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In the Supreme Court of the State of California

In re

MIGUEL MOLINA,

On Habeas Corpus.

Case No. _____

Second Appellate District, Division Six, Case No. B208705
San Luis Obispo County Superior Court Case No. CR13298 (HC-2)
The Honorable Michael L. Duffy, Judge

PETITION FOR REVIEW

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INTRODUCTION

Warden Ben Curry, respondent in the court below (respondent), and the Board of Parole Hearings (Board) and Governor Arnold Schwarzenegger as real parties in interest, petition this Honorable Court to grant review, pursuant to California Rules of Court, rule 8.500, following a decision by the California Court of Appeal, Second Appellate District, Division Six, filed on April 16, 2009 (slip opinion).

This Court has established the standard of judicial review for executive parole consideration decisions. (*In re Lawrence* (2008) 44 Cal.4th 1181; *In re Shaputis* (2008) 44 Cal.4th 1241.) Nevertheless, the question remains as to what the proper remedy is when the judiciary determines that a parole decision is not supported by some evidence. Although this Court has previously indicated that a parole decision that violates due process should be vacated and the matter remanded to the Board to proceed in accordance with due process (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658), this instruction has been interpreted by the courts in inconsistent ways. The Court of Appeal in this matter chose the most extreme remedy among the broad spectrum of remedies that appellate courts have been ordering in cases in which Board decision have been found to violate due process: ordering a life inmate's immediate release from prison without allowing either the Board or the Governor to assess his suitability for parole. (Slip opn. at p. 13.) This remedy implicates basic due process principles, and it prevents the Governor from exercising his constitutional and statutory duties to be the final arbiter of parole release decisions. Thus, review is necessary to answer the important legal question regarding the extent of relief a court may order in parole matters and to

secure uniformity of decision as to the proper remedy for due process violations.[1] (Cal. Rules of Court, rule 8.500 (b)(1).)

ISSUE FOR REVIEW

When a reviewing court determines that a parole decision by the Board is not supported by some evidence, may the court order the Board to release a life-term inmate without allowing the Board to determine parole suitability or permitting the Governor to exercise his constitutional and statutory authority to review the Board's decision?

STATEMENT OF THE CASE

In 1985, Miguel Molina pled no contest to second degree murder, and was sentenced to 15 years to life. (Slip opn. at p. 2.) In 2006, the Board considered his suitability for parole. A conflict between Molina's version of his commitment offense and the version documented in the record concerned the Board, and called into question the validity of Molina's remorse and insight into his crime, as well as the validity of a

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[1] In addition to this matter, pending petitions for review have been recently filed raising similar issues: *In re De La Barcena* (Apr. 10, 2009, B202315, B203772) [nonpub. opn.] [2009 WL 962415] (petn. for review pending, petn. filed April 27, 2009, S172512) ["Whether the Court of Appeal exceeded its jurisdiction under the separation-of-powers doctrine by refusing to permit the board, on remand, to take into account information that was not available at the time of the prior parole hearing in determining whether the inmate was suitable for parole."]; *In re Prather* (Apr. 28, 2009, B211805) [nonpub. opn.] [2009 WL 1124976] (petn. for review pending, petn. filed May 13, 2009, S172903) [When a reviewing court determines that the Board's decision denying parole is not supported by "some evidence," may the court order the Board to reach a particular result or prohibit the Board from considering and weighing all relevant and reliable information on remand?]. Because the proposed issue on review in *De La Barcena* is essentially subsumed within the proposed issues in both *Prather* and in this matter, real parties in interest respectfully requests that this Court grant review in this matter or *Prather* and hold *De La Barcena*.

psychological evaluation that was based on Molina's version of the events. Thus, the Board denied Molina parole and ordered an internal investigation to resolve the factual conflict before Molina's next hearing date. (*Id.* at p. 3.) Molina challenged the Board's decision by filing a habeas corpus petition in the San Luis Obispo Superior Court. (*Id.* at pp. 3-4.) The superior court granted Molina's petition and ordered Molina's release from prison within thirty days of the court's order. (*Ibid.*) Respondent filed an appeal and obtained from the appellate court a stay of the superior court's release order pending the resolution of the appeal.

In an unpublished, split decision filed on April 16, 2009, the Court of Appeal affirmed the superior court's order granting Molina's petition. As the superior court had done, the majority concluded that the factual conflict that concerned the Board had no bearing on Molina's suitability for parole and that there was no evidence in the record suggesting that Molina currently posed a risk of danger. (Slip opn. at pp. 5-12.) The majority then ordered the matter remanded to the superior court with instructions to the Board to release Molina. (*Id.* at pp. 12-13.) The dissenting justice concluded that there was some evidence of Molina's current dangerousness based on the factual conflict and criticized the majority for, among other things, not remanding the matter to the Board in accordance with this Court's instructions in *Rosenkrantz*. (Slip opn. dissent at pp. 6-7.)

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE APPROPRIATE REMEDY FOLLOWING A FINDING THAT A PAROLE DECISION IS NOT SUPPORTED BY SOME EVIDENCE.

This Court has never definitively set forth the proper remedy for a due process violation in the context of a parole proceeding, which has led to lower courts ordering a wide array of remedies upon finding parole

decisions unsupported by some evidence. The spectrum of remedies being ordered by the courts ranges from unrestricted remand to the Board, to directing a finding of suitability absent very specific new evidence, to, as here, ordering the release of the inmate. Given the significant due process implications of this issue, this case warrants review so this Court can establish the proper remedy when a parole decision is determined to be without evidentiary support.

A. The Issue of Remedy when a Reviewing Court Finds that a Board Parole Denial Lacks "Some Evidence" Is an Important Question of Law.

The determination of the proper remedy when Board decisions denying parole are found to lack sufficient evidentiary support implicates important issues of due process, intertwined with considerations of the principles of separation of powers, calling for definitive resolution by this Court. In *Rosenkrantz,* this Court stated that when a parole decision does not comport with due process, the reviewing court should order the Board to "vacate its decision denying parole and thereafter to proceed in accordance with due process of law." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.) The question remains, however, what exactly due process requires.

