

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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 1241 and *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

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

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