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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re KENNETH MICHAEL FERGUSON

D061630

on

(Super. Ct. No. SCN029511)

Habeas Corpus.

Original proceeding on a petition for writ of habeas corpus. Relief granted.

Kenneth Ferguson has served about 16 years in prison after being sentenced to a life sentence for his 1996 conviction for torturing his wife, Alida Ferguson. In August 2010, the Board of Parole Hearings (Board) found Ferguson not suitable for parole. Ferguson challenges the Board's decision, contending it was arbitrary and capricious because the reasons given by the Board do not support the conclusion that he remains an unreasonable risk to public safety if granted parole. We agree and grant relief. The matter must be remanded to the Board to hold a new hearing in accordance with due process of law, our decision and the Supreme Court's decision in *In re Prather* (2010) 50 Cal.4th 238 (*Prather*).

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Ferguson's Preconviction History and the Offense

Ferguson has no arrests or convictions as a juvenile. His only adult conviction is the instant offense, committed when he was 52 years old. He has a college education and no history of drug use or alcohol abuse.

In July 1995, after 23 years of marriage, Alida informed Ferguson that she wanted to divorce him. On August 28, 1995, while their son was out of the house, the couple got into an argument about how to divide Alida's jewelry. Because Ferguson looked angry, Alida decided to leave the room. She picked up some laundry and went to the laundry room. As she stood in the laundry room, Ferguson hit her from behind with a 12-inch wrench. Alida collapsed to the floor after Ferguson hit her several times in the head. Ferguson continued the attack as Alida lay face down on the floor.

Eventually, Ferguson put down the wrench, tried to suffocate Alida with a blanket, and then choked her around the neck. During the struggle, Alida bit Ferguson's thumb until he stopped the attack. Alida fled the home after Ferguson left the room. A house cleaner working in the house next door saw Alida come out of the garage and a man follow her carrying a wrench, but the man did not leave the garage. Ferguson called 911 claiming that Alida had attacked him. They were both transported to the hospital where it was discovered that Alida had a fractured skull, contusions, numerous cuts to her head, a compound finger fracture and a large contusion to her right arm. Alida had a total of 13 wounds to her head. Although

some of the wounds could have been caused by the same blow, there were at least 10 to 11 incidences where some object hit her head.

The jury rejected Ferguson's claims of self-defense and, while acquitting him of attempted murder, found him guilty of torture with use of a deadly weapon, battery, corporal injury to a spouse using a deadly weapon and personally inflicting great bodily injury on the victim, and aggravated assault with personal weapon use and infliction of great bodily injury. The trial court sentenced Ferguson to life with the possibility of parole, plus one year. We affirmed the judgment on appeal.

#### B. Ferguson's Postconviction Conduct

Ferguson has been discipline free during his incarceration. He has been a peer health educator for 13 years, teaching inmates to stay healthy and educating them on common prison diseases and drug use. He is a Laubach Literacy teacher; he instructs inmates on reading and teaches English to those whose first language is not English. Ferguson is also a founding member of the Victim-Offender Reconciliation Group, which raises money for charities and the community.

Ferguson belongs to many different religious groups, studies the Bible and does anything he can to enlighten himself in the area of faith. He has received numerous laudatory chronos from psychologists, correctional officers, instructors, doctors, and the Jewish chaplain. Ferguson has taken many courses including conflict resolution, leadership skills group training and advanced leadership training. He has certificates of completion in creative conflict resolution, peer education training, disease education, group facilitation and counseling skills. In his October 2008 psychological

evaluation, Dr. Richard Starrett rated Ferguson at the low range for psychopathy (PCL-R), risk of future violence (HCR-20) and future recidivism (LS/CMI).

Ferguson believed that his work in the peer health education area prepared him for service in the health industry and that he could also help people learn to read. He planned to live at the Salvation Army in San Diego or the Free Methodist Church Home Free Ministries in Placentia. He also had a letter dated August 2009 from Patricia Oso extending him an employment opportunity and offering to assist him with housing. Ferguson is eligible for social security benefits and has a trust account from his mother containing \$90,000.

