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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re EDWARD ESTRADA

on

Habeas Corpus.

D060014

(San Diego County
Super. Ct. No. CR131451A)

Petition for Writ of Habeas Corpus. Relief granted.

In 1996, petitioner Edward Estrada was sentenced to a prison term of 19 years to life. He has been incarcerated since 1992 and, with the exception of one brief period, has avoided any disciplinary conduct while incarcerated. Although Estrada first became eligible for parole in 2004, the Board of Prison Hearings (the BPH)—despite Estrada's exemplary conduct in prison and his unblemished record of rehabilitative progress—nevertheless found him unsuitable for parole at his first three parole hearings. (*In re Estrada* (Sept. 30, 2010, D056903) [nonpub. opn.], (*Estrada I*)). After the 2009 denial by the BPH, this court granted Estrada relief in response to his petition for a writ of habeas corpus because we found the BPH's conclusion that Estrada posed an

unreasonable risk of danger to public safety were he released from prison did not have any evidentiary support. (*Ibid.*) However, this court did not order the BPH to set a parole date. Instead, the matter was remanded to the BPH with directions to hold a new parole suitability hearing in accordance with due process of law and consistent with the decision of this court. (*Ibid.*)

The BPH held a new suitability hearing and, operating under the guidelines of *Estrada I*, concluded Estrada was suitable for parole because there was no new evidence supporting a conclusion he would pose an unreasonable risk of danger to society if released. However, Governor Edmund G. Brown, Jr., found Estrada did pose an unreasonable risk of danger to society if released and therefore reversed the BPH's decision. Estrada petitions for a writ of habeas corpus raising numerous challenges to the Governor's decision.

I

FACTS¹

A. The Offense

In 1990, Estrada was 16 years old and lived in Encanto. The Varrío Encanto Loco (VEL) gang was the Encanto neighborhood gang. Estrada, having witnessed many acts of violence in his neighborhood, felt compelled to join the VEL gang. (*Estrada I, supra*, D056903.)

¹ We rely largely on the facts and procedural history derived from *Estrada I, supra*, D056903.

On the night of the murder, Estrada, accompanied by his brother Roman (another VEL member) and Ms. Casey (Roman's girlfriend), intended to go to a local park to meet friends. Estrada brought his recently acquired sawed-off shotgun to display to his friends, and placed it in Casey's car.² However, they went instead to a party being held at a house located in a rival gang's neighborhood. (*Estrada I, supra*, D056903.)

As Estrada left the party, he "tagged" a wall with VEL gang names, knowing this was a sign of disrespect to the local gang. Estrada, along with Casey (the driver), Roman and another VEL gang member, then drove away in Casey's car. (*Estrada I, supra*, D056903.)

Casey's car stopped at a traffic light and a truck, driven by 19-year-old Robert Gill, pulled alongside Casey's car. Estrada did not know Gill or know him to be involved with rival gangs. The occupants of Casey's car flashed gang signs at Gill, and Gill responded by flipping them off in return, then driving away. The other occupants of Casey's car urged her to catch up with Gill, and she drove faster to pursue Gill's truck. (*Estrada I, supra*, D056903.)

As they neared Gill's truck, Estrada loaded his shotgun. Estrada testified at trial that he saw Gill's arm extended toward Casey's car and believed he saw something

² In the months preceding the murder, Estrada's house had been subjected to rock-throwing incidents by rival gangs, and insulting and threatening telephone calls were made to his home. Estrada bought a sawed-off shotgun one week before the murder to provide protection for his home. (*Estrada I, supra*, D056903.)

metallic in Gill's hand, which Estrada thought was a gun pointed at Casey's car.³ As they traveled alongside Gill's truck, Estrada fired twice at Gill with the shotgun, killing him. They then drove away. (*Estrada I, supra*, D056903.)

B. Estrada's Criminal Background

Prior to the offense in question, Estrada had one wardship proceeding involving a nonviolent offense.⁴ He also told the BPH that, sometime earlier in 1990, he had been riding in the front passenger seat of a car when someone in the backseat discharged a weapon. (*Estrada I, supra*, D056903.)

C. Estrada's Performance in CYA and Prison

Estrada was convicted in 1992, and was initially sent to the California Youth Authority, where he remained until the end of 1996 when he was transferred to the Donovan Reception Center (DRC) for incarceration in the state prison system. He received three "CDC 115's"⁵ during his first couple of months at DRC, but shortly

³ Gill's father, along with Gill's roommate, were in a car following Gill when the shooting occurred. They pulled him from the truck and transported him to the hospital, where he died. They denied taking anything out of the truck when they removed the injured Gill. Police did not find a gun in the truck, but did find a diver's knife with a reflective silver blade. (*Estrada I, supra*, D056903.)

⁴ Estrada was declared a ward based on a true finding of his involvement in a vehicle theft ring, and he was placed on probation. Although the court records show Estrada successfully completed his probation, the court was unaware (prior to the end of Estrada's probationary term) that he had killed Gill while on probation. (*Estrada I, supra*, D056903.)

⁵ "[A] CDC 115 documents misconduct believed to be a violation of law which is not minor in nature. A form 128 documents incidents of minor misconduct." (*In re Gray*

thereafter was transferred to California Mens Colony (CMC) and has since remained discipline free. (*Estrada I, supra*, D056903.)

The evidence showed, and the BPH did not question, that Estrada's conduct while in prison had been exemplary. As we noted in *Estrada I*, "[h]is commitment to his educational and vocational training is too extensive to chronicle in detail, but the BPH recognized at his parole hearing that the positive assessments reflected 'overwhelming support by staff' regarding his positive behavior while incarcerated. Similarly, Estrada has participated in innumerable self-help and therapy groups, has attained leadership roles in several self-help programs, and has worked with other inmates to (among other things) help them develop skills to cope with anger and break away from gangs."

