Supreme Court Copy

In the Supreme Court of the State of California

In re

RICHARD SHAPUTIS,

On Habeas Corpus.

S [illegible]

Case No. _____

SUPREME COURT
FILED

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Deputy

Fourth Appellate District, Division One, Case No. D056825
San Diego County Superior Court, Case No. HC18007
Judge Michael T. Smyth

PETITION FOR REVIEW

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INTRODUCTION

James D. Hartley, Warden of Avenal State Prison, respondent in the court below (respondent) and the Board of Parole Hearings (Board), real party in interest, petition the Court to grant review of the decision of the California Court of Appeal, Fourth Appellate District, Division One filed November 17, 2010. (Ex. 1 – Slip opn; Ex. 2 – Modification order.)

Just two years ago, this Court reviewed the Governor's decision denying parole to life-term inmate Richard Shaputis and concluded that—based on the gravity of the offense and Shaputis's lack of insight into and failure to accept responsibility for the commitment offense and his history of abuse—some evidence supported the Governor's conclusion that Shaputis remains a danger to public safety. Shaputis then hired a psychologist who concluded that he has adequate insight into the commitment offense and his abusive history. The Board, however, after reviewing all of the evidence in the record, including other mental health evaluations, determined that Shaputis lacked insight which made him an unreasonable risk of danger to the public if released on parole.

The majority below discredited the Board's reliance on lack of insight when denying parole and credited the new psychological report over other evidence the Board found more persuasive, while the dissent found evidence supporting the Board's conclusion and that the Board had valid reasons for not affording the new psychological report much weight. This split decision below reflects a growing split in the Courts of Appeal regarding the proper application of this Court's decisional law; the appellate courts now apply significantly varied levels of deference when reviewing parole decisions. Therefore, this Court should grant review, pursuant to rule 8.500 of the California Rules of Court, to settle important questions of law and secure uniformity of decision among the Courts of Appeal.

ISSUE FOR REVIEW

Where the Board identifies the nexus between an inmate's past violent conduct and his current risk to public safety as a lack of insight into the causes of, and failure to take responsibility for, his past violent behavior, must a court defer to the Board's weighing of conflicting evidence regarding the inmate's insight?

STATEMENT OF THE CASE

Richard Shaputis was convicted of second degree murder with a firearm and sentenced to serve seventeen years to life in prison. Shaputis killed his second wife with a gunshot to her neck at close range during an argument. Prior to the murder, Shaputis and his wife had been married for twenty-three years during which he repeatedly beat her. The abuse was so severe that she needed corrective plastic surgery.

Shaputis also abused his children, beating and threatening them with knives. Shaputis was charged with raping his daughter, which was reduced by plea to soliciting or engaging in a lewd act. Shaputis's first wife had left him because of his violence. Before their divorce, Shaputis had jumped on his first wife's stomach while she was pregnant, causing her to miscarry.

On August 20, 2009, the Board found Shaputis unsuitable for parole. The Board found that Shaputis still minimized responsibility for and lacked insight the murder of his wife and the years of domestic violence that preceded it. The Board considered a report from a privately hired psychologist, Dr. Barbara Stark, which favorably assessed Shaputis's insight and remorse but it questioned Dr. Stark's findings.

Dr. Stark reported that Shaputis has no history of unstable tumultuous relationships because she believed his abusive relationship with his wife and his daughter did not meet the level of unstable tumultuous relationships as defined in the Board's regulations. Shaputis told Dr. Stark that the murder occurred after he and his wife had been drinking together and she dropped a loaded gun in his lap. Dr. Stark accepted this version of the murder. She believed that Shaputis expressed profound insight into the causes of the murder and that Shaputis had been misinterpreted in the past, which created a misunderstanding that he lacked insight. Dr. Stark also reported her belief that the police investigation and the judicial proceedings involving Shaputis were plagued with clear inconsistencies. Dr. Stark assessed Shaputis as posing a very low risk.

The Board found that Dr. Stark's conclusions were not consistent with the facts in the record and attributed little weight to them. The Board found that Shaputis has a history of unstable tumultuous relationships and his claim of an accidental shooting is contradicted by the record. The Board concluded that Shaputis remained currently dangerous because he continued to claim that he accidentally killed his wife, minimized his lengthy history of domestic violence, and exhibited no understanding or insight into his violent and abusive behavior.

Shaputis challenged the Board's decision via a habeas corpus petition, which the San Diego County Superior Court denied. Shaputis filed a petition for writ of habeas corpus in the Fourth District Court of Appeal. The appellate court granted the writ in an unpublished, split decision filed November 17, 2010. The majority found that no evidence supported the Board's findings because it believed Dr. Stark's report proved that Shaputis has adequate insight and poses a low risk of danger. The dissent criticized the majority for reweighing the evidence, because the Board reasonably

attributed little weight to Dr. Stark's report and a modicum of evidence supported the Board's decision.

The Court of Appeal ordered its decision final within five days and directed the Board to hold a new hearing, within thirty days of the issuance of the remittitur, in accordance with due process of law and consistent with its decision and the principles of res judicata. The Court of Appeal later modified its decision by extending the timeframe for the new hearing to sixty days after the issuance of the remittitur.

REASONS FOR GRANTING REVIEW

I. THE COURTS OF APPEAL ARE SPLIT OVER THE IMPLEMENTATION OF THE SOME-EVIDENCE TEST FOR CURRENT DANGEROUSNESS.

The Court of Appeal's decision here illustrates a growing split in the appellate courts regarding the application of the some-evidence test to executive parole decisions. In *Lawrence* and *Shaputis*, this Court outlined a deferential standard of review that requires some evidence of current dangerousness, which "ensure[s] that the Board and the Governor have complied with the statutory mandate and have acted within their constitutional authority." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1213; see *In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 665; see also *In re Prather* (2010) 50 Cal.4th 238, 253.) But the Courts of Appeal have struggled to balance their review of parole decisions against the appropriate deference that should be afforded to the parole authority. The growing trend among the appellate courts has been to impose stricter standards on the parole authority's findings, thereby establishing a heightened level of scrutiny that reaches beyond the some-evidence standard. Such varying and heightened standards of review have created confusion in the courts and undermine the executive branch's exercise of its parole authority. Thus, review is necessary here to settle

important questions of law and to secure uniformity of decision. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

This Court's prior decisions establish that the parole authority must duly consider the parole factors in light of the entire record and make findings that are supported by a modicum of evidence. (See *In re Lawrence*, *supra*, 44 Cal.4th at p. 1204; *In re Shaputis*, *supra*, 44 Cal.4th at p. 1258; see also *In re Prather*, *supra*, 50 Cal.4th at p. 260.) The disparate approaches in the implementation of this test manifest in the way the appellate courts examine various factors. For instance, when the parole authority considers a psychological report, courts have held that the report is only one of the many factors that must be considered and the psychologist's findings are not necessarily binding on the parole authority. (See *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202; see also *In re Rozzo* (2009) 172 Cal.App.4th 40, 62 [the Governor has broad discretion to disagree with the State's psychologists].) The dissent here endorses this view, stating that the Board had a rational basis to attribute little weight to Dr. Stark's report because her findings are inconsistent with the record and she accepted that Shaputis accidentally killed his wife, raising questions about her objectivity. (Slip opn. dissent at 2-3.)

The majority, however, took a different approach by giving the Board no latitude to weigh the report as it did, instead requiring the Board to credit Dr. Stark's findings. (Slip opn. at 27-29.) The majority believed Dr. Stark's report persuasively established that Shaputis has insight into the murder and conceded no room for a different interpretation. (Slip opn. at 25-27, 29.) This view affords no deference to the Board's discretionary authority, despite this Court's clear instruction that it is for the Board—not the court—to consider the evidence in the record, resolve any conflicts, and weigh the factors. (See *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 665; *In re Prather*, *supra*, 50 Cal.4th at p. 253; *In re Lawrence*, *supra*, 44 Cal.4th at p.

1204; *In re Shaputis*, *supra*, 44 Cal.4th at pp. 1254-1255.) As the dissent noted: "The majority simply disagrees with the weight the Board gave to Dr. Stark's report and its assessment of the evidence concerning Shaputis's suitability for parole." (Slip opn. dissent at p. 3.)

