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California Supreme Court

In re

RICHARD SHAPUTIS,

Petitioner-Appellee,

On Habeas Corpus.

No. S188655

Fourth Appellate District, Division One, No. D056825

ANSWER BRIEF ON THE MERITS
FILED

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I. QUESTIONS PRESENTED

(1) Did the Board of Parole Hearings (“Board” or “BPH”) set forth “*some evidence*,” including evidence that Shaputis *currently* lacks adequate “insight” into his prior criminality or fails to adequately “accept responsibility” for it, which established that Shaputis’ parole *currently* poses “an *unreasonable* risk of danger” to public safety, the statutory standard below which the Board was mandated by law to set Shaputis’ parole date (15 CCR § 2401, 2402(a); Penal C. § 3041)?

The Court of Appeal correctly determined that no such evidence was set forth by the Board, which likewise fails in its Opening Brief to cite any such evidence in the record.

(2) Does there exist any *evidence* demonstrating that a prospective parolee’s alleged “lack of insight,” based on the subject’s failure to conform his or her honest but deteriorating recollection of decades-old criminality to a version previously urged by a prosecutor, in an appellate decision, or in a sentencing report based mainly on hearsay, or to admit thereto, renders the subject an unreasonable danger to society if released to supervised parole?

Shaputis respectfully asserts that parole cannot tenably be precluded based on a contrary notion because such a notion is a whim, unsupported by a study, report, or any other evidence suggested by the Board, the Attorney General, or the Court.

II. SUMMARY OF RELEVANT FACTS

Judicial proceedings. The decision under review is the *third* judgment by the Court of Appeal finding no evidence to support a decision denying Shaputis parole. In its first (published) judgment on December 28, 2005, the Court of Appeal (case No. D046356) set aside the Board’s 2004 decision and

directed the Board to conduct a new hearing compliant with due process. On May 17, 2006, this Court ordered that judgment depublished (No. S141547).

On August 21, 2007, after the Board granted Shaputis parole at his subsequent hearing, and the Governor reversed that decision, the Court of Appeal (No. D049895), finding that the Governor failed to set forth any evidence that Shaputis' parole would create an unreasonable danger to society, set aside the Governor's action and ordered Shaputis' release on parole on the parole date set by the Board.

After granting review, this Court reversed the Court of Appeal's second judgment, and validated the Governor's decision finding Shaputis unsuitable for parole because in a 2004 psychological evaluation by Dr. Mura, quoted in a 2006 assessment by Dr. Silverstein (*In re Shaputis* (2008) 44 Cal.4th 1241, 1250-1252) ("*Shaputis*"), one of the factors – considered and weighed by the psychologist in determining Shaputis posed a low parole risk in view of his age, health, and the entire record – was an alleged limited insight into his commitment offense and prior misconduct. (*Shaputis*, 44 Cal.4th at pp. 1259, 1252, 1260.)

Shaputis petitioned the Court for a rehearing, as set forth below. Counsel respectfully advises that this verbiage reflected no disrespect for the Court. Counsel acknowledges the Court's authority but respectfully suggests that its discretion, however broad, and the constraints of the some evidence standard of review, do not permit a court to substitute personal presumptions and speculation, for *evidence*.

A gaping abyss exists in the Opinion. To our knowledge there has never been a study or a reasoned court decision, and there is no hint of one in the Opinion, suggesting how, why, or *that* an alleged lack of insight into fading decades-old events bears any relationship whatsoever to an alleged current public safety risk.

The Court's gigantic leap from insight into ancient behavior to future parole risk is but a presumptive whim from thin air.

Because no causal relationship between insight into past behavior and a future societal risk has been established, the Board's codified regulations do not list lack of insight as an unsuitability factor. More importantly, had Richard Shaputis chosen to *altogether to deny* his guilt of the murder, the Court would be required to *affirm* the judgment as in *Lawrence* because the State's parole laws and regulations, specifically Penal Code § 5011(b) and 15 CCR § 2236, ***prohibit the denial of parole on that basis***. The Court has condemned Shaputis to life without parole in violation of those laws.

The Court's irrational leap from insight into a decades-old event to future societal risk is also inapposite to the fact, noted by the Court, that the State's forensic experts, retained explicitly for this purpose, who evaluated Mr. Shaputis and fully explained his limited insight into the offense uniformly determined that the risk to public safety posed by his parole is nevertheless *low*, substantially below the "unreasonable risk" level below which a parole date "shall" be granted. (Penal Code § 3041(a); 15 CCR §§ 2401, 2402(a).

