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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re ELIZABETH OZERSON, on Habeas Corpus.	B233842 (Los Angeles County Super. Ct. Nos. A815403, BH007327)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Patricia M. Schnegg, Judge. Petition granted.

Rich Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Jennifer A. Neill, Acting Senior Assistant Attorney General, Phillip Lindsay, Amy M. Roebuck, and Jennifer O. Cano, Deputy Attorneys General, for Respondent.

Elizabeth Ozerson petitions for a writ of habeas corpus to overturn the July 2010 decision of the Board of Parole Hearings finding her unsuitable for parole. After reviewing the entire record we find no evidence to support the Board's decision. Therefore, we grant the petition.

BACKGROUND

In 1987, the court sentenced Ozerson to a term of 15 years to life for the second degree murder of her husband, plus a two-year enhancement for personal use of a firearm in the killing. In 2004 the Board found Ozerson suitable for parole, but the Governor reversed that decision. In 2007 the Board found Ozerson unsuitable for parole. By a 2-1 vote we affirmed that decision. (*In re Ozerson* (July 13, 2009, B204725) [nonpub. opn.].) She challenges that decision in this writ proceeding.

A. The Commitment Offense

Ozerson married her husband Ray in 1975. In May 1979, Ray accidentally shot himself in the head while cleaning his revolver. Ozerson attempted to care for Ray, who made substantial progress in his recovery and was able to walk with a cane.

In the summer of 1981, Ozerson met Burt Kriesburg who worked in the same office building as she. They began an affair. In 1983, the Ozersons bought a home in Tarzana. One witness described their neighborhood as a "good, quiet neighborhood." Ozerson continued living with Ray but spent most of her free time with Kriesburg. It appears that Ray did not know about the affair for a long time, despite Ozerson's frequent absences from home and her claims that she was working overtime.

Kriesburg was a social visitor at the Ozersons' home. For a while, Ray and Kriesburg ran an insurance business together. During that time, the Ozersons obtained a number of insurance policies from Jefferson National Life Insurance Company. The amount of coverage on Ray's life was $240,000; Ozerson's life was insured for a substantial amount as well.

Ozerson was upset that Kriesburg continued to see other women, but she resisted his pleas that she leave Ray for him. Ozerson was conflicted and insisted that although she loved Kriesburg, she also loved Ray and did not want to walk out on a disabled man.

In December 1986, Ozerson told Kriesburg she was ready to leave Ray. Kriesburg bought two tickets to Switzerland for December 17. Ozerson assured Kriesburg that she would move out of the family residence by then. At first, she said she would move out on December 8, but she later made an excuse, putting off the move until December 10.

On December 10, 1986, the Ozersons were at home early in the morning. A number of the neighbors testified at trial that they saw Ozerson walking her dog after 7:30 a.m., later than her usual 7:00 a.m. walk. No one heard any gunshots. Returning home at approximately 7:45 a.m., Ozerson greeted Daniel Hale, the son-in-law of a neighbor, Ann Ostrander, and then went inside her house. Moments later, Ozerson came running out of her backyard and said there was a man in her house and that Ray was inside. She was holding the dog leash and had the dog with her. Hale said the dog appeared calm. Hale brought Ozerson into his mother-in-law's home to call the police. Ostrander dialed "911" and summoned the police. Ozerson said, "I wonder what happened with Ray?" She also said, "My God, his car is out there," referring to Ray's car. Ozerson continued to express concern about her husband and wanted to go back into the house, but Hale and Ostrander persuaded her to wait for the police.

Hale went outside and looked around but did not see or hear anyone departing from the Ozersons' residence. He looked in the Ozersons' backyard and could see that a sliding door in back was open about 12 inches. He ascertained that the gate on the far side of the house appeared to be locked and that Ray's car was parked on that side of the driveway.

Los Angeles police officers Webb and Panek responded to the 911 call at 7:54 a.m. Webb entered through the back sliding door of the Ozerson residence and observed a man lying on the floor in a pool of blood. The officer radioed for emergency medical care. Los Angeles paramedic Gocke arrived at 8:05 a.m. and examined the body. He noted no vital signs. Gocke observed a ring on the decedent's finger.

Ozerson described the man she had seen in the house as Hispanic, about 5 feet 9 inches tall, medium build, wearing a dark cap and dark clothing. Webb, accompanied by several other police officers, searched the home thoroughly for the

suspect but found no one. Webb looked for evidence of escape. The grass in the yard was wet, but there were no footprints or impressions to indicate that someone had departed through the yard. Another officer informed Ozerson at the Ostrander home that her husband was in the house, dead. Ozerson was hysterical. The officer asked Ozerson if she would go to the police station to assist in the investigation. Ozerson seemed eager to cooperate and agreed to go to the station.