The decision below illustrates how courts are struggling with the difference between identifying some evidence and reweighing the evidence. Justice Chin predicted just such confusion when *Lawrence* was announced—that courts would bypass the some-evidence test in favor of an independent review which substitutes the court's judgment over that of the executive branch. (See *In re Lawrence*, *supra*, 44 Cal.4th at p. 1236 (dis. opn., Chin, J.).) This type of review has become the prevalent approach among the appellate courts.

For example, in examining an inmate's discussion of the commitment offense, the Third District Court of Appeal required the Board to accept an inmate's characterization of his commitment offense where that version "was not physically impossible and did not strain credulity such that [it] was delusional, dishonest, or irrational." (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1112.) The dissenting justice in *Palermo* criticized that approach as reweighing the evidence and forcing the Board to "adopt[] Palermo's version of the murder, a version with which the trial judge expressly disagreed during the posttrial proceedings." (*Id.* at p. 1118 (dis. opn., Nicholson, J.).)

Palermo curbs the Board's authority to weigh an inmate's statements against the full record and elevates the evidentiary threshold from a modicum of evidence to a much stricter standard. Courts in the First, Second, and Sixth Districts have followed suit and devised similarly strict tests to reject the Board's and the Governor's findings. (See, e.g., *In re Twinn* (Nov. 23, 2010) __ Cal.App.4th __, 2010 WL 4723782 at *12 [inmate's version was not physically impossible]; *In re Macias* (Nov. 9,

2010) __ Cal.App.4th __, 2010 WL 4457309 at *13, petn. rehg. filed Nov. 24, 2010 ["the evidence here does not necessarily, clearly, or even persuasively refute Macias's statement"]; *In re Moses* (2010) 182 Cal.App.4th 1279, 1310 ["Moses's recollection of events, to the extent it differed from other evidence, is insignificant."].)

Tests such as these presume that an inmate's statements to the Board are true and that the Board or the Governor must rebut that presumption by proving physical impossibility or presenting significant, persuasive evidence. But the some-evidence standard is deferential to the parole authority—not the inmate—and sets a low evidentiary threshold such that reasonable minds could differ over the same record. (See *In re Shaputis*, *supra*, 44 Cal.4th at p. 1260; see also *In re Lawrence*, *supra*, 44 Cal.4th at p. 1204.) Moreover, these tests limit the parole authority's ability to assess credibility, which is beyond the scope of some-evidence review. (See *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 664, quoting *Superintendent v. Hill* (1985) 472 U.S. 445, 455-456 [105 S.Ct. 2768, 86 L.Ed.2d 356] ["'Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence.'"].)

In contrast to this approach, the First District, Division Three affirmed the Board's determination that an inmate lacks insight because it was reasonable, despite evidence that could support the contrary conclusion. (See *In re Shippman* (2010) 185 Cal.App.4th 446, 459 ["Our role on appeal is simply to identify this evidence, not to reweigh it."].) The Second District, Division Six likewise affirmed the Governor's findings because he had a reasonable basis to conclude that an inmate minimized responsibility for, and lacked insight into, the murder of her daughter. (*In re Smith* (2009) 171 Cal.App.4th 1631, 1638-1639.) Similarly, the dissent here looked for a "modicum of evidence" to support the Board's findings and whether it had

a "rational basis" to discredit certain evidence. (Slip opn. dissent at 2-3.) Having found that evidence, the dissent would have denied the writ petition.

The varying levels of deference that courts apply are reflected in the inconsistent outcomes. For example, the superior court in this case denied Shaputis's claims in a reasoned decision without issuing an order to show cause, but the appellate court granted his petition. In *In re Juarez*, the San Mateo County Superior Court found some evidence supported the Board's decision but the First District held that the Board failed to duly consider the record, articulate a nexus between the crime and current dangerousness, or establish that the inmate's lack of credibility was relevant to current dangerousness. (*In re Juarez* (2010) 182 Cal.App.4th 1316, 1339-1345.) In *In re Hare*, the Los Angeles County Superior Court vacated the Governor's parole decision, but the Second District held that some evidence supported the parole decision because the Governor reasonably determined that the inmate was currently dangerous due to his possession of a weapon in prison. (*In re Hare* (2010) 189 Cal.App.4th 1278, ___, 2010 WL 4056076 at *8-9.) And in *In re Moses*, the Alameda County Superior Court upheld the Governor's decision because the inmate's lack of insight linked his crime and criminal history to current dangerousness. (*In re Moses* (2010) 182 Cal.App.4th 1279, 1296.) The First District, however, held that the Governor did not expressly cite to insight and failed to establish a nexus to current dangerousness. (*Id.* at pp. 1303-1306.)

This disparity in judicial review creates uncertainty in the executive branch's exercise of its parole authority, particularly when a court, such as the majority here, questions this Court's jurisprudence by doubting the relevance of insight. (Slip opn. at 23-25.) The majority criticized insight because it is "not among the criteria . . . set forth in the governing regulations" and is "a more subjective factor than those specified in the

regulations." (Slip opn. at 23-25.) However, this Court explained why insight is relevant for parole suitability: an inmate's lack of insight establishes a nexus between past violent acts and his current risk because the implications of dangerousness deriving from his commission of those acts remain probative of current dangerousness. (See *In re Lawrence*, *supra*, 44 Cal.4th at p. 1228 ["where the record also contains evidence demonstrating that the inmate lacks insight into his or her commitment offense or previous acts of violence . . . the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration."].)

By characterizing insight as a parole factor, the majority reveals a common misinterpretation of this Court's holding—that insight is reviewed as a discrete factor rather than as something that links the inmate's past violence to current circumstances. Since parole factors must have a nexus to current dangerousness, these courts require the parole authority to establish this nexus for insight. But this creates a confusing standard. The lack of insight establishes a nexus to current dangerousness. So it is unclear how, if at all, the executive branch could establish a nexus to current dangerousness for something that is a nexus to current dangerousness.

Also, the majority echoes the sentiment of other courts in rebuking the parole authority for merely considering insight: "the increasing use of this factor is likely attributable to the belief of parole authorities that [following *Shaputis*,] 'lack of insight' is more likely than any other factor to induce the courts to affirm the denial of parole." (Slip opn. at 25.) Such criticism is unjustified as this Court held that an inmate's insight into past violence is relevant for evaluating current dangerousness. (See *In re Lawrence*, *supra*, 44 Cal.4th at p. 1228; *In re Shaputis*, *supra*, 44 Cal.4th at pp. 1259-1260.) Additionally, the parole authority's reliance on insight and acceptance of

responsibility preceded *Shaputis*, so they have been and continue to be significant issues for parole suitability determinations. (See, e.g., *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 634 [relying on inmate's "lack of remorse," his "attempt[] to mitigate his role in the crime," and his failure to "tak[e] full responsibility for the crime"]; *In re Dannenberg* (2005) 34 Cal.4th 1061, 1074-1075 [relying on inmate's "need[] to accept full responsibility for the crime . . . and discontinue his attempts to minimize his responsibility for [it]"]; *In re Roberts* (2005) 36 Cal.4th 575, 581 [relying on inmate's "refusal to accept responsibility."].) The majority's criticism of insight demonstrates how far afield the courts have traveled from the deferential some-evidence test endorsed in *Lawrence* and *Shaputis*.

This Court established the framework for reviewing parole decisions: did the parole authority duly consider the factors, identify facts relevant to the consideration of public safety, and make reasonable findings supported by a modicum of evidence? (See *In re Shaputis*, *supra*, 44 Cal.4th at p. 1258; *In re Lawrence*, *supra*, 44 Cal.4th at pp. 1204, 1210.) This is the approach taken by the dissent here—finding that the Board had a rational basis to attribute little weight to certain evidence and that a modicum of evidence supported the Board's decision. (Slip opn. dissent at 2-3.) But when courts establish standards that create a presumption favoring the inmate, as the appellate courts have done, the executive branch's judgment and its review of the record become immaterial. Courts must be deferential to the parole authority and should not substitute their own judgment of a parole factor which would convert the deferential standard of review into "a phantom." (See *In re Lawrence*, at p. 1235 (dis. opn., Chin, J.), internal quotations omitted.)