#### C. The Present Proceedings

The Board found Ferguson unsuitable for parole and denied parole for five years. Ferguson petitioned the superior court for a writ of habeas corpus in an attempt to reverse the Board's denial, but the superior court denied the petition. Ferguson filed a writ petition in this court, and we issued an order to show cause why the relief requested should not be granted.

### DISCUSSION

#### A. General Legal Principles

An inmate is entitled to be released on parole if the inmate does not currently pose a danger to public safety. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191 (*Lawrence*)). Release on parole is the rule, rather than the exception. (*Id.* at p. 1204.) A parole decision is an inherently subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that is guided by a number of factors identified in

Penal Code section 3041 and the Board's regulations (Cal. Code Regs., tit. 15, §§ 2281, 2402). In making the suitability determination, the Board must consider "[a]ll relevant, reliable information," such as the nature of the commitment offense including behavior before, during, and after the crime, the prisoner's social history, mental state, criminal record, attitude towards the crime, and parole plans. (*Id.*, § 2402, subd. (b).) Circumstances tending to show unsuitability for parole include that the inmate (1) committed the offense in a particularly heinous, atrocious, or cruel manner, (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. (*Id.*, subd. (c).)

These criteria are "'general guidelines,'" and "'the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board].'" (*Rosenkrantz, supra*, 29 Cal.4th at p. 654; Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) Nonetheless, the Board's decision must comport with due process. (*Rosenkrantz, supra*, at p. 660.) The Board "must determine whether a particular fact is probative of the central issue of current dangerousness when considered in light of the full record." (*Prather, supra*, 50 Cal.4th at p. 255.) "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence, supra*, 44 Cal.4th at p. 1212.)

We review the record in the light most favorable to the Board's decision "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." (*In re Shaputis* (2011) 53 Cal.4th 192, 214 (*Shaputis II*)). We may not substitute our own "credibility determination for that of the parole authority.

[Citation.] Any relevant evidence that supports the parole authority's determination is sufficient to satisfy the 'some evidence' standard." (*Ibid.*) Nonetheless, the paramount consideration is whether the inmate currently poses a threat to public safety; thus, there must be some evidence "'demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability. [Citation.]" (*Id.* at p. 209.) "Under the 'some evidence' standard of review, the parole authority's interpretation of the evidence must be upheld if it is reasonable, in the sense that it is not arbitrary, and reflects due consideration of the relevant factors." (*Id.* at p. 212.) If the Board's consideration of the specified factors is not supported by some evidence in the record, we must grant the petition and order the Board to vacate its decision. (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.)

Additionally, we "generally should direct the Board to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider." (*Prather, supra*, 50 Cal.4th at p. 244.)

## B. Analysis

The Board's reasons for finding Ferguson unsuitable for parole are not well articulated. It appears the Board concluded that Ferguson remained a risk to society because he (1) lacked insight and remorse into "the immense magnitude of" what he caused because he focused his comments on himself, and (2) lacked adequate parole plans. The Attorney General claims that Ferguson did not address why he was so angry and why his anger reached the level where he lost control and that Ferguson needs to convincingly answer these questions to show his insight into the crime. The Board, however, never expressed concern that Ferguson lacked insight because he failed to understand "why" he was angry. Accordingly, we reject the Attorney General's suggestion that the Board found Ferguson unsuitable for parole on the ground he lacked insight into the anger that precipitated the crime. (Cf. *In re DeLuna* (2005) 126 Cal.App.4th 585, 593–594 ["[w]e must confine our review to the stated factors found by the Board . . . not to findings that the Attorney General now suggests the Board might have made".])

As the dissent notes, the record contains "some evidence" suggesting that Ferguson's statements regarding his insight and remorse lack credibility; however, simply establishing that Ferguson's statements regarding his insight and remorse are deficient is insufficient unless there is some connection between the cited deficiency and the conclusion of current dangerousness. (*In re Morganti* (2012) 204 Cal.App.4th 904, 923.) Here, the Board and the dissent fail to articulate a rational nexus between

Ferguson's lack of credibility and the determination that he is currently dangerous. Further, the record contains no reasoning by the Board supporting such a nexus.