(*Estrada I, supra*, D056903, at p. 5.) We also recognized that Estrada's participation in these self-help and therapy groups was neither nominal nor passive: "Estrada is a certified HIV one-on-one educator, a certified infectious disease instructor, and a certified hepatitis educator with the Inmate Peer Education Program. He is actively involved in the 'Higher Ground' Juvenile Diversion Program working with at-risk male youths, serves as secretary for the Literacy Council, and works with the younger inmate population to improve their literacy skills as well as helping with workshops designed to train inmates in developing new skills for interpersonal relations and conflict resolution. He is chairman of the Steering Committee for the Prisoners against Child Abuse group, and is a member of the steering committee for the Big Four Fellowship of AA. He is extensively

(2007) 151 Cal.App.4th 379, 389.) Estrada's first "115" was because he had two 5-dollar bills in his possession on arriving at DRC. (*Estrada I, supra*, D056903.)

involved with the Individuals Making Peace and Change Together (IMPACT) group, as well as the Gang Members Anonymous (CGA) program, and he helped establish the CGA Reunification Workshop to teach inmates new tools, including empathy, conflict resolution, and job skills to reduce recidivism. As a facilitator for these programs, he has regularly taught anger management courses, including a 16 week course, and is constantly involved in upgrading his training in these groups. He is also involved in the Alternatives To Violence program and is a trained facilitator for that program." (*Id.* at fn. 7.)

The evidence also demonstrated, and the BPH did not dispute, that Estrada had viable parole plans, including family support systems, job offers, living arrangements, and relapse prevention programs. (*Estrada I, supra*, D056903.)

D. Estrada's Psychological Evaluations

Estrada's psychological evaluation prepared in conjunction with his 2009 parole hearing concluded he posed a low risk for violence in the community if released on parole.⁶ The evaluation also noted that, as early as 1996, Estrada had expressed "remorse for his actions and empathy for the victim's family," and had previously explained that he understood the underlying causes of his crime, describing those causes as " 'feeling the need to impress others, wanting acceptance, feeling pulled between his family and the gang, selfishness, choosing negative friends,' " and loyalty to the gang. The evaluator

⁶ The conclusions of this evaluation accorded with the other two psychological examinations, performed in conjunction with Estrada's first and second parole hearings in 2003 and 2006, respectively. Those examiners also concluded Estrada's risk for violence if released on parole was low. (*Estrada I, supra*, D056903.)

concluded Estrada felt "remorse about murdering the victim," had "insight into the events in which he participated, and about the decisions he made that were related to the offense," and had "explored his commitment offense and . . . made significant gains in identifying and responding to the underlying causes [and] improved his understanding of how numerous factors converged and culminated in [the murder]." (*Estrada I, supra*, D056903.)

II

HISTORY OF PROCEEDINGS

A. *Estrada I*

At Estrada's 2009 parole hearing, the BPH considered Estrada's testimony at the hearing, as well as the written reports, and ultimately concluded he was unsuitable for parole because he posed an unreasonable risk of danger to society if released. The BPH appeared to rely on the facts of the crime, his juvenile delinquency, and his lack of insight into or acceptance of full responsibility for the crime to conclude he posed a current danger to society if released on parole.

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

evidence. Accordingly, we ordered the BPH to vacate its denial of parole and to conduct a new parole suitability hearing for Estrada. (*Estrada I, supra*, D056903.)

However, because this court could not predict whether additional evidence might be available when the BPH conducted the new parole suitability hearing, and under the constraints of *In re Prather* (2010) 50 Cal.4th 238, we were limited to ordering the BPH to vacate its decision finding Estrada unsuitable for parole and to conduct a new parole suitability hearing in accordance with due process of law and consistent with the decision of this court and the principles of res judicata. (*Estrada I, supra*, D056903.)

B. The Current Proceeding

The BPH conducted the most recent parole hearing in November 2010. Estrada contends, and the Governor does not dispute, that the only additional evidence bearing on suitability introduced at the 2010 hearing and not considered at the 2009 hearing was evidence that Estrada had an additional period (following the 2009 hearing) of positive programming and participation in pro-social activities while incarcerated. After considering all of the evidence in light of *Estrada I, supra*, D056903, the BPH concluded Estrada was suitable for parole because he would not pose an unreasonable risk of danger to society if released on parole.

However, in April 2011, the Governor reversed the BPH's decision because he found Estrada did pose an unreasonable risk of danger to society if released. The Governor cited two principal reasons for this finding. First, the Governor found the crime was especially aggravated because it was "a completely senseless murder [and Estrada's] motive for committing such a vicious crime [was] inexplicable." Second, the

Governor cited his belief that, by "cling[ing] to his story that he thought [the victim] had a gun and that [Estrada] shot him out of fear and in self defense," Estrada had not "accept[ed] responsibility for his [actions or] confront[ed] and deal[t] with the reasons he committed [the murder]" but instead continued to insist on a version of events that "places blame on the victim and minimizes his own conduct."

III

LEGAL STANDARDS

A. The Parole Decision

The decision whether to grant parole is an inherently subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that should be guided by a number of factors, some objective, identified in Penal Code section 3041 and the BPH's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The Governor's decision to affirm, modify, or reverse the decision of the BPH rests on the same factors that guide the BPH's decision (Cal Const., art. V, § 8(b)), and is based on "materials provided by the parole authority." (§ 3041.2, subd. (a).) "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the [BPH's] decision." (*Rosenkrantz*, at pp. 660-661.)

In making the suitability determination, the BPH and Governor must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, reference to § 2402 refers to the regulations), including the nature of the commitment offense; behavior before, during, and after the crime; the prisoner's social history; mental

state; criminal record; attitude towards the crime; and parole plans. (§ 2402, subd. (b).)

The circumstances tending to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel manner⁷; (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (§ 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (*Id.* at subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)

⁷ Factors supporting the finding that the crime was committed "in an especially heinous, atrocious or cruel manner" (§ 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

These criteria are "general guidelines," illustrative rather than exclusive, and "the importance attached to [any] circumstance [or combination of circumstances in a particular case] is left to the judgment of the [BPH]." (*Rosenkrantz, supra*, 29 Cal.4th at p. 679; § 2402, subds. (c), (d).) The parole endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz*, at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the BPH and Governor are free to consider facts apart from those found true by a jury or judge beyond a reasonable doubt. (*Id.* at p. 679.)