The majority in this case disregarded the Board's judgment and substituted its judgment that Shaputis is suitable for parole—just as it did in its prior decision, which this Court reversed. (See *In re Shaputis*, *supra*, 44

Cal.4th at pp. 1258-1260.) Aside from Dr. Stark's interpretation of the record, her report reaffirms the public safety concerns identified in *Shaputis*: Shaputis still minimizes his long history of domestic violence and he still characterizes the murder of his wife as an isolated accident without acknowledging his prolonged abuse of her. In short, this case is essentially unchanged since this Court last reviewed it.

The Board should not be required to adopt Dr. Stark's interpretation of the record merely because it aligns with the majority's view. The Board had a reasonable basis to attribute little weight to Dr. Stark's report, so its finding should be affirmed. Otherwise, upon remand, the Board will be required to adopt the majority's view of Dr. Stark's report and must give it great weight under *Prather* and the principles of res judicata. (See *In re Prather*, *supra*, 50 Cal.4th at p. 258 ["In conducting a suitability hearing after a court's grant of habeas corpus relief, the Board is bound by the court's findings and conclusions regarding the evidence in the record . . . "]; Slip opn. at 31.) The Board would be prejudiced and public safety compromised if it must find Shaputis suitable for parole because the Board has reasonable and significant concerns about Shaputis's public safety risk and there is a reasonable basis to doubt the reliability of Dr. Stark's conclusions.

The Board and the Governor are vested with the authority to consider public safety and make a subjective determination about an inmate's suitability for parole. An inevitable tension arises when courts apply conflicting standards to rebuke the executive branch and dismiss its reasonable interpretations of the record. This undermines the deference that should be afforded to the executive branch's obligation to consider and protect public safety. Thus, review is necessary not only to settle important questions of law but also to resolve the split in the appellate courts

regarding judicial review of parole decisions. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Dated: December 2, 2010 Respectfully submitted,

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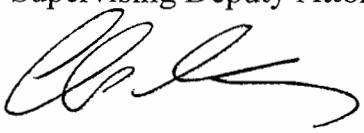

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 3,462 words.

Dated: December 2, 2010

EDMUND G. BROWN JR.
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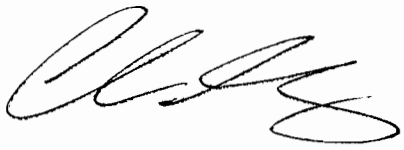

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EXHIBIT 1

Filed 11/17/10 In re Shaputis CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RICHARD SHAPUTIS on Habeas Corpus.	D056825 (San Diego County Super. Ct. No. HC18007)

Petition for Writ of Habeas Corpus. Relief granted.

Petitioner Richard Shaputis was sentenced to an indeterminate prison term of 15 years to life plus a determinate prison term of two years following his 1987 conviction for second degree murder. Shaputis, now 74 years old, has been in prison for the past 23 years. Although he first became eligible for parole in 1998, the former Board of Prison Terms (now Board of Parole Hearings, hereafter BPH) found him unsuitable for parole at hearings conducted in 1997, 2002, and 2004, despite Shaputis's exemplary conduct in prison and his unblemished record of rehabilitative progress. After the 2004 denial of parole by the BPH, this court granted Shaputis's petition for writ of habeas corpus because we found no evidence to support the BPH's conclusion that he would pose an

unreasonable risk of danger to public safety were he released. (*In re Shaputis* (Dec. 28, 2005, D046356) opn. ordered nonpub. May 17, 2006 (*Shaputis I*).) However, this court did not order the BPH to set a parole date. Instead, we remanded the matter to the BPH with directions to hold a new parole suitability hearing and consider whether there was any new evidence, apart from the evidence available to it at the 2004 hearing, which might support a finding that Shaputis would pose an unreasonable risk of danger to public safety were he released from prison. (*Id* at pp. 19-21.)

The BPH held a new suitability hearing and, operating under the constraints of *Shaputis I*, concluded he was suitable for parole because there was no new evidence supporting a conclusion he would pose an unreasonable risk of danger to society if released. However, Governor Arnold Schwarzenegger found Shaputis did pose an unreasonable risk of danger to society if released and reversed the BPH's decision. Shaputis filed a petition for writ of habeas corpus in the trial court, which was denied, and Shaputis again petitioned this court for a writ of habeas corpus. This second petition challenged the Governor's decision, and this court granted Shaputis's petition for writ of habeas corpus because we found no evidence to support the Governor's conclusion that Shaputis would pose an unreasonable risk of danger to public safety were he released. (*In re Shaputis* (Aug 21, 2007, D049895) [nonpub. opn.] (*Shaputis II*).)

However, the Supreme Court granted review in *Shaputis II* and, in an opinion issued concurrently with its decision in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), held this court erred in reversing the Governor's decision because the Supreme Court concluded this court improperly applied the "some evidence" standard of

review as clarified in *Lawrence*. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1245-1246, (*Shaputis III*).) The Supreme Court concluded that some evidence in the record supported the Governor's conclusion that Shaputis remained a threat to public safety because there was some evidence Shaputis had not gained insight into his previous violent behavior and did not take responsibility for the murder of his wife. (*Shaputis III,* at pp. 1259-1261.)

In this proceeding, Shaputis challenges the 2009 BPH determination that found him unsuitable for parole based on its conclusion that his "lack of insight" made him an unreasonable risk for violence if released on parole. Shaputis petitioned the San Diego County Superior Court for a writ of habeas corpus alleging the BPH violated his due process rights because its unsuitability determination was not supported by the evidence and was therefore arbitrary and capricious. The court denied the writ, concluding the BPH's decision was supported by some evidence. Shaputis then petitioned this court for a writ of habeas corpus. We issued an order to show cause and the People filed a return. Shaputis's petition asserts the BPH's decision to deny parole violated due process because its conclusion that he posed an unreasonable risk of danger was based on immutable past facts and was contrary to the only reliable evidence that he was not currently dangerous.

I

BACKGROUND[1]

A. The Offense and Prior Violent and Abusive Behavior

In 1987, Shaputis was convicted of the second degree murder of his wife, Erma. He was sentenced to 15 years to life with the possibility of parole, plus a determinate two-year sentence because he used a firearm to commit the murder.

Shaputis and Erma were married for 23 years and their relationship was marked by domestic violence.[2] Two years earlier, Erma complained that Shaputis had beaten her and cracked her ribs, and approximately 18 months earlier Shaputis had shot at her when they had been drinking and arguing. Shaputis apparently beat Erma at least two or three times per year and had threatened her with a knife. However, none of these alleged events resulted in criminal charges.

On the night of the murder, Shaputis called 911 around 10:00 p.m. and stated he had fought with his wife and killed her, but claimed it was an accident.[3] When police

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1 The background recited in section I is derived from *Shaputis III, supra,* 44 Cal.4th at pages 1245 to 1248, except where otherwise noted.

2 Shaputis had also been abusive toward his prior wife, as well as toward the children from that union.

3 As we explained in *Shaputis I*, the BPH "concluded the gun could not have been fired accidentally because the hammer must be pulled back manually to a cocked position before pulling the trigger, and there was a 'transfer bar' to prevent accidental discharges. Although this information is recited in the 'Life Prisoner Evaluation Report' (LPER), prepared for the 2004 Parole hearing by correctional department counselors, the factual basis for the conclusions in the LPER does not appear in the probation report filed in connection with the 1987 conviction, and the source of this information is unclear."

arrived at his home, Shaputis surrendered without incident. When police entered, they found Erma's body in the living room with a handgun lying nearby. The autopsy report concluded Erma had been killed sometime after 8:30 p.m. and death had been caused by a single gunshot wound to the neck. The shot had been fired from close range, most likely less than 16 inches away, and entered the neck between the junction of the neck and jaw. Death was apparently instantaneous. Shaputis was a heavy drinker who became violent when intoxicated, and he had been drinking the night of the murder. (*Shaputis III, supra*, 44 Cal.4th at pp. 1247-1248.)