#### 1. Lack of Insight and Remorse

"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' ([Cal. Code Regs., tit. 15,] § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' ([Cal. Code Regs., tit. 15,] § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of 'insight.'" (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

Accordingly, "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. [Citations]." (*Ibid.*; *In re Shaputis* (2008) 44 Cal.4th 1241, 1261 (*Shaputis I*)). However, lack of insight is probative of unsuitability only to the extent that it is both demonstrably shown by evidence in the record, and is rationally indicative of the inmate's current dangerousness. (Cf. *Lawrence, supra*, 44 Cal.4th at pp. 1211–1212.)

Here, after the Board described the crime, Ferguson's counsel asked him to address what remorse meant to him. Ferguson stated, "I completely accept responsibility for the crime. I own the crime. It should never have happened. There's absolutely no excuse for it." When asked to explain his sorrow, Ferguson responded, "It's something I live with. It's something that I think about constantly. It's something I wish I could go back and change constantly. I know I can't do it." When asked how

he is making amends for the crime, Ferguson stated that as a peer health educator, he tries to ensure that other prisoners are staying healthy and as a literacy teacher, he helps others whose first language is not English.

In his closing statement, Ferguson took "total and complete" responsibility for what he did to his "innocent victim," stating that his act was "senseless and cowardly." He expressed his "bitter remorse" for his act, acknowledging the "hurt and suffering" he caused Alida. He agreed with the prosecution's version of the crime, stating that he lost control of himself. He addressed at length the other options and choices he had and where he could have turned for help. He stated that his "out-of-control anger" led to his behavior and he understood that he needed to remove himself from the situation. He "chose fight and not flight," stating, "I will never fully understand my failed choice," but indicating he had gained insight from the classes and programs he has taken, and that his conduct in prison reflects his current choices.

The record here supports the sincerity of the statements Ferguson made at the hearing. A 2004 psychosocial evaluation addressed insight, stated that Ferguson previously "rationalized and denied aspects of his crime," but that he recently wrote two letters of remorse where he admitted committing a violent crime and that he deserved jail time. The evaluator considered this "a positive development, considering that at first [Ferguson] claimed that [Alida] initiated the crime by attacking him." As to "causative factors" of the crime, Ferguson stated that he was angry about the divorce. Ferguson also expressed remorse, stating, "I feel terrible about it."

A 2006 psychological evaluation found that Ferguson took "blame for his role and [saw] his prior judgment as poor." "Ferguson stated that he [felt] terrible about his behavior during the instant offense. He had felt frustrated and had some difficulties in communicating with his wife. They were going through a divorce. Pent-up frustrations and angry feelings had bubbled over to the instant offense. He said he feels very bad that he hurt his wife and that she is having ongoing mental difficulties." The evaluator concluded, "It appears, from what [Ferguson] stated during this evaluation, that he has taken ownership of his thoughts and his feelings and responsibility for his actions during the instant offense. It was noted that communicating was an important factor and it was noted that his completion of his self-help and therapy rehabilitative course within the CDCR in 2006 helped him to be able to articulate the lifestyle that he has chosen to live, which is a healthy and law-abiding one."

Finally, the most recent 2008 psychological evaluation concluded that Ferguson accepted responsibility for the crime, stating Ferguson "readily acknowledged responsibility for the crime. He listed a number of stressors at the time of the crime that were affecting him: particularly, abandonment issues and the stress of divorce. He acknowledges the fact that he went into a rage and lost control. The inmate has been in the mental health program for many years and has had a chance to explore his life crime through access to the mental health department and other resources available to him. The inmate appears to have spent a considerable amount of time attempting to understand his background and other influences in the controlling case. [¶] It is

unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate."

The Board seems to have completely ignored this evidence and based its lack of insight finding solely on the fact that Ferguson's closing statement focused on himself, and not Alida or their son, and the harm he caused them. Ferguson prepared his closing statement in advance of the hearing. It turns out, however, the Board wanted Ferguson to concentrate on himself as it instructed him to focus and direct his closing statement on "why you feel you're suitable for parole." In other words, the Board asked Ferguson to speak about himself. The Board never asked Ferguson to address how his actions had impacted Alida or their son. In any event, Ferguson acknowledged the victims in his prepared closing statement. He stated that Alida was an "innocent victim" he had "failed," that his "violent and inexcusable act" scarred family members, friends and neighbors, that he regretted the "suffering" he caused, and that he hoped those he had harmed could find a way to forgive him.