What expertise in this specialized field do Justices or governors possess? On what study have they relied to link insight to public safety risk? *None. None whatsoever.*

The abyss in *Shaputis* will create far more inequity, abuse, and misunderstanding by our state's courts and by governors and the parole board commissioners the Governors hand-pick to deny parole, than the "minimal elements" theory the Court created in *Rosenkrantz* which it has now, five years later, finally, disavowed.

Neither the Governor nor the Court has linked Shaputis' limited insight into the commitment offense to current public safety risk, defined by the Court as the State's sole statutory parole suitability determinant, nor has the Governor or the Court suggested any

evidence to dispute the forensic experts' determinations that Shaputis' parole poses a low public safety risk.

Petitioner respectfully suggests that the Court should address and correct this defect now, to prevent the kind of struggle described in the Opinion among the State's courts over the "minimum elements" theory suggested by the Court in *Rosenkrantz and Dannenberg*. The most unfortunate part is, of course, Richard Shaputis, in his mid-70's and in poor health, who as the Court recognizes has completed all applicable treatment available and harbors the maximum level of insight of which he is capable, and whose parole has been forensically determined to pose a low further risk to public safety. His parole is nonetheless precluded – forever – by non-experts who have not cited and cannot cite a shred of evidence to link his alleged lack of insight into a fading event to the notion of dangerousness.

The speculative whim on which *Shaputis* is based has been defined by the Court as a due process violation. The concurring comment by the *Lawrence* dissenters is prescient: There is "no basis to distinguish this case (involving a *second* degree murder) from *Lawrence, supra* (involving a *first* degree murder) and to release Lawrence but deny parole to Shaputis." Particularly because the Court has relied for this distinction on the whim that limited insight into an ancient event constitutes a current unreasonable public safety risk.

(Petition for Rehearing, case No. S155872, filed on August 28, 2008; denied on October 22, 2008.)

Predictably, and as the Court has been repeatedly reminded, Governor Schwarzenegger and his parole board promptly transformed the *Shaputis* "insight" factor into the new talisman to be recited in nearly all decisions as a ground for denying and reversing parole. Although the Court depublished *In re Calderon* (2010) 109 Cal.Rptr.3d 229, which statistically established that fact, and has effectively done so by granting review in *In re Macias* (2010) 117

Cal.Rptr.3d 727, which likewise documented the policy, it remains well documented in published decisions.

Since *In re Lawrence*, *supra*, 44 Cal.4th at pages 1181, 1206, 82 Cal.Rptr.3d 169, 190 P.3d 535, and *In re Shaputis*, *supra*, 44 Cal.4th 1241, 82 Cal.Rptr.3d 213, 190 P.3d 573, were decided, the use of the lack-of-insight factor and the weight placed upon it has increased exponentially. Previous, to those decisions, the Board and Governor primarily relied on other factors.

(*In re Gomez* (2010) 190 Cal.App.4th 1291, 1308; see also *In re Powell* (2010) 188 Cal.App.4th 1530, 1539-1542.)

New psychological evaluations. Two additional psychological evaluations were conducted prior to Shaputis' subsequent parole hearing in 2009. The first was by Dr. Sahni, which she noted was incomplete because Shaputis exercised his right not to be interviewed upon the advice of his attorney, who had scheduled a noted forensic psychologist, Dr. Stark, to evaluate Shaputis' parole risk with a focus on his insight into and acceptance of responsibility for his past criminality, using recognized tools which the Board's assigned psychologists had failed to utilize. (Exhibit C¹, pp. 1-2; see exhibit D.)

Dr. Sahni reviewed the previous assessments and, consistent with the six psychologists who had previously assessed Shaputis' parole to be low or negligible [*“low”*; *“very low”*; *“low or close to average when compared to **the average citizen**”* (exhibit C, P. 4)], determined that Shaputis' current recidivism potential if paroled was *“low risk”*; specifically:

¹ “Exhibit” refers to the enumerated exhibit lodged by the petitioner in the Court of Appeal, the record of which should be before this Court.

After weighing all of the data from the available records, the clinical interview, and the risk assessment factors, it is opined that Mr. Shaputis presents a relatively low risk for violence in the free community.

(Exhibit C, p. 7; emphasis in original.)