Although the commitment offense was Shaputis's first felony conviction, his record showed prior violent and nonviolent criminal conduct. He was arrested in 1966 for alleged violation of Penal Code section 476, although those charges were later dismissed. In 1975, he was charged with and convicted of failing to make child support payments, and was placed on three years' formal probation. In 1978, he was arrested for pandering, convicted of an unspecified offense, and sentenced to "30 days work furlough." In 1978, Shaputis was also charged with raping his 16-year-old daughter, who reported that he had raped her twice while he was intoxicated;[4] the charges were later reduced to a misdemeanor of soliciting or engaging in a lewd act, to which he pleaded no

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(*Shaputis I, supra*, D046356, at p. 3, fn. 3.) Because of the pivotal role this "fact" has played in assessing Shaputis's suitability at numerous BPH hearings, the absence of any explanation as to the provenance of this statement is curious.

4 According to the 2005 mental health evaluation update, Shaputis denied the allegation and claimed he had wandered into his daughter's room by mistake. However, the 2005 mental health evaluation stated that in 2001, Shaputis (although continuing to deny that intercourse occurred) admitted he had touched his daughter inappropriately.

contest and for which he was placed on three years' formal probation. Shaputis also admitted having once been arrested and fined for driving a motor vehicle while under the influence of alcohol (DUI) when he was 25 years of age.

B. Shaputis's Performance in Prison

Shaputis's record during his incarceration has been impeccable. He has been discipline free during his entire term, his work record is unblemished, he has fully participated in all available AA and NA programs since 1991, and he has completed all applicable therapy programs. For several years, Shaputis has had the lowest classification score possible for a life-term inmate, and has numerous commendations from prison staff for his work, conduct and reform efforts.

Shaputis's physical health has declined over the years. He has had three heart attacks and suffers from chronic health problems.

C. The 1997 and 2002 BPH Proceedings

Shaputis's minimum eligible parole date was in September 1998. At his first parole hearing in 1997, the LPER prepared by his prison counselor for submission to the BPH stated his "progress in state prison could best be described as exemplary" and concluded Shaputis "would probably pose a low degree of threat to the public at this time, if released from prison." (*Shaputis III, supra,* 44 Cal.4th at p. 1249.) The BPH denied parole and recommended he remain discipline free and participate in self-help and therapy groups. At Shaputis's second parole hearing in 2002, the LPER confirmed Shaputis had remained discipline free and participated in self-help groups, and again concluded (based on his commitment offense, his prior record, and his prison adjustment)

that he "would probably pose a low degree of threat to the public at this time if released from prison." (*Ibid.*) The BPH again denied parole, apparently based on an unsuitability determination, and again recommended he remain discipline free and participate in self-help and therapy groups.

II

SHAPUTIS I[5]

A. The 2004 BPH Hearing

The forensic psychologist who evaluated Shaputis's psychological condition, and submitted a report to the BPH in connection with the 2004 parole hearing, concluded Shaputis had feasible and appropriate plans for his life if granted parole and appeared committed to maintaining his sobriety through continued involvement with AA. Addressing Shaputis's risk for violence if paroled, the forensic psychologist concluded he presented a low risk for violence absent a relapse into alcoholism.[6]

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5 The information recited in section II is derived from *Shaputis III, supra,* 44 Cal.4th at pages 1250 to 1251, and *Shaputis I, supra*, D046356.

6 The forensic psychologist's risk of violence assessment evaluated three elements: Shaputis's history and background, his clinical presentation, and "management of future risk." (*Shaputis III, supra,* 44 Cal.4th at p. 1250, fn. 10.) Because his history of violence appeared intertwined with his alcoholism, the forensic psychologist concluded the risk based on this history was low as long as he did not relapse into alcoholism. Shaputis's clinical presentation showed some growth in insight and the forensic psychologist believed that this factor presented a low risk for violence as long as Shaputis remained sober and involved in activities that held his interest. Finally, the forensic psychologist concluded Shaputis's ability to handle future stress in a nonviolent manner was also largely rooted in his ability to remain sober; the forensic psychologist believed that Shaputis's prison record (e.g. his commitment to his AA program and his demonstrated ability to comply with rules) and his then current physical condition (a senior citizen with

The LPER, prepared by Shaputis's prison counselor for submission to the BPH, again noted his exemplary prison record and that he had "fully adhered" to the BPH's prior recommendations. The report again concluded, considering the commitment offense, his prior criminal record, and his adjustment in prison, Shaputis would " 'probably pose a low degree of threat to the public at this time if released from prison.' "

The BPH considered the materials presented, including the forensic evaluations, and concluded Shaputis was not suitable for parole because he posed " 'an unreasonable risk of danger to society or a threat to the public safety if released from prison.' " The BPH relied on two findings for this conclusion: the nature and quality of commitment offense, and Shaputis's " 'history of unstable and tremulous [*sic*] relationships with others . . . ." (*Id.* at pp. 1250-1251.)

B. The Habeas Corpus Proceeding

Shaputis petitioned the San Diego County Superior Court for a writ of habeas corpus alleging the BPH violated his due process rights because its unsuitability determination was not supported by the evidence and was therefore arbitrary and capricious. The court denied the writ, concluding the BPH's decision was supported by some evidence. Shaputis then petitioned this court for a writ of habeas corpus. We concluded the BPH's decision to deny parole violated due process because its finding that he posed an unreasonable danger if released was contrary to the only reliable evidence of his current dangerousness and relied on findings unsupported by any evidence. We

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chronic health problems that would limit concerns about his acting out in inappropriate ways) made him a low risk for future violence. (*Ibid.*)

ordered the BPH to vacate its denial of parole and to conduct a new parole suitability hearing for Shaputis. (*Shaputis III, supra,* 44 Cal.4th at p. 1251.)

However, because this court could not predict whether new evidence might be available when the BPH conducted the new parole suitability hearing, we recognized we could not evaluate the BPH's consideration of evidence that had yet to be presented. We therefore concluded, although it was barred from finding Shaputis unsuitable for parole based on the same findings articulated at the 2004 hearing (absent evidence new or different from that presented at the 2004 hearing), the BPH could consider Shaputis's suitability de novo insofar as new or different evidence was presented at the new hearing. (*Shaputis III, supra,* 44 Cal.4th at p. 1251.)

III

SHAPUTIS II and *SHAPUTIS III*[7]

A. The 2006 BPH Hearing

The BPH conducted another parole hearing in March 2006. The only information not previously available to the BPH was the psychological assessment, conducted in April 2005 by Dr. Silverstein, which concluded Shaputis " 'would appear to be a low risk of future violence if release[d], as long as he maintains sobriety and involvement in an active relapse prevention program.' " (*Shaputis III, supra,* 44 Cal.4th at p. 1251.) However, Dr. Silverstein noted Shaputis (1) seemed to have " 'limited . . . insight' " regarding his alleged antisocial behavior and (2) his history of alcohol abuse was closely

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7 The information recited in section III is derived from *Shaputis III, supra,* 44 Cal.4th at pages 1250 to 1252.

associated with his history of domestic violence. (*Ibid.*) Dr. Silverstein concluded that, if Shaputis remained sober, his risk for violence was close to that of the " 'average unconfined citizen,' " but if he relapsed " 'the risk would likely rise considerably and he would present . . . an unpredictable risk for future domestic violence.' " (*Id.* at p. 1252.) Dr. Silverstein's concern was that Shaputis planned to move in with his new wife (with whom he had never lived) and his violence tended to be " 'confined to his family systems and [it is] difficult to assess how well extinguished his pattern of domestic violence is[,] given that he has been confined for more than 18 years. If he abstains from alcohol, the risk is probably low.' " (*Ibid.*) Dr. Silverstein concluded alcohol relapse prevention and domestic violence treatment programming would " 'likely adequately manage these risks,' " and recommended Shaputis's conditions of parole include random alcohol testing and mandatory participation in a relapse prevention program and community-based domestic violence program. (*Ibid.*)

The BPH considered the new evidence and, operating under the constraints of this court's instructions on remand, reluctantly found Shaputis suitable for parole. The BPH, although convinced its prior decision finding him unsuitable was correct because it believed Shaputis still lacked an understanding of why he killed his wife and why he engaged in domestic violence,[8] concluded this court's opinion in *Shaputis I* barred the

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8 During the 2006 proceedings, the Board referred to Dr. Silverstein's report, noting the report's observation that Shaputis found "inexplicable" his daughters' prior allegations of molestation and domestic violence, that Shaputis had a flat affect when discussing these allegations, and that this circumstance could be a sign of the schizoid tendencies noted in some previous evaluations. The Board also expressed concerns regarding

BPH from finding Shaputis unsuitable on the same evidence previously considered and therefore found him suitable for parole. The BPH therefore granted Shaputis parole subject to the special parole conditions that he submit to alcohol testing, and participate in a substance abuse program and a domestic violence program.