When Ozerson arrived at the West Valley Police Station, a police officer conducted a gun residue test on Ozerson, which came back negative. A pair of brown gloves belonging to her also tested negative for gunshot residue.

Ozerson was interviewed during the morning of December 10, then at length by Detective Dolley in the afternoon. Dolley advised her of her rights, which she waived. At various times, detectives told Ozerson untrue things to test her reaction. At one point, she was told she had tested positive for gunshot residue (she had not). Ozerson quickly explained that she had shot the family gun in the air in the backyard the night before the killing on December 9.

Dolley and another detective went out to the Ozersons' house to investigate. They found no sign of forced entry into the residence. Ray's body was in the family room area of the house. His cane was lying parallel to his body. In addition to his ring, Ray was wearing a watch on his left wrist and had $66 in his right pocket. There were no signs of a struggle. The detectives found a briefcase on the floor with a zippered clutch bag beneath it. Various items were positioned on the floor around the briefcase in a circle, seemingly staged. The only place in the house where there appeared to have been any activity was in the office. Desk drawers and a filing cabinet drawer were open, and papers were strewn about the floor. Dolley testified that in his experience, burglars usually go directly to residential bedrooms to check drawers for women's jewelry and men's wallets. There was no sign of such activity in the Ozerson house. Ozerson's jewelry was undisturbed. No effort had been made to take stereos or televisions, and the detectives noted there was no "exit plan." Experienced burglars typically open a door or two for an escape route in case they need to leave in a hurry. The detectives also

observed that Ray had been shot multiple times. A fleeing burglar, in their experience, would not engage in such overkill. The detectives noted Ray's car in the driveway, another anomaly, because most burglars avoid residences that appear to be occupied or at least they test the doorbell first.

The detectives searched for Ray's gun but did not find it in the bedroom nightstand. They did find a pink towel with what appeared to be a gun imprint on it. Gunshot residue was found on the towel, but not, as noted, on Ozerson, her clothing, or her brown gloves. Gunshot residue was later found on each glove of a pair of gray gloves belonging to Ozerson, which Ostrander found in her home at different times after the crime. One glove was found near her living room couch. Later she found the matching glove under her dining room table. Ostrander recalled seeing Ozerson wearing the gloves on the morning of the murder.

As for the gun, the Ozerson home and neighborhood were searched extensively on December 10 and 12, but a gun was not found. Firearms examiner Luczy recovered several bullets from the wall and floor of the room where Ray's body was found. The bullets were .357 magnum bullets and had been shot from a .38 caliber revolver. There was evidence that Ray's gun was a .38 caliber revolver. Luczy and others went back to the Ozersons' previous residence, where Ray's gun-cleaning accident had occurred in 1979, and extracted a .38 caliber bullet from the ceiling. Officers also checked a gun belonging to Kriesburg but determined the bullets that killed Ray were not fired by that weapon.

Forensic pathologist Schnittker performed the autopsy and testified the cause of death was multiple gunshot wounds to the back, head, and chest. Death occurred between 7:00 and 8:00 a.m. on December 10. Prosecutors advanced a theory that Ray had been shot twice in the back and then at closer range.

Ozerson denied guilt. A jury convicted her of second degree murder, and the court sentenced her to a term of 15 years to life plus a 2 year enhancement for use of a gun in the crime. We affirmed her conviction in an unreported opinion in 1988.

At her 2007 parole hearing, Ozerson confirmed that an account she had given some years before remained accurate, and she gave a similar account at her most recent hearing. She claims that her husband was killed by an intruder. On the day of the offense, she had taken her dog for a walk and upon return between 7:30 and 8:00 a.m. entered her home through the back sliding door. She knew her husband was home because it was a weekday, and the car was still in the driveway. She saw a man standing in her den, looking toward the dining area. He did not see her.

Ozerson immediately went to her neighbor's house and called the police. The police arrived and told her they found her husband dead in the den where she had seen the intruder standing.

Ozerson ultimately admitted that for the previous five years she had been having an affair with another man. She had lied to her lover about leaving her husband, first saying she would leave Ray on December 8, then December 9, and finally agreeing to leave him on December 10, the day Ray was killed. Ozerson's lover had badgered her, telling her that she was going to Switzerland with him. He purchased the tickets, then later told her he had returned the tickets. He bought the tickets again without her knowledge.

Ozerson stated she initially lied to the police, telling them that Kriesburg was a family friend and that she had not fired the gun the night before the killing. She stated that in the summer of 1986, Ray told her that he wanted to kill himself. He had expressed suicidal feelings before and talked about suicide the night before he was killed. He told Ozerson she would be there when it happened. Ozerson took the gun with the intention of throwing it in the garbage. Instead, she went to the grassy area in her backyard. The dog jumped on her arm, and she accidentally fired the gun into the air.