Although not specifically delineated in *Rosenkrantz*, this Court provided an indication of the process to be provided when a parole decision is found to be without an evidentiary basis by citing to two Court of Appeal decisions, *In re Ramirez* (2001) 94 Cal.App.4th 549, 572 (disapproved on other grounds in *In re Dannenberg* (2005) 34 Cal.4th 1061, 1100), and *In re Bowers* (1974) 40 Cal.App.3d 359, 362. In *Ramirez*, the superior court determined that the Board's parole denial was not supported by any evidence, and ordered the Board to set a release date for the inmate. The Court of Appeal affirmed the superior court's granting of the petition, but

remanded the matter back to the Board to reconsider Ramirez's suitability for parole, explaining that the judiciary should be "reluctant to direct a particular result" in a parole suitability proceeding and that the Board "must be given every opportunity to lawfully exercise its discretion" in parole matters. (*In re Ramirez*, *supra*, 94 Cal.App.4th at p. 572.)

Similarly, in *Bowers*, the inmate filed a habeas petition challenging the Board's (then known as the Adult Authority) revocation of his parole without providing him with a pre-revocation hearing. (*In re Bowers*, *supra,* 40 Cal.App.3d at pp. 360-361.) The trial court determined that the failure of the Board to provide the mandatory pre-revocation hearing mandated habeas relief and it ordered the Board to release the inmate onto parole and precluded the Board from seeking any further revocation proceedings based on the parole violation that served as the basis for the revocation proceeding at issue before the court. (*In re Bowers*, *supra,* 40 Cal.App.3d at p. 361.) The appellate court agreed that the inmate was entitled to relief, but stated that the superior court had erred in precluding the Board from reinstituting further revocation proceedings based on the previous parole violations. (*Id.* at p. 362.) Specifically, the court stated that "where the Department of Corrections has failed to accord a prisoner due process of law in revoking parole, the relief to which the prisoner is entitled on habeas corpus is not an order forever barring the Department of Corrections from proceeding further, but, rather, an order directing the Department of Corrections to vacate its order of revocation and thereafter proceed in accordance with due process of law." (*Ibid.*, citations omitted.)

Thus, this Court's citation to *Ramirez* and *Bowers* in *Rosenkrantz* when discussing the proper remedy for a due process violation in a parole proceeding seemingly indicates that any order that restricts or prevents the Board from exercising its discretion in parole matters would be an improper remedy. (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 658; see also *Lindell*

Co. v. Board of Permit Appeals (1943) 23 Cal.2d 303, 315 [citing general principle that while a court can direct an administrative agency possessing discretionary power to act, it may not compel it to act in any particular manner].) This is consistent with several additional parole-related cases acknowledging that when a due process violation is alleged, the proper remedy is to provide the process due. (*In re Love* (1974) 11 Cal.3d 179, 185 [petitioner had right to confidential report relevant to parole revocation proceedings; remedy is to provide a copy of the report and schedule a new hearing]; *In re Carr* (1995) 38 Cal.App.4th 209, 218 [remedy for failure to hold annual parole review is to grant the process due: an annual hearing]; *In re Marquez* (2007) 153 Cal.App.4th 1, 15 ["When a due process violation is alleged, the proper remedy is to provide the process due."].) Following these principles, courts generally interpreted this Court's directive to order the Board to proceed in accordance with due process as meaning the Board would provide the inmate a new parole consideration hearing. Yet since *Lawrence*, which did not address the remedy issue, courts have significantly expanded the meaning of "process due," which has led to the release order at issue here. The expansion of the remedy merits this Court's attention.

Additionally, the release order here implicates separation-of-powers principles. The power to grant and revoke parole is vested exclusively in the executive branch through the Board and the Governor (Cal. Const., art. V, § 8, subd. (b); Pen. Code, §§ 3041-3041.2, 5054, 5077; *In re Rosenkrantz, supra,* 29 Cal.4th at 659; *In re Powell* (1988) 45 Cal.3d 894, 901), whereas the judiciary reviews the executive's parole decision to ensure that the prisoner is accorded due process. (*Rosenkrantz, supra,* 29 Cal.4th at p. 658 ["the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process"]; see also *In re*

Lawrence, *supra*, 44 Cal.4th at p. 1211 ["judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights"].) Thus, there is a fundamental difference between the Board's discretionary assessment of whether an inmate is suitable for parole and the court's determination of whether that decision is supported by some evidence.

By ordering the Board to release Molina, the appellate court interfered with the authority of the executive branch. (See *Lindell, supra,* 23 Cal.2d at p. 315.) The order deprives the Board of its authority to determine Molina's suitability for parole and bypasses the Governor's constitutional and statutory authority to review the parole suitability of a convicted murderer. (*In re Morrall* (2002) 102 Cal.App.4th 280, 295-296 [court may not arrogate to itself the exercise of authority that the Constitution expressly vests in the Governor].) Thus, separation-of-powers concerns, in addition to basic principles of due process, make it necessary for this Court to definitively resolve the important question of law regarding the proper remedy when a decision by the Board denying parole is found to violate due process. (Cal. Rules of Court, rule 8.500, (b)(1).)

B. This Court Should Grant Review to Secure Uniformity of Decision Among the Lower Courts.

Review is further necessary in this matter because there exists a significant conflict among the courts regarding the interpretation of what it means "to proceed in accordance with due process."

Some courts have acted in accordance with the principles set forth in *Ramirez* and *Bowers,* the cases cited by this Court in *Rosenkrantz*, and refrained from directing the Board to take any particular action other than providing the inmate with a new parole consideration hearing. (See, e.g., *In re Lazor* (2009) 172 Cal.App.4th 1185 [ordering Board to reconsider matter in light of *Lawrence* and *Shaputis* with restrictions imposed by trial court

ordered removed]; *In re Parker* (Mar. 26, 2009, C052410) [nonpub. opn.] 2009 WL 791282 [Board ordered to hold a new hearing and to "exercise its discretion," noting that the record contained evidence which might support a denial of parole, but record did not indicate whether the Board had relied on such information in finding inmate unsuitable];[2] *In re Barker* (2007) 151 Cal.App.4th 346, 378 [Board ordered to conduct new hearing and "consider evidence of all relevant circumstances identified in its own regulations as tending to show a prisoner suitable for release from prison"]; *In re Weider* (2006) 145 Cal.App.4th 570, 590-591 [appellate court struck portion of trial court's order granting petition to omit direction which "preclude[d] the Board from considering 'all relevant, reliable information,'" finding that this preclusion exceed the trial court's jurisdiction]; *In re De Luna* (2005) 126 Cal.App.4th 585, 599-600 [Board may hold new hearing without restriction and "[i]f there is evidentiary support for a finding currently lacking it, the Board may make that finding again"]; *In re Alvarade* (Jan. 21, 2005, H027090) [nonpub. opn.] 2005 WL 217030 [noting that a reviewing court "can hardly direct the Board's consideration of evidence that has yet to be presented," striking portion of the trial court's order which prohibited the Board from relying on specific reasons in a future hearing]).