In its decision, the Board claimed it was not "pick[ing Ferguson's] words apart." However, this is exactly what it did. The Board stated that Ferguson used the phrase "live to fight another day" "a number of times during the hearing" and found this odd because Ferguson almost killed someone. Review of the hearing transcript shows that Ferguson mentioned "fight and flight" for the first time in response to a question asking him what he learned from a particular class. Ferguson stated that the class helped him put together a program on anger management for his position as a peer

health educator to convince people that the two things to think about were "fight and flight. And you never choose fight. You choose flight."

In response to a question about how this is done, Ferguson responded that things can happen in "millisecond[s]," that a person has to practice and when things turn bad, "you have to get away from the problem as quickly as possible. That's the flight part versus the fight part." The Board mentioned that Ferguson had written two book reports on the topic of how genetics impacts behavior. The Board then asked Ferguson whether he could "change [his] hardwiring" or a "hardwired emotion." Ferguson responded by using his book report, stating that a person's reaction to a threat or fear is reflexive, that people need to learn to control their reactions, that he reacted without thinking because he became overwhelmed by emotion, anger and fear, and that a person needs to stop and seek alternatives to violence.

Finally, the Board asked Ferguson what "tools" he had gotten from his courses to deal with confrontational situations other than "fight or flight." Ferguson addressed the concept of taking a "time out, you must change your environment, you must change the people you're around, you must -- Sometimes it's said that you live to fight for another day. And I think that what I take out of that, when you live to fight for another day is, it allows you some time to get away and cool off. So, when you get hot, you need to cool off, and you need to reevaluate, and evaluate what you're doing and why you're doing it."

Thus, our review of the record reveals that Ferguson mentioned the phrase "live to fight" another day only once, that it was mentioned to reinforce the concept that

individuals must seek to avoid conflict, and that his life crime occurred because he failed to follow this concept.

In its decision, the Board was not satisfied by Ferguson's statements of insight and remorse, but it never expressly found that any of Ferguson's statements lacked credibility. As the dissenting justice states, and we agree, a trier of fact is generally not required to make express credibility findings. Nonetheless, when reviewing a parole denial, it is critical to examine the Board's reasoning. While our review is deferential, it "is 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, supra*, 44 Cal.4th at p. 1210.)

Accordingly, we will assume that the Board did not believe Ferguson's repeated expressions of remorse and insight; and thus, some evidence suggests he may be unsuitable for parole. The next step is to establish a connection between these deficiencies and current dangerousness. (*Lawrence, supra*, 44 Cal.4th at p. 1212 ["It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public."].) The Board's decision and the record are devoid of evidence connecting any such deficiencies to the conclusion that Ferguson presents a risk to public safety if released on parole.

It is not enough for the Board to simply state we do not believe the inmate's expressions of insight and remorse and thus find the inmate is currently dangerous. "If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry. Such a standard, because it would leave potentially arbitrary decisions of the Board or the Governor intact, would be incompatible with our recognition that an inmate's right to due process 'cannot exist in any practical sense without a remedy against its abrogation.'" (*Lawrence, supra*, 44 Cal.4th at p. 1211.)

As the California Supreme Court has recognized, "expressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (*Shaputis I, supra*, 44 Cal.4th at p. 1260, fn. 18.) Ferguson is nearly 70 years old. He committed a *single* horribly violent criminal act while subject to significant and unusual emotional stresses that are not likely to recur. (See *Lawrence, supra*, 44 Cal.4th at pp. 1225–1226.) He has a perfect prison record. The experts who evaluated Ferguson all concluded that he does not present a risk of danger to the community. His acceptance of responsibility for the life crime and expressions of remorse and insight into what triggered his violent conduct are consistent, undisputed and date back to at least 2006.

"Where, as here, undisputed evidence shows that the inmate has acknowledged the material aspects of his or her conduct and offense, shown an understanding of its causes, and demonstrated remorse, the [Board's] mere refusal to accept such evidence is not itself a rational or sufficient basis upon which to conclude that the inmate lacks insight, let alone that he or she remains currently dangerous." (*In re Ryner* (2011) 196 Cal.App.4th 533, 549.)