B. Standard for Judicial Review of Parole Decisions

In *Rosenkrantz*, the California Supreme Court addressed the standard the court must apply when reviewing parole decisions by the executive branch. The court first held that "the judicial branch is authorized to review the factual basis of a decision of the [BPH] denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) *Rosenkrantz* further held that "courts properly can review a Governor's decisions whether to affirm, modify, or reverse parole decisions by the [BPH] to determine whether they comply with due process of law, and that such review properly can include a determination of whether the factual basis of such a decision is supported by some evidence in the record that was before the [BPH]." (*Id.* at p. 667.)

The "some evidence" standard is "extremely deferential" and requires "[o]nly a modicum of evidence." (*Rosenkrantz, supra*, 29 Cal.4th at p. 677, 679.) A court may not vacate an administrative decision that is subject to the "some evidence" review simply because it disagrees with the assessment of the BPH or Governor. (*Ibid.*) The decision must be "devoid of a factual basis" to be overturned. (*Id.* at p. 658.) Because judicial review of a parole denial is to ensure that a decision is not arbitrary and capricious, thereby depriving the prisoner of due process of law, "the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Id.* at p. 658.)

In *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), the Supreme Court noted that its decisions in *Rosenkrantz* and *In re Dannenberg* (2005) 34 Cal.4th 1061, and specifically *Rosenkrantz's* characterization of the "some evidence" standard as "extremely deferential" and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra*, 29 Cal.4th at p. 667), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence*, at p. 1206.) *Lawrence* explained that some courts interpreted *Rosenkrantz* as limiting the judiciary to reviewing whether "some evidence" exists to support an unsuitability factor cited by the BPH or Governor, while other courts interpreted *Rosenkrantz* as requiring the judiciary to instead review whether "some evidence" exists to support "the core determination required by the statute before parole can be denied—that an inmate's release will unreasonably endanger public safety." (*Lawrence*, at pp. 1207-1209.)

The *Lawrence* court, recognizing the legislative scheme contemplates "an assessment of an inmate's *current* dangerousness" (*Lawrence, supra*, 44 Cal.4th at p. 1205), resolved the conflict among the lower courts by clarifying that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is "whether some evidence supports the *decision* of the [BPH] or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212.) *Lawrence* clarified that the standard for judicial review, although "unquestionably deferential, [is] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors *with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision*—the determination of current dangerousness." (*Lawrence*, at p. 1210, italics added.) Indeed, it is *Lawrence's* numerous iterations (and variants) of the requirement of a "rational nexus" between the *facts* underlying the unsuitability factor and the *conclusion* of current dangerousness that appear to form the crux of, and provide the teeth for, the standards adopted in *Lawrence* to clarify and illuminate "the precise contours of the 'some evidence' standard." (*Id.* at p. 1206.)

After clarifying the applicable standard of review, *Lawrence* addressed how one "unsuitability" factor—whether the prisoner's commitment offense was done in a particularly heinous, atrocious, or cruel manner—can affect the parole suitability determination, and whether the existence of some evidence supporting the BPH's finding that the offense was particularly heinous, atrocious, or done in a cruel manner is alone

sufficient to deny parole. *Lawrence* concluded that when there has been a lengthy passage of time, the BPH may continue to rely on the nature of the commitment offense as a basis to deny parole only when *other* facts in the record, including the prisoner's history before and after the offense or the prisoner's current demeanor and mental state, provide a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. (*Id.* at pp. 1211, 1214, 1221.) Thus, the "extremely deferential" standard, while vesting in the Governor the power to resolve evidentiary conflicts and assign the weight to be given to the evidence (*Rosenkrantz, supra*, 29 Cal.4th at p. 679), is not the equivalent of judicial abdication, because the court must be satisfied there is some evidence substantiating the ultimate conclusion that the prisoner's release currently poses an unreasonable risk of danger to the public. (*In re Lee* (2006) 143 Cal.App.4th 1400, 1408.) It violates a prisoner's right to due process when the Governor attaches significance to evidence that forewarns no danger to the public or relies on an unsupported conclusion. (See, e.g., *In re DeLuna* (2005) 126 Cal.App.4th 585, 597 [the BPH concluded, contrary to psychological evaluations, that inmate needed therapy, and faulted inmate facing deportation for failing to learn English]; *In re Scott* (2005) 133 Cal.App.4th 573, 597-603 [Governor misconceived inmate's history of violent crime and nature of the commitment offense]; *In re Lee*, at pp. 1411-1414 [Governor overstated seriousness of commitment offense and improperly faulted inmate for late acceptance of responsibility].)

The Supreme Court recently reaffirmed *Lawrence's* articulation of, and approach to, judicial review of parole decisions in *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis*

II), explaining that the "essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety." (*Id.* at pp. 220-221.) That essential question "is posed first to the [BPH] and then to the Governor, who draw their answers from the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior" (*id.* at p. 221), and judicial review "is conducted under the highly deferential 'some evidence' standard [which requires the decision be] upheld unless it is arbitrary or procedurally flawed [based on a review of] the entire record to determine whether a modicum of evidence supports the parole suitability decision." (*Ibid.*) *Shaputis II* teaches that a reviewing court may not reweigh the evidence, but must instead "consider[] whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness" (*ibid.*), and "[o]nly when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the [BPH] or the Governor [because] [i]n that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process." (*Id.* at p. 211.)

Shaputis II also clarified that, although numerous intermediate courts had expressed concerns about the expanded focus by the parole authority on an inmate's lack of insight into his or her criminal behavior as a factor to deny parole (see, e.g., *In re Powell* (2010) 188 Cal.App.4th 1530, 1539), these concerns were misplaced because the parole authority properly considers an inmate's prisoner's "insight" when evaluating whether the inmate currently poses a threat to public safety. As *Shaputis II* explained, "[c]onsideration of an inmate's degree of insight is well within the scope of the parole

regulations. The regulations do not use the term 'insight,' but they direct the [BPH] to consider the inmate's 'past and present attitude toward the crime' [citation] and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' [citation]. These factors fit comfortably within the descriptive category of 'insight.' " (*Shaputis II, supra*, 53 Cal.4th at p. 218.) Indeed, *Shaputis II* noted even if "insight" could not be tethered to a specific regulation, consideration of "insight" would be proper because "it is difficult to imagine that the [BPH] and the Governor should be required to ignore *the inmate's understanding of the crime and the reasons it occurred*, or the inmate's insight into other aspects of his or her personal history relating to future criminality. Rational people, in considering the likely behavior of others, or their own future choices, naturally consider past similar circumstances and the reasons for actions taken in those circumstances." (*Id.* at p. 220, italics added.)

