This conduct reasonably suggests a certain amount of calculation, and despite his claim of self-defense, Willcoxon was convicted of first degree murder. (See Regs., § 2281, subd. (c)(1)(B).) Finally, given Willcoxon’s version of his altercation with Evans, the Board could find that Willcoxon’s reasons for shooting Evans—i.e., he invaded Willcoxon’s space and mistook him for someone else—were trivial in relation to his fatal response. (See Regs., § 2281, subd. (c)(1)(E).)¹⁰

In sum, there is “some evidence” to support the Board’s finding that the commitment offense was aggravated. Moreover, our summary of Willcoxon’s criminal and social background amply supports the Board’s view that those factors also showed unsuitability for parole. (Regs., § 2281, subd. (c)(2) & (c)(3).)

However, these factors support the denial of parole only insofar as they have some tendency to show that Willcoxon was *currently* dangerous. (*Lawrence, supra*, 44 Cal.4th at p. 1212.) Although they could have supported a finding that Willcoxon was dangerous

¹⁰ In announcing its decision, the Board said, “The motive for the crime? We don’t know what the motive -- the motive, we don’t even know why you did this” In context, we understand the Board’s comment as a rhetorical way of saying that the motive for the crime was trivial, an aggravating factor. (Regs., § 2281, subd. (C)(1)(E).)

when he entered prison, these factors are immutable. In *Lawrence, supra*, 44 Cal.4th 1181, the court explained that since parole for murderers is the rule, not the exception, the immutable aggravated circumstances of an offense alone rarely will provide a valid basis to deny parole after an inmate has served the suggested base term when there is strong evidence of rehabilitation and no other evidence of current dangerousness. (*Id.* at pp. 1211, 1218-1219.) Under such circumstances, the aggravated nature of the offense realistically loses probative value to show current dangerousness unless there is some other, more recent evidence reasonably indicating that the offense still has some tendency to show that the inmate poses a risk of harm to others. (*Id.* at p. 1214, 1219.) Thus, for example, where an inmate “has failed to make efforts toward rehabilitation, has continued to engage in criminal conduct postincarceration, or has shown a lack of insight or remorse, the aggravated circumstances of the commitment offense may well continue to provide ‘some evidence’ of current dangerousness even decades after commission of the offense.” (*Id.* at p. 1228.)

“[T]he relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate’s psychological or mental attitude.” (*Lawrence, supra*, 44 Cal.4th at p. 1221.) Accordingly, if the Board relies on immutable factors, there must not only be some evidence to support them but also some evidence establishing a rational nexus between the immutable factors and the Board’s determination of current dangerousness. (*Id.*, 44 Cal.4th at pp. 1221, 1227.)

B. Other Circumstances

Although the Board cited a number of immutable unsuitability factors, it stated that its decision was based on “current” factors. Thus, we focus on whether those “current” circumstances together with the immutable factors constitute “some evidence” to support the Board’s finding that Willcoxon was currently dangerous.

The Board found that Willcoxon lacked insight into the recklessness of the commitment offense because in discussing it, he failed to mention that he had injured Pena. However, the record reveals that Willcoxon mentioned Pena three times during the hearing, and each time, he expressed his regret at having injured him.

The Board found that Willcoxon lacked credibility and sincerity because his version of the offense was inconsistent with its version.

Because the Board can hear and see an inmate firsthand, it is in the best position to determine his or her credibility. For this reason, appellate courts defer to its determinations. (*In re Roderick* (2007) 154 Cal.App.4th 242, 272, fn. 26.) Here, however, the Board’s credibility finding is not viable.

It is settled that the Board may not condition parole on an inmate’s admission of guilt. (§ 5011, subd. (b); Regs., § 2236.) Nor may the Board deny parole because an inmate insists on his or her version of the offense and refuses to accept the prosecution’s version. (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1110, disapproved on another point in *Prather, supra*, 50 Cal.4th at p. 252.) Nevertheless, where the undisputed evidence renders an inmate’s version impossible or so improbable as to strain credulity, the inmate’s insistence on it can undermine his or her credibility and reflect a lack of understanding and insight concerning the criminal conduct.

For example, in *Shaputis I, supra*, 44 Cal.4th 1241, the inmate insisted that he had shot his wife accidentally; but the undisputed evidence established that his gun could not have fired accidentally and that he had brutalized her for years. (*Id.* at pp. 1248, 1259.) Similarly, in *In re McClendon* (2003) 113 Cal.App.4th 315, the inmate claimed that he

did not intentionally kill his estranged wife despite overwhelming evidence that he had carefully planned the murder. (*Id.* at pp. 319-320.)