B. Ozerson's Social History

Ozerson was born on September 19, 1953, and raised in Scotland. Ozerson's mother still lives there; her father died in 1999. She has an older brother who also lives in Scotland.

Ozerson attended school in Scotland, graduating high school and completing one year of college. She met Ray in Boston and married him in 1975 in Great Britain, after which they moved to Germany, where Ray was stationed in the armed forces. Ozerson worked as a secretary for the United States Army in Nuremberg, Germany, for three years. She also was enrolled in a master's degree program for two and one-half additional years. Upon arriving in the United States, Ozerson worked for an insurance company, selling policies.

Ozerson has no juvenile criminal record. As an adult, she had one prior arrest for petty theft (she stole a carton of cigarettes). She was fined $80 and released. Ozerson has no history of illegal use of drugs or abuse of alcohol.

C. Ozerson's Prison Record

Ozerson has received no "CDC 115's" (serious infractions of prison rules) and only one "CDC 128-A" (minor infraction), which she received in 1997 for possession of contraband food ("some kind of jelly or something" in the words of a member of the Board.

While in prison, Ozerson has participated in numerous self-help courses and therapy programs. She received numerous awards and recognitions including certificates of appreciation from Title and Change, Alanon, and the Prison Pups Program, and for completing HIV and AIDS training. She also participated in the Life Long-Term organization, Children at Risk Walkathon, and Toastmasters. Ozerson was involved in a 12-week psychotherapy group and was a tutor secretary for a program called Yes, I Can. She received a certificate from the Mexican American Resource Association and participated in Victims Impact seminars, the Parenting program, Creative Conflict Resolution, Building Adequate Concepts with Life Plan for Recovery, Pathway to Wholeness, and Roots of Bitterness. She was a GED tutor and was involved in the Drug Awareness and Constant Relapse Prevention Program, Convicts Who are Women Versus Abuse seminars, Breaking Barriers, Narcotics Anonymous, and Alcoholics Anonymous. Ozerson also participated in Prison Fellowship Ministries, the Interfaith Chapel In-House Ministry, the Mentoring Outreach Program, drug awareness counseling, Anger

Management, No More Colors, Introduction to Conflict and Information Skills, Canine Support Teams, and Time for Change Foundation. She also took courses in the School of Ministry, Biblical Studies and earned an Associate of Arts degree. Her keyboarding certificate shows she types 97 words per minute. She is certified in Advanced Office Services, Sight Safety, and Introduction to Windows using Microsoft Windows 2000, Advanced Services, as well. Ozerson was employed at the prison as a clerk and received exceptional grades from her supervisors.

D. Ozerson's Parole Plans

Ozerson's plans upon parole release remain unchanged from her previous hearing. She plans to reside with a married couple in Thousand Oaks. The couple and other members of their church will provide transportation and financial and personal support such as food and new clothing. As backup options, she has support and a place to stay with Crossroads.

Ozerson continues to have multiple job offers for positions as an administrative assistant. One offer is from an engineering firm, another is from a medical group, and two others are from churches. Two of the positions would pay $15-$18 per hour; another pays $30,000 per year.

The Board took note of approximately 90 letters of support but this time did not read them into the record.

E. Ozerson's Psychological Evaluations and Insight

The Board considered Ozerson's 2005 and 2008 psychological evaluations by California Department of Corrections and Rehabilitation (CDCR) psychologists, which were entirely favorable to Ozerson. The Board read or paraphrased parts of the 2008 evaluation into the record, including the statements that Ozerson is "a mature, intelligent, honest and responsible adult who programs well and is observant of the institution's rules and regulations" and that she placed "in the low risk category for recidivism" and "pose[s] a low risk of violent recidivism."

The 2008 psychological evaluation states that when asked by the evaluator how she saw herself when she arrived in prison, Ozerson answered, "I had been lying to

myself about the affair I was having. I was lied to by the person I was seeing . . . . Physically, I was not well. I was not a very nice person. It took me a while to see that; it evolved by going to groups." The evaluator noted that Ozerson "has been responsive to the [Board's] recommendations to participate in self-help groups" and "has continued to participate in self-help groups per the [Board's] recommendation." As for how she sees herself now, Ozerson said she is "100% nicer and better than I was then. I am truthfully honest now, because I lived a lie at the time" of the crime. Asked what she considered to be the biggest change she had experienced since being imprisoned, Ozerson said, "My honesty."