Because *Shaputis II* reaffirmed *Lawrence's* admonition that the "some evidence" standard for judicial review is "highly deferential" (*Shaputis II, supra*, 53 Cal.4th at p. 221), the determination to deny parole based on the inmate's lack of insight must be affirmed if there is some modicum of evidence to support the finding that the inmate in fact lacked "insight." However, because *Shaputis II* also reaffirmed *Lawrence's* admonition that this highly deferential review " 'certainly is not toothless' " (*Shaputis II*, at p. 215, quoting *Lawrence, supra*, 44 Cal.4th at p. 1210), our search for whether a modicum of evidence supports the finding that the inmate "lacked insight" cannot proceed without some understanding of the contours of what the parole authority

determined to be lacking in the inmate. The *Shaputis II* court, although not outlining the definitive parameters of "insight," foreshadowed some of its components when it described why it is a proper consideration (and why there can be a rational nexus between this deficit and the ultimate determination of current dangerousness): *Shaputis II* states the term "insight" encompasses the inmate's " 'past and present attitude toward the crime,' " his or her " 'presence of remorse,' " the inmate's " 'understand[ing of] the nature and magnitude of the offense,' " and his or her "understanding of the crime and the reasons it occurred."⁸ (*Shaputis II, supra*, 53 Cal.4th at pp. 218, 220.) With this guidance, a court may meaningfully review whether there is some evidence to support a determination of current dangerousness when lack of insight is the basis for parole denial.

⁸ Justice Liu's concurring opinion, recognizing that "an important dimension of the rationality required of parole decisions is that the [BPH] or the Governor must offer 'reasoning establishing a rational nexus' between identified unsuitability factors and current dangerousness" (*Shaputis II, supra*, 53 Cal.4th at p. 225 (conc. opin. of Liu, J.)), and noting that "[t]oday's decision acknowledges 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' " (*id.* at p. 226), attempted to provide more definitive guidance on the contours of insight. Justice Liu stated that "[t]he term 'lack of insight' in the parole context appears to refer broadly to inmates with one of two types of deficiencies: (1) to inmates who deny committing the crime for which they were convicted or deny the official version of the crime and (2) to inmates who admit their crime but are regarded as having an insufficient understanding of the causes of their criminal conduct." (*Ibid.*) This second category appears to dovetail with the majority's articulation of "insight."

IV

ANALYSIS

A. Analysis of Merits

The Governor did not suggest below (and does not dispute on appeal) that the evidence on most of the relevant suitability factors,⁹ as well as the only evidence on most of the unsuitability factors, uniformly militated in favor of finding Estrada suitable for parole. In this evidentiary context, we must examine whether, notwithstanding the numerous factors supporting parole, there is some evidence that Estrada's *current* mental attitude provides a rational nexus for concluding the circumstances of the crime continue to be predictive of current dangerousness.

The Governor found that, notwithstanding the evidence (from both Estrada and the psychologist) that Estrada was remorseful and accepted full responsibility for the crime, Estrada nevertheless was an unreasonable risk were he released on parole because he "clings to his story that he thought [the victim] had a gun and that [Estrada] shot him out of fear and in self defense," thereby continuing to persist in proffering a version of events that minimized his own culpability while blaming the victim. Because the Governor's conclusion of Estrada's current dangerousness appears to have been based exclusively on his findings that, as of the 2009 hearing, Estrada lacked adequate insight about and did

⁹ Estrada has a stable social history and family support system, has shown signs of remorse, made realistic plans for release, developed marketable skills that can be put to use on release, engaged in institutional activities that indicate an enhanced ability to function within the law on release, and does not possess a prior record of violent crime. (§ 2402, subd. (d).)

not accept responsibility for his criminal conduct, we must affirm the decision unless there is no evidentiary support for these findings.

We conclude the finding Estrada had not accepted full responsibility for Gill's death or dealt with the reasons he committed the murder (because Estrada continued to "blame . . . the victim and minimize[] his own conduct") lacks any modicum of evidentiary support.¹⁰ First, the Governor's conclusion is unsupported by any expert evidence. The only expert evidence the Governor could have considered consisted of the psychological evaluations considered by the BPH at Estrada's 2009 parole hearing. As we observed in *Estrada I*, the conclusion that Estrada had not accepted full responsibility for Gill's death or dealt with the reasons he committed the murder was "precisely the opposite [of the conclusions of the psychologist]: Estrada understood how his past

¹⁰ This court ruled in *Estrada I* that the BPH's 2009 finding—that he had not fully accepted responsibility for the commitment offense—lacked evidentiary support and barred the BPH from relying on that basis to deny parole absent new or different evidence. (*Estrada I, supra*, D056903.) This ruling was binding on the BPH on remand because, as explained by *In re Prather, supra*, 50 Cal.4th 238, 258, "the [BPH on remand] is bound by the court's findings and conclusions regarding the evidence in the record and, in particular, by the court's conclusion that no evidence in the record before the court supports the [BPH's] determination that the prisoner is unsuitable for parole. Thus, an order generally directing the [BPH] to proceed in accordance with due process of law does not entitle the [BPH] to 'disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record.' [(Quoting *In re Masoner* (2009) 172 Cal.App.4th 1098, 1110.)] Rather, a judicial order granting habeas corpus relief implicitly precludes the [BPH] from again denying parole—unless some *additional* evidence (considered alone or in conjunction with other evidence in the record, and not already considered and rejected by the reviewing court) supports a determination that the prisoner remains currently dangerous." Estrada asserts that *res judicata* principles should apply equally to preclude the Governor from disregarding this court's prior determination of the adequacy of the evidence on this subject. We need not reach this thorny issue because, for the reasons stated below, we conclude the Governor's order must be reversed on the merits.

feelings (e.g. of rebelliousness, the need to impress his peers, his gang lifestyle, his poor impulse control and judgment) were the underlying causes of his crime, and that Estrada understood he felt ' "the need to impress others, want[ed] acceptance, [felt] pulled between his family and the gang, [was selfish], [chose] negative friends" 'and felt loyalty to the gang. The evaluation noted that, in addition to identifying these factors, Estrada had 'made significant gains in . . . responding to the underlying causes [and] has improved his understanding of how numerous factors converged and culminated in [the murder].' " (*Estrada I, supra*, D056903, at pp. 15-16.) There is no new or different evidence from the experts, employed by the Governor to examine these questions,¹¹ on which the Governor might have relied to conclude Estrada lacked an "understanding of the crime and the reasons it occurred." (*Shaputis II, supra*, 53 Cal.4th at p. 220.)