In contrast, the inmate in *In re Palermo, supra*, 171 Cal.App.4th 1096, admitted that he had pointed a gun at his girlfriend and pulled the trigger. However, he claimed her death was accidental because he thought the gun was unloaded. The jury rejected his story and convicted him of murder. Although the inmate accepted responsibility for the shooting and expressed remorse, the Board denied parole because he continued to maintain that the killing was accidental. On appeal, the court noted that unlike the situations in *Shaputis* and *McClendon*, the inmate's claim that the killing was accidental was not physically impossible; his version did not so strain credulity as to suggest that his denial of an intentional killing was delusional, dishonest, or irrational; and he had accepted full responsibility and expressed complete remorse. Under the circumstances, the court concluded that the inmate's continued insistence that the killing was accidental did not constitute some evidence that he was currently dangerous. (*Id.* at pp. 1110-1112.)

Here, the Board's "official version" of the incident was the summary of the incident in a previous parole report. The record does not contain that parole report or reveal the summary's factual basis or the documentary evidence on which it was based. Nor does the record contain the probation report or a summary of the evidence presented at trial. According to the Board's version, Willcoxon invited Evans outside to settle their dispute and once outside shot him several times. Willcoxon narrated a more complicated story of mistaken identity, an escalating interpersonal confrontation inside the club, its continuation outside, and a shooting in apparent self-defense. Clearly, the jury disbelieved Willcoxon's claim of self-defense. On the other hand, the Board did not cite, and the record does not reveal, strong, let alone, overwhelming or undisputed, evidence that Willcoxon "invited" Evans outside and immediately shot him or evidence that so refutes Willcoxon's version as to render his continued insistence on it dishonest, delusional, or irrational. Furthermore, as did the inmate in *Palermo*, Willcoxon accepted

full responsibility for killing Evans and injuring Pena, and he expressed complete remorse for doing so.

Under the circumstances, the Board could not have denied parole simply because Willcoxon maintained his version of the incident and refused to accept its summary of the incident. Moreover, since the Board had no actual evidence before it tending to refute Willcoxon's version, we consider its reliance on the inconsistency between his version and the Board's summary to be an arbitrary basis upon which to conclude that he lacks credibility and insight into his offense. (See *Shaputis II*, 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].)

The Board also inferred from Willcoxon's version an effort to shift some of the blame to Evans and thereby minimize his own culpability and lessen his responsibility. Again, however, Willcoxon was entitled to maintain his version of what happened and did not have to adopt the Board's version. Moreover, although Willcoxon maintained that he thought Evans was about to attack him when he fired, Willcoxon accepted full responsibility for killing Evans and wounding Pena. More importantly, he disavowed reliance on self-defense to justify or even mitigate the killing. He admitted full responsibility for the situation and circumstances that resulted in the shooting, and he blamed it on his background, his state of mind, his actions, and his failings. Willcoxon acknowledged that the killing was an irrational and explosive manifestation of his lifelong anger, his gangster mentality, the failure to heed his parole officer's advice, his possession of a gun, and personal frustration over his lack of money, housing, and employment. He also blamed a lack of self-knowledge, his overreaction to Evans, and his inability to control his anger and deal with Evans in a peaceful, unantagonistic way. According to Willcoxon, these were the causes of the shooting, not self defense, and in explaining them, he did not suggest that Evans's actions lessened his culpability and responsibility for it. Under the circumstances, that Willcoxon maintained his version of

events cannot rationally be considered an attempt to shift some blame to Evans or an effort to avoid or minimize his conduct, culpability, and responsibility.¹¹

The Board concluded that Willcoxon lacked insight into the cause of his offense because at one point he said he shot Evans because he was angry at Evans but later he said he did so because he was angered and frustrated by his current circumstances.

Willcoxon said he was angry and mad because Evans had invaded his space and then wanted to hurt him. In disavowing self-defense at the hearing, Willcoxon explained that throughout the incident, he was acting out a deeply-seated anger that had developed as a rebellious youth, gotten distorted by his experience in prison, and had later become aggravated by his lack of money, housing, and employment. Willcoxon said that because of the interaction with Evans—an interaction that he said should not have happened or escalated—he allowed this anger get irrationally out of control.

When viewed not in isolation but as part of his explanation for the killing, Willcoxon's statements that he acted out of anger at Evans and also out a more deeply-seated anger are not mutually exclusive or contradictory. They acknowledge superficial anger at Evans during the incident and the underlying anger and the inner forces that more generally influenced his mental state and fueled his behavior that night. Thus, that Willcoxon said he was both angry at Evans and angry because of his circumstances—i.e., that he ascribed multiple sources and causes, some superficial others more profound, to his anger—does not rationally constitute some evidence that he was unaware of or

¹¹ Given our discussion, we reject the Attorney General's assertion that Willcoxon's credibility was suspect because on the one hand, he told the Board that he had realized many years before that the shooting was not self-defense; and yet as recently as 2006, Willcoxon reiterated his version of what happened, which implied that the shooting was justified as self-defense.