Of critical importance to the review at hand, Dr. Sahni, the State's forensic psychologist, explained that *the accuracy of Mr. Shaputis' prior evaluations* (relied on by the Governor in 2007 and by this Court in *Shaputis*) *is suspect and that those assessments must be viewed with caution because they were purely subjective, and because formalized risk assessment measures were not employed as required by the Board.* (Exhibit C, p. 4.)

Dr. Stark's forensic report, which focused as intended on Shaputis' insight and acceptance of responsibility, was based on an exhaustive 5½-hour interview with Shaputis (whose interviews with Dr. Mura and Dr. Silverstein lasted an hour or less; see petitioner's exhibits, case No. S155872; exhibit E, p. 1). (Exhibit D, pp. 6-8, 9. 12-15.) Dr. Stark reviewed Shaputis' six prior evaluations, then administered the Millon Clinical Multiaxial Inventory 3 test, the LSI-R, the HCR-20, the Psychological Inventory of Criminal Thinking test, and the DSM-IV-TR. (Exhibit D, pp. 4-5, 8-10, 12-13.) Dr. Stark found, *inter alia*:

In the . . . current dynamic domain of risk assessment, Mr. Shaputis . . . has *developed an understanding regarding the factors that led to the offense.* He continues and has throughout the years maintained that he was responsible for his wife's death. Prior to the crime *he depicts his life in a realistic manner with no holds barred.* He has participated in self-help groups and he has shown growth and *remarkable insight and attitudinal and behavioral change.*

(Exhibit D, pp. 12-13; emphasis added.)

As to the possibility of an alcoholism relapse, Dr. Stark noted:

[S]everal factors probably mitigate against this happening, including his ability to maintain sobriety for the past several [22] years, his intense involvements and commitment to substance abuse programming and personal support in the community. He seems to have rehabilitated himself.

(Exhibit D, p. 13.)

As to Shaputis' current insight into his former criminality and alcoholism, Dr. Stark concluded:

Mr. Shaputis has gone through a profound process of developing insight into the reasons for his behavior. Insight is a process, not an event . . . based upon current psychological testing, as well as on his presentation in the interview, Mr. Shaputis . . . is free of any mental or emotional problems. He does not have any psychopathology that would cause him to be a danger to society when he is released . . . At this point in his life he appears to be an open, honest, truthful, and responsible person . . . his prognosis for successful adjusting in the community is excellent . . .

. . . Current psychological testing indicates he is not criminally oriented. Results indicated Mr. Shaputis does not pose a risk to society. Mr. Shaputis' impeccable conduct in prison and his exceptional record of rehabilitative progress clearly illustrates his suitability for parole. Mr. Shaputis . . . is not inclined to engage in criminal or destructive behavior . . . throughout the interview Mr. Shaputis expressed *deep and authentic remorse* for his wife's death . . . The presence of family and social support in the community is a very strong indicator that he will do well on parole.

. . . The fact that he has a strong release program is a good indication that he will do well on parole and he poses no threat to public safety . . .

(Exhibit D, pp. 13-14; emphasis added.)

Mr. Shaputis' level of insight into the role that his prior feelings, thoughts, and behaviors played in the index offense have been addressed and detailed ... *I conclude that Mr. Shaputis has the "insight"; however, the issue was due to a misinterpretation of the word "insight." Mr. Shaputis had developed insight many years ago, and his insight remains more than adequate.*

Mr. Shaputis' level of insight into the role alcoholism played in his previous misconduct has been brought into question. I have addressed the matter and conclude that this was a misunderstanding, rather than a deficiency on Mr. Shaputis' part. *I have questioned him in-depth on the subject. It is clear that Mr. Shaputis does, in fact, understand and appreciate the role that his alcoholism played, not only in the commitment offense, but in his previous indiscretions. He has fully addressed and dealt with this problem in extensive programming over the past two decades. At this time Mr. Shaputis' insight into the role that alcoholism played in his life offense and previous criminal behavior is more than adequate.*

(Exhibit D, p. 15; emphasis added.)

As to the repeated denials of Shaputis' parole, Dr. Stark concluded:

This long incarceration has no rehabilitative effects given he has already met all requirements for release and poses no threat to public safety. He is free from any mental or emotional problems that would interfere with routine parole planning. This is supported by psychological testing as well as by a Comprehensive Risk Assessment . . . He has a strong release program in place. Mr. Shaputis' prognosis for successful adjustment to the community is excellent . . .

(Exhibit D, p. 13.)

