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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re HUI KYUNG KANG,  
  
on Habeas Corpus.

H038257  
(Santa Clara County  
Super. Ct. No. 175010)

**I. INTRODUCTION**

After killing a visiting Korean businessman in 1993 by stabbing him approximately 40 times in his hotel room, petitioner Hui Kyung Kang pleaded guilty to second degree murder and was sentenced to 16 years to life in the state prison. Following a parole hearing held on January 6, 2011, the Board of Parole Hearings (the Board) found that Kang was unsuitable for parole because she would pose an unreasonable risk of danger if released from prison. Kang challenged the Board’s decision by filing a petition for a writ of habeas corpus in the superior court. The superior court granted the habeas corpus petition, vacated the Board’s decision, and remanded the matter to the Board with directions to provide Kang with “a new hearing comporting with due process.”

On appeal, Acting Warden Deborah Johnson (the Warden) contends that the superior court erred because some evidence supports the Board’s finding that Kang would pose an unreasonable risk of danger if released from prison. For the reasons stated below, we conclude that under the deferential standard of review established by the California Supreme Court in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and

*In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis I*) and clarified in *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*), some evidence supports the Board's decision. Therefore, we will reverse the superior court's order and remand the matter to the superior court with directions to issue a new order denying the petition for writ of habeas corpus.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Social and Criminal History***

After emigrating from South Korea at the age of two, Kang lived with her mother, father, two brothers, and a sister in San Jose. Kang, the youngest child, was left alone at home much of the time while her parents worked. Both parents used corporal punishment, striking her with wooden utensils, and her older brothers physically abused her by slapping her.

Kang attended elementary school and high school. After she was expelled from public high school for non-attendance, she attended a private high school where she became truant before graduation but eventually received a diploma. While she was in high school, Kang was engaged in extracurricular activities, including cheerleading, school orchestra, the school newspaper, and team sports.

Kang remembers lying to her friends and family for no reason. She also "stole a lot as she got older. . . . [S]he did it to get 'bad attention, which is better than no attention at all.'" At the age of 11 or 12, Kang began experimenting with drugs. By the age of 18 or 19, Kang was involved in the lifestyle of partying and using cocaine.

After high school, Kang had a series of short-term jobs, including working for her father in his video store and working for chiropractors. She was terminated from her position as a chiropractor's receptionist after she committed fraud using patients' credit cards. When she was 19 years old Kang "ran away to Hawaii" where she worked in restaurants and hotels.

In 1991, Kang was arrested for receiving stolen property. Her diversion was terminated in 1992 as successful. Kang was also arrested in 1991 for forgery, possession

of a bad check, and attempted grand theft, but apparently she was not prosecuted due to victim unavailability. In 1993, Kang was arrested for vehicle theft and theft by use of access card data, but the record does not reflect a disposition for those arrests.

***B. The Commitment Offense***

In 1993, Kang, who was then 21 years old, was introduced to a Korean businessman in a karaoke bar in San Francisco who wanted to meet her at a hotel. He gave her his telephone number at his office in Korea, but Kang did not follow up. A few months later, when Kang needed money, she decided to call him thinking that “she would give him what he wanted and then ask for money.” The victim, Han Suk Yoon, was a Korean businessman on a trip to California who was staying in a hotel in Sunnyvale. Kang telephoned Yoon and offered to travel to Sunnyvale if he would pay her cab fare from San Francisco.

After Kang arrived at his hotel, she realized that Yoon, age 49, was not the businessman she had met at the karaoke bar in San Francisco. She nevertheless stayed at the hotel that night. The next morning Yoon left \$100 in cash and told her to order food and wait for his return at 5:00 p.m. While she was waiting, Kang “thought about her situation, her need for money, having sex with an older man, the probability of him helping her out financially, and the difficulty of the police finding traceable fingerprints in a hotel room.” She also hid a knife underneath the mattress.

Before going to bed with Yoon that night, “Kang placed her clothes far away from the bed because she knew she was going to attack him, try to hurt him, [and] possibly kill him, so she didn’t want blood on her clothes when she left.” Kang then had consensual sex with Yoon. After he fell asleep, Kang thought “she could get away with killing him.” She then began to stab Yoon while he was sleeping. Yoon awoke and fought back. Kang screamed “so that if someone heard the attack, she could say that she herself, was being attacked.” When a security guard came to the door to investigate a noise complaint, “Kang started making noises like she was having a good time having

sex with Mr. Yoon. . . .” She apologized for the noise and promised the security guard that she would “keep it down.” After waiting for Yoon to stop breathing, Kang showered, took Yoon’s credit cards, wallet, and car keys, and returned to San Francisco.

The next day, a female telephoned the hotel and asked that housekeeping staff not enter Yoon’s room because important papers had been left there. Five telephone calls with the same request were made the next day. Due to the telephone calls, Yoon’s body was not discovered until three days after his death, when police officers made a security check of his hotel room at a co-worker’s request. Yoon had been stabbed 10 times in the chest, which was the cause of his death. Approximately 30 other knife wounds were found on his body. A bloody fingerprint on the hotel room telephone was later identified as Kang’s fingerprint.