However, in August 2006, Governor Arnold Schwarzenegger reversed the BPH's decision because he concluded Shaputis posed an unreasonable risk of danger to society if released. The principal reasons given for this conclusion were (1) the crime was especially aggravated because it involved some premeditation, and (2) Shaputis had not fully accepted responsibility for and lacked sufficient insight about his conduct toward the victim.

B. The Habeas Corpus Proceedings

Shaputis then filed his second petition for a writ of habeas corpus, alleging the Governor's decision violated his due process rights because the unsuitability determination was not supported by the evidence and was therefore arbitrary and capricious. We ruled in favor of Shaputis, concluding that (1) the circumstances of the crime did not provide any evidence to support the conclusion that he would currently pose an unreasonable risk to public safety if released on parole, and (2) there was no

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Shaputis's lack of insight into his history of domestic violence and his alcoholism. When Shaputis was asked whether he had a problem in the way he treated women, he replied, "[w]ell, no I don't. I don't know how to say that I don't have a problem now. I didn't have a—I guess I had a problem then but I don't know how to put it into pictures or words. I just—It was one of those things I didn't quite understand, I guess. Not having a thorough idea of how stupid I was being, how dumb I was being." When questioned concerning his current understanding of why he committed the murder and why he now would not commit such a crime, Shaputis's counsel advised him not to answer the question. (*Shaputis III, supra*, 44 Cal.4th at p. 1252.)

evidence to support the conclusion that petitioner posed an unreasonable risk of danger merely because of his method of coping with his guilt. However, the Supreme Court granted review and, in *Shaputis III, supra*, 44 Cal.4th 1241, concluded there was some evidence to support the Governor's decision, and therefore affirmed the Governor's ruling. (*Id.* at pp. 1258-1261.) The court in *Shaputis III* reiterated its approach in *Lawrence*—that the circumstances of the commitment offense is a proper consideration on the question of current dangerousness only where there is other evidence that the prisoner's current condition made his or her prior crimes probative of the likelihood of renewal of violent behavior (*Shaputis III,* at p. 1261, fn. 20)—and stated that Shaputis's offense, when coupled with the evidence supporting the conclusions that he lacked insight or understanding about his violent conduct and had not accepted responsibility for his actions, provided some evidence supporting the Governor's conclusion that he would remain a danger to society if released on parole. (*Id.* at pp. 1259-1261.)

IV

THE CURRENT PROCEEDING

A. The 2009 BPH Hearing

The BPH conducted another parole hearing in August 2009. The BPH was aware Shaputis's record during his incarceration had remained impeccable: he has now been discipline free for more than 22 years, and has continued for many years to have the lowest possible classification score for a life-term inmate; his work record is unblemished and has been lauded by his supervisor; he has fully participated in the available AA and NA programs, and apparently has been involved in those programs since 1991; and he

completed a host of therapy programs and classes. The BPH was also apprised that Shaputis's physical health has declined over the years.[9]

At the 2009 hearing, the BPH considered (in addition to all of the prior psychological evaluations) a 2009 psychological assessment prepared by Dr. Stark, and a 2009 psychological assessment prepared by Dr. Sahni. Both of these 2009 reports concluded Shaputis did not present a substantial risk of violence if released to the community.[10] These 2009 reports were consistent with the reports from six prior evaluators who, after evaluating Shaputis at various times over the preceding 18 years, repeatedly concluded Shaputis's risk for violence was "*low or close to average* when compared to the average citizen."

The BPH also considered Shaputis's written statement, submitted in lieu of testimony, explaining that he was remorseful for his crime (as well as his misconduct toward others in his family) and that he grown to understand how his underlying character flaws, exacerbated by his alcohol abuse, had produced his criminal conduct.[11]

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9 Shaputis's declining physical health is undisputed: he has had three heart attacks, and he suffers from other chronic health problems, including hypertension and pancreatitis.

10 Dr. Sahni stated Shaputis "presents a relatively ***low risk*** for violence," although he stated that risk would likely increase if Shaputis relapsed into alcoholism. Dr. Stark also concluded Shaputis had a "***very low*** . . . ***risk*** for future violence."

11 Shaputis explained that his years of "treatment and soul searching" had led him to understand that "I was self-centered and did not respect the needs of my wife and children[, and a]lthough that was compounded and exacerbated by drinking, the basic flaw was in my own character" and "morality." He stated that he recognized the "destructive effects of my drinking and how it terribly impaired my judgment, and [o]ver

He explained he was "deeply regretful" about his past and that his "shame about my horrible conduct" and his "deep sorrow" for the victims, coupled with his commitment to sobriety and his ability to recognize and deal with stress in a socially appropriate manner, would insure he would not again engage in such conduct.

Dr. Stark's report devoted significant attention to evaluating and discussing Shaputis's "insight" concerning the crime and his other misconduct.[12] Dr. Stark explained that the concept of insight implicates "an awareness of the underlying emotional, cognitive or behavioral difficulty with oneself. However, insight alone does not change behavior the inmate must feel prepared to do anything to change that such a tragedy will never occur." Dr. Stark quoted the HCR-20 Companion Guide (an instrument employed by the Corrections Department to assess the risk of violence for inmates), which stated that insight:

> " *'can be defined in a variety of ways . . . . Ultimately, it is a judgment that is made by one person about another person. . . . The question is not simply whether the client has insight (i.e. is about to make reasonable sense of his or her experience and behavior), but how the client makes sense or his or her behavior within the context*[] *of his or her experience. The task is to uncover and understand the internal logic of the client's behavior* (*i.e. the client's*

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time and with treatment I have come to know that I would have not committed such horrific acts but for alcohol, but I blame myself and low morality, not alcohol, for my crime and former misconduct."

12 Dr. Sahni, explaining that her 2009 report had been prepared without the benefit of a current personal interview, stated she was unable to express any views on Shaputis's remorse about or insight into the crime. Dr. Sahni did caution, however, that "[i]nsight and remorse are abstract concepts, which do not lend themselves to operationalized definition or measurement. Therefore, any opinions regarding insight and remorse are subjective in nature, and should be interpreted with this caveat in mind."

subjective 'insight'), and then there comes a time when active change has been successful when the client feels that the hard work of transformation ha[*s*] *led to consolidation of a new pattern of feelings*[,] *thoughts and behavior.*' "

Dr. Stark, stating that Shaputis had "successfully made this transformation from insight to an active sustained change in his feelings, thoughts and behavior," provided detailed information regarding Shaputis's understanding of the nature and source of his underlying character traits and weaknesses; his understanding of how his fears and lack of self-esteem led him seek and remain in abusive relationships and the role that alcohol played in his life and in his crime; and the significant changes in Shaputis's behavioral, emotional and cognitive makeup and coping strategies that reduced the likelihood of recurrence.