Second, the conclusion that Estrada lacked insight or failed to accept responsibility is unsupported by any snippet of evidence from his institutional behavior. As we observed in *Estrada I*, his institutional behavior up to the time of the 2009 hearing "belies the conclusion that he lacked insight or failed to accept responsibility. His conduct showed his commitment to jettisoning gang membership and, indeed, he has been trained to assist others to escape gang life. His disciplinary record confirms he has abandoned

¹¹ Unlike *Shaputis II*, in which the inmate refused to be examined by the parole authority's psychologist and instead submitted an opinion by the inmate's expert that conflicted with the earlier opinions expressed by the parole authority's psychologist, this case does not involve a conflict *among* experts that the Governor was required to resolve, and the Governor's letter does not identify any other evidentiary basis for disregarding "the most recent evidence of the inmate's degree of insight [that] usually bear[s] most closely on the parole determination." (*Shaputis II, supra*, 53 Cal.4th at pp. 219-220.)

violence as a method to obtain prestige or resolve conflicts, and he has mentored others to develop skills to break the cycle of violence. He has demonstrated that he has internalized his responsibility through genuine apologies to the victim's family, through writing exercises placing himself in the shoes of the victim and the victim's father, through workshops in which he was confronted by the mother of a victim of a drive-by killing and listened to personal accounts of the devastating effect on the victim's family of the shooting, and by engaging in extensive volunteer work in prison as the "best way that I can make amends. . . ." (*Estrada I, supra*, D056903, at p. 17.) The new information available about Estrada—his institutional behavior subsequent to the 2009 hearing—has burnished this record, because he has continued receiving numerous additional laurels for his contributions to many programs while incarcerated.

Finally, the conclusion that Estrada lacked insight or failed to accept responsibility was unsupported by any modicum of evidence derived from his testimony before the BPH. The primary evidence considered by the Governor was the same testimony from Estrada the BPH heard and considered at his 2009 parole hearing. As we observed in *Estrada I*, the conclusion Estrada had not accepted full responsibility for Gill's death or lacked an understanding of the crime and the reasons it occurred was inexplicable in light of his testimony during the 2009 BPH hearing that Estrada had "explained at length that his maturation had led him to understand that he feared shedding his gang identity, and wanted to obtain the gang's approval and demonstrate he was fearless, but "[t]oday my fear is not of what the gang thinks about me. Today my fear is of letting those people down who have put their reputation on the line for who I am today. Correctional officers,

staff, my family, that's my fear of not living up to what they saw in me.' Moreover, when pressed by the BPH about whether he still believed the victim had pointed something at Estrada's car and thereby precipitated Estrada's decision to shoot, Estrada stated that (although he thought the victim had pointed something toward the car) it really 'didn't matter what he did that night. I was . . . anticipating and waiting and looking for confrontation,' and that a combination of his 'fears and anger,' coupled with his 'being in the company of my older homeboy and impressing—trying to be that guy' and seeking validation and acceptance, were the reasons he committed the murder. Estrada explained '[t]here's no excuses for me today [and] [t]here [were] no excuses back then' and, while he initially 'prayed that they found a gun in [Gill's] car' to rationalize his actions, he now 'accept[ed] responsibility for the murder of Richard Gill.' 'I didn't want to come to terms with that [in the past, but] [t]oday I accept that.' " (*Estrada I, supra*, D056903, at pp. 16-17, fn. omitted.) The Governor cites nothing from the additional testimony provided by Estrada at his 2010 BPH hearing suggesting Estrada lacked remorse or tried to minimize his own culpability, and the additional statements by Estrada at that 2010 hearing only confirms he understood what led him to commit the crime and accepted responsibility for his actions.¹²

¹² At his 2010 hearing, Estrada (after listening to the recap of a long list of his accomplishments and contributions while incarcerated) stated his accomplishments were "minute compared to the devastation that I caused. . . . I understand that I took the most precious thing in [Richard Gill's family's] life and . . . I'm very sorry for that. . . . I want them to know that I remember that night. . . . I am not that 16-year-old kid anymore who was searching for an identity and not being true to himself. And I was a coward for not being there for Richard and for doing what I did, and I accept full responsibility for

In this evidentiary milieu, the Governor concluded Estrada was unsuitable for parole because the circumstances of Estrada's commitment offense, when coupled with his lack of insight into why he committed the murder and his failure to fully accept responsibility for the murder, made Estrada an unreasonable risk of danger were he released on parole. The Governor concluded Estrada committed the offense in a particularly heinous, atrocious, or cruel manner because the motive for the killing was inexplicable. (§ 2402, subd. (c)(1)(E).) Even assuming the evidence supports the Governor's conclusion the offense was committed in a particularly heinous, atrocious or cruel manner because of its "inexplicable" motive, there must be some modicum of evidence of the prisoner's current demeanor and mental state that provides a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. (*Lawrence, supra*, 44 Cal.4th at pp. 1211, 1214, 1221.) In this case, the only evidence of "current demeanor and mental state" cited by the Governor was the Governor's conclusion Estrada had not accepted full responsibility for Gill's death or dealt with the reasons he committed the murder because Estrada "clings to his story that he thought [the victim] had a gun and that [Estrada] shot him out of fear and in self defense." We turn to this finding to determine whether a modicum of evidence supports this finding.

that. . . . I know that forgiveness may never come, but I just want the family and the Panel to know that I'm going to continue to be of service, and I'm going to continue to honor Richard in everything I do, and that I am not that kid anymore who committed this . . . murder."