Kang began using Yoon’s credit cards the day after the murder. She stayed at an expensive hotel in San Francisco and then traveled to New York City, where she purchased clothing, jewelry, and other items until she reached the credit limit of \$20,000. About six months later, Kang was arrested in Bedford, New York, where the local police department was investigating a grand larceny in which she was a suspect. Kang had been working as a nanny for several families on the east coast, from whom she stole before moving on to her next job.

Kang gave a different version of the commitment offense when she spoke with a probation officer in 1996. At that time, Kang claimed that Yoon had beaten her and raped and sodomized her in the hotel room, so while he was taking a shower, she armed herself with a knife from the kitchen and hid it under the mattress. When Yoon returned to bed, he tried to sodomize her again. In self-defense, Kang grabbed the knife and attacked him. In 2009, Kang admitted to prison staff that “her explanation of self-defense was a lie, that there was not one true word in her explanation for self-defense.”

After Kang was arrested in 1994, she gave birth to a son who now lives with her brother. In 1996, she pleaded guilty to second degree murder and admitted the special

allegation of personal use of a deadly and dangerous weapon. She also pleaded guilty to forging an access card holder's signature. Kang was sentenced to a total prison term of 16 years to life.

### ***C. Conduct While Incarcerated***

Kang's incarceration in state prison began in 1996. Her history of prison discipline shows that she has not received a disciplinary report since 2002. During the six-year period between 1997 and 2003, Kang received nine California Department of Corrections (CDC) 115 reports of serious rule violations, including four reports of mutual combat and five other reports for smoking in the kitchen, inmate-manufactured alcohol, refusing to work, conspiracy to introduce narcotics, and forging a state document.<sup>1</sup> She also received 11 CDC 128 reports of minor administrative rule violations, including refusal to work, failing to wear gloves while handling food, refusing to program, stealing food, not reporting to class, and clothing violations.

Kang has participated in numerous self-help and therapeutic programs while incarcerated. Recently, her programming has included attending church and Bible study. She has also served as a volunteer for the Friends Outside Program and as a Parole Employability Academics Resource Lifeskills mentor, a Creative Conflict Resolution facilitator, and an alternatives to violence program facilitator. She also started two organizations within the prison, The Coalition for Cultural Awareness and the Asian Prisoners Group. She volunteers in the administrative office for the Associate Warden and the Investigative Services Unit.

Educational and vocational programming has included Kang's completion of programs for eyewear manufacturing and forklift operator. While in prison, Kang has

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<sup>1</sup> "According to the California Code of Regulations, 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. (See [Cal. Code Regs., tit. 15] § 3312, subd. (a)(2) & (3).)" (*In re Gray* (2007) 151 Cal.App.4th 379, 389.)

been employed in the kitchen and laundry, served as a porter in the chapel, performed clerical work, and served as an English language tutor.

#### ***D. Psychological Evaluation***

During the parole hearing, the Board considered the 2009 comprehensive risk assessment prepared by Martin H. Williams, Ph.D. Dr. Williams interviewed Kang in January 2009 and reviewed her institutional records.

The records show that Kang was prescribed psychotropic drugs and given a diagnosis of bipolar disorder when she was first arrested. Dr. Williams noted that although Kang was initially treated in the prison mental health system, “[s]he acknowledges now that she was creating symptoms and was lying ‘about a lot of things.’” Among other symptoms, Ms. Kang created a speech difficulty, such that she would speak with great hesitation at times. However, at other times, she would forget to mangle this symptom and would speak normally.” In 2009, Kang was taking no medications, appeared to be free from any mood disorder, and her health records revealed no psychiatric problems. Dr. Williams also reported that Kang “has a history of impulsivity and a lack of behavioral control, both prior to her incarceration and during the first years of incarceration. However, she has demonstrated that she can maintain adequate control and direct herself only towards pro-social activities during the past five to six years.”

Although Kang used heroin for the first six years of her incarceration, she became drug-free in 2003 after she received a 2002 CDC 115 report for conspiracy to introduce narcotics. Kang told Dr. Williams “it was [a] really serious 115, that she lost a lot of privileges and finally decided she could not keep up with the lies she told her family.” In March 2003, Kang “reportedly became a Christian” and learned about “taking responsibility for her actions.”

Regarding the commitment offense, Kang told Dr. Williams that she was not using drugs or alcohol at the time of the offense and had no one to blame but herself. She admitted that she went to Yoon’s hotel room in an effort to get money from him and that

she had lied when she originally claimed that he had raped her. While discussing the commitment offense with Dr. Williams, Kang cried and stated, “ ‘You really can’t explain murder easily. I really didn’t have any regard for human life. I wish I could say I was high or I was drunk. I wish there was some reason why. I didn’t think he was going to help me the way I thought I needed the help. These past few years it’s hard to talk about because it just sounds so cold. I hear these ladies when they share their stories, they’re either battered women or in a fight in a heated moment, and I did it while he was sleeping.’ ”

Kang also stated to Dr. Williams: “ ‘I can’t imagine the person I am today being capable of something like that. I know that it happened, and I know that is somebody who I was.’ ” Dr. Williams reported that “Ms. Kang, to this day, cannot understand how she committed that crime. To her credit, she offers no excuses or facile explanations that might ease her conscience.” He found that she “is remorseful and has a difficult time understanding why she committed that crime and how she had been emotionally able to do so.”