B. The BPH Decision

Although all of the recent evaluators had concluded Shaputis's objective behavior as a prisoner raised no concerns about his future dangerousness, and had also concluded his advancing age and physical infirmities were factors contributing to their opinions that he was a low risk for violence if released on parole, and notwithstanding Dr. Stark's 2009 evaluation extensively assessing and discussing Shaputis's subjective attitudes and understandings about the psychological and behavioral factors that led to the murder, the BPH nevertheless concluded Shaputis posed an unreasonable risk of danger to public safety were he released from prison because he lacked sufficient insight and continued to minimize his responsibility for the murder and prior abuse. The BPH stated that, despite Dr. Stark's current evaluation detailing the evolution of Shaputis's understanding of the

nature and source of his character traits that produced his abusive behavior and ultimate murder of Erma and his acceptance of responsibility for (and remorse about) his crimes, the earlier evaluations (a 2004 evaluation by Dr. Mura and a 2005 evaluation by Dr. Silverstein) had concluded Shaputis seemed to have limited insight into the causative events and continued to minimize his responsibility for the crime. The BPH apparently concluded the earlier psychological evaluations were more probative of Shaputis's current dangerousness than the current psychological evaluation, and until Shaputis fully accepted responsibility for the crime and gained an understanding of what character traits led him to commit the crimes, he would continue to pose an unreasonable risk of danger to public safety were he released.

Shaputis petitioned the San Diego County Superior Court for a writ of habeas corpus, alleging the BPH's decision violated his due process rights because the unsuitability determination was not supported by the evidence and was therefore arbitrary and capricious. The court denied the writ. Shaputis then petitioned this court for a writ of habeas corpus.

V

LEGAL STANDARDS

A. The Parole Decision

The decision whether to grant parole is a subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that should be guided by a number of factors, some objective, identified in Penal Code section 3041 and the BPH's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) In making the suitability

determination, the BPH must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, reference to section 2042 refers to the regulations), including the nature of the commitment offense; behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude towards the crime; and parole plans. (§ 2402, subd. (b).) The circumstances tending to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel manner;[13] (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. (§ 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (*Id.,* subd. (b).)

Circumstances tending to show *suitability* for parole include that 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 or her 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)

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13 Factors supporting the finding that the crime was committed "in an especially heinous, atrocious or cruel manner" (§ 2402, 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.

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 on release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law on release. (§ 2402, subd. (d).)

These criteria 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 [BPH]." (*Rosenkrantz, supra,* 29 Cal.4th at p. 679; § 2402, subds. (c), (d).) Thus, the endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz, supra,* 29 Cal.4th at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the BPH may consider facts apart from those found true by a jury or judge beyond a reasonable doubt. (*Id.* at p. 679.)

B. Standard for Judicial Review of Parole Decisions

In *Rosenkrantz*, the California Supreme Court addressed the standard for a court to apply when reviewing a parole decision by the executive branch. The court first held that "the judicial branch is authorized to review the factual basis of a decision of the [BPH] denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra,* 29 Cal.4th at p. 658.)

In *Lawrence,* the Supreme Court noted that its decisions in *Rosenkrantz* and *In re Dannenburg* (2005) 34 Cal.4th 1061, and specifically *Rosenkrantz's* characterization of the "some evidence" as "extremely deferential" and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra,* 29 Cal.4th at p. 667), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra*, 44 Cal.4th at p. 1206.) *Lawrence* explained some courts interpreted *Rosenkrantz* as limiting the judiciary to reviewing whether "some evidence" exists to support an unsuitability factor cited by the BPH or Governor, but other courts interpreted *Rosenkrantz* as requiring the judiciary to instead review whether "some evidence" exists to support "the core determination required by the statute before parole can be denied—that an inmate's release will unreasonably endanger public safety." (*Lawrence, supra*, 44 Cal.4th at pp. 1207-1209.)

The *Lawrence* court, recognizing the legislative scheme contemplates "an assessment of an inmate's *current* dangerousness" (*Lawrence, supra,* 44 Cal.4th at p. 1205), resolved the conflict among the lower courts by clarifying that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is "whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212.) *Lawrence* clarified that the standard for judicial review, although "unquestionably deferential, [is] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors *with no reasoning establishing a rational nexus*

between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Id.* at p. 1210, italics added.) Indeed, it is *Lawrence's* numerous iterations (and variants) of the requirement of a "rational nexus" between the *facts* underlying the unsuitability factor and the *conclusion* of current dangerousness that appears to form the crux of, and provide the teeth for, the standards adopted in *Lawrence* to clarify and illuminate "the precise contours of the 'some evidence' standard." (*Id.* at p. 1206.)

The implementation of a "rational nexus" standard finds confirmation in *Lawrence's* numerous references to that standard or to functional equivalents of that standard. For example, in at least two other places in the opinion, *Lawrence* reiterated the requirement that there be a "rational nexus" between the facts relied on by the Governor and the conclusion of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at p. 1213 [suggesting court applied inappropriate standard when it affirmed denial of parole "without specifically considering whether there existed a rational nexus between those egregious circumstances and the ultimate conclusion that the inmate remained a threat to public safety"] & p. 1227 ["mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability"].) Additionally, other critical passages in *Lawrence* reinforce the requirement of some rational connection between the facts relied on and the conclusion of dangerousness. (See, e.g., p. 1211 ["If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were

sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have *no bearing* on the paramount statutory inquiry"], italics added.)

Indeed, *Lawrence's* "rational nexus" requirement is echoed by its repeated references to a slightly different variant of that concept: whether the factor relied on by the BPH is probative of current dangerousness. (See, e.g., *Lawrence, supra,* 44 Cal.4th at p. 1212 [factors will "establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger"], p. 1214 ["the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety"], & p. 1221 [the "relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record"].) Because evidence is "probative" only when it has "some tendency in reason to prove" the proposition for which it is offered (see, e.g. *People v. Hill* (1992) 3 Cal.App.4th 16, 29, disapproved on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5), the

Lawrence court appears to have employed the terms "rational nexus" and "probative" interchangeably.

After clarifying the applicable standard of review, *Lawrence* then turned to and specifically addressed how one "unsuitability" factor—whether the prisoner's commitment offense was done in a particularly heinous, atrocious, or cruel manner—can affect the parole suitability determination, and whether the existence of some evidence supporting the Governor's finding that the offense was particularly heinous, atrocious, or cruel is alone sufficient to deny parole. *Lawrence* concluded that when there has been a lengthy passage of time, the Governor may continue to rely on the nature of the commitment offense as a basis to deny parole only when there are *other* facts in the record, including the prisoner's history before and after the offense or the prisoner's current demeanor and mental state, that provide a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at pp. 1211, 1214, 1221.)

In *Shaputis III*, the Supreme Court (echoing its observations in *Lawrence*, *supra*, 44 Cal.4th at p. 1228) concluded that the nature of the commitment offense, when coupled with other facts in the record such as evidence that the prisoner lacks insight or remorse, can provide some evidence of current dangerousness. (*Lawrence, supra; Shaputis III*, *supra*, 44 Cal.4th at pp. 1260-1261.)

VI

ANALYSIS

A. Analysis of Merits

The People do not dispute that the evidence on the relevant suitability factors, as well as the only evidence on most of the unsuitability factors, uniformly militated in favor of finding Shaputis suitable for parole. In this evidentiary context, the BPH nevertheless found Shaputis was unsuitable based primarily on its conclusion that his lack of insight into the reasons for his abusive behavior, when coupled with the commitment crime, showed he remained a danger to society if released on parole. Because we are charged with the obligation to ensure the BPH's decision comports with the requirements of due process of law, and we can discharge that obligation only if we are satisfied there is some evidence in the record providing a rational nexus between the evidence and the conclusion of current dangerousness (*Lawrence, supra*, 44 Cal.4th at pp. 1211-1212), we examine the articulated grounds to determine if some evidence supports the decision.