## 2. Sufficiency of Parole Plans

At the hearing, Ferguson stated that his work in the peer health education area prepared him for service in the healthcare industry and that he could also help people learn to read. The Board read out loud Ferguson's parole plans as planning to live at the Salvation Army in San Diego or the Free Methodist Church Home Free Ministries in Placentia, being eligible for social security benefits, and having a letter dated August 2009 from Patricia Oso that extended Ferguson an employment opportunity and offered to assist him with housing. In its decision, the Board noted that there were no letters updating Ferguson's parole plans and concluded that his parole plans were lacking.

An inmate's plans for release are relevant in deciding whether the inmate is suitable for release. (Cal. Code Regs., tit. 15, § 2402, subds. (b), (c).) The Board should consider whether "[t]he prisoner has made realistic plans for release *or* has developed marketable skills that can be put to use upon release." (*Id.*, subd. (d)(8), italics added.) Here, the Board apparently concluded that Ferguson failed to have realistic plans for release. It failed to acknowledge, however, that the appropriate test

is whether Ferguson had "realistic plans for release or [had] developed marketable skills." (*Ibid.*)

Ferguson claimed to have developed marketable skills in the healthcare industry and the Board reviewed comments from three correctional officers supporting this assertion. In addition to having marketable skills, Ferguson was eligible for social security benefits and had a trust account from his mother containing \$90,000. Ferguson clearly has the means to find a place to live and support himself without a current job offer.

To the extent the Board was concerned that Ferguson's planned living arrangements were outdated, its focus on this factor is misplaced as once he receives a parole date, a parole agent will then investigate his plans, including confirming his proposed residence. (Cal. Dept. of Corrections & Rehabilitation Operations Manual (Jan. 2012) Adult Parole Operations, § 81010.5.1, at pp. 675–676.) If the plan is not suitable, the parole agent must try to develop "an appropriate alternate program." (*Id.*, § 81010.5, at p. 675.)

The Board's concern about Ferguson's inadequate parole plans was not supported by the record. Additionally, Ferguson's lack of a current job offer or firm residence, whether considered alone or in conjunction with the other cited factors, does not support a finding of current dangerousness given the undisputed evidence that Ferguson had no criminal record except for the commitment offense and the financial means to obtain a place to stay and survive on parole without a job.

We conclude that the Board's decision violates due process. We grant the relief sought in the petition and remand this matter to the Board to conduct a new parole-suitability hearing consistent with our decision, due process and the Supreme Court's decision in *Prather, supra*, 50 Cal.4th 238.

#### DISPOSITION

The relief sought in the petition for writ of habeas corpus is granted. The Board is directed to vacate its decision denying parole and thereafter proceed in accordance with due process of law and consistent with the decision of this court. (*Prather, supra*, 50 Cal.4th 238.) In the interests of justice, this decision is made final as to this court seven days from the date of filing. (Cal. Rules of Court, rule 8.387(b)(3)(A).)

McINTYRE, J.

I CONCUR:

McDONALD, J.

McConnell, P. J., dissenting.

I respectfully dissent and would deny Ferguson relief, as I believe there is ample evidence in the record to support the conclusion of the Board of Parole Hearings (Board) that Ferguson is presently dangerous because of his lack of insight into and remorse for his commitment offense. The majority, while acknowledging the highly deferential standard of review applicable to the Board's decision, misapplies the standard by overlooking parts of the record supplying the requisite modicum of evidence to support the decision. Instead, the majority views the evidence in the light most favorably to Ferguson, effectively substituting its judgment for the Board's and "[fundamentally failing] to accord the Board's decision the deference that the 'some evidence' standard was designed to provide." (*In re Shaputis* (2011) 53 Cal.4th 192, 212 (*Shaputis II*).

At the outset of Ferguson's 2010 parole hearing, the Board informed Ferguson it would be focusing on exploring his insight into the crime, honesty, acceptance of responsibility, and remorse. A short while later, before swearing in Ferguson, the Board chair emphasized, "It's very important that you tell the truth. That's one of the things we look at." Thus, Ferguson knew his veracity was a key issue at the hearing.