Dr. Williams assessed Kang’s future risk of violence in the community after considering the data he had obtained from several risk assessment tools, which placed her in the low risk category. His overall risk assessment was that Kang “presents a relatively Low Risk for violence in the free community. [¶ Her] risk of violent recidivism would likely *increase* if she: returned to the use of intoxicating substances; associated with antisocial peers; possessed a weapon; found herself without a permanent residence, her income was insufficient to meet her living expenses, or she had no social support in the community. She could *decrease* her risk of violent reoffense by: adhering to a substance abuse relapse prevention plan; verifying all parole plans; continuing to examine and come to terms with the causative factors of the life crime, as well as developing proactive strategies to avoid those liabilities, such as never associating with substance abusers, even if she herself continued to refrain from use.”

### ***E. Parole Plans***

As a Korean national, Kang is subject to an active Immigration and Customs Enforcement hold. If she is granted parole, she intends to live with relatives in the Bay Area and has several job opportunities, including working in her brother's construction business, working as a home health aide for her parents, or doing clerical work for a roofing company or a gutter cleaning company. Alternatively, she plans to live with her sister's "congregational family" in South Korea and work as an English translator for international guests.

### ***F. The Board Hearing***

During the hearing held on January 6, 2011, the Board reviewed the facts of the commitment offense. The presiding commissioner then asked Kang, "I want to know why, why it happened. Do you know why?" Kang replied, "I know at that point in my life I chose to believe, I made a distinction that I had no other out, and that was my last resort pretty much. I backed myself into a corner." She further answered, "I wanted to hurt him, immobilize him. I knew there was a possibility that I was going to end up killing him. . . . I needed money, I needed out." Kang acknowledged that she "didn't have any kind of respect for human life at that time. . . . I have absolutely no excuse."

At the time of the commitment offense, Kang recalled, she was supporting herself by staying with friends, stealing from her parents and family, and selling drugs. She explained that "a lot of the things that I did was in support of my [cocaine and alcohol] habit." Kang agreed with the presiding commissioner's statement that "the reason that you got involved in the commitment offense would be your reckless behavior and your need for money."

The Board also reviewed Kang's extensive family support for her release from parole, her parole plans, and her relapse plans, as well as her institutional record and Dr. William's 2009 comprehensive risk assessment. When asked why she had not received any disciplinary reports since 2002, Kang responded that her last CDC 115

disciplinary report had consequences that she could not ignore. She explained that she “was just tired. My lies, I couldn’t keep up with them.” She also developed a personal relationship with her “higher power” immediately after her last CDC 115 disciplinary report in 2002 and came to understand the gravity of the commitment offense and that she could be forgiven. By the end of 2002, Kang had decided to continue her recovery and sobriety.

The Board heard the closing arguments of the prosecutor and defense counsel as well as Kang’s statement. Among other things, Kang expressed her remorse for the commitment offense and her understanding of the harm she had caused to Yoon’s family. She also asserted that since taking Yoon’s life she has changed due to making an effort to “fix[] what was wrong with me.” Kang further stated, “My Biblical foundation is who I am.”

#### ***G. The Board’s Decision***

After the conclusion of the hearing, the Board announced its decision denying parole for a three-year period.<sup>2</sup> The Board concluded that Kang “is not suitable for parole because [she] currently poses an unreasonable risk of danger if released from prison.”

The first basis for the Board’s conclusion was the commitment offense, which the Board described as “an atrocious, heinous and cruel crime.” The Board further explained, “There were approximately 30 wounds that were found on his body, and many of them defensive-type wounds located on the hand and forearms. . . . [B]ecause of the number of wounds, the defensive wounds, this is torture, because he’s still alive and he’s fighting for his life. He doesn’t die right away.”

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<sup>2</sup> The Marsy’s Law amendments to Penal Code section 3041.5 went into effect on November 5, 2008, after voters approved Proposition 9, otherwise known as the “Victims’ Bill of Rights Act of 2008: Marsy’s Law.” (Pen. Code, § 3041.5; Cal. Const., art. I, § 28.) Where parole is denied, under Marsy’s Law the minimum deferral period for the next parole suitability hearing is three years. (Pen. Code, § 3041.5, subd. (b)(3)(C).)

Second, the Board found that Kang's institutional misconduct showed that she had continued her "reckless lifestyle" in prison, including her "propensity for violence" and her use of drugs and alcohol.