The evaluation further states that "[t]o Ms. Ozerson's credit, she was able to discuss in detail her previous pattern of lying to the people in her life at the time of the life crime. She said, 'I lied to my husband about the affair. I lied (to my lover) about leaving my husband. I lied to my family and friends. I lied to the police about not shooting the gun the day before the crime. It's no wonder the police didn't believe me when I told them I did not shoot my husband.'" The evaluation continues, "During Ms. Ozerson's time in custody, she stated that she applied the 12-Step principles to address her pattern of lying to others. She related that others have suggested that she 'just go before the Board and admit you did it (the crime).' She stated that she believed that lying is what contributed to her conviction; she has reportedly dedicated herself to not repeating a similar pattern. From her perspective, a current admission of guilt for the crime would not be honest. Hence, she continues to maintain her innocence."

According to the 2008 psychological evaluation, Ozerson appears to have "worked diligently to develop insight into the causative factors of" her commitment offense, although her insight "has been limited to the causative factors of her extramarital affair." The evaluator concluded that Ozerson "has significant insight into her personality structure and how it has historically led to maladaptive patterns of lying to those around her. She was also able to identify the stressors, which were related to her caretaking responsibilities as precursors to her involvement in an unhealthy, extramarital affair." In addition, the evaluation states that Ozerson "has consistently demonstrated credible

remorse and sadness for her husband's death" and "believes her choice to have an extramarital affair contributed to her husband's murder[,] choices for which she still feels a certain level of shame and guilt."

F. District Attorney's Position on Parole

The Los Angeles County District Attorney opposed parole solely on the basis that Ozerson was lying when she denied killing her husband.

G. The Board's Decision

At the close of the hearing on July 7, 2010, the Board found Ozerson not suitable for parole on the basis of her mental state, because "[s]he continues to minimize her involvement in her husband's death in the face of overwhelming evidence in the record of her involvement and what that involvement is." This mental state, the Board concluded, "goes directly to being an unreasonable risk of dangerousness in a free community." The Board noted that Ozerson "significantly programs" (i.e., extensively participates in self-help programs), but the Board concluded that she "continues to appear to overcompensate in her programming" and participates in programs "in overcompensation and not dealing with other issues like her continual lying." The Board also referred elsewhere to Ozerson's "habitual lying" and "continued extreme lying" but identified no evidence of such lying other than Ozerson's denial of her guilt.

H. Habeas Corpus Proceedings

Ozerson filed a petition for writ of habeas corpus in the Los Angeles County Superior Court in September 2010. In February 2010 the court denied the petition, concluding the record contained some evidence to support the Board's unsuitability determination.

In June 2011, Ozerson filed a habeas petition in this court. We requested an informal response from the Attorney General. After receiving that opposition, we appointed counsel to represent Ozerson and issued an order to show cause. The Attorney General filed a return to the order to show cause, and Ozerson filed a traverse to the return.

DISCUSSION

Ozerson argues that the Board's decision to deny parole is not supported by "some evidence." We agree.

A. Governing Law

In a series of decisions beginning with *In re Rosenkrantz* (2002) 29 Cal.4th 616 and including most recently *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*), the Supreme Court has explained both the standard to be applied by the Board in making parole decisions and the "some evidence" standard for judicial review of those decisions. We begin with a summary of the legal principles articulated by the Court.

"The applicable statutes provide that the Board is the administrative agency within the executive branch that generally is authorized to grant parole and set release dates. ([Penal Code,] §§ 3040, 5075 et seq.) The Board's parole decisions are governed by section 3041 and title 15, section 2281 of the California Code of Regulations ([Cal. Code] Regs., [tit. 15,] § 2230 et seq.).[**1**] Pursuant to statute, the Board 'shall normally set a parole release date' one year prior to the inmate's minimum eligible parole release date, and shall set the date 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude *in respect to their threat to the public . . . .*' (§ 3041, subd. (a), italics added.) Subdivision (b) of section 3041 provides that a release date must be set 'unless [the Board] determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the *public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.'" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1201-1202, fn. omitted (*Lawrence*).)

The governing regulation "sets forth the factors to be considered by the Board in carrying out the mandate of the statute," guiding "the Board's assessment of whether the

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[1] Unless otherwise indicated, all further unspecified statutory references are to the Penal Code, and all further undesignated references to regulations are to title 15 of the California Code of Regulations.

inmate poses 'an unreasonable risk of danger to society if released from prison,' and thus whether he or she is suitable for parole. (Regs., § 2281, subd. (a).)" (*Lawrence*, *supra*, 44 Cal.4th at p. 1202.) The same regulation also lists certain factors that may tend to show an inmate is suitable or unsuitable for parole, such as the presence or absence of a previous history of violence. (Regs., § 2281, subds. (c), (d); see *Lawrence*, *supra*, 44 Cal.4th at pp. 1202-1203 & fns. 6-8.)