Due to the questions concerning Shaputis' "insight" into his former behavior and the role of alcoholism, Dr. Stark devoted considerable time and

attention in assessing his current level of insight and to addressing the Board's, Governor's, and Courts' previously expressed lay concerns on the subject:

According to the American Psychological Association . . . ***Insight*** is defined as an awareness of the underlying sources of emotional, cognitive or behavioral difficulty with oneself. However ***insight alone does not change behavior***. The inmate must feel prepared to do anything to change that such a tragedy will never occur . . .

The HCR-20 Companion Guide (Forensic Assessment Division [of the Board] uses this instrument for assessing risk of violence) reports: "Insight . . . is a judgment that is made by one person about another person . . . if a person speaks about his or her behaviors in ways that are in concordance with the other's perceptions and view, he or she has insight, if not he or she lacks insight. The question is not simply whether the client has insight (i.e., is about to make reasonable sense of his or her experience and behavior) but how the client makes sense of his or her behavior within the contexts of his or her experience. The task is to uncover and understand the internal logic of the client's behavior (i.e., the client's subjective 'insight'), and then there comes a time when active change has been successful when the client feels that the hard work of transformation had led to consolidation of a new pattern of feelings, thoughts, and behavior."

Mr. Shaputis has for several years successfully made this transformation from insight to an active sustained change in his feelings, thoughts and behavior . . . he has developed over the years a consistent reality based view of his extremely destructive choices due to unmet needs and being substance dependent. He related his past behavior was a need to make himself feel good and he behaved in a self-centered manner to obtain those feelings that resulted in a tragedy that took his wife's life . . .

Mr. Shaputis has remained consistent over the years in the circumstances of the index offense. Mr. Shaputis said he has been quoted many times incorrectly when the relationship with his wife was discussed. It is clear that there were inconsistencies in the investigation regarding the logistics regarding the firing of the gun

during the index offense. Mr. Shaputis' quest for self understanding has been a process that has taken many years.

Mr. Shaputis has long since achieved compelling insights [quoting him] . . . *Mr. Shaputis continues to state that he provided the environment for the tragedy [and] does express deep feelings of sorrow and remorse about the events that have caused great pain and suffering to his family*, stating "I feel sorrow for what occurred and my wife's death will always be with me . . . First I needed to develop a better understanding of myself. I did this through self help classes and groups and intensive therapy . . . I am aware of what I did every day. There were so many warning signs I chose to ignore." . . . *Mr. Shaputis was able to identify and label the various factors that led up to the offense . . .* "I never even thought at the time of the consequences of my drinking and my wife's drinking and our continuous arguments. I really had no understanding, as unbelievable as that may seem. Since that time I've done a lot of intensive groups regarding how my low self esteem [and] horrible substance abuse caused my detachment. I'm astonished at the time of the offense at my lack of any thoughts that this situation was out of hand."

The BPH has expressed many times their concern about his denial of alcoholism and responsibility for the index offense. According to Mr. Shaputis this revolved around his initial denial 21 years ago about his alcoholism. He related he has attended numerous substance abuse treatment groups and has for years admitted to his alcoholism and being in recovery since his incarceration. Regarding the index offense Mr Shaputis explained he "just told the facts of what I remembered happening. *Of course I was responsible but others took my statements out of context. I know that the reason I was told I lacked insight was because I was only asked to give my version of the death of Erma. I was never asked how I developed into that person called insight or I was asked in the prior evaluation to go into how I changed.* They asked me questions and I responded. *I was never asked about my thinking then and the changes in the last several years.*"

(Exhibit D, pp. 6-8; emphasis added.)

On the PCL-R test for psychopathy, The Board noted that Dr. Stark rated Shaputis as a “*very low*” risk for recidivism. (Exhibit A, p. 31.)² She also scored Shaputis *very low* on risk from a historical management perspective, and *very low* for future violence.³ (*Ibid.*) Dr. Stark’s analysis of Shaputis’ needs for services on parole, using the LSI-R report, scored him in “the *very low* risk needs area.” (Exhibit D, p. 13.)

The Board cited Dr. Stark’s summary as:

The prognosis for successful adjustment in the community is excellent. The factors are listed below to support the conclusions. The tests that have been given, the classes you’ve taken, the disciplinary free since you’ve been with the Department of Corrections. You have not had any violence, strong family support, strong work ethic while you’ve been incarcerated. And then the doctor indicates that you have, the prognosis for successful adjustment in the community is excellent.