The Board's emphasis on veracity is neither arbitrary nor unreasonable in this case. As the majority describes, Ferguson does not have a criminal history apart from the commitment offense, he has programmed very well during his incarceration, and most commendably, he has remained discipline free. Consequently, his suitability for parole largely turns on his "past and present attitude toward the crime" and "[s]igns of [r]emorse," including "indications that he understands the nature and magnitude of the

offense" (collectively, insight and remorse). (Cal. Code Regs., tit. 15, § 2281, subd. (b), (d)(3); *Shaputis II, supra*, 53 Cal.4th at p. 218 [past and present attitude toward crime and presence of remorse can be described as "insight."])

Although an inmate's prison programming and psychological evaluations provide potentially helpful information on this point, there are no foolproof, objective means of accurately measuring an inmate's level of insight and remorse. Rather, "a parole suitability decision is an 'attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.' " (*Shaputis II, supra*, 53 Cal. 4th at p. 219.) The Board must, therefore, rely at least partially on its assessment of the inmate's credibility, making the inmate's veracity critically important. As one commissioner plainly stated during Ferguson's 2002 parole hearing, "If you're not telling us the truth then that means you haven't come to grips with what happened at all, that you're in denial, that you don't have any idea as to exactly what occurred so you may not be able to control again . . . ."

In this case, the only reasonable inference to be drawn from the Board's decision and the record is that the Board did not find Ferguson's statements of insight and remorse credible. The "some evidence" standard requires only a modicum of evidence to support this finding, which the record sufficiently provides. (*In re Shaputis, supra*, 53 Cal.4th at p. 213.)

More particularly, the record shows concerns about Ferguson's credibility date back to his trial when he insisted he struck Alida in self-defense after she bit his thumb. Not only did the jury reject this defense, but the trial court, having heard the relevant

evidence, labeled the defense "preposterous." Nonetheless, Ferguson maintained he acted in self-defense until at least 2004, at which point he changed his version of the commitment offense to "stipulate with the events presented by the prosecution" because he "had amnesia and [he] did not clearly remember the events during the commission of [his] crime." In discussing his amnesia with the Board at his 2005 parole hearing, he explained he "didn't remember the chronological order of what happened at the scene of the crime," specifically referring to whether Alida attacked him first or whether he attacked her first. He further admitted he untruthfully testified at his 2002 parole hearing that Alida came at him with a wrench and a knife.

He subsequently told the psychologist who prepared his 2008 psychological evaluation that his trial defense counsel wanted him to claim self-defense and he followed his counsel's advice. However, shortly after his trial, in a written statement incorporated into the probation report prepared for his sentencing hearing, he remarked, "I can truthfully say that I have not broken any criminal law or made any untruthful testimony or statement to the court or my attorney . . . ." He then went on to describe the incident as follows: "Alida was extremely angry with me over several custody and financial problems. Alida did bite my thumb to the bone and I did injure her head trying to regain my thumb from her jaw. I now wish that I could have somehow removed my thumb by a means that would not have caused her any harm." In his oral remarks to the trial court at the sentencing hearing, he reaffirmed he was "not a violent person" and had "never had any acts of violence except this one occurrence which [was] a very short

occurrence which [he] truly believed was self-defense." These remarks belie any notion Ferguson's self-defense claim was solely or even primarily counsel driven.

Moreover, notwithstanding his current acceptance of the prosecution's version of events, Ferguson continues to describe the crime as if he acted in self-defense. When the psychologist who prepared the 2008 psychological evaluation asked him why he committed the crime, he told the psychologist he and his wife had gotten into a shouting match over their divorce, they were pushing each other and " '[t]he next thing I know, my thumb was in her mouth and I called the police.' "

Another ongoing credibility concern involves Ferguson's employment history. He told the probation officer who prepared the probation report that he worked from June 1991 until his arrest in August 1995 at F & G International, a business that bought older computers and computer components and resold them to third world and developing nations. He said he was a vice-president in sales and earned approximately \$60,000 annually. However, Alida told the probation officer Ferguson had not worked since 1991 and F & G International was completely fictitious. In a letter to the trial court incorporated into the probation report, Alida stated Ferguson had never held a job for more than about three years and he was out of work for about eight of the last 11 years of their marriage, including every day of the last five and a half years. She indicated Ferguson's inability to maintain employment was due to a "deceitful resume" and "lack of motivation to work." Presumably, in response to Alida's statements, the probation officer called the number Ferguson provided for F & G International and reached another

business. The probation officer was unable to find another listing for the company in Carlsbad.