"In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety . . . . Moreover, . . . the core determination of 'public safety' under the statute and corresponding regulations involves an assessment of an inmate's *current* dangerousness. . . . [A] parole release decision authorizes the Board . . . to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.'" (*Lawrence*, *supra*, 44 Cal.4th at pp. 1205-1206, quoting *Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.)

Judicial review of the Board's decision is conducted under the highly deferential "some evidence" standard. "When reviewing a parole unsuitability determination by the Board . . . , a court must consider the whole record in the light most favorable to the determination before it, to determine whether it discloses some evidence—a modicum of evidence—supporting the determination that the inmate would pose a danger to the public if released on parole." (*Shaputis II*, *supra*, 53 Cal.4th at p. 214.) "The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence." (*Id.* at p. 221.)

Beyond those general principles, several Supreme Court decisions bear directly on our analysis in this case. In *Lawrence*, the petitioner was convicted of first degree murder for killing her lover's wife. (*Lawrence*, *supra*, 44 Cal.4th at p. 1190.) When the Board for the fourth time found her suitable for parole in August 2005, she had been free of serious discipline throughout her 23 years of incarceration, had "worked as a plumber

for the prison and volunteered as a tennis coach for other inmates," had earned bachelor's and master's degrees, and in various other respects appeared to have been rehabilitated and unlikely to reoffend. (*Id.* at pp. 1194-1195, 1199.) The inmate "had no prior criminal record or history of violent crimes or assaultive behavior." (*Id.* at p. 1225.) In addition, her "psychological reports map[ped] the path of her rehabilitation," from an initial negative report in 1984 to "12 separate evaluations since 1993," conducted by five psychologists, all concluding that she "no longer represented a significant danger to public safety." (*Id*. at pp. 1194-1195.)

The Governor, however, reversed the Board's decision on the ground that the circumstances of the murder "'demonstrated a shockingly vicious use of lethality and an exceptionally callous disregard for human suffering.'" (*Lawrence*, *supra*, 44 Cal.4th at p. 1200.) The Court of Appeal granted the inmate's habeas corpus petition, concluding that the Governor's decision was not supported by "some evidence," and the Supreme Court affirmed. (*Id.* at pp. 1191, 1201.)

In explaining its reasoning, the Court resolved a conflict in the decisions of the Court of Appeal. One line of cases had reasoned that "a denial-of-parole decision must be affirmed if 'some evidence' supports the Board's or the Governor's factual determination that the commitment offense was particularly aggravated, or that some other factor establishing unsuitability is present." (*Lawrence*, *supra*, 44 Cal.4th at p. 1208.) Another line of cases, however, had reasoned that "the some evidence standard . . . poses not simply a question of whether some evidence supports the factors cited for denial, but instead, whether the evidence supports the core determination . . . that an inmate's release will unreasonably endanger public safety," concluding that "'[s]ome evidence of the existence of a particular factor does not necessarily equate to some evidence the parolee's release unreasonably endangers public safety.' [Citation.]" (*Id.* at p. 1209.)

The Supreme Court agreed with the second line of cases. First, the Court held that "when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the

inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.) Second, the Court held that some evidence of the existence of a parole unsuitability factor—the factor at issue in the case before the Court was the aggravated circumstances of the commitment offense—does not always constitute some evidence of current dangerousness: "[A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Id.* at p. 1214.) Thus, "mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id.* at p. 1227.) "[T]he relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Id.* at p. 1221.)

Applying that standard to the case before it, the Court concluded that there was no rational nexus between the aggravated circumstances of the commitment offense and a finding of current dangerousness. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1224-1226.) "The commitment offense occurred 36 years ago when petitioner, who is now 61 years of age, was 24 and . . . under significant emotional stress as a result of her love affair with the victim's husband." (*Id.* at p. 1225.) Psychological evaluations had emphasized that the inmate "committed this crime while she was experiencing an unusual amount of stress arising from circumstances not likely to recur, and . . . for this reason (as well as her prior crime-free life, her age, and her record of rehabilitation) there was a low risk she

would commit another violent act if released." (*Id.* at pp. 1225-1226.) For these reasons and others, the Court concluded that "the unchanging factor of the gravity of petitioner's commitment offense has no predictive value regarding her *current* threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole at the present time." (*Id.* at p. 1226.)