(Exhibit A, p. 31.)

In reality, Dr. Stark’s conclusion was much more compelling:

Mr. Shaputis continues to exhibit an exceptional pattern of programming and institutional adjustment. Mr. Shaputis has gone through a profound process of developing insight into the reasons for his behavior. Insight is a process, not an event. Mr. Shaputis has met all the BPH recommendations again . . . Based upon current psychological testing, as well as his presentation in the

² Dr. Stark gave a detailed report of her PCL-R analysis, which the Board did not read into the record. Dr. Stark scored Shaputis at the 3.2 percentile for Factor 1, and at the 5.2 percentile for Factor 2 (due to his history) – yielding an overall 4.2 percentile rating for PCL-R, which she characterized as “very low.” (Exhibit C, p. 20.)

³ This is the Board’s reference to Dr. Stark’s HCR-20 analysis for future violence. Dr. Stark rated Shaputis’ HCR-20 “historical domain” at “*very low* risk” and his clinical domain at “*very low* risk.” (Exhibit C, p. 21.)

interview, *Mr. Shaputis does not pose any more risk to society at this time than the average citizen.*

(Exhibit D, pp. 6-7, 13.)

In sum, the past *eight* evaluations of Shaputis' parole risk by forensic psychologists, including both new assessments prepared for the 2009 hearing, projected "*very low*" and "*low*" risks of dangerousness. Only Dr. Stark's report was based on an extensive personal interview; the 5½-hour session was roughly three times the total amount of time spent with Shaputis by Drs. Mura and Silverstein, whose reports were based on an hour or less spent with him (see petitioner's exhibits, case No. S155872; exhibit E, p. 1), and were limited to a review of his central and medical files (*id.*, pp. 1, 8); Dr. Stark reviewed Shaputis' cumulative case summary, his Board reports and past psychological evaluations, the Board's previous decisions, Shaputis' trial documents, including the probation report for sentencing, and his counselor's reports. (Exhibit D, p. 2.) Only Dr. Stark's determination included the required risk assessment tests. Dr. Stark's report was the only assessment that addressed Shaputis' insight and acceptance of responsibility in depth.

The 2009 parole hearing. Under oath, Shaputis provided *the Board* with significant "insight" into the etiology of the obvious misunderstanding about his own insight into his former criminality and his acceptance of responsibility for it. Specifically, in pertinent part:

It is my understanding that, regarding my commitment offense and conduct, the issue of my insight into my conduct and the role my alcoholism played have been questioned.

Until my most recent psychological evaluation when Dr. Stark explained the meaning of insight and asked me to reveal how I feel about my former behavior and the role that my alcohol addiction

played in it, I had never directly addressed the matter because I misunderstood it. And the psychologist who did my previous interview for the Board asked me only superficially about it.

Because of a fading memory, probably due to my age and illnesses, I do not have a vivid recollection of all of my previous conduct, but I do remember that I abused my wife and at least one of my daughters. I also recall my drinking habits and severe addiction to alcohol.

I do recognize the destructive effects of my drinking and how it terribly impaired my judgment. Over time and with treatment I've come to know I would not have committed such ... horrific acts but for alcohol. But I blame myself and low morality, not alcohol, for my crime and former misconduct. Most alcoholics, those with decent character and morality, do not commit such acts.

In my treatment and soul searching over the years I have addressed and dealt with this issue of morality, and with the requirement of lifelong sobriety. On the former subject, I was self-centered and did not respect the needs of my wife and children. Although that was compounded and exacerbated by drinking, the basic flaw was in my own character.

I've come to understand these issues. I look back at the way I answered questions asked by the Board and the Board's psychologists. I had focused almost entirely on my present and future sobriety, but failed to adequately explain how deeply regretful I feel about my past. Because Dr. Stark and Ms. Buchalter told me how important it is to express this, I have tried to address the subject. I'm making this written statement because it is now more difficult, due to my memory and illnesses, to immediately understand and reply spontaneously to questions, particularly about my past. My shame about my horrible conduct and how it impacted the victims has also played a role.

I want the Board, and everyone, to know that I will and can never again engage in such terrible conduct. How repulsive it is to me now serves as a powerful deterrent. I have learned to recognize and deal with stress in a socially acceptable manner in a stressful

environment. I'm committed to sobriety. Alcohol and drugs have been readily available, but I have no further need and temptation in that direction, My record should reflect that I have remained sober, and committed to lifetime sobriety. I am not mentally the same person as before. I think entirely differently and respond to stress differently. I have no use for alcohol, and because I will always feel deep sorrow for my victims and know that I am completely responsible for the offense and my previous conduct, I could never again engage in such behavior ...