As support for his finding that Estrada had insufficient insight into why he committed the murder or had not fully accepted responsibility, the Governor stated that Estrada *continued* to "claim[] that he shot and killed Mr. Gill out of concern for his safety and the safety of the other passengers in his car. [Estrada] said in 2009 that he fired at Mr. Gill because he believed Mr. Gill had a gun and 'was going to fire at us.' " Although this may well have been the version of events Estrada had given at trial, the Governor provides no citation to the 2009 record reflecting *any* evidentiary support (and our independent review of the 2009 hearing has found none) for the conclusion that Estrada *maintained at the 2009 hearing* that he shot Gill to protect himself or others or because Estrada believed "[Gill] was going to fire at us."

The only possible support for the Governor's conclusion consisted of Estrada's responses to certain questions the BPH posed to him during the 2009 hearing.¹³ During extensive questioning about the events on the night of the murder, the BPH asked Estrada for his recollection of the sequence of events leading to the shooting. Estrada stated (consistent with his answers about the events he had given on several prior occasions) that Gill rolled his window down, Estrada saw Gill leaning over, and then Estrada saw Gill "looking in my direction, pointing something."¹⁴ Estrada then immediately clarified

¹³ Estrada did not discuss the circumstances of the offense at the 2010 hearing, and the Governor's brief in the current habeas proceeding cites nothing from the 2010 hearing as evidentiary support for the Governor's finding.

¹⁴ There is no evidence that Gill did *not* point at or make some gesture towards Estrada's vehicle moments before Estrada shot at him, and *Estrada I* noted that, after the

that Gill's pointing "could've been an innocent—any kind of move [but] [*i*]n my state of mind [*that night*], he's [armed]." (Italics added.) The BPH, noting Estrada stated at an earlier time that he thought Gill might be going for a gun when he leaned over, then asked "did you see any evidence of a gun?" to which Estrada replied, "No." He explained to the BPH that, because his *mindset that night* was geared for confrontation, he misperceived Gill's pointing toward them as a challenge, although Estrada stated he now understood that "anything that he was doing at that moment was confrontational in my state of mind at the time. . . . [I]t was, again, nothing that [Gill] had done himself." He told the BPH that he now recognized he had not seen Gill brandish a gun, and the other evidence before the BPH showed that Estrada had developed a fundamental understanding about what led him to shoot Gill: that "I was the aggressor. . . . It was not about anything personal the victim did to me. I had been shot at and chased with a knife and . . . I had the fear of becoming a victim. It was about me, not about [Gill]."

As our Supreme Court recognized in *Lawrence, supra*, 44 Cal.4th 1181, when all of the other evidence unambiguously shows the inmate has accepted responsibility for his or her crime and expressed deep remorse for his or her actions, the fact an inmate *explains* the inmate's current understanding of his or her state of mind leading to the life crime is not some evidence that the inmate was seeking to *justify* his or her actions. In *Lawrence*, as here, the numerous psychological evaluations over a long period of time concluded the inmate no longer represented a significant danger to public safety, and had

occupants riding with Estrada flashed gang signs at Gill before the chase began, Gill had gestured toward them with a rude hand symbol. (*Estrada I, supra*, D056903, at p. 3.)

"gained insight into the monstrous dimension of her crime [and] now comprehended her psychological motivation [for the crime]—that she killed Dr. Williams's wife . . . to retaliate against him." (*Lawrence*, at p. 1195.) In *Lawrence*, as here, the Governor reached a contrary conclusion by citing the inmate's testimony at her most recent parole hearing that the Governor concluded showed the inmate "was not remorseful and because she continued to attempt to justify the victim's murder," because the inmate testified she viewed the victim " "as the obstacle in my fantasy romance. That she was the one that was keeping me from having what I wanted. So in my mind, it was natural for me to confront her as though she would disappear. . . ." [Petitioner also] said that she saw Mrs. Williams as her "problem." ' ' " (*Id.* at p. 1222.) The *Lawrence* court, rejecting the argument that these statements were "some evidence" supporting the Governor's determination that the inmate's current mental attitudes showed she posed a continuing danger, observed:

"We agree with the Court of Appeal majority that it is evident from the full context of petitioner's statements that she merely was explaining her state of mind at the time of the homicide, not justifying it. 'To the contrary, these and like statements were made in the course of condemning her own behavior on that occasion and expressing deep remorse for what she had done and why she had done it.' Additionally, as the Court of Appeal recognized and as the record amply demonstrates, petitioner consistently, repeatedly, and articulately has expressed deep remorse for her crime as reflected in a decade's worth of psychological assessments and transcripts of suitability hearings that were before the [BPH]. Accordingly, the Governor's conclusion that petitioner showed insufficient remorse is not supported by any evidence; rather, it is clearly contradicted by abundant evidence in the record. [(Citing *Rosenkrantz, supra*, 29 Cal.4th at p. 681 [upholding the Governor's decision but finding 'no evidence supporting the Governor's additional determination that petitioner has continued . . . to avoid responsibility for his crime by

lying about pertinent events or by improperly attempting to portray himself as a victim'.)]" (*Lawrence, supra*, 44 Cal.4th at pp. 1222-1223.)

The *Lawrence* court's analysis is controlling here. "[I]t is evident from the full context of [Estrada's] statements that [he] merely was explaining [his] state of mind at the time of the homicide, not justifying it." (*Lawrence, supra*, 44 Cal.4th at p. 1222.) The Governor's rationale—that Estrada continues to "blame . . . the victim and minimize his own conduct"—lacks any modicum of evidentiary support, and is contrary to a record replete with facts demonstrating Estrada has fully accepted that he killed Gill without justification or necessity and as the result of Estrada's own insecurities and needs rather than Gill's actions.¹⁵ The Governor's contrary conclusion lacks any modicum of

¹⁵ Although we have concluded the Governor's reading of the record severely skews the import of Estrada's testimony, we also note numerous courts have recognized that when an inmate has expressed remorse for his or her crime and accepted responsibility for the crime, as here, the fact the inmate continues to adhere to a version of events that provides some explanation of why he or she killed the victim cannot be the sole ground for concluding the inmate is unsuitable for parole. (See *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112 [where defendant's version of the shooting of the victim "was not physically impossible and did not strain credulity such that his denial of an intentional killing was delusional, dishonest, or irrational" and he accepts full responsibility and expressed complete remorse, and psychologists conclude he did not represent a risk of danger if released on parole, "his continuing insistence that the killing was the unintentional result of his foolish conduct (a claim which is not necessarily inconsistent with the evidence) does *not* support the [BPH's] finding that he remains a danger to public safety"]; *In re Moses* (2010) 182 Cal.App.4th 1279, 1307-1310; accord, *In re Juarez* (2010) 182 Cal.App.4th 1316, 1341-1342 [while the BPH can rely on finding that inmate lacks credibility to deny parole where inmate asserts he did not engage in criminal or other relevant misconduct despite evidence to the contrary, inmate's failure to recall the details of his commitment offense has no bearing on his current dangerousness where he accepts full responsibility for the crime and his explanations for what induced his actions are not disputed].)

evidence necessary to support a finding of current dangerousness. (*Lawrence, supra*, 44 Cal.4th at p. 1213 [the BPH's determination of current dangerousness "must be supported by some *evidence*, not merely by a hunch or intuition"].)