In a recent published opinion from the Sixth District Court of Appeal, the court fashioned a remedy that allows the Board to exercise its discretion in determining parole suitability, but provides direction as to the

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[2] The Court may take judicial notice of unpublished decisions because they are court records. (Evid. Code, § 452, subd. (d); *People v. Hill* (1998) 17 Cal.4th 800, 847.) Petitioner's Request for Judicial Notice (RJN) of unpublished appellate court decisions referenced herein is filed together with this petition.

evidentiary sufficiency of certain factors. (*In re Criscione* (2009) 173 Cal.App.4th 60 [remand to trial court with directions to modify order granting petition and to hold new hearing "in accordance with due process in light of . . . *Lawrence* . . . and . . . *Shaputis* . . . taking into account all relevant statutory factors. . . . [The Board must also] . . . articulate a rational nexus between its factual findings and a conclusion that petitioner is not suitable for parole[;]" Board also directed to disregard evidence regarding parole plans (which court found lacking in evidentiary support) unless there was new evidence relating to this factor which supported parole denial].)

Other courts have placed restrictions on the Board's further parole consideration. These restrictions have been applied to the parole suitability factors the Board may consider as well as the specific evidence in a particular record. (See, e.g., *In re Masoner* (2009) 172 Cal.App.4th 1098 [court reversed superior court's order to release inmate but directed lower court to order Board to hold a new hearing and find inmate suitable unless "new evidence of his conduct or a change in his mental state subsequent to [the hearing in question] supports a determination that he currently poses an unreasonable risk of danger to society if released on parole"]; *In re Rico* (2009) 171 Cal.App.4th 659, 689 [on remand, directed Board to find inmate suitable for parole "unless either previously undiscovered evidence or new evidence subsequent to [the hearing in question], regarding his conduct, circumstances, or change in mental state, supports a determination that [the inmate] poses an unreasonable risk of danger if released on parole"]; *In re Jeffery* (Sept. 25, 2008, H031673) [nonpub. opn.] 2008 WL 4358535 [Board ordered to conduct new hearing but not to consider petitioner's motive as court determined no evidence supported parole denial on that factor]; *In re Scott* (2004) 119 Cal.App.4th 871, 899 [Board ordered to hold new hearing and "consider all of the psychological evaluations made of Scott since 1999 as favoring his application for a parole date . . . [and]

consider evidence of all relevant circumstances identified in its own regulations as tending to show a prisoner suitable for release from prison."].)

In an unpublished case from the First District Court of Appeal, the court took a different approach to the interplay between the time passed between the hearing at issue and the relief granted on habeas corpus review. The court ordered the Board to essentially repeat the challenged hearing based solely on the evidence that was before the Board at that time, and if the new hearing resulted in a grant of parole, then the Board could rescind that grant based on subsequent evidence. (*In re Hayes* (Jan. 27, 2009, A119968) [nonpub. opn.] 2009 WL 180269 at fn. 13.) This remedy is problematic because it orders the Board to consider subsequent evidence under guidelines for parole rescission, not parole suitability. (Compare Cal. Code Regs., tit. 15, § 2450 et seq. [limiting grounds for rescission to disciplinary conduct, psychiatric deterioration, fundamental errors of granting panel, and any new information indicating that parole should not occur] with Cal. Code Regs., tit. 15, § 2402 [listing general guidelines for parole suitability].)

Other courts have taken the additional step of specifically directing the Board to find an inmate suitable for parole unless narrow circumstances exist. (*In re De La Barcena* (Apr. 10, 2009, B202315, B203772) [nonpub. opn.] [2009 WL 962415, *11] [Board limited to new evidence of conduct since prior hearing], petn. for review pending, petn. filed April 27, 2009, S172512; *In re Palermo* (2009) 171 Cal.App.4th 1096 [Board directed to hold a new hearing "and to find defendant suitable for parole unless new evidence of his conduct and/or change in mental state subsequent to the 2006 parole hearing is introduced and is sufficient to support a finding that he currently poses an unreasonable risk of danger"]; *In re Gaul* (2009) 170 Cal.App.4th 20 [Board ordered to find petitioner suitable for parole unless

new evidence of the inmate's conduct in prison subsequent to the hearing in question supported unsuitability]).

And still other courts, as here, have made judicial determinations regarding parole suitability and ordered the executive branch to release inmates on parole. (Slip opn. at pp. 12-13 [Molina ordered released without further consideration by the Board or review by the Governor]; *In re Burdan* (2008) 169 Cal.App.4th 18, 38-40 [reviewing a Governor's parole decision and stating that this Court's directive "to 'proceed in accordance with due process of law' does not mean the Board, or the Governor, is to be given an opportunity to reconsider the parole decision"].) The release order in this matter illustrates the disarray in the Courts of Appeal because the same court previously determined that it was not appropriate to release an inmate upon finding a due process violation in a Governor's parole decision, but rather the proper remedy was to remand the matter to the Governor to "proceed in accordance with due process." (*In re Capistran* (2003) 107 Cal.App.4th 1299, 1306-1307.) Thus, the conflict amongst the courts is not limited to different districts, but also within the divisions themselves.

These divergent interpretations of this Court's instruction "to proceed in accordance with due process" have led to results which are unjust to both the executive branch and the inmates. Depending on the reviewing court, the executive branch may or may not be given an opportunity to execute its duties in accordance with due process and retain its authority to determine parole suitability. Similarly, one inmate seeking enforcement of his due process rights may receive a new hearing, while a similarly situated inmate may be released on parole without review by the Governor. This inconsistency has become increasingly problematic since this Court decided *Lawrence* and will continue unless this Court provides specific guidance on the proper remedy for a due process violation in the parole context.

Accordingly, this Court's review is necessary to secure uniformity of decision. (Cal. Rules of Court, rule 8.500, (b)(1).)

CONCLUSION

The petition for review should be granted.

Dated: May 26, 2009

Respectfully submitted,

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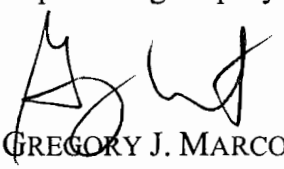

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,286 words.