First, the Board did not assert this as the reason it questioned Willcoxon's credibility. And second, that Willcoxon reiterated his version of events does not undermine or contradict his disavowal of self-defense as an explanation and justification for the killing or his acceptance of full responsibility and expression of remorse.

confused about why he shot Evans or that he lacked insight into his conduct and its immediate and underlying causes.

The findings by the Board that we have reviewed so far do not themselves constitute some evidence of current dangerousness or provide a rational nexus between the immutable unsuitability factors discussed above and a finding of current dangerousness. However, we reach a different conclusion concerning the Board's reliance on Willcoxon's "115" citation in 2006.

In *Prather, supra*, 50 Cal.4th 238, the Supreme Court explained that evidence of an inmate's recent institutional conduct, mental state, or parole plans may not support a determination of current dangerousness standing alone, but it may do so when considered together with other evidence. "For example, if the record disclosed a recent disciplinary violation for reporting late to work, that information might not, standing alone, constitute some evidence that [the inmate] remains dangerous, but it may possess substantially more probative value if the record demonstrates that [the inmate's] criminality was tied to an inability to retain employment because of his chronic tardiness." (*Id.* at p. 256.)

Here, Willcoxon's criminal and social background before the robbery and murder reflect his lengthy history of poor judgment and difficulty in controlling his anger and antisocial impulses. At the hearing, Willcoxon admitted that his killing Evans reflected poor judgment, impulsivity, difficulty dealing with frustrating personal circumstances, and an inability to control his anger and deal with it in a constructive way. His numerous "115" and "128" disciplinary citations over the years in prison, as Dr. Kuekes observed, demonstrated that these traits continued for years after Willcoxon was incarcerated, although he appeared to have made some progress and improvement.

The record further reveals that in August 2006, the Board denied parole and recommended, among other things, that Willcoxon receive no more "115" disciplinary citations and reduce his custody level. However, within two months, he was involved in the incident with Ms. Stenner, he received a disciplinary citation, albeit a mitigated

citation, for disrespect “by reason of intensity or context [created] a potential for violence or mass disruptive conduct,” his custody level was increased, and he was transferred to another facility.

At the hearing, Willcoxon admitted that over the years, he had argued with Ms. Stenner a few times without incident. This time, however, he misread her and lost his temper and composure. He admitted that he was angry at the situation and that he manifested it by calling her a “stupid bitch.” Although he said he did not intend for her to hear him, he nevertheless said it loud enough for other inmates in the area to hear. He explained that one reason he lost control was that he was upset because his stepmother was dying. When asked if he saw any similarity between this altercation and the killing, he said he did not.

The Board opined, in essence, that this incident with Ms. Stenner was yet another manifestation of Willcoxon’s poor judgment and a lack of impulse control. Given how long he had been incarcerated, the Board considered the relatively recent “115” incident to be probative of his current dangerousness because it tended to show that he still had difficulty keeping his behavior within boundaries, controlling his impulses, dealing with personal issues, and channeling his anger in a constructive way. The Board thus found a “direct link” between the incident and the sort of risk Willcoxon would pose if released.

Because the incident with Ms. Stenner involved a display of anger and lack of impulse control due in part to personal issues, the Board could reasonably find that it demonstrated the same qualities reflected in the circumstances of Willcoxon’s offenses, his prior criminal and social background and instability. For this reason, the Board could further find that those immutable circumstances continued to be probative of current dangerousness. Accordingly, we conclude that together, the killing, the citation for deliberate disrespect, the subsequent increase in Willcoxon’s custodial status, his inability to see a similarity between the incident and the shooting, and Dr. Kuekes’s risk assessment constitute “some evidence” supporting the Board’s ultimate conclusion that

Willcoxon was currently dangerous. This is especially so given the Board's finding that his parole plans were inadequate and that the difficulties that he might face finding employment and supporting himself could generate the sort of frustration that in the past had made it difficult for him to control his impulses and anger.

Willcoxon argues that contrary to the Board's view, the "115" citation demonstrated that he does have impulse control. He notes that although he was upset by the way Ms. Stenner dealt with him, he chose to walk away despite his anger. He did not destroy anything or engage in physical violence. He further notes that he was not found guilty of threatening conduct.

Although the Board could have viewed the incident in this way, it is not the only reasonable view of the incident, and given the evidence, we cannot say that it was irrational or arbitrary for the Board to view the incident as a recent example of a lifelong inability to control his impulses and anger. The fact that he did not act out more violently by destroying property or assaulting Ms. Stenner does not necessarily establish that he was in control of his anger and impulsivity.

Having found that there is "some evidence" to support the Board's denial of parole, we conclude that the trial court erred in granting the petition for habeas corpus.

VI. DISPOSITION

The order granting Willcoxon's petition for a writ of habeas corpus is reversed. The matter is remanded, and the court is directed to enter new order denying the petition.¹²

¹² Given our disposition, we need not address respondent's claim that the court erred in requiring the Board to hold a new hearing within 30 days.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.