Third, the Board determined that Kang had credibility issues, noting that she had faked mental illness when she was first incarcerated. The Board was also concerned that the record contained some information that Kang had failed to mention during the hearing, which the Board quoted from the brief submitted by Kang's attorney: "Draw[ing] your attention to the brief submitted by counsel, the brief in support of parole for Ms. Kang, page 16, paragraph two. 'In 2002, I got caught for conspiring to bring drugs into the institution, and one would think that would be a wake-up call, and it wasn't. I tried again, I didn't get caught the second time, but a friend who was having problems started going to church. I started going to church with her. I actually started using church for me to get to where I needed to to try to bring drugs inside.' " The Board stated, "[T]he credibility issues just seem to surface all around. . . . [I]t was just, this Panel just couldn't quite buy everything, tie it all together, with what we see in the record."

Finally, the Board found that Kang needed to further develop her insight into her reasons for committing the murder since she still could not explain why she did it. The Board advised Kang that "[y]ou've got to be able to articulate reasons. This is why I did it, and these are the things I've done to ensure that this kind of action will never happen again."

However, the Board commended Kang for her positive prison programming and her excellent parole plans, and recommended that she remain disciplinary-free, continue to be involved in self-help programs, and cooperate with a clinical evaluation.

#### **H. *Habeas Proceedings***

Kang challenged the Board's three-year denial of parole by filing a petition for writ of habeas corpus in the superior court on July 19, 2011. She argued that she met the

statutory criteria for release on parole and that there was no valid evidence to support the Board's finding that she would pose an unreasonable threat to others if released. She also contended that the Board had failed to articulate a rational nexus between its reasons for denying parole and her "purported current dangerousness."

The superior court issued an order to show cause on October 3, 2011, stating that the Board had erred in making a " 'torture' finding" with respect to the commitment offense, and had also erred in holding it against Kang that she had "invoked her right to not discuss the crime itself (Penal Code, § 5011)."<sup>3</sup> The court also stated that "another error of such magnitude that alone it requires reversal" was the Board "demanding from [Kang] a statement of 'why I did it.' "

The Warden filed a return arguing that the Board's denial of parole was based on some evidence that Kang remains a current danger, consisting of Kang's minimization of her conduct when discussing the commitment offense, her institutional record of serious misconduct violations, the concerns about her credibility, and her lack of insight in the reasons she committed the murder. The Warden further argued that the Board's discussion of the commitment offense was not improper and its characterization of the offense as torture was reasonable under state regulations defining torture. Finally, the Warden did not agree that the Board had violated section 5011 by asking Kang why she did it, since the Board did not ask her to admit guilt and it is well established that an inmate's lack of insight into the reasons for committing the life crime is relevant to a determination of suitability for parole.

Kang filed a traverse in which she disputed the Warden's contentions and asserted that her rehabilitation had been sustained for a number of years, the record showed she was honest and credible, the commitment offense did not show current dangerousness,

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<sup>3</sup> All statutory references hereafter are to the Penal Code unless otherwise indicated.

and the Board failed to expressly articulate “a rational nexus between the facts and current dangerousness.”

### **I. *The Superior Court’s Order***

On April 19, 2012, the superior court issued its order granting the petition for writ of habeas corpus for three principal reasons.

First, the superior court relied on this court’s pre-*Shaputis II* decisions in *In re Ryner* (2011) 196 Cal.App.4th 533 and *In re Rodriguez* (2011) 193 Cal.App.4th 85 (*Rodriguez*) for the proposition that “if ‘lack of insight’ is invoked as a reason to deny parole, that finding must be based on a factually identifiable deficiency manifested by the inmate concerning a matter of probative significance on the issue of current dangerousness.” The court determined that the Board had failed to meet this test because the Board’s decision ignored Dr. Williams’ opinion that Kang presented a low risk of danger and failed to identify a material deficiency that Kang had manifested that was probative on the issue of current dangerousness.

Second, relying on the decision in *In re Morganti* (2012) 204 Cal.App.4th 904, the superior court faulted the Board for finding that Kang’s inability to explain the reasons for the murder constituted a lack of insight. In the court’s view, Kang’s inability to provide an explanation indicated that Kang’s “changed values and internal moral compass are now such that a life crime is unthinkable.”

Finally, the superior court determined that the Board had failed to articulate a nexus between Kang’s history of prison discipline and her current dangerousness, stating that the Board “[w]hen drawing a nexus from the crime it must reach to the inmate’s present dangerousness, not to [CDC] 115s that are so old that they must themselves be deemed stale and static factors. This is another Board finding that compounds, rather than cures, its errors.”

The superior court therefore ordered as follows: “For the above reasons, as well as those outlined in the order to show cause (the unsupportable ‘torture’ finding and

the . . . section 5011 violation) the petition is granted and the matter is remanded to the Board with directions to provide Petitioner, within 100 days, a new hearing comporting with due process.”

The Warden filed a timely notice of appeal from the superior court’s order. This court granted the Warden’s petition for a writ of supersedeas and ordered a stay of enforcement of the superior court’s order until final determination of this appeal.

### **III. DISCUSSION**

#### ***A. The Parties’ Contentions***

On appeal, the Warden emphasizes the California Supreme Court’s ruling in *Shaputis II, supra*, 53 Cal.4th 192 that the Board’s decision to deny parole must be upheld where “the decision ‘reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards,’ and some evidence in the record supports the conclusion that an inmate remains a current danger. . . .”