Dated: May 26, 2009

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In re Miguel Molina

PETITION FOR REVIEW

EXHIBIT A

Filed 4/16/09 In re Molina CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re MIGUEL MOLINA, on Habeas Corpus.	2d Crim. No. B208705 (Super. Ct. No. CR13298) (San Luis Obispo County)

How should the Board of Parole Hearings (Board) determine a prisoner's suitability for parole? Our Supreme Court in *In re Shaputis* (2008) 44 Cal.4th 1241and *In re Lawrence* (2008) 44 Cal.4th 1181 gives guidance to the Board and the courts. Yet, numerous appellate decisions have interpreted these Supreme Court decisions in a variety of ways. We add to the plethora of cases.

Here the majority and dissent consider the issue whether the prisoner under consideration for parole is a current danger to society. Our majority opinion concludes that deference to the Board must end where there is no evidence to support its decision.

B. Curry, the Warden of the Correctional Training Facility (Warden), appeals a judgment granting a writ of habeas corpus and ordering the release of petitioner Miguel Molina. The superior court vacated the decision of the Board which had ruled that Molina was not suitable for release on parole. We conclude, among other things, that there is no evidence to support the Board's finding that Molina posed a current danger to society if released. We affirm.

FACTS

On December 5, 1984, Ruben Morales was watching television in a room of a "bunkhouse." Molina entered the room with a .22 caliber rifle. He shot and killed Morales. Dr. Stephen Jobst, a pathologist, determined that Morales "was shot a minimum of 15 times and a maximum of 18 times."

At the preliminary hearing, Jose Antonio Romero Zarate testified that he was Molina's coworker. Zarate lived at the residence where the shooting occurred and was there when Morales was killed. He said Morales did not live at the bunkhouse, but resided in another city.

Zarate testified that he and Molina had been living in the same room of the bunkhouse in May or June of 1984, in November of 1984, and between December 1 to December 5, 1984. Molina was not living there on the day of the shooting because he was expecting his brother to move there and stay in his room. Molina told Zarate that he had paid the current rent. Zarate testified that Molina's clothes and belonging were in the bunkhouse room on the day Morales was killed. He said that prior to the shooting Morales and Molina had been working together. They had an argument at work. Morales pulled out a knife and had chased Molina with it.

After the shooting, Molina fled. He was arrested four months later. After his arrest, Molina told detectives that Morales had stabbed him at work.

Molina pled no contest to second degree murder. He was sentenced to a state prison term of 15 years to life. At the 1985 sentencing hearing, the prosecutor said that second degree murder was "appropriate in this case." He noted that prior to the offense Molina and Morales had argued at work, and that Morales had pulled a knife on Molina.

On September 25, 2002, the Board found that Molina was suitable for parole and "would not pose [an] unreasonable risk of danger to society." The Governor reversed the Board's decision. The Governor's decision was vacated by the superior court

which granted a writ of habeas corpus. The Governor's decision subsequently was upheld on appeal.

The Hearing Before the Parole Board

At his 2006 parole hearing, Molina said, "It's very hard for me to wake up every day knowing that I took the life of a human being. And that's why I would like to ask Mr. Morales' family for forgiveness." Molina said he had lived at the residence where the crime took place and that Morales did not live there.

Molina presented evidence about his background, his family history, his rehabilitation, his plans upon release, his good behavior while in prison, and other positive parole suitability factors. The Board previously had requested a psychological evaluation. The psychologists concluded that Molina "poses no risk to society."

The Board denied parole. It noted that Molina claimed that he had lived at the residence where the crime occurred and that Morales did not live there. The Board said that it had reviewed the transcripts of his criminal proceeding and found: 1) there was no evidence or reference to any facts to support Molina's claim that he ever lived there, and 2) the evidence in that record showed that Morales lived there. It did not find that Molina lied, but found that his account of who resided there was inconsistent with the facts in the official record. Because of this inconsistency, there was "confusion" and a need for a new factual investigation. The Board found that his crime was egregious, but the remaining parole suitability factors were either positive or excellent.

The Superior Court Proceedings

Molina filed a petition for a writ of habeas corpus. In granting the writ, the superior court found, among other things, that the Board made findings about the commitment offense that were not supported by any evidence and that there was no evidence that Molina was a current threat to public safety. It noted that the Board claimed that Molina's account of his offense was not consistent with the official record because he said that he had lived at the bunkhouse and that Morales did not live there. The court concluded that the evidence in the record showed that Molina had lived at the

bunkhouse and there was no evidence that Morales lived there. It said that the Board "found Molina unsuitable only because they convinced themselves that whether Molina went to Morales' 'residence' or Morales went to Molina's 'residence' is of controlling importance." But that was "not probative of whether Molina presents an 'unreasonable risk'" to society.

DISCUSSION

I. *Findings on Facts Involving Molina's Crime*

The Warden contends that we must defer to the Board's findings about the facts relating to Molina's offense. He claims the trial court improperly rejected findings the Board made about the commitment offense. We disagree.

A parole board has substantial discretion to weigh the relevant factors involving an inmate's history and rehabilitation in deciding whether to grant or deny parole. But that discretion is not unlimited. "[A] petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision . . . ." (*In re Lawrence*, *supra*, 44 Cal.4th 1181, 1205.) If the Board's decision on the parole suitability factors "is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus . . . ." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658.)

To protect a prisoner's due process rights and to prevent arbitrary decision making, the Board's findings must be supported by a "modicum of evidence." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1205.) A court may properly vacate a Board decision that relies on factual findings which have no evidentiary support. (*Ibid.*) We, like the trial court, conclude that the Board based its decision on assumptions about who resided at the murder scene. But these assumptions are ill-founded.

The Board found that the evidence in Molina's criminal case showed that Morales was killed at "[Morales'] own home." It consequently concluded that this contradicted Molina's claim that Morales did not live at the bunkhouse. This finding is not supported by any evidence. The Warden claims the court had no authority to make

this ruling. We disagree. Although the court may not weigh or reweigh the evidence, or decide credibility, it must decide whether there is some evidence in the record to support the Board's factual findings. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212.)

In his return to the petition for writ of habeas corpus in the trial court, the Warden cited six references to Zarate's testimony in the preliminary hearing transcript. He claimed they support the Board's finding that Morales was living at the bunkhouse. In one reference relied on by the Warden, Zarate testified that on December 5, 1984, there was another man who was going to move into the room with him at the bunkhouse. But this testimony does not support the Board's finding because Zarate was not referring to Morales as the individual who would be moving into the bunkhouse. Another portion of Zarate's testimony relied on by the Warden involved a list of names of the individuals who had lived at the bunkhouse. But this provides no evidentiary support because Morales is not included in that list. The remaining four references to Zarate's testimony relied on by the Warden make no mention of Morales.