(Exhibit A, pp. 41-44.)

By the time of the August 20, 2009, parole hearing at issue, Shaputis had been eligible for release on parole for *11 years* (since *1998*). The prescribed prison term for the facts of his commitment offense, set by the 2006 Board's Panel, was 151 months, which lapsed in November *1999*. (*Shaputis*, 44 Cal.4th at p. 1253; see petition, p. 15 and references.)

Despite three more years of Shaputis' exemplary conduct, treatment and reform since his previous hearing at which the Board found him *suitable* for parole (without any "insight" concern), despite two more evaluations by forensic psychologists who again assessed his parole risk as "low" and "very low," one being the most exhaustive to date and the only one that employed proven assessment tools to establish Shaputis' abundant insight, remorse, and acceptance of responsibility for his commitment offense and prior record, the Board denied him parole on August 20, 2009.

The 2009 Panel's decision was based on two findings, (1) the immutable facts of the commitment offense and petitioner's prior record of criminality, and (2) statements and inferences made by the Panel. The decision was a rambling, almost incongruent 20-page *lay* dissertation about Shaputis' alleged lack of insight based on verbiage in outdated, incomplete assessments, including

statements petitioner purportedly made to a probation officer *23 years earlier*, to psychologists *between 2000 and 2006*, and by psychologists during that period (who failed to administer any risk assessment tools and did not specifically ask Shaputis to elaborate on the subject) that although Shaputis poses a low or negligible further danger to public safety if released on parole, his insight into prior criminality was limited. (Exhibit A, pp. 96-106.)

More specifically, the 2009 Panel relied on the **2004** psychological assessment (exhibit A, pp. 98-99, 102, 109), the **2005** assessment (*id.*, p. 102), and the Governor's **2007** report quoting those assessments from the **2006** record (*id.*, p. 102), all of which were addressed and resolved in the 2009 evaluation – which the Panel ignored in its decision.

The Board relentlessly scolded Shaputis for his decades-old criminality and chided him abusively for his statement, quoted above, in which he truthfully explained that the 2009 evaluating psychologist asked him for the first time about his understanding of his prior actions and their cause, and explained for the first time to me the true meaning of insight (as set forth in her report, exhibit D, at pp. 6-8, 13-14, 21). The Panel Chair sarcastically told Shaputis: “You say that you didn’t know what [insight] meant essentially. When I had a Vietnamese guy the other day he had a Vietnamese interpreter and I explained to him what insight was and he understood it. And then I asked my nail lady, I said what is you know, in Vietnamese. She goes (inaudible). That’s insight in Vietnamese. Everybody knows what insight is...” (Exhibit A, p. 106.) The Board also castigated Shaputis for the expressions of remorse in his declaration because (unlike his statements to the 2009 psychologist) he did not specifically refer to the victim by name.

The 2009 Panel dismissed or ignored the new forensic evaluations of Shaputis’ *current* level of insight, acceptance of responsibility, and his low

potential parole risk, and failed as required to suggest how its professed concerns about what it cast as Shaputis' only recent gain of insight, his failure to state the victim's name, and even the outdated, superseded assessments it continued to cite, would serve as a rational nexus that could markedly elevate Shaputis' forensically determined *low* current parole risk to "an unreasonable risk of danger" to public safety.

III. THERE EXISTS NO EVIDENCE SUGGESTING THAT A PROSPECTIVE PAROLEE'S ALLEGED "LACK OF INSIGHT," EVEN WHEN BASED ON THE SUBJECT'S FAILURE TO CONFORM HIS OR HER RECOLLECTION OF THE FACTS OF A DECADES-OLD COMMITMENT OFFENSE TO ANY OTHER VERSION, OR TO ADMIT THERETO, RENDERS THE SUBJECT AN UNREASONABLE DANGER TO SOCIETY IF RELEASED TO SUPERVISED PAROLE

Neither the Board in its decision or in its opening argument, or this or any Court, has cited any evidence, such as a study of the subject, to the contrary. The Commissioner's statement, "everybody knows what insight is" (which she illustrated with her example of Vietnamese-speaking people) (exhibit A, p. 106), typifies the ignorant presumptions on which Shaputis' parole decisions have rested.