Under this standard, the Warden argues, some evidence supports the Board’s decision to deny parole to Kang because the evidence shows the following: (1) the commitment offense “was brutal and egregious”; (2) Kang lacked credibility in discussing her rehabilitation, since she represented that she had developed a personal relationship with a higher power immediately after receiving the 2002 CDC 115 for a serious drug violation although she had previously admitted that she attended church in order to traffic drugs into prison; (3) Kang’s extensive record of institutional misconduct included nine serious rule violations, and she had been disciplinary-free only in the past decade; and (4) Kang lacked insight into her reasons for committing the murder because she could not articulate why she did it. The Warden therefore contended that the Board’s decision was not arbitrary or procedurally flawed and should be upheld under *Shaputis II*.

Kang responds that the Board’s multiple errors “rendered the decision a violation of due process.” In her view, these errors include (1) giving the commitment offense

“independent weight” without explaining how the offense supported a parole denial; (2) finding that Kang lacked credibility although she “openly and honestly discussed her past actions of manipulation and dishonesty”; (3) failing to articulate any deficiency in Kang’s insight and failing to articulate a nexus between the lack of insight and current dangerousness; (4) violating Kang’s right under section 5011 not to discuss the commitment offense by telling her the Board “needed to understand how the crime happened”; and (5) relying on prison rule violations without articulating a nexus to current dangerousness. Kang contends that absent these errors on the Board’s part, the decision would have been different and for that reason the superior court’s order granting her habeas petition should be affirmed.

We will begin our analysis of the parties’ contentions with an overview of the legal framework that governs the Board’s parole suitability decisions, followed by the standard for judicial review established by the California Supreme Court in *Lawrence*, *supra*, 44 Cal.4th 1181 and *Shaputis I*, *supra*, 44 Cal.4th 1241, and clarified in *Shaputis II*, *supra*, 53 Cal.4th 192.

### ***B. The Legal Framework for Parole Suitability Decisions***

The Board is the administrative agency within the executive branch that is generally authorized to grant parole and set release dates. (§§ 3040, 5075 et seq.; *In re Vicks* (2013) 56 Cal.4th 274, 294 (*Vicks*)). The Board’s parole decisions are governed by section 3041 and title 15, section 2400 et seq. of the California Code of Regulations.<sup>4</sup>

Under section 3041, “[a] panel of two or more commissioners or deputy commissioners must meet one year prior to a prisoner’s minimum eligible parole release date to consider whether to set a parole date. ‘The panel . . . shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing

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<sup>4</sup> All further undesignated references to regulations are to title 15 of the California Code of Regulations.

and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.’ (§ 3041, subd. (b).)” (*Vicks, supra*, 56 Cal.4th at p. 294, fn. omitted.)

In assessing whether “the inmate poses ‘an unreasonable risk of danger to society if released from prison,’ and thus whether he or she is suitable for parole,” the Board is guided by the factors set forth in title 15, section 2402 of the California Code of Regulations. (*In re Prather* (2010) 50 Cal.4th 238, 249 (*Prather*)). Title 15, section 2402 “lists several circumstances relating to unsuitability for parole (such as the heinous, atrocious, or cruel nature of the crime, or an unstable social background) and several circumstances relating to suitability for parole (such as an inmate’s rehabilitative efforts and demonstration of remorse, and the mitigating circumstances of the crime). (Regs., § 2402, subds. (c), (d).)” (*Prather, supra*, at pp. 249-250, fns. omitted.) “The circumstances identified in the regulations ‘are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel.’ [Citations.]” (*Vicks, supra*, 56 Cal.4th at p. 294.)

“The Board applies these criteria to ‘attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts. [Citation.] “The [Board’s] exercise of its broad discretion ‘involves the deliberate assessment of a wide variety of individualized factors on a case-by-case basis, and the striking of a balance between the interests of the inmate and of the public.’ [Citation.]” [Citation.] “The [Board’s] discretion in parole matters has been described as ‘great’ [citation] and ‘almost unlimited’ [citation].” [Citation.]’ [Citation.] The Board’s discretion is limited only by the requirements that it provide an individualized consideration of all relevant factors, provide a written statement that sets forth its reasons

for denying a parole date, and not render an arbitrary decision. [Citation.]” (*Vicks, supra*, 56 Cal.4th at p. 295.)

### **C. Judicial Review**

“When a superior court grants relief on a petition for [writ of] habeas corpus without an evidentiary hearing, as happened here, the question presented on appeal is a question of law, which the appellate court reviews de novo. [Citation.] A reviewing court independently reviews the record if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely on documentary evidence. [Citation.]” (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192.)