The evidence presented below showed the commitment offense, because of the passage of time and Estrada's actions over the last 20 years, has lost any predictive value on whether he would pose an unreasonable risk if released on parole. He has been discipline free since his transfer to CMC, and his commitment to his rehabilitative programming is undisputed. He has shed his gang involvement, has dedicated many years to teaching others how to eschew gang involvement, and has an extensive support system outside of prison that will be available to allow him to maintain the lifestyle he has developed for more than a decade. His psychiatric evaluations uniformly agree that he poses a low risk of future violence, and the most recent psychological evaluation found he is "remorse[ful]" and has "identif[ied] and respond[ed] to the underlying causes [and] improved his understanding of how numerous factors converged and culminated in [the murder]." (*Estrada I, supra*, D056903.) The Governor's rejection of the opinions of these expert opinions proffered by the parole authority's experts—which constitute "the most recent [expert] evidence as to the inmate's level of insight" and are neither "unreliable [n]or insubstantial" (*Shaputis II, supra*, 53 Cal.4th at p. 211)—is sufficiently "arbitrary and capricious [to] amount[] to a denial of due process." (*Ibid.*) We conclude, on this record, there is no evidence supporting the Governor's determination that Estrada was unsuitable for parole.

There remains the issue of the proper remedy. Estrada argues the appropriate remedy is to reinstate the BPH's decision setting a parole date. The Attorney General, although not expressly contending to the contrary, has argued in other cases that under *In re Prather, supra*, 50 Cal.4th 238, a decision reversing the Governor should be accompanied by an order remanding the matter to the Governor to proceed in accordance with due process. (See, e.g., *In re Nguyen* (2011) 195 Cal.App.4th 1020, 1036; *In re McDonald* (2010) 189 Cal.App.4th 1008, 1023-1025.) We agree with the *Nguyen* and *McDonald* courts, for the reasons they articulated, that the appropriate remedy is to reinstate the BPH's decision.

DISPOSITION

Estrada's request for relief in his petition for a writ of habeas corpus is granted. The Governor's April 28, 2011, decision reversing the BPH's November 29, 2010, decision granting Estrada parole is vacated and the BPH's parole release order is reinstated. Estrada shall be released from custody on parole under the terms and conditions prescribed by the BPH on finality of this opinion as to this court. This opinion shall be final as to this court 10 days after it is filed.

McDONALD, J.

I CONCUR:

McINTYRE, J.

NARES, J., dissenting:

I respectfully dissent, as (1) the record demonstrates there is "some evidence" supporting the Governor's decision that Edward Estrada currently poses a danger to society and should not be released on parole; and (2) the majority has misapplied the deferential standard of review we must apply in assessing the Governor's decision to deny parole, as was recently reaffirmed in *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*).

In *Shaputis II*, the California Supreme Court recently clarified the "some evidence" standard of review, stating: "When reviewing a parole unsuitability determination by the Board or the Governor, 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.) Noting that "review under the 'some evidence' standard is *more deferential* than substantial evidence review, and may be satisfied by a lesser evidentiary showing" (*id.* at p. 210, original italics), the high court explained it is *irrelevant* that a reviewing court might determine the evidence tending to establish suitability for parole outweighs evidence showing unsuitability for parole: "It is settled that under the 'some evidence' standard, [o]nly a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board or] the Governor. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of [the Board

or] the Governor *It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole.* As long as the . . . decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the . . . decision.' " (*Ibid.*, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677, italics added.)

In this case, I believe the Governor's decision is supported by "some evidence" in the record, and the majority has invaded the province of the Governor in reaching its conclusion the Governor erred in overturning the grant of parole to Estrada.

The horrific nature of Estrada's commitment offense, which is detailed in the majority opinion, is undisputed. In reversing the grant of parole, the Governor commended Estrada for making positive steps, but concluded "the circumstances of the commitment offense, along with other relevant evidence, show that Mr. Estrada remains dangerous." In doing so, the Governor cited the following facts from the record: "Mr. Estrada claims that he shot and killed Mr. Gill for his safety and the safety of the other passengers in his car. He said in 2009 that he fired at Mr. Gill because he believed Mr. Gill had a gun and 'was going to fire at us.' This is essentially the same story he gave at trial. . . . But the evidence shows that Mr. Gill did not have a gun. During her testimony at trial, Ms. Casey did not indicate that Mr. Gill pointed a gun at her car or that anyone in her car expressed concern that Mr. Gill might fire at them. She testified that after the confrontation at the stop light, the three men instructed her to catch up with Mr. Gill and

that when she did, she heard a gunshot fired from the seat behind her where Mr. Estrada was sitting. She was instructed to keep up with Mr. Gill's truck and then she heard another shot fired by Mr. Estrada. Mr. Gill's father told police that he saw Ms. Casey's car chase after Mr. Gill's truck and fire a shot at the truck. He saw his son duck down after the first shot. He then saw his son stick his head up at which time he saw the flash of a second shot being fired from Ms. Casey's car."

The Governor continued: "The record does not support Mr. Estrada's version of the crime and I do not accept his version as fact. While Mr. Estrada claims to accept responsibility for murdering Mr. Gill, he clings to his story that he thought Mr. Gill had a gun and that he shot him out of fear and in self-defense. In sticking to his story, Mr. Estrada places blame on the victim and minimizes his own conduct. *Until he accepts responsibility for his actions, and confronts and deals with the reasons he committed such a senseless, unprovoked, and vicious murder, Mr. Estrada remains a threat to public safety if released from prison.*" (Italics added.)