Because the BPH's conclusion of Shaputis's *current* dangerousness appears exclusively to have been based on its findings that (as of the 2009 hearing) he did not have adequate insight into his prior criminal conduct and did not accept responsibility for his conduct, an extended examination of these factors,[14] and whether there is any

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14 Although both *Lawrence* and *Shaputis III* have approved consideration of the prisoner's failure adequately to express remorse for or "insight" into his conduct as a basis for concluding the prisoner is unsuitable for parole, at least one court has expressed discomfort with an approach that indirectly requires the prisoner to admit guilt notwithstanding the statute and applicable regulations (see Pen. Code, § 5011, subd. (b);

evidentiary support for these findings, is required. Before *Lawrence* and *Shaputis III* were decided, it appears that virtually all decisions of the BPH and Governor denying parole relied primarily on the gravity of the commitment offense. (See *Lawrence, supra*, 44 Cal.4th at p. 1206 [noting "the practical reality that in every published judicial opinion [reviewing a parole decision], the decision of the Board or the Governor to deny or reverse a grant of parole has been founded in part or in whole upon a finding that the inmate committed the offense in an 'especially heinous, atrocious or cruel manner' "].) In the wake of *Lawrence* and *Shaputis III,* the articulated grounds for denial of parole now seem usually based, at least in part, on the inmate's asserted "lack of insight," which has become the " 'new talisman.' " (*In re Shippman* (2010) 185 Cal.App.4th 446, 481 (dis. opn. of Pollak, J.).) The intensified interest in this malleable factor—which is *not* among the criteria indicative of unsuitability for release on parole set forth in the governing regulations (Cal. Code Regs., tit. 15, §§ 2281, 2402)—seems to have been sparked by the Supreme Court's opinion in *Shaputis III*, in which the Governor's reversal of an award of parole was upheld because his reliance on the gravity of the inmate's commitment offense was coupled with concern about the inmate's "lack of insight into the murder and into the years of domestic violence that preceded it." (*Shaputis III*, *supra*, 44 Cal.4th at p. 1258.)

The weight placed on this factor in *Shaputis III* has stimulated far greater use of it by the BPH and Governor than was formerly the case. Considering that "lack of insight" is not among the factors indicative of unsuitability for parole specified in the sentencing

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Cal Code Regs., tit. 15, § 2236) that preclude the BPH from conditioning a prisoner's parole on an admission of guilt. (See *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110-1111; accord, *In re Juarez* (2010) 182 Cal.App.4th 1316, 1340-1342.)

regulations and has been rarely relied on by the BPH or Governor in the past, the increasing use of this factor is likely attributable to the belief of parole authorities that, as in *Shaputis III*, "lack of insight" is more likely than any other factor to induce the courts to affirm the denial of parole. The recitation of "lack of insight," a more subjective factor than those specified in the regulations as indicative of unsuitability, should have no talismanic impact on our review, particularly because a statement that an inmate "lacks insight" appears to be stating a conclusion drawn from other evidence rather than being evidence itself. (Cf. *In re Macias* (2010) ___ Cal.App.4th ___ [2010 DJDAR 17122, 17126-17129] [a finding of lack of insight must be rooted in a "factually identifiable deficiency in perception and understanding [involving] an aspect of the criminal conduct or its causes"].)

We conclude that, as with any other factor relied on to find an inmate unsuitable for release on parole, "lack of insight" is probative of unsuitability only to the extent that it is both demonstrably shown by evidence in the record, and is rationally indicative of the inmate's current dangerousness.

We conclude the BPH's finding that Shaputis lacked "insight" and failed to accept responsibility is not demonstrably shown by the record *as of the 2009 hearing.* Shaputis's written statement clearly expressed his remorse, both for his crime and for his misconduct toward other family members, and squarely acknowledged that (while his alcohol consumption played some role in the crime), "I blame myself and low morality, not alcohol, for my crime and former misconduct." Additionally, his written statement

provided affirmative evidence that he had grown to understand how his underlying character flaws, exacerbated by his alcohol abuse, had produced his criminal conduct.

Moreover, even disregarding Shaputis's statement to the BPH, the evaluation by Dr. Stark was unequivocal: it detailed Shaputis's ability to articulate the sources of his low self-esteem, possessiveness and alcohol abuse; it explained how Shaputis's growth in recognizing these issues had been transformed into new coping skills and empathy for others that he lacked during his time of abusive behavior; and it explained why his earlier statements to other evaluators may have been misconstrued as a lack of insight into what had led to the crime. Dr. Stark characterized Shaputis's insight as "compelling" and, when coupled with his demonstrated track record of model institutional behavior, his advancing age, and his postrelease support system, concluded Shaputis presented "no threat to public safety" if released on parole.[15]

Our review of the transcript of the BPH hearing leaves us uncertain as to the precise basis for the BPH's decision to disregard the only current evidence of Shaputis's insight. However, it appears the decision was premised on evaluations performed several years earlier that described Shaputis's insight regarding his antisocial behavior as limited and concluded Shaputis had not accepted responsibility for his actions), and on the BPH's

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15 Although her opinion included her subjective assessment of Shaputis's mental status, she also conducted a battery of more objective tests, all of which confirmed her opinion that Shaputis posed little threat if released on parole. In so concluding, Dr. Stark appears to have agreed with every evaluator (including Drs. Charlens, Saunders, Segal, Mura, Hitchcock and Silverstein) who examined Shaputis for purposes of parole and concluded he posed no unreasonable risk to public safety.

apparent conclusion that these reports (rather than the more current evaluations) were more persuasive.[16] We conclude reliance on the outdated information, some of which may have been decades old, cannot provide "some evidence" of Shaputis's *current* mental attitudes.[17] To paraphrase *Lawrence*, the more recent positive psychological

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16 The People on appeal also suggest the BPH was entitled to disregard Dr. Stark's report as lacking credibility, arguing (based on snippets from the report) that Dr. Stark was not an objective evaluator but was instead a hired advocate. However, the only expressed concern about her objectivity is a single comment from one commissioner that Dr. Stark had said Shaputis had "no history of unstable relationships and I'm telling myself, how could she state that [considering Shaputis's history of domestic violence]?" However, this commissioner apparently ignored the context of those statements, because Dr. Stark acknowledged the domestic violence (stating "the relationship with his wife and misconduct with his daughter while under the influence of alcohol were the sum of his relationships") and merely stated "this does not meet the level of a history of 'unstable tumultuous relationships.' " The People also cite other snippets as evidence from which the BPH could have questioned Dr. Stark's credibility, but we are convinced those passages in context do not suggest she lacked objectivity. For example, the People characterize quotes from Dr. Stark (when she stated "there are inconsistencies in the judicial proceedings" and "inconsistencies in the investigation regarding the . . . firing of the gun during the index offense") as echoing and validating Shaputis's complaints about the courts and the police investigation. However, these statements—made in the context of discussing Shaputis's prior descriptions about the murder characterizing the killing as accidental—appear to describe potential inconsistencies between Shaputis's characterization of the crime and the evidence gathered during the investigation and judicial proceedings.

17 The only *current* information adverted to by the BPH when it denied parole was that Shaputis's written statement employed terminology one commissioner interpreted as reflecting an insufficient internalization of responsibility for his actions. That commissioner, quoting Shaputis's statement that he felt "shame about [his] horrible conduct and how it impacted the victims," complained that (1) Shaputis should have said "my shame about me murdering my wife," and (2) should have specified that "the victim was [his] wife . . . [but the term] victims is so objective and so remote and so emotionally detached from anything . . . that bothered me a lot." However, Shaputis's reference to his "horrible conduct" and how it "impacted the victims" appears to be global references to *all* of his abusive behavior (e.g. his physical abuse of his family) toward *all* of his victims (e.g. his wives and his daughter), rather than a deflection of responsibility. Indeed, the

assessments of Shaputis "have undermined the evidentiary value of these dated reports setting forth stale psychological assessments. Moreover, in the negative psychological assessments cited by the [BPH], the treating psychologists recommended petitioner should undergo specific forms of therapy—which [he] did for many years, resulting in successive positive evaluations. . . . [T]he passage of time is highly probative to the determination before us, and reliance upon outdated psychological reports—clearly contradicted by petitioner's successful participation in years of intensive therapy, a long series of reports declaring petitioner to be free of psychological problems and no longer a threat to public safety, and petitioner's own insight into [his] participation in this crime—does not supply some evidence justifying the [BPH's] conclusion that petitioner continues to pose a threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1223-1224; accord, *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1490 ["[w]here, as here, a stale negative psychological evaluation is superseded by subsequent positive evaluations, the previous negative evaluation does not constitute evidence that the inmate poses a current danger to the public"]; *In re Gaul* (2009) 170 Cal.App.4th 20, 38-39 [reliance on outdated evaluations, when contradicted by more recent evaluations, was "irretrievably flawed," and did not support denial of parole].)