The California Supreme Court has established the standard that governs our independent review. In *Shaputis II*, the court stated: “As we have explained, in *Lawrence* [*supra*, 44 Cal.4th 1181] we ‘resolved a conflict among the appellate courts regarding the proper scope of the deferential “some evidence” standard of review we set forth in [*In re Rosenkrantz* (2002) 29 Cal.4th 616] . . . . We clarified that in evaluating a parole-suitability determination by either the Board or the Governor, a reviewing court focuses upon “some evidence” supporting the core statutory determination that a prisoner remains a current threat to public safety—not merely “some evidence” supporting the Board’s or the Governor’s characterization of facts contained in the record. Specifically, we explained that, because the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety, and because the inmate’s due process interest in parole mandates a meaningful review of a decision denying parole, the proper articulation of the standard of review is whether there exists “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.]’ [Citation.]” (*Shaputis II, supra*, 53 Cal.4th at p. 209, fn. omitted.)

“[T]he ‘ ‘some evidence’ standard is extremely deferential . . . ,’ and cannot be equated with the substantial evidence standard of review. [Citation.]” (*Shaputis II*, *supra*, 53 Cal.4th at p. 214.) “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.’ [Citations.]” (*Id.* at p. 210.)

Thus, a court reviewing the Board’s parole unsuitability determination “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. [Citations.] The court may not . . . substitute its own credibility determination for that of the parole authority. [Citations.] Any relevant evidence that supports the parole authority’s determination is sufficient to satisfy the ‘some evidence’ standard. [Citation.]” (*Shaputis II*, 53 Cal.4th at p. 214, fn. omitted.)

In short, “[w]hile 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. [Citation.]” (*Shaputis II, supra*, 53 Cal.4th at p. 211.)

#### **D. Analysis**

To evaluate the merits of Kang’s habeas corpus petition, we have carefully reviewed the record in the light most favorable to the Board’s parole unsuitability decision, pursuant to the direction of the California Supreme Court in *Shaputis II, supra*, 53 Cal.4th at page 214, to determine whether some evidence supports the Board’s conclusion that Kang “is not suitable for parole because [she] currently poses an unreasonable risk of danger if released from prison.” Our review indicates that the Board’s decision was based on four factors: (1) the commitment offense; (2) institutional misconduct; (3) lack of credibility; and (4) lack of insight. We will address these factors in turn.

##### **1. The Commitment Offense**

Under the regulatory scheme, one of the circumstances tending to show parole unsuitability is that “[t]he prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include: [¶] (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 which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense.” (Regs., § 2402, subd. (c)(1).)

The Board described the commitment offense as “an atrocious, heinous and cruel crime,” noting that “she stabbed him 40 times, ten times in the chest. There were approximately 30 wounds that were found on his body, and many of them defensive-type

wounds located on the hand and forearms. . . . [B]ecause of the number of wounds, the defensive wounds, this is torture, because he's still alive and he's fighting for his life. He doesn't die right away." Thus, the Board's decision implicitly relied, in part, upon a finding that the aggravated circumstances of the commitment offense showed that Kang was unsuitable for parole.

We find that some evidence supports the Board's determination that circumstances of the commitment offense show that it was committed in "an especially heinous, atrocious or cruel manner." (Regs., § 2402, subd. (c)(1).) The record reflects that Kang hid a knife under the mattress before engaging in consensual sex with Yoon and then stabbed him to death, beginning while he was sleeping, in order to steal his credit cards. Kang stabbed Yoon a total of 40 times and waited for him to stop breathing before she showered and dressed in the clean clothing she had purposefully placed away from the bed. However, in accordance with the Supreme Court's instruction in *Lawrence, supra*, 44 Cal.4th at page 1214, that the aggravated circumstances of the commitment offense alone are not sufficient to show current dangerousness, we next consider whether some evidence supports the Board's determination that additional factors establish that the circumstances of the commitment offense "remain probative of the statutory determination of a continuing threat to public safety." (*Ibid.*)

## **2. Institutional Misconduct**

Another circumstance tending to show unsuitability for parole is institutional behavior; specifically, whether "[t]he prisoner has engaged in serious misconduct in prison or jail." (Regs., § 2402, subd. (c)(6).)

Explaining its decision that Kang was not suitable for parole, the Board stated, among other things, that Kang had continued her "reckless lifestyle" in prison, including her "propensity for violence" and her use of drugs and alcohol. The record showed that during the six-year period between 1997 and 2003, Kang received nine CDC 115 reports of serious rule violations, including four reports of mutual combat and five other reports

for smoking in the kitchen, inmate-manufactured alcohol, refusing to work, conspiracy to introduce narcotics, and forging a state document. She also received 11 CDC 128 reports of minor administrative rule violations, including refusal to work, failing to wear gloves while handling food, refusing to program, stealing food, not reporting to class, and clothing violations.

On this record, it cannot be disputed that the evidence shows that Kang has engaged in serious misconduct while in prison. Kang argues that the Board nevertheless erred in considering her institutional misconduct, because her rule violations were “stale,” she had not received any disciplinary reports during the past 10 years, and the Board did not articulate a nexus between institutional misconduct and her current dangerousness. For three reasons, this argument is not convincing.