The Governor concluded: "I have considered the evidence in the record that is relevant to whether Mr. Estrada is currently dangerous. When considered as a whole, I find the evidence I have discussed shows why he currently poses a danger to society if released from prison. Therefore, I reverse the decision to parole Mr. Estrada."

A review of the record demonstrates there is evidence that amply supports the Governor's decision that Estrada currently poses a danger to society based upon his failure to take responsibility for the unprovoked and vicious murder of Gill, because he

continues to claim that he shot Gill because he saw him reaching for a gun and then pointing it at him.

When Estrada last testified before the Board, he was asked whether, at the time of the offense, he was "going to go after [the victim, Gill,] anyway" no matter what Gill had done "because you were out looking for a fight." Estrada equivocated, stating, "[T]hat is possible." When asked about what he saw immediately before he shot Gill in the head with the shotgun, Estrada responded that he saw him roll down his window, lean to his right over the steering wheel, "looking in [Estrada's] direction, . . . *pointing something.*" (Italics added.) Estrada further stated, "In my state of mind, he's packing. He's strapped" Acknowledging he thought Gill might be going for a gun, Estrada stated, "[A]s far as I was concerned, that's exactly what I was seeing." Estrada was then asked, "So did you really see his hand come out or not?" Estrada clung to his story and replied, "I saw him *pointing something* . . . [¶] [¶] [i]n our direction." (Italics added.)

However, the record shows no gun was found in Gill's truck. Moreover, according to Gill's father, he saw his son duck after the first shot, and when his head came back up, Estrada fired a *second* shot. There is nothing in the record to support Estrada's version of events, and it is in fact *contradicted* by the evidence.¹

The foregoing constitutes some evidence that supports the Governor's determination that Estrada minimizes his criminal conduct and places blame on the

¹ Inexplicably, the majority states, "There is no evidence that Gill did *not* point at or make some gesture towards Estrada's vehicle moments before Estrada shot at him" (Maj. opn., p. 24, fn. 14, original italics.) In fact, the only evidence in the record is that Gill did not do so and that Estrada did not shoot him out of fear or self defense.

victim by clinging to his version of the crime, and thus poses a current threat to public safety if released from prison. This evidence regarding Estrada's lack of insight provides a rational nexus between his violent past behavior and the Governor's determination he poses a current threat to public safety if released on parole. (See *Shaputis II*, *supra*, 53 Cal.4th at p. 218 ["[W]e have expressly recognized that the . . . 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."].)

For example, courts have found some evidence to support a finding that an inmate lacks insight into the offense when the inmate's version of the commitment offense is inconsistent with the facts in the record and demonstrates the inmate is minimizing his or her role or culpability in the offense. In *In re Shaputis* (2008) 44 Cal.4th 1241, 1246-1248, the California Supreme Court upheld the Governor's reliance on the inmate's lack of insight because the inmate continued to insist the killing was accidental, despite evidence that the killing was intentional. Similarly, in *In re Smith* (2009) 171 Cal.App.4th 1631, 1638, the Court of Appeal found some evidence the inmate lacked insight because she denied personally beating the murder victim despite the eyewitness testimony of her daughter that she beat the victim. In *In re Taplett* (2010) 188 Cal.App.4th 440, 448-450, the Court of Appeal upheld the Governor's finding the inmate lacked insight where the inmate, who was the driver in a drive-by shooting, claimed she did not know her codefendant would shoot the victim and thought they were only going to fight, despite the fact the her co-defendant stated she was going to "bust a cap on her,"

and the inmate intentionally pursued the victim even after her codefendant shot at the victim's vehicle.

The majority, in deciding "there is no evidence supporting the Governor's determination that Estrada was unsuitable for parole" (maj. opn., p. 28), states that "*the [Governor's] finding* Estrada had not accepted full responsibility for Gill's death or dealt with the reasons he committed the murder . . . lacks any modicum of evidentiary support." (Maj. opn., p. 19, italics added, fn. omitted.) The majority asserts this "*conclusion*" by the Governor is " 'precisely the opposite' " of the conclusions of the expert psychologist (maj. opn., p. 19), is "unsupported by any snippet of evidence from [Estrada's] institutional behavior" (maj. opn., p. 20), and is "unsupported by any modicum of evidence derived from his testimony before the BPH [(Board of Parole Hearings or Board)]." (Maj. opn., p. 21.) The majority also states "[*t*he Governor's rationale—that Estrada continues to 'blame . . . the victim and minimize his own conduct'—lacks any modicum of evidentiary support, and is *contrary to* a record replete with facts demonstrating Estrada has fully accepted that he killed Gill without justification or necessity and as the result of Estrada's own insecurities and needs rather than Gill's actions. The *Governor's contrary conclusion* lacks any modicum of evidence necessary to support a finding of current dangerousness." (Maj. opn., pp. 27-28, italics added, fn. omitted.) The majority further states that "the Governor's reading of the record severely skews the import of Estrada's testimony" (Maj. opn., p. 27, fn. 15.)

All of these statements at most show that the majority simply disagrees with the Governor's decision, not that there is not a "modicum" of evidence to support that

decision. This shows the majority's fundamental misapplication of the standards under which we review the Governor's decision to deny parole. As noted, *ante*, "*It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole.* As long as the . . . decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the . . . decision." (*Shaputis II, supra*, 53 Cal.4th at p. 210.)

Moreover, the Governor was not required to accept the opinions of experts if he concluded that Estrada's own testimony showed a lack of insight and a failure to accept responsibility. The majority's belief that the Governor's reading of the record is "skewed" similarly shows only a disagreement with the Governor's interpretation of the record, not that there is *no* evidence to support his conclusion that Estrada is unsuitable for parole. Our review of that decision begins and ends with a determination of whether there is *any* evidence in the record to support the Governor's decision. It is not our role to conclude that we would have made a different decision or that the factors supporting suitability for parole far outweigh those demonstrating that Estrada was unsuitable. For all the foregoing reasons, I would uphold the Governor's decision and deny the petition.

NARES, Acting P. J.