In his return, the Warden also alleged that a November 1985 probation report supplies evidence that Morales lived at the bunkhouse. The report contains no such evidence. It states that Zarate told police that the shooting took place in Zarate's room at the bunkhouse.

The only evidence regarding where Morales lived came from Zarate's testimony, and it refutes the Board's finding. Zarate testified that although Morales was in the bunkhouse room on the day of the shooting, Morales did not live there. He lived in another city.[1] This testimony was uncontradicted. There is simply no evidence that Morales lived at the bunkhouse. Consequently the Board erroneously assumed that Molina misstated facts when he said Morales did not live there.

The Board noted that Molina claimed he had lived at the place where he committed the offense. It said it had read the transcripts, "looked at everything," and

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[1] In a prior decision (*People v. Molina* (July 22, 2004, B170538) [nonpub. opn.]), on an earlier habeas case, we stated that Morales was "sitting in his room" when he was killed. That was incorrect.

found that all the evidence in his criminal case contradicted his claim. We note that the trial court found that there was no evidence to support the Board's findings. Indeed that is also our finding.

In his return, the Warden claimed that a November 1985 probation report contains evidence that Molina had not lived at the bunkhouse. That report reflects that Molina told police at the time of his arrest that he had been living in another city, Fresno. But the Warden's reliance on this report is misplaced because it involves statements by Molina about a different time period. His arrest occurred several months after the shooting.

The Board claimed that there is nothing in the probation reports to indicate that Molina had ever claimed that he had been living at the place where the crime took place. But the Board was wrong. The November 1985 probation report reflects that at the time of his arrest, Molina in discussing the crime told police that Morales "had come over *to his place* . . . ." (Italics added.)

The Warden claimed that another document, the December 1985 probation report, contains evidence to support the Board's findings. That report reflects that immediately before the shooting took place, Molina confronted Morales at *Molina's house*. The report indicates that Molina said he shot Morales after "[*Molina*] *went into his house* and took a shower and . . . exited the bathroom" and discovered that Morales was there. (Italics added.) This account is consistent with what Molina told the Board at the parole hearing and directly contradicts the Board's findings.

At the preliminary hearing, Zarate testified that before the day of the shooting, Molina had been living in the room where the murder took place. Molina had paid the rent and his clothes and belongings were there on the day of the murder. The Board erroneously assumed Molina misstated facts when he claimed that he had lived at the bunkhouse.

Moreover, the facts about who resided at the bunkhouse did not prevent the Board from making the determination about whether his crime was egregious. The Board

said that regardless of whether Molina barged in on the victim or vice versa, Molina had committed "an egregious crime." But that does not end the inquiry.

Molina correctly notes that the Board was so preoccupied with the peripheral facts about who lived at the bunkhouse, that it ignored the critical issue of whether he was currently a threat to public safety.

"[W]hen a court reviews a decision of the Board . . . , the relevant inquiry is whether some evidence supports the *decision* of the Board . . . that the inmate constitutes a current threat to public safety . . . ." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212.) The Board may certainly consider the "circumstances of the commitment offense." (*Id.* at p. 1214.) But "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public . . . ." (*Ibid.*) The Board's findings on this issue must be supported by evidence, and "not merely by a hunch or intuition." (*Id.* at p. 1213.) Consequently the critical issue is whether there is evidence in the record of current dangerousness. (*Id.* at p. 1212.)

II. *Current Danger to Society*

Molina contends that there is no evidence that he posed a current danger to society if released on parole. We agree.

The Board had no evidence of current dangerousness before it and made no findings on specific facts that show that Molina would pose a risk to the public. Instead, it assumed there was a need for another factual inquiry based on its erroneous assumption that Molina had misstated facts about who lived at the house.

A) *Medical Evidence and Psychological Evaluations*

All the medical evidence and psychological evaluations before the Board uniformly concluded that Molina did not pose a current danger to society.

In the most recent evaluation, two psychologists, Dr. M. Macomber and Dr. Bill Zika, concluded: 1) Molina had a positive personality, 2) he was "free from any mental" problems, 3) he had no emotional problems, and 4) the "commitment offense

was entirely out of character for him . . . ." Both of them unequivocally concluded that Molina "*poses no risk to society*." (Italics added.)

The Warden claims that the Board could find that Molina lacked the ability to appreciate and understand the nature of his offense. But, as Molina notes, the Board did not make such a finding. "We must confine our review to the stated factors found by the Board . . . not to findings that the Attorney General now suggests the Board might have made." (*In re DeLuna* (2005) 126 Cal.App.4th 585, 593-594.) Moreover, even had the Board made such a finding, there must be evidence to support it. Here the Board suggested that Molina may have misstated facts, but that conclusion was based on the Board's erroneous assessment of the facts. The Board did not find evidence that showed that Molina had any mental, emotional, psychological or behavioral deficiency or any character flaw that could cause him not to understand or appreciate the serious nature of his crime.

The Warden cites *In re Shaputis*, *supra*, 44 Cal.4th 1241. There our Supreme Court concluded that a decision to deny parole may be sustained on the ground that the prisoner lacks insight about his crime. But the court noted that there was medical evidence in the record that supported a finding on this issue. It said, "recent psychological reports" reflected that the prisoner's "character remains unchanged and that he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming.'" (*Id.* at p. 1260.)

In *Lawrence*, our Supreme Court concluded that the petitioner was suitable for parole notwithstanding the Governor's reliance on psychiatric evaluations which concluded that she was "'sociopathic, unstable and moderately psychopathic.'" (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1223.) The court said that there was no evidence of current dangerousness because the more recent evaluations found she had no psychiatric problems. (*Id.* at pp. 1223-1224.)

Here the evidence is entirely favorable to Molina. Dr. Stack found that Molina "indicated *his understanding of the seriousness of his actions in taking the life of*

a human being. He expressed *great remorse*, and *demonstrated insight, empathy for the victim* and the victim's family, and *awareness of his serious level of responsibility*." (Italics added.) Molina did not have any mental or emotional conditions or psychiatric disorders that would lead to a risk of recidivism or make him a threat to society. Dr. Stack said, "Molina would indeed pose a very low threat if released to the community . . . . [¶] . . . [¶] Inmate Molina's prognosis is positive for being able to maintain his current mental state in the community upon parole."

The Board discussed Dr. Stack's evaluation and found the findings in that report to be positive. It said, "Dr. Stack gave you a GAF score of 90. GAF stands for global assessment functioning. It talks about how you might function in the community. It's kind of like an A- if you're doing grades on a report card."