First, as we have noted, serious misconduct in prison is a factor that the Board may properly consider in determining parole suitability. (Regs., § 2402, subd. (c)(6).) Second, our Supreme Court in *Shaputis II* instructed that the “ ‘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 . . . .’ ” (*Shaputis II, supra*, 53 Cal.4th at p. 210.) Third, as the reviewing court we do not examine the Board’s decision to determine whether the Board has expressly articulated a nexus between each specified factor and the parole suitability decision; instead, we “consider[] whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness.” (*Shaputis II, supra*, 53 Cal.4th at p. 221.) As we will discuss, the evidence of institutional misconduct in the context of the Board’s findings regarding Kang’s credibility (see, e.g., *In re Hare* (2010) 189 Cal.App.4th 1278, 1294-1295 [seven-year-old CDC 115 relevant to risk of current dangerousness in context of particular violation]), as well as the evidence of Kang’s lack of insight, is sufficient to provide a modicum of evidence to support the Board’s decision that Kang is currently dangerous. (*Shaputis II, supra*, at p. 209.)

### 3. Lack of Credibility

In finding that Kang was not suitable for parole, the Board expressed its concern that she lacked credibility. One Board member stated, “[T]he credibility issues just seem to surface all around. . . . [I]t was just, this Panel just couldn’t quite buy everything, tie it all together, with what we see in the record.”

In particular, the Board pointed to its discussion with Kang about the 2002 CDC 115 for conspiracy to introduce narcotics, and its inquiry as to “why . . . this point in time, why was this your wake up?” The Board had reviewed the brief in support of parole submitted by Kang’s attorney, which included two admissions by Kang: (1) that she even after receiving the 2002 CDC 115 for conspiracy to introduce narcotics, she had done it again and not been caught; and (2) she had initially attended church in order to bring drugs into the prison. The Board was concerned that Kang “didn’t talk to us at all about this additional attempt to bring narcotics into the institution when [she] didn’t get caught, and how [she] really only went to the church to get to where [she] needed to get the drugs inside. . . . [W]e were talking about it, and [she] didn’t cover that gap. That’s just one example.”

Kang contends that the Board erred in finding that she lacked credibility because she “openly and honestly discussed her past actions of manipulation and dishonesty.” This contention has no merit under the applicable standard of review.

“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. [Citations.]” (*Shaputis II*, 53 Cal.4th at p. 212.) Here, it was not arbitrary for the Board to find that Kang’s statements about her rehabilitation lacked credibility. The Board could reasonably doubt Kang’s claim, made during the hearing, that after receiving the CDC 115 in 2002 for conspiracy to introduce narcotics she immediately experienced a spiritual awakening and began her recovery. As the Board pointed out, Kang’s brief in

support of parole included the contrary admissions that she had subsequently attempted to introduce narcotics and her initial purpose in attending church was to bring drugs into the prison.

Moreover, a “court may not . . . substitute its own credibility determination for that of the parole authority. [Citations.] Any relevant evidence that supports the parole authority’s determination is sufficient to satisfy the ‘some evidence’ standard. [Citation.]” (*Shaputis II, supra*, 53 Cal.4th at p. 214, fn. omitted.) We therefore determine that the Board did not err in considering Kang’s credibility in making its parole decision.

#### **4. Lack of Insight**

The Board also found that Kang was not suitable for parole because she could not explain why she murdered Yoon and therefore she needed to further develop her insight into the commitment offense. The Board advised Kang that “[y]ou’ve got to be able to articulate reasons. This is why I did it, and these are the things I’ve done to ensure that this kind of action will never happen again.”

According to Kang, the Board erred because it failed to articulate any deficiency in her insight and also failed to articulate a nexus between the lack of insight and current dangerousness. This argument lacks merit under the California Supreme Court’s clarification in *Shaputis II* of “the use of an inmate’s degree of insight into his or her criminal behavior as a factor in parole suitability determinations.” (*Shaputis II, supra*, 53 Cal.4th at p. 217.)

In *Shaputis II*, the court instructed that “[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 Board to consider the inmate’s ‘past and present attitude toward the crime’ (Regs., § 2402, subd. (b)) and ‘the presence of remorse,’ expressly including indications that the inmate ‘understands the nature and magnitude of

the offense' (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of 'insight.' ” (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

In *Shaputis I*, the court determined that some evidence supported the Governor's decision that inmate Shaputis remained “a threat to public safety in that he has failed to take responsibility for the murder of his wife, and despite years of rehabilitative programming and participation in substance abuse programs, has failed to gain insight into his previous violent behavior, including the brutal domestic violence inflicted upon his wife and children for many years preceding the commitment offense. By statute, it is established that the gravity of the commitment offense and petitioner's current attitude towards the crime constitute factors indicating unsuitability for parole . . . .” (*Shaputis I, supra*, 44 Cal.4th at p. 1246.) Referring to its decision in *Shaputis I*, the *Shaputis II* court stated, “Thus, we have expressly recognized that 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.]” (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

The *Shaputis II* court accordingly clarified “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. [Citation.]” (*Shaputis II, supra*, 53 Cal.4th at p. 219.) The court emphasized “that lack of insight pertains to the inmate's current state of mind, unlike the circumstances of the commitment offense, the factor primarily at issue in *Lawrence*. [Citation.] Thus, insight bears more immediately on the ultimate question of the present risk to public safety posed by the inmate's release. Moreover, insight, unlike the circumstances of the offense, may change over time. [Citation.] Therefore, the most recent evidence of the inmate's degree of insight will usually bear most closely on the parole determination, although . . . this is not necessarily so.” (*Id.* at pp. 219-220.)