The companion case of *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis I*) further clarified the "some evidence" standard by holding that evidence of the inmate's lack of insight can provide the rational nexus between the inmate's history of crime and violence and the Board's or Governor's ultimate determination concerning current dangerousness. In that case, the petitioner was convicted of killing his second wife. (*Id*. at pp. 1245-1247.) During his first marriage, Shaputis "severely abused" his wife and their four daughters, and his first wife divorced him after nine years "because of this physical abuse." (*Id.* at p. 1246.) His second marriage was likewise "beset by violence." (*Id.* at p. 1247.) He was "a problem drinker with a history of violence when drunk," and he beat his second wife repeatedly (one beating was so severe that his wife required plastic surgery; another cracked her ribs). (*Id.* at p. 1247.) Having subjected her to years of such abuse, he finally killed her by shooting her in the neck at close range after an evening of heavy drinking. (*Id.* at pp. 1247-1248.) He maintained that the shooting was an accident, but the arrest report stated "that the gun could not have been fired accidentally" because of certain safety features incorporated in the gun's design. (*Ibid*.) In addition, although the commitment offense was his first felony conviction, "his record reflect[ed] a long and sometimes violent criminal history." (*Id.* at p. 1248.)

Once imprisoned, the petitioner "remained discipline free throughout his incarceration" and in other respects made "exemplary" progress as an inmate. (*Shaputis I*, *supra*, 44 Cal.4th at p. 1249.) Psychological reports noted that he continued to maintain that the shooting was an accident, but the reports concluded nonetheless that "he presented a low risk for violence absent a relapse into alcoholism." (*Id.* at p. 1250.) Eventually the Board ordered him paroled, the Governor reversed the Board's decision, the Court of Appeal concluded that the Governor's reversal was not supported by

"some evidence," and the Supreme Court reversed the Court of Appeal. (*Id.* at pp. 1246, 1253-1254.)

The Court began its analysis by reiterating its holding in *Lawrence* that "the proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor." (*Shaputis I*, *supra*, 44 Cal.4th at p. 1254.) Reviewing the Governor's decision under that standard, the Court concluded that "some evidence" did support the Governor's determination that the inmate currently posed an unreasonable public safety risk. (*Id.* at p. 1255.)

The Governor had stated "two general reasons" for his decision: "(1) defendant's premeditated intent to kill his wife, which rendered the second degree murder commitment offense 'especially aggravated'; and (2) petitioner's lack of insight into the murder and into the years of domestic violence that preceded it." (*Shaputis I*, *supra*, 44 Cal.4th at p. 1258.) The Court agreed that the circumstances of the commitment offense were probative of the petitioner's current dangerousness because "[t]his is not a case, like *Lawrence*, *supra*, 44 Cal.4th 1181, 1225, in which the commitment offense was an isolated incident, committed while petitioner was subject to emotional stress that was unusual or unlikely to recur. [Citation.] Instead, the murder was the culmination of many years of petitioner's violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Shaputis I*, *supra*, 44 Cal.4th at p. 1259.) In addition, the petitioner had "failed to gain insight or understanding into either his violent conduct or his commission of the commitment offense" and continued to insist that his fatal shooting of the victim was an accident. (*Id.* at p. 1260.) "This claim, considered with evidence of petitioner's history of domestic abuse and recent psychological reports reflecting that his character remains unchanged and that he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming,' all provide some evidence in support of the Governor's conclusion that petitioner remains dangerous and is unsuitable for parole." (*Ibid.*)

The same petitioner came before the Court again in *Shaputis II*. After the court's decision in *Shaputis I*, the petitioner "refused to be interviewed by the psychologist appointed by California's Department of Corrections and Rehabilitation . . . to perform a comprehensive risk assessment for the Board's consideration. Instead he hired his own psychologist, who submitted a report. Petitioner also refused to testify at his parole hearing. He chose to submit a written statement prepared with the assistance of counsel." (*Shaputis II*, *supra*, 53 Cal.4th at p. 199.) The Board denied parole, the Court of Appeal reversed, and the Supreme Court again reversed the Court of Appeal, concluding that the Board's denial was supported by some evidence. (*Id.* at pp. 199, 207-208.)

After critiquing the Court of Appeal's interpretation of the "some evidence" standard, the Supreme Court addressed several issues concerning "the use of an inmate's degree of insight into his or her criminal behavior as a factor in parole suitability determinations." (*Shaputis II*, *supra*, 53 Cal.4th at p. 217.) The Court rejected the contention that lack of insight falls outside "the scope of the parole regulations." (*Id.* at p. 218.) "The regulations do not use the term 'insight,' but they direct the Board to consider the inmate's 'past and present attitude toward the crime' (Regs., § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of 'insight.'" (*Shaputis II*, *supra*, 53 Cal.4th at p. 218.) The Court further observed that under *Shaputis I*, "the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Ibid.*)