There was additional evidence in the record showing that Molina understood and had insight about the serious nature of his crime. In a prior report, Dr. Carswell determined that Molina "appears to be very remorseful and shows empathy for the victim. . . . He appears to have *insight into his crime* . . . ." (Italics added.) "If released to the community, his violence potential is estimated to be no more than the average citizen in the community."

Where, as here, the "unanimous clinical evidence" shows that the prisoner is not a danger to society and has insight, the Board does not have "some evidence" to make contrary findings. (*In re Roderick* (2007) 154 Cal.App.4th 242, 272; see also *In re Lawrence*, *supra*, 44 Cal.4th at pp. 1222-1223 [Governor could not ignore "a decade's worth of psychological assessments" favorable to the prisoner and then claim that there was some evidence to support a negative contrary finding].)

At oral argument, the Warden suggested that the Board could find that Dr. Carswell may have relied on Molina as the sole source for the facts about the commitment offense. But that is not the case. Dr. Carswell reviewed the case records. In his report he said, "There is *much evidence in his Central file* which support[s] [Molina's] story . . . ." (Italics added.) Dr. Carswell was not relying solely on Molina as

the factual historian. Moreover, most of his report involved a diagnostic assessment of Molina's insight, remorse, lack of potential for violence, his positive institutional adjustment and his ability to adjust to the community on release. The Warden has not met his burden to show that there is evidence in the record that contradicts Dr. Carswell's positive findings on these issues. (*In re Smith* (2003) 114 Cal.App.4th 343, 369.)

The Warden claims that at the parole hearing Molina was attempting to justify the murder. But that is not the case. Molina was asked why he committed the crime. He described his state of mind at the time of the offense. He said he was scared, intoxicated, depressed and was an immature young man. Molina said that before the shooting, he and Morales had worked at the same company. Morales was upset with him, had followed him and had chased him with a knife. He was frightened of Morales and ran away. Molina said he should have called the police after Morales had threatened him. He was not trying to justify what he did. In fact, he told the Board, "It's very hard for me to wake up every day knowing that I took the life of a human being."

The Warden's argument here is essentially the same argument the Governor unsuccessfully advanced in *Lawrence*. There, at a parole hearing the prisoner who had been convicted of first degree murder said that she killed another woman because the victim was "the obstacle in [her] fantasy romance." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1222.) The prisoner added, "[S]he was the one that was keeping me from having what I wanted." (*Ibid.*) The Governor concluded that she lacked remorse and was trying to justify the murder. But the court said she "was explaining her state of mind at the time of the homicide," which is different than justifying murder. (*Ibid.*) It noted that her remorse was documented and confirmed by numerous psychological assessments, and consequently there was no evidence to support a finding that she lacked remorse. (*Id.* at p. 1223.) That is also the case here as Molina's remorse has been consistently documented in the various psychological assessments.

The Warden suggests that the Board could conclude that Molina's claim at the parole hearing that he feared Morales was a new claim and inconsistent with anything

he had ever raised in his criminal case. But that is not accurate. At Molina's sentencing hearing, his counsel said she had not raised a self-defense claim. But she felt that a relevant mitigating sentencing factor was that Molina "felt very frightened by Mr. Morales, and he felt that he was going to be knifed by him." The prosecutor conceded that Morales had pulled a knife on Molina before the day of the shooting. He said there was no conflicting evidence on this issue. In addition, the November 1985 probation report indicates that Molina told police that Morales had "come after him with a knife."

Here the result reached by the trial court is consistent with *Lawrence*. There is no medical evidence or psychological assessments that support a finding that Molina poses a current danger to society if released on parole.

B) *Rehabilitation and Positive Parole Suitability Factors*

Molina claims that the Board's own findings showed that he was a model prisoner who had rehabilitated himself. We agree.

Suitability factors for parole include, among other things, the absence of a juvenile record, the lack of an extensive adult criminal record, stable relationships with others, realistic plans made by the inmate for the release on parole, rehabilitation efforts, remorse, efforts made for personal improvement, and the inmate's acceptable record of behavior within the penal institution. (*In re Shaputis*, *supra*, 44 Cal.4th at p. 1257.)

At the hearing, the Board made numerous favorable findings on these factors. It found that Molina had "very sound" parole plans for his release. He obtained his GED and took business courses. He became "well qualified and certified in the area of bookkeeping." He received "laudatory chronos." His 16-year participation in AA was "excellent." He received training in "controlling antisocial behavior" and for "community re-entry."

As to his progress in rehabilitation, it found that Molina had "done a very good job in upgrading [himself] . . . ." Presiding Commissioner Shelton said, "[Y]ou truly have, Mr. Molina, taken advantage of what the State has to offer. . . . The bottom line is, sir, you've done an excellent job."

The Board found that his social history "was fairly stable," his "family is still intact" and "very supportive of [Molina] being paroled." It said Molina's behavior in prison was excellent. Presiding Commissioner Shelton said, "[Y]ou have received absolutely no 115's and I commend you for that. That is often beyond my comprehension how someone can do that . . . ." The Board found that, other than his commitment offense, Molina had "no juvenile record" and "no adult record."

The Warden does not suggest that the Board's favorable findings on these factors are not supported by the record. In *Lawrence*, the Supreme Court ruled that the Governor's finding that the prisoner had committed an especially egregious premeditated first degree murder was not sufficient to justify denying parole. It noted that there were several favorable parole suitability factors including: 1) that the prisoner was "incarcerated for nearly 24 years," 2) she had "an exemplary record of conduct" in prison, 3) she participated in "many years of rehabilitative programming," 4) she expressed remorse and insight, and 5) the more recent psychological reports concluded that she was not currently dangerous. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1226.) The court held that given these favorable suitability factors, the Governor's denial of parole violated the prisoner's right to due process. (*Id.* at p. 1227.)

In contrast to the petitioner in *Lawrence*, Molina is a more suitable candidate for parole. Molina's offense was less egregious, he was convicted of second degree murder, and *all* his psychological reports were favorable. The Board's decision to deny parole cannot be sustained.

III. *Ordering Molina's Release*

The Warden claims that the trial court erred by ordering Molina to be released from prison. He contends it should have remanded the matter to the Board for another hearing. We disagree.

The superior court properly granted the writ because there is no evidence that Molina is currently dangerous. (*In re Lee* (2006) 143 Cal.App.4th 1400, 1414.) The Board initially granted parole in 2002. Any further delay is unwarranted.

The judgment is affirmed. We remand to the superior court. The superior court shall in turn remand to the Board with instructions to release Molina on parole in accordance with conditions set by the Board. The supersedeas stay order is vacated.