Nothing could be further from the truth. The literature emphasizes the experts' disagreement on the meaning of a subject's insight. See *Predicting Dangerousness: The Social Construction of Psychiatric Reality*, Pfohl, S.J., (1978), D.C. Health, Lexington, MA; *Violent Offenders: Appraising and Managing Risk (2nd ed.)*, Quinsey, V.L., Harris, .T., Rice, M.E., & Cormier, C.A., (2006), Washington, D.C. American Psychological Association;

Assessing Risk of Violence to Others, Webster, C.D., Douglas, K.S., Eaves, D., et al, (1997); In *Impulsivity: Theory, Assessment and Treatment* (eds C. D. Webster & M. A. Jackson), (1997), 251-277, NY, Guilford Press.

There is simply no evidence in the literature that trying to judge one's "insight" into past behavior, without using empirically validated measures, has any value in predicting recidivism. Although the HCR-20 assessment tool does include a clinical item labeled "Lack of Insight," it defines insight as the subject's current insight into his or her *current mental processes* ("reasonable understanding and evaluation of one's mental processes, reactions, self-knowledge") – *it has nothing to do with taking responsibility for one's past actions*. See *HCR-20: Assessing Risk for Violence – version 2*, Weber, C.D., Douglas, K.S., Eaves, D., Hart, S.D., (1997), Mental Health, Law, and Policy Institute, Simon Fraser University, Burnaby B.C. The LSI-R and VRAG assessment tools do not mention "insight."

Indeed, major studies reporting on this issue do *not* find a relationship between insight and future violence. See *A Meta-analysis of the Predictors of Adult Offender Recidivism: What Works!*, Gendreau, P., Little, T., & Goggin, C., *Criminology*, (November 1996), V. 34(4), 575–608 [lack of insight *not* a predictor of future violence]; *Predicting Violent Reconvictions Using the HCR-20*, Gray, N.S., Taylor, J., & Snowden, R.J., *The British Journal of Psychiatry*, (2008), V. 192, 384–387 [the Clinical component of the HCR-20, which includes insight, does *not* significantly predict recidivism]; *Utility of Social Cognition and Insight in the Prediction of Inpatient Violence Among Individuals with a Severe Mental Illness*, Waldheter, E.J., Jones, N.T., Johnson, E.R., & Penn, D.L., *Journal of Nervous and Mental Disease*, (September 2005), V. 193(9), 609-618 [no relationship]; *Empirical Evidence of a Relationship Between Insight and Risk of Violence in the Mentally Ill: A Review of the*

Literature, Bjorkly, S., *Aggression & Violent Behavior*, (July/August 2006), V. 11(4), 414-423 [no relationship]; *Predictive Value of Insight for Suicide, Violence, Hospitalization, and Social Adjustment for Outpatients With Schizophrenia: A Prospective Study*, Yen, C.F., Yeh, M.L., Chen, C.S., & Chung, H.H., *Comprehensive Psychiatry*, (November/December 2002), V. 43(6), 443-447 [no relationship].

Because a prospective parolee's version of or insight into an offense that occurred decades earlier is not predictive of future violence or recidivism, such a finding cannot be deemed some evidence that the subject's parole poses an unreasonable risk of danger to public safety. This is especially so in Shaputis' case because the record and his current psychological evaluation verify his acceptance of responsibility for, and remorse for his former behavior.

IV. NO NEXUS EXISTS BETWEEN ANY ALLEGED DISCREPANCY BETWEEN THE FACTS SHAPUTIS RECALLS ABOUT HIS 25-TO-35 YEAR-OLD MISCONDUCT, AND A NOTION THAT HIS RELEASE TO SUPERVISED PAROLE POSES AN UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY

Nothing about Shaputis' recollection of the facts of his offense, or even an inability to recall the details of his prior misconduct, can fairly be deemed dishonest or irrational, nor does it strain Shaputis' credibility in view of his age and health, the amount of time that has since lapsed, and the fact that he was intoxicated on all or most of those occasions. To preclude Shaputis' parole by deeming his "insight" inadequate on that basis denies due process because (1) that would be prohibited even if Shaputis had *denied guilt altogether* (Penal C. § 5011(b); 15 CCR § 2236; see *In re Palermo*, 171 Cal.App.4th 1096, 1110 (2009); *In re Rico*, 171 Cal.App. 4th 659, 678 (1909); *In re Vasquez*, 170

Cal.App.4th 370, 385-386 (2009) *In re Aguilar*, 168 Cal.App.4th 1479, 1491 (2008)); (2) because an aging inmate's honest but deteriorating recollection of past events is at best immutable, parole would be interminably denied on that basis, converting a sentence for second degree murder to life without the possibility of parole; and (3) the process would require Shaputis to fabricate facts he does not recall in order to achieve parole (in which case parole would probably be denied based on inconsistencies in his versions of the offense).