The court further explained in *Shaputis II* that “it is difficult to imagine that the Board . . . 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.” (*Shaputis II, supra*, 53 Cal.4th at p. 220.) In other words, as this court has previously stated: “[A] ‘lack of insight’ into past criminal conduct can reflect an inability to recognize the circumstances that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to those circumstances and, if confronted by them again, would likely react in a similar way. [Citations.]” (*Rodriguez, supra*, 193 Cal.App.4th at p. 98.)

In the present case, the Board could reasonably find that Kang lacked insight into the reasons that the commitment offense occurred. (*Shaputis II, supra*, 53 Cal.4th at p. 220.) At the Board hearing, when a Board member asked Kang why she had murdered Yoon, she replied, “I know at that point in my life I chose to believe, I made a distinction that I had no other out, and that was my last resort pretty much. I backed myself into a corner.” She further answered, “I wanted to hurt him, immobilize him. I knew there was a possibility that I was going to end up killing him. . . . I needed money, I needed out.” Kang acknowledged that she “didn’t have any kind of respect for human life at that time. . . . I have absolutely no excuse.” In his 2009 comprehensive risk assessment, Dr. Williams reported that “Ms. Kang, to this day, cannot understand how she committed that crime. To her credit, she offers no excuses or facile explanations that might ease her conscience.” However, Dr. Williams also reported that Kang “could *decrease* her risk of violent reoffense by: . . . continuing to examine and come to terms with the causative factors of the life crime. . . .” Thus, there was evidence that even after many years of rehabilitative programming, Kang still lacked “understanding of the crime and the

reasons it occurred.” (*Shaputis II, supra*, 53 Cal.4th at p. 220.) Kang’s lack of insight was therefore “rationally indicative of [her] current dangerousness.” (*Id.* at p. 219.)

We are also not convinced by Kang’s argument, in reference to the insight factor, that the Board violated her right under section 5011 not to discuss the commitment offense by telling her the Board needed “to understand how the crime happened.” Section 5011, subdivision (b) states: “The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed.” Where, as here, the inmate does not deny guilt, the provisions of section 5011 have no application. (*Shaputis II*, 53 Cal.4th at p. 216.)

Moreover, the Board is not precluded from questioning an inmate about the commitment offense. To the contrary, the pertinent regulation provides: “The facts of the crime shall be discussed with the prisoner to assist in determining the extent of personal culpability. The [B]oard shall not require an admission of guilt to any crime for which the prisoner was committed. A prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner.” (Regs., § 2236; *Shaputis II, supra*, 53 Cal.4th at pp. 211-212.) Accordingly, in *Shaputis II* the court explained that if Shaputis had participated in the hearing, the Board could have asked him “about the offense,” and also could have inquired about “his psychologist’s report, the statement he prepared with counsel, or his current state of mind.” (*Shaputis II, supra*, at p. 211.)

## **5. Conclusion**

The California Supreme Court has instructed that a court reviewing the Board’s parole unsuitability determination “ ‘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. [Citations.] The court may not . . .

substitute its own credibility determination for that of the parole authority. [Citations.] Any relevant evidence that supports the parole authority’s determination is sufficient to satisfy the ‘some evidence’ standard. [Citation.]” (*Shaputis II*, 53 Cal.4th at p. 214, fn. omitted.)

Having independently reviewed the record under the deferential “some evidence” standard clarified in *Shaputis II*, we determine that the the facts of the commitment offense, together with the Board’s findings regarding Kang’s institutional misconduct, her lack of credibility, and her lack of insight into her past criminal behavior, constitute a modicum of evidence supporting the Board’s decision that Kang is unsuitable for parole because she currently poses a threat to public safety. (*Shaputis II, supra*, 53 Cal.4th at p. 221.) As in *In re Stevenson* (2013) 213 Cal.App.4th 841, 870 “[t]he Board could reasonably conclude that [Kang] had not yet fully developed the insight and coping skills necessary to ‘live in society without committing additional antisocial acts.’ [Citation.]”

For these reasons, we conclude the Board’s decision to deny parole to Kang was not “arbitrary or procedurally flawed” and should be upheld. (*Shaputis II, supra*, 53 Cal.4th at p. 221.) We will therefore reverse the superior court’s order granting Kang’s habeas corpus petition and direct the court to issue a new order denying the petition.

#### **IV. DISPOSITION**

The superior court’s April 19, 2012 order granting the petition for a writ of habeas corpus is reversed, and the matter is remanded to the superior court with directions to issue a new order denying the petition for writ of habeas corpus.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.