NOT TO BE PUBLISHED.

GILBERT, P.J.

I concur:

PERREN, J.

YEGAN, J. Dissenting

I respectfully dissent. The majority mischaracterizes the basis of the Board's decision. The majority states: "We, like the trial court, conclude that the Board based its decision on assumptions about who resided at the murder scene. But these assumptions are ill-founded." (Maj. Op. p. 4.) "Molina correctly notes that the Board was so preoccupied with the peripheral facts about who lived at the bunkhouse, that it ignored the critical issue of whether he was currently a threat to public safety." (Maj. Op. p. 7.)

The Board did not base its decision on erroneous assumptions about who resided at the bunkhouse, nor did it ignore the critical issue of Molina's current dangerousness. It determined that Molina "would pose an unreasonable risk of danger to society or a threat to public safety if released from prison" because his version of the commitment offense was contrary to evidence in the Board's records. Those records showed that Molina had committed a calculated, execution-style murder. Zarate testified that Molina had opened the door to the bunkhouse and had immediately fired his rifle at Morales, who was sitting on a bed watching television. A pathologist testified that between 15 and 18 bullets had struck Morales. All of the entry wounds were "distant wounds" except for "two rounds on the left side of the face which were close-range wounds." The close-range wounds had been fired at a distance of two to three inches up to a maximum of 24 inches. The pathologist opined that the close-range wounds "were the last two shots fired." Based on this evidence, it is reasonable to infer that, after firing between 13 and 16 bullets into Morales's body, Molina delivered a two-round "coup de grace" to the head to assure that Morales was dead.

Molina's version of events casts him in a totally different light. At the 2006 hearing, he told the Board: "I went to my house where I lived to take a shower because we were going to celebrate one of my friend's birthdays. And he [Morales] arrived there with his friend and that's where *the fight* started. And unfortunately, that's where I took Mr. Morales' life." (Italics added.) According to Zarate, there never was a fight at the

bunkhouse. Molina entered the premises and killed Morales before he was able to get up from the bed.

Molina's version of events is consistent with his earlier statements. At a 2002 parole hearing, he told the Board that Morales and two other persons had entered his apartment and had confronted him as he was exiting the bathroom. "They were exclusively there to make sure they would stab me. They actually had a switchblade on them." Morales pulled out the switchblade and made "a gesture to stab" Molina. Molina "picked up the rifle" to protect himself. They "were in the middle of a fight" when he shot Morales.

Molina gave a similar version of events to the probation officer who prepared a supplemental probation report in 1985 after Molina's no contest plea to second degree murder: "Subject [Molina] states he went into his house and took a shower and when he exited the bathroom noticed that Ruben Morales, Tony Romero and a third person who he did not know were inside the residence drinking beer and smoking marijuana. Subject states that the victim said he was going to pay for it and then Mr. Morales got a knife from the kitchen and struck at [Molina] puncturing him in the right forearm. Mr. Molina relates that he then began running to the room where his rifle was kept and enroute Mr. Morales hit him in the back of the head. Subject states he indicated to the victim that he did not want to fight and began moving away from him but Mr. Morales kept coming at [Molina]. Mr. Molina states that he then turned around and pulled the trigger on the rifle and shot Mr. Morales." "Mr. Molina feels that in reality he is not guilty of murder as the victim provoked [him] until [he] had no choice but to defend himself."

At the 2006 hearing, the Board took a recess after hearing Molina's version of events. The purpose of the recess was to prepare its decision. During the recess, the Board reviewed its records and became aware of the discrepancy between Molina's version and the facts as shown in its records. When the hearing resumed, the Board expressed concern about this discrepancy: "We have been reviewing your files and reviewing your files and we have been confused, frustrated and concerned. It appears that there are two totally different stories as to this offense. Your version is that you

came out of the shower in your home and was [*sic*] greeted by three men. And you ran into the bedroom and got the gun and shot [Morales]. The official version from the Sheriff's Department, the District Attorney's Office and everybody else is . . . Mr. Morales was in his own home." "Well, we have struggled and that's why it took us so long to get you in here [after taking the recess], because . . . it's like totally two different worlds."

In view of the conflicting versions of events, the Board decided to further investigate the matter: "We are going to request an investigation from the State to verify what, in fact, happened. If you look at it from our side of the table, on one hand if you were coming out of your shower in your own home and you stumbled across three people in your home, one who you'd been having problems with, that's one scenario. Probably a more plausible one for your behavior. Everything shows that you entered Mr. Morales' home with a loaded gun and shot him 15 to 18 times. That's a whole lot different set of circumstances. We have been through your C-file. We've looked at everything. There's no verification. You have one totally different story than the other stories." "[T]his issue is like day and night in terms of where were you when the crime was committed. Were you barged in on or did you barge in? Were you the barger inner? So we need to clarify that." "[W]as this an execution style offense or was it defense to some degree?" "[I]f you're being truthful, the records are all wrong. So we have an Investigative Division at the State Department and we're going to spell that out as clearly as we can and have them review it for us. So it's done and ready for your next hearing."

In reviewing its records, the Board must also have become aware of a conflict as to why Molina had purchased the rifle used to shoot Morales. Molina told the Board that, about one week before the shooting, he had purchased the rifle to go rabbit hunting. But based on Zarate's statements to the police, it is reasonable to infer that Molina purchased the rifle to kill Morales. According to the original probation report, Zarate told the police that Molina and Morales had an argument at their workplace approximately one month before the shooting. "During the argument [Molina] accused Mr. Morales of taking piece work from him and a confrontation developed. Mr. [Zarate] further stated that during this

confrontation there was a knife involved and Mr. [Zarate] heard Mr. Molina tell the victim that he was going to kill him. According to Mr. [Zarate] that same day Mr. Molina went to K-Mart department store and purchased a rifle." Although Molina pleaded guilty to second degree murder, the Board could consider facts showing that the murder was premeditated. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 678-679 [even though inmate had been acquitted of first degree murder, Governor not precluded from considering evidence of premeditation and deliberation in reviewing Board's decision granting parole]; *In re Burdan* (2008) 169 Cal.App.4th 18, 35 ["while second degree murder [to which Burdan had pleaded guilty] does not involve premeditation, the Governor [or Board] may consider facts suggesting Burdan planned and prepared for the murder"].)