At the 2002, 2005 and 2010 parole hearings, Ferguson characterized his relationship with F & G International differently. He told the Board that F & G International was a company he started up. At the 2005 hearing, he stated he was just getting the company off the ground at the time of the commitment offense and he wished it had been more successful. At the 2010 hearing, he assured the presiding commissioner, F & G International was a real company and it was located in the "San Diego area."

His characterization of his employment history to the psychologists evaluating him over the years has also been inconsistent. He told the psychologist who prepared the 2008 psychological evaluation that, before his incarceration, he had run several major companies. He told the psychologist who prepared his 2006 psychological evaluation that he worked in technology companies before his incarceration. Specifically, he said he worked for six years with a German technology firm and became a vice-president. He also stated he invested in real estate and had a real estate broker's license. He told the psychologist who prepared his 2004 psychological evaluation that he had been a director of sales and marketing for nine years and this employment was terminated by his arrest. He also said that, at that the time of the commitment offense, he had just established a new company, F & G International. He told the psychologist who prepared his 2002 psychological evaluation that, before his incarceration, he had worked "at Memorex for 5 years as a District and Regional Sales Manager. He [then] moved to ITT Qume as

Western Regional Manager in sales for 8 years, and then to Smith Corona Marchant as National Sales Supervisor for 8 years. Finally, he worked at Mannesmann as Vice President of sales for 9 years."

The discrepancies surrounding Ferguson's self-defense claim and his employment history demonstrate he has a propensity for falsifying, fabricating, and manipulating facts to portray himself more favorably.<sup>1</sup> Thus, the Board had a sufficient evidentiary basis for discounting the sincerity of his statements of insight and remorse.

While the majority acknowledges the adequacy of the evidentiary support for an adverse credibility determination, the majority nonetheless faults the Board for ignoring favorable conclusions about Ferguson's insight and remorse in the psychological evaluations. These conclusions, however, were based on the same statements of insight and remorse the Board found incredible in the first instance. They were also based on other questionable information supplied by Ferguson. For example, the 2008 psychological evaluation indicates Ferguson's violence risk was decreased in part, because he purportedly had a well-established career prior to his incarceration and steady employment throughout most of his life. Ferguson additionally told the psychologist who prepared the evaluation "he does not lie" and he believes "[Alida] has become more

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<sup>1</sup> There are other examples of this propensity, which Alida highlighted during her remarks at the various parole hearings. I have not referenced these examples because, although the transcripts from the hearings show Alida provided the Board with evidentiary support for them, including documents written by Ferguson, the evidence is not in the record before us.

favorable towards his release over the years."<sup>2</sup> Because of the questionable foundation for the conclusions in the psychological evaluations, the Board was not required to give appreciable weight to the conclusions and we cannot criticize the Board for failing to do so. (*Shaputis II, supra*, 53 Cal. 4th at p. 215 ["When, as in this case, the parole authority declines to give credence to certain evidence, a reviewing court may not interfere unless that determination lacks any rational basis and is merely arbitrary."].)

The majority further faults the Board for criticizing Ferguson's closing statement because of his word choices<sup>3</sup> and because he focused on himself, rather than on the impact his actions had on Alida and their son. The majority suggests the Board's criticism were unfair because the Board did not directly ask him to speak about how his actions impacted his victims. The majority's suggestion might be more persuasive if Ferguson's remarks were spontaneous. However, Ferguson prepared his closing remarks, and many of the other remarks he made at the hearing, in advance of the hearing.

Moreover, Ferguson has made similar word choices in the past and has been consistently criticized for his self-focus since his sentencing hearing. In his written

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<sup>2</sup> At the parole hearing under review, he said he believed this because his son "indicated that there was more favorable feelings." Given Ferguson's general credibility concerns and Alida's persistent, vehement opposition to his release, the Board could have reasonably doubted Ferguson's veracity on this point. Even assuming his son did give such an indication, the vagueness of Ferguson's description of his son's remarks does not support a reasonable belief on Ferguson's part that Alida truly favored his release. Instead, this appears to be one of many examples in the record where Ferguson manipulated the facts to suit his purpose.