In *In re Singler* (2008) 169 Cal.App.4th 1227, the Board denied parole based on "lack of insight" into what triggered the murder of his wife. "According to the Board ... Singler's inability to explain this supports its finding that he posed a risk of reacting in a similar way if confronted on parole with [a similar situation] . . . All of the other evidence disclosed that Singler's efforts to learn anger and impulse control have been successful . . . In sum, there is no evidence that Singler lacks insight into why he killed his wife. (*Id.*, 169 Cal.App.4th at pp. 1241-1243.)

In *In re Palermo, supra*, 171 Cal.App.4th 1096, the Court of Appeal addressed a decision denying parole based on lack of insight, i.e., Palermo's "insistence that the killing was the unintentional result of an accidental shooting" (manslaughter rather than murder). Because Palermo accepted responsibility for his offense, was remorseful for it, and was rehabilitated, his version and recollection of the facts of the offense did not render him an unreasonable risk of danger to public safety. *Id.*, 171 Cal.App.4th at p. 1111.

In *In re Powell* (2010) 188 Cal.App.4th 1530, the Board denied Powell parole based on an alleged lack of insight; the Panel chided Powell for insisting that he "didn't intend to hit anybody" when he "beat [the victims] to death with a baseball bat" and thus, the Board reasoned, Powell obviously intended to hit both victims. Because Powell's statement of his initial intent was not

inconsistent with the evidence, and because, like Shaputis, Powell had accepted responsibility for the victims' death and harbored remorse for their families, the Court of Appeal found that Powell's version of the offense did not provide some evidence that his parole still posed an unreasonable public safety risk. (*Id.*, 188 Cal.App.4th at p. 1542; see also *In re Dannenberg* (2009) 173 Cal.App.4th 237, 255-256; *In re Smith* (2003) 109 Cal.App.4th 489, 505 [striking Governor's finding that Smith did not accept sufficient responsibility because an alleged factual disparity between his version of the offense facts and the prosecutor's version allegedly minimized his role in the offense]; *In re Roderick* (2007) 154 Cal.App.4th 242, 270-272; *In re Elkins* (2006) 144 Cal.App.4th 475, 494-495 [parole improperly denied based on Elkins' initial claim of self-defense, case as a failure to accept responsibility].)

In *In re Gomez* (2010) 190 Cal.App.4th 1291, Gomez initially did not recall stabbing the victim, but currently acknowledged that fact and accepted responsibility for his crime. The Court of Appeal reversed the Governor's decision because, as here, "... continued reliance on petitioner's supposed lack of insight after his full acknowledgement of his crime has transformed into an immutable factor. The effect of this position is to transmute petitioner's sentence into life without the possibility of parole." (*Id.*, 190 Cal.App.4th at p. 1308.)

**V. THE COURT OF APPEAL'S DECISION SHOULD BE AFFIRMED;
THE FACTUAL BASIS FOR THE BOARD'S APPEAL IS ERRONEOUS**

The Board raises two claims on appeal. In its second claim the Board argues that reviewing courts should require "denials of parole to be based on evidence of dangerousness ..." (Opening Brief, p. 6 et seq.) Shaputis agrees.

On numerous grounds, Shaputis takes issue with petitioner's first, primary contention – that the Court of Appeal erred because the Board's decision was based on “credible evidence of Shaputis' lack of insight.” (Opening Brief, pp. 4-6.)

1. Although facially acknowledging that a parole suitability decisions “rests on evidence ... of *current* dangerousness” (Opening Brief, p. 5; emphasis added), the Board based its decision entirely on *non-current*, i.e., substantially *outdated* (2004 – 2006) assessments.

2. The Board attempts to justify that approach – in which it ignored Dr. Stark's current, exhaustive evaluation of Shaputis' insight and acceptance of responsibility, and equally ignored the warning of its own psychologist – Dr. Sahni – that the 2004 and 2006 assessments were invalid because none of the risk assessment tools required by the