Because of the conflicting versions of events, " 'some evidence' supports the conclusion that [Molina] is unsuitable for parole because he . . . currently is dangerous." (*In re Lawrence, supra,* 44 Cal.4th at p. 1191.) Based on Zarate's statements and the pathologist's testimony, the shooting was a premeditated, execution-style murder. Based on Molina's version of events, the shooting was in self-defense against an assault with a deadly weapon perpetrated by an intruder who had entered his home. The Board did not accept Molina's version. It stated, "Everything shows that you [Molina] entered Mr. Morales' home with a loaded gun and shot him 15 to 18 times." In view of Molina's refusal to acknowledge that he had sought out Morales to kill him, the Board impliedly found that he lacked insight into his crime and showed insufficient remorse. "[E]vidence in the record corresponding to both suitability and unsuitability factors" include, "importantly, the inmate's attitude concerning his or her commission of the crime . . ." (***Id.***, at p. 1213.) "In some cases, such as those in which the inmate . . . 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; see also *In re Shaputis*, *supra*, 44 Cal.4th at p. 1261 [some evidence in the record supported Governor's conclusion "that petitioner remains a current danger to the safety of the public, and specifically that the gravity of

the offense and petitioner's lack of insight and failure to accept responsibility outweigh the factors favoring suitability for parole"].)

The majority relies on psychological evaluations concluding that Molina does not pose a current danger to society. But " 'the Governor [or Board] . . . has broad discretion to disagree with [the] State's forensic psychologists . . . .' " (*In re Rozzo,* __ Cal.App.4th ___, ___ 2009 DJDAR 3971, 3979.) Here the psychological evaluations are suspect because they are based on Molina's version of events. The most recent psychological evaluation is a one-page perfunctory report prepared in October 2005. It relies on a 2004 psychological evaluation prepared by Dr. S. Stack: "The recent psychological evaluation by Dr. Stack . . . was reviewed. The contents of this evaluation and the conclusions are accurate." Dr. Stack's 2004 evaluation does not disclose the details of Molina's crime. Instead, it refers the reader to a 2001 psychological evaluation "for a detailed review of the life crime."

The 2001 psychological evaluation recounts Molina's version of events, not Zarate's: "Inmate Molina described the circumstances surrounding his commitment offense. His view of the crime continues to be consistent over time. He reports that he was very afraid of the victim and had been having difficulties with him for some time. On the evening of the crime, the inmate . . . went to his friend's apartment to shower, and when he came out of the bathroom, the victim and two other men were there. The inmate ended up shooting the victim with a shotgun." The evaluation quoted Molina as saying: " 'The victim invited me to fight. He had a big knife and chased me all over. I was scared to death. I was hiding from him.' " No mention was made of the evidence indicating that, instead of hiding from Morales, Molina had hunted him down. The 2001 psychological evaluation concludes: "There is much evidence in the Central file which supports [Molina's] story that he was perhaps defending himself in committing this crime."

At the 2006 hearing, the Board expressed concern with the psychological evaluations because it was "unclear" which "version of events" they were "relying on." The Board requested that Molina undergo a new psychological evaluation after the

completion of the investigation to assure that the evaluation would be based on the actual circumstances of the crime.

In *Lawrence* our Supreme Court noted that "the Board's ' "discretion in parole matters has been described as 'great' [citation] and 'almost unlimited' " [citation].' [Citation.] 'Resolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the Board.' [Citation.]" (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1204.) Here the majority usurps the Board's authority by reweighing the evidence. The majority does not even discuss evidence in the record indicating that Molina fabricated a story to excuse his conduct and deceive the Board as to the true nature of the commitment offense. Instead, the majority concludes that "the evidence in this record is entirely favorable to Molina." (Maj. Op. p. 8.)

The majority faults the Board for "assum[ing] there was a need for another factual inquiry based on its erroneous assumption that Molina had misstated facts about who lived at the house."[1] (Maj. Op. p. 7.) But the Board's decision to conduct a factual inquiry was not based on such an erroneous assumption. It was instead based on the Board's reasonable concern that, in an attempt to minimize his culpability for the murder, Molina had constructed an entirely false version of the commitment offense. The Board wanted to ascertain the circumstances of the crime and determine whether Molina appreciated its magnitude.

The " 'some evidence' " standard is 'extremely deferential' [citation] . . . ." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1233.) The majority accords no deference to the Board's decision. At the very least, instead of affirming the trial court's judgment ordering Molina's release, the majority should have remanded the matter to the Board for

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[1] It is understandable why the Board questioned Molina's statement that the shooting had occurred not in Morales's home but in his own home. In our 2004 opinion, this court stated: "On December 5, 1984, Molina bought a .22 caliber rifle and went to *the home of Ruben Morales*, who was unarmed and sitting down watching television. Molina entered the home and killed Morales." (Italics added.) "He [Molina] drove to *Morales' home* with it [the rifle] and looked 'around the room' before shooting Morales." (Italics added.) The Board was entitled to rely on our summation of the facts.

further consideration in light of the investigation's findings and our Supreme Court's decisions in *Lawrence* and *Shaputis*. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 [if the Board's decision "is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law"]; *In re Ramirez* (2001) 94 Cal.App.4th 549, 572, disapproved on other grounds in *In re Dannenberg* (2005) 34 Cal.4th 1061, 1100 [trial court erred in ordering the Board to set a parole date instead of requiring it to conduct another parole suitability hearing in conformance with lawful guidelines; "[t]he Board must be given every opportunity to lawfully exercise its discretion over [the inmate's] parole application"].)

When the Board makes an adverse parole decision, it sits as trier of fact and may draw reasonable inferences from the evidence that it credits. Both the superior court and the majority draw inferences in favor of the prisoner and, based thereon, grant extraordinary relief. This is not their "call." (See *In re Smith* ___Cal.App.4th ___ [2009 DJDAR 3855].)

I would reverse the judgment granting a writ of habeas corpus and ordering Molina's release.

NOT FOR PUBLICATION

YEGAN. J.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Jennifer A. Neill, Supervising Deputy Attorney General, Gregory J. Marcot, Deputy Attorney General, for Appellant B. Curry, Warden of Correctional Training Facility.

Michael Satris, under appointment by the Court of Appeal, for Petitioner and Respondent Miguel Molina.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Molina**
No.: **B208705**

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 May 26, 2009, 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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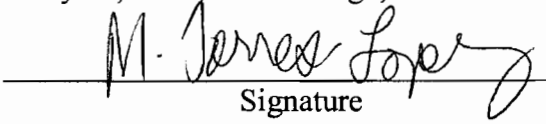
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 26, 2009, at San Diego, California.

M. Torres-Lopez
Declarant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