<sup>3</sup> Consistent with concerns about Ferguson's general credibility, many of Ferguson's word choices, expressions, and remarks have a grandiose quality.

statement to the trial court incorporated in the probation report, he expressed "bitter regret" and "great remorsefulness" as he did at his 2010 parole hearing. The trial court did not find Ferguson's remarks persuasive. In making its sentencing choices, the trial court explained, "[A]fter looking at the specific character of the defendant in this case, he has in the vernacular shown little insight as to the inappropriateness of his conduct and the seriousness of the offense. He has focused almost entirely upon his own predicament, I guess the woe is me approach. I think he has shown virtually no remorse for the terrible injuries he's inflicted on [Alida], the woman he's lived with for 23 or 24 years. This lack of insight I think needs to be addressed in a correctional setting for a period of time that is more appropriately handled on an indeterminate basis by review by the Board . . . ."

In his closing remarks at his 2005 parole hearing, he briefly stated he had the "greatest and most bitter remorse" for his crime, he regretted hurting Alida, and he desired her forgiveness. He devoted most of the rest of his time to recounting laudatory remarks about himself, reviewing his successful prison programming, endorsing a psychologist's view his crime was a "once in a lifetime event," and assuring the Board he was able and willing to comply with any parole requirements. He never discussed the impact of the crime on Alida or their son. In fact, he admitted in his closing remarks that he did not completely understand the crime. He wrapped up his remarks by stating he believed he was suitable for parole because he was not a violent or dangerous person, he had the "greatest remorse" for his crime, and he needed a chance to prove himself on parole.

After the Board found him unsuitable for parole, the deputy commissioner commented, "I just observed today, Mr. Ferguson, that I don't think you've changed a whole lot from the man that you were at the time. I see you today as very cold, very controlled, very self-contained and very prone to intellectualizing all matters. When your victim was making a very emotional statement a while ago related to your son, it would seem to me that that might have provoked at least a twinge of emotion in you. I saw none whatsoever. I saw cold calculation, writing down things that I determined—or speculated in my mind that you were going to be focusing on, to address those issues that she raised. I have a strong spirituality myself and do understand forgiveness, but there's another part of that equation and it's called justice. I would suggest—and it is my opinion that you really have not even begun your rehabilitation yet."

Further, the Board did not, as the majority complains, simply pick apart Ferguson's remarks. The Board explained in detail, based on its collective experience conducting thousands of parole hearings, the differences between Ferguson's remarks and the remarks of inmates who demonstrate insight. Even if the Board had not offered such a detailed explanation, Ferguson knew from past experience his self-focus and failure to address the impact of his crime on his victims did not persuade the Board of his parole suitability. His continued use of that approach in his prepared remarks at the 2010 parole hearing was, therefore, inexplicable and the Board's criticisms of his remarks were neither surprising nor unfair.

Finally, the majority faults the Board for failing to articulate a rational nexus between Ferguson's lack of credible insight and remorse and his current dangerousness.

It may, indeed, have been preferable for the Board to explicitly state it found Ferguson remained dangerous, at least to Alida, because he did not appear to be genuinely sorry for his conduct, to understand why he previously harmed her, to understand how his conduct impacted her or their son, and to lack the capacity to harm her again. However, as such a nexus is manifest from the record, I have no difficulty concluding Ferguson's lack of credible insight and remorse is rationally indicative of his current dangerousness as required by our Supreme Court's decisions. (*Shaputis II, supra*, 53 Cal.4th at p. 219.) To return the matter to the Board to require such an explicit statement would, in my view, amount to a waste of scarce government resources.

As the Supreme Court recently reminded this court, "While the evidence supporting a parole unsuitability finding must be probative of the inmate's current dangerousness, it is not for the reviewing court to decide *which* evidence in the record is convincing. [Citation.] Only 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 Board or the Governor. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process." (*Shaputis II, supra*, 53 Cal.4th at p. 211.) As I find nothing arbitrary about the Board's decision and am not persuaded the only decision to be drawn from the record is that Ferguson is not presently dangerous, I cannot join in the majority's opinion.

McCONNELL, P. J.