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commissioner's focus on these global terms apparently induced the commissioner to overlook that, on the *prior* page of Shaputis's statement, he specifically referred to "my wife and at least one of my daughters" as victims of his abuse and specifically said he blamed himself for his "crime" and his other "misconduct," which Shaputis characterized as "horrific acts." Shaputis's statement, read as a whole, cannot fairly be interpreted as a failure to internalize responsibility.

We are convinced the materials before the BPH as of the 2009 hearing are not rationally indicative of Shaputis's current dangerousness as of the 2009 hearing. The evaluators over at least the past decade have uniformly concluded he posed a relatively minimal risk to public safety, and the only evidence that could have anchored a finding of unsuitability *in the past* (e.g. his limited insight into or remorse for his conduct, see *Shaputis III, supra*, 44 Cal.4th at p. 1260) has evaporated considering the only current evidence as to his insight into and remorse for his conduct. Because of Shaputis's 23 years of uninterrupted model behavior in prison, his age of 74 years and his declining physical condition, his acknowledgement of guilt and remorse, the litany of expert opinions of his minimal further risk of violence, and the affirmative evidence that he has insight into his prior character and has concomitantly developed attitudes and behaviors to reverse prior antisocial propensities, we conclude there is no evidence to support a finding that he would currently pose an unreasonable risk of danger to society were he released on parole. The BPH's conclusion that Shaputis remains a danger to society is not supported by some evidence of current psychological or behavioral conditions and therefore is arbitrary and capricious, within the deferential standards articulated by *Rosenkrantz, supra,* 29 Cal.4th 616.

B. The Proper Disposition

We have concluded there was no evidence from which the BPH could have found that Shaputis's history as a prisoner or his current demeanor and mental state could provide a rational nexus for concluding his offense or pre-incarceration conduct continues to be predictive of current dangerousness. The People assert the appropriate

disposition would be to vacate the BPH's decision and to remand the matter to the BPH to conduct a new hearing in accordance with due process, while Shaputis asserts the proper remedy is to order him immediately released on parole.

Our disposition is constrained by our Supreme Court's decision in *In re Prather* (2010) 50 Cal.4th 238 [that, under these circumstances, we are limited to ordering the BPH to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of this court. We are confident the BPH understands that our order directing it to proceed in accordance with due process of law "does not entitle the Board to 'disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record.' [Quoting *In re Masoner* (2009) 172 Cal.App.4th 1098, 1110.) Rather, a judicial order granting habeas corpus relief implicitly precludes the Board from again denying parole—unless some *additional* evidence [to that considered or that reasonably could have been considered] (considered alone or in conjunction with other evidence in the record, and not already considered and rejected by the reviewing court) supports a determination that the prisoner remains currently dangerous." (*In re Prather,* at p. 258.)

Accordingly, we order the BPH to vacate its decision finding Shaputis unsuitable for parole. The BPH shall conduct a new parole suitability hearing within 30 days of the issuance of the remittitur in this matter, in accordance with due process of law and consistent with the decision of this court and the principles of res judicata.

DISPOSITION

The BPH shall vacate its decision finding Shaputis unsuitable for parole and conduct a new parole suitability hearing within 30 days of the issuance of the remittitur in this matter, in accordance with due process of law and consistent with the decision of this court and the principles of res judicata. Pursuant to California Rules of Court, rule 8.387(b)(3)(A), this opinion shall be final as to this court within five days after it is filed.

McDONALD, J.

I CONCUR:

McINTYRE, J.

NARES, Acting P. J., dissenting:

I respectfully dissent as I believe there is "some evidence" to support the Board of Parole Hearing's (the Board's) decision to deny Shaputis's release on parole. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258-1260 (*Shaputis*).)

"[T]he standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191 (*Lawrence*); *Shaputis supra,* 44 Cal.4th at p. 1255.) As our Supreme Court noted: "Our deferential standard of review requires us to credit the [Board's] findings if they are supported by a modicum of evidence." (*Lawrence, supra,* 44 Cal.4th at p. 1226; see also *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1488.) Stated differently, " 'the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board]. . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board's] decision reflects *due consideration of the specified factors* as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision.' " (*Shaputis, supra,* 44 Cal.4th at pp. 1260-1261.)

As the majority concedes, the gravity of the commitment offense, when coupled with other facts such as evidence the prisoner lacks insight or fails to take responsibility,

can provide some evidence of current dangerousness so as to justify a denial of parole. (*Shaputis, supra,* 44 Cal.4th at pp. 1260-1261.)

The majority's decision is based in large part on the 2009 psychological examination from Dr. Barbara Stark that concluded that he had adequate insight, and disagreed with past psychological reports that concluded otherwise.

However, while a psychological report is information that the Board may weigh in reviewing the record, it does not control the Board's decision. (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) In this case, the Board gave little weight to Dr. Stark's report. The Board had a rational basis for doing so.

Dr. Stark was hired by Shaputis to prepare the report. As the Board noted, there are reasons to question the objectivity of the report as Dr. Stark accepted Shaputis's complaints about courts and the police investigation: "It is clear from reviewing the legal documentation that there are inconsistencies in the judicial proceedings and he has continued to accept responsibility for the offense"; "It is clear that there were inconsistencies in the investigation regarding the logistics regarding the firing of the gun during the index offense." Indeed, Dr. Stark's report opines that our Supreme Court, in *Shaputis* "misinterpreted" the term insight. The Board also criticized Dr. Stark's report because it concluded he had no history of unstable tumultuous relationships, despite his history of beating his wife and abusing his children.

Dr. Stark also accepted Shaputis's continued claim that the killing was accidental: "I was drunk and had no sense of what happened when the gun was dropped in my lap." However, this explanation is contradicted by the evidence and the coroner's conclusion

his wife was killed by a gunshot wound at close range to the neck, and a "transfer bar" on the gun made an accidental discharge impossible. Moreover, Shaputis's continued assertion the killing was an accident was one of the major reasons for our Supreme Court's denial of parole in 2008. (*Shaputis, supra,* 44 Cal.4th at p. 1260.) This continued lack of insight and attempt to minimize his responsibility for the crime, together with the seriousness of the offense, provides "some evidence" to support the Board's decision that Shaputis poses a current risk to public safety and therefore it did not err in denying parole. Where the record contains evidence "demonstrating that the inmate lacks insight into his or her commitment offense or previous acts of violence, even after rehabilitative programming tailored to addressing the issues that led to commission of the offense, the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration." (*Shaputis, supra,* 44 Cal.4th at p. 1228.)

The majority simply disagrees with the weight the Board gave to Dr. Stark's report and its assessment of the evidence concerning Shaputis's suitability for parole. However, that is not our function in reviewing this writ petition. Rather, "[o]ur deferential standard of review requires us to credit the [Board's] findings if they are supported by a modicum of evidence." (*Lawrence, supra,* 44 Cal.4th at p. 1226.) Such evidence clearly exists here.

NARES, Acting P. J.

EXHIBIT 2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RICHARD SHAPUTIS	D056825
on	(San Diego County Super. Ct. No. HC18007)
Habeas Corpus.	ORDER MODIFYING OPINION
	NO CHANGE IN JUDGMENT

THE COURT:

The petition for rehearing, filed November 19, 2010, is treated as a request for modification. It is ordered that the opinion filed herein on November 17, 2010, be modified as follows:

In the first sentence of the Disposition, the number "30" is changed to "60" so the sentence reads:

The BPH shall vacate its decision finding Shaputis unsuitable for parole and conduct a new parole suitability hearing within 60 days of the issuance of the remittitur in this matter, in accordance with due process of law and consistent with the decision of this court and the principles of res judicata.

There is no change in the judgment.

NARES, Acting P. J.

Copies to: All parties

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *In re Richard Shaputis*

Case No.: **(Supreme Court of the State of California No. Not Assigned)**
California Court of Appeals Fourth Appellate No.: D056825

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 2, 2010, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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(2 Copies)

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San Diego, CA 92101-2936

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 2, 2010, at Los Angeles, California.

Y. Cuan-Claro
Declarant


Signature

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