At the same time, however, the Court recognized that "lack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness." (*Shaputis II*, *supra*, 53 Cal.4th at p. 219.) In addition, reliance on lack of insight as a parole unsuitability factor must be informed by section 5011, subdivision (b), which provides: "The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which

an inmate was committed." The Court observed that the petitioner did not deny his guilt, however, so the statute did not apply. (*Id.* at p. 216.) Moreover, the petitioner's "lack of insight was established" not by his (nonexistent) denial of guilt but rather "by a variety of factors: the 2004 and 2005 psychological reports discussed in *Shaputis I* . . . ; his own statements about the shooting, which failed to account for the facts at the scene or to provide any rational explanation of the killing; his inability to acknowledge or explain his daughter's charge that he had raped her; and his demonstrated failure to come to terms with his long history of domestic violence in any but the most general terms." (*Shaputis II*, *supra*, 53 Cal.4th at p. 216.)

Finally, the Court rejected the petitioner's claim that because social scientific research has "found no relationship between insight into past behavior and future violence," the presence or absence of insight "plays no proper role in determining suitability for parole." (*Shaputis II*, *supra*, 53 Cal.4th at p. 220.) Such arguments "would be more appropriately presented to the Legislature, or to the Board in its rulemaking capacity," but "the current parole regulations firmly support consideration of an inmate's insight into his or her criminal behavior as a relevant factor." (*Ibid.*)

B. Application of the "Some Evidence" Standard

Under the foregoing authorities, the question before us is whether the record reveals "some evidence" supporting the Board's determination that Ozerson currently poses an unreasonable public safety risk. The Attorney General argues that the evidence concerning the gravity of the commitment offense and Ozerson's lack of insight constitutes the necessary modicum of evidence supporting the Board's determination. We disagree, and we find no other evidence in the record that supports the Board's decision.

The facts of this case fall in between the facts of *Lawrence*, on the one hand, and *Shaputis I* and *Shaputis II*, on the other. Like the petitioner in *Lawrence*, Ozerson has accumulated an exemplary record as an inmate, spanning decades of incarceration. She has a long and successful history of involvement in self-help, vocational, and educational programs, has shown insight into the circumstances of her commitment offense, and has

realistic parole plans, which include multiple job offers and community support. (See *Lawrence*, *supra*, 44 Cal.4th at p. 1225.) Also like the petitioner in *Lawrence*, apart from the commitment offense she has no history of violence and no criminal history except for one arrest for stealing a carton of cigarettes, and she committed the commitment offense while experiencing an unusual amount of emotional stress resulting from circumstances (i.e., her involvement in a love triangle and her position as the primary caretaker for her disabled husband) not likely to recur. (See *id.* at pp. 1225-1226.)

Like the petitioner in *Shaputis I* and *Shaputis II*, however, Ozerson has not fully accepted responsibility for the commitment offense. Although the 2008 psychological evaluation states that Ozerson blames herself for the crime, "has consistently demonstrated credible remorse and sadness for her husband's death," "has significant insight into her personality structure and how it has historically led to maladaptive patterns of lying to those around her," and has "worked diligently to develop insight into the causative factors of" her commitment offense, she continues to maintain that she did not shoot her husband, and her insight into the causes of the crime "has been limited to the causative factors of her extramarital affair." (Cf. *Shaputis I*, *supra*, 44 Cal.4th at p. 1260.) In contrast, the petitioner in *Lawrence* did, after "many years" of denial, finally admit her guilt. (*Lawrence*, *supra*, 44 Cal.4th at p. 1200.)

For the reasons articulated in *Lawrence*, the gravity of Ozerson's commitment offense does not, on its own, constitute "some evidence" supporting a finding of current dangerousness. The commitment offense occurred 25 years ago, when Ozerson, who is now 58 years of age, was 33 and under significant emotional stress as a result of her extramarital affair and caretaking responsibilities for her husband, circumstances that are unlikely to recur. (See *Lawrence*, *supra*, 44 Cal.4th at p. 1225.) The CDCR psychological evaluator concluded that for that reason, as well as her prior violence-free and virtually crime-free life, her age, and her record of rehabilitation, there was a low risk she would commit another violent act if released. (See *id.* at pp. 1225-1226.) Indeed, the 2008 evaluation states that she "displayed virtually none of the predictive factors for

recidivism." "In light of petitioner's extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past . . . behavior, her expressions of remorse, her realistic parole plans, the support of [members of the community into which she would be released], and . . . institutional reports justifying parole, . . . we conclude that the unchanging factor of the gravity of petitioner's commitment offense," considered on its own, "has no predictive value regarding her *current* threat to public safety, and thus provides no support for the [Board's] conclusion that petitioner is unsuitable for parole at the present time." (*Lawrence*, *supra*, 44 Cal.4th at p. 1226.)

The remaining issues are whether the record contains evidence of lack of insight that either (1) provides a rational nexus between the gravity of Ozerson's commitment offense and the Board's finding of current dangerousness or (2) independently constitutes "some evidence" that Ozerson currently presents an unreasonable public safety risk. We conclude that under the circumstances of this case the record does not contain evidence of lack of insight that is adequate to support the Board's decision under the "some evidence" standard of review.

According to the 2008 psychological evaluation by a CDCR psychologist, Ozerson has "worked diligently to develop insight" and has achieved "significant insight." Moreover, she "has consistently demonstrated credible remorse and sadness for her husband's death" and "still feels a certain level of shame and guilt" for her role in causing it.

In announcing its decision, the Board referred to Ozerson's "continual lying," "habitual lying," and "continued extreme lying," as well as the appearance that she is "overcompensat[ing] in her programming," as support for the Board's conclusion that she lacks insight and consequently poses an unreasonable public safety risk. The Board's suggestion that Ozerson "continues to appear to overcompensate in her programming" is of no evidentiary value. As the psychological evaluator noted, the Board previously recommended that Ozerson participate in self-help groups. Indeed, in announcing its most recent denial of parole, the Board again "recommend[ed] that she continue her

programming." Ozerson's decision to follow the Board's recommendation that she participate in self-help groups and programs does not constitute some evidence that she presently poses an unreasonable public safety risk, notwithstanding the Board's inference that she was "overcompensat[ing]" through her programming.

Concerning Ozerson's honesty, the psychological evaluation dealt in detail with the issue and identified no cause for concern. The CDCR psychological evaluator reported that "[t]o Ms. Ozerson's credit, she was able to discuss in detail her previous pattern of lying to the people in her life," noted that she has "applied the 12-Step principles to address her pattern of lying to others" and "has significant insight into her personality structure and how it has historically led to maladaptive patterns of lying to those around her," and concluded on that basis (and others) that she "displayed virtually none of the predictive factors for recidivism."

The only evidence of Ozerson's "continued extreme lying," and the only evidence cited by the Board, is her continuing denial of her guilt. Assuming for the sake of argument that, despite the detailed and extensive findings of the psychological evaluator, Ozerson's denial of her guilt constitutes some evidence that she lacks insight in certain respects, we conclude that such lack of insight neither (1) provides a rational nexus between the gravity of her offense and a finding that she is currently dangerous nor (2) independently constitutes some evidence of current dangerousness. "[L]ack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness." (*Shaputis II*, *supra*, 53 Cal.4th at p. 219.) Ozerson's denial of guilt notwithstanding, this case materially resembles *Lawrence* much more closely than it resembles *Shaputis I* or *Shaputis II*. The petitioner in *Shaputis I* and *Shaputis II* had "a long and sometimes violent criminal history," and his commitment offense "was the culmination of many years of [his] violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Shaputis I*, *supra*, 44 Cal.4th at pp. 1248, 1259.) Ozerson has no remotely comparable history. Rather, as was the case in *Lawrence*, her commitment offense stands out as an aberration in an otherwise violence-free and virtually crime-free life, and she committed

it while subject to significant and unusual emotional stresses that are not likely to recur. (See *Lawrence*, *supra*, 44 Cal.4th at pp. 1225-1226.) In her decades of incarceration, she has remained discipline-free, availed herself of an extraordinary breadth and number of self-help programs, accumulated an ample record of rehabilitation, achieved "significant insight," and "consistently demonstrated credible remorse and sadness for her husband's death." We accordingly conclude that her denial of guilt and whatever lack of insight it might show are not "probative to the central issue of current dangerousness when considered in light of the full record before the Board." (*Lawrence*, *supra*, 44 Cal.4th at p. 1221, italics omitted.)[2]

DISPOSITION

The petition for a writ of habeas corpus is granted and the decision of the Board of Parole Hearings is hereby vacated. The Board is directed to conduct a new parole suitability hearing consistent with due process of law and consistent with this decision. (*In re Prather* (2010) 50 Cal.4th 238, 244.)

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.

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[2] At oral argument, the Attorney General focused on the Supreme Court's statement in *Shaputis II* that "an *implausible* denial of guilt may support a finding of current dangerousness" (*Shaputis II*, *supra*, 53 Cal.4th at p. 216), and the Attorney General argued that Ozerson's denial is not plausible. The Court did not say, however, that an implausible denial *always* supports a finding of current dangerousness. Rather, the Court said that it "may." (*Ibid*.) Thus, the dispositive question remains whether, under the particular circumstances of the case under review, the lack of insight shown by the petitioner's (plausible or implausible) denial of guilt "is rationally indicative of the inmate's current dangerousness." (*Id*. at p. 219.) For the reasons given, we conclude that in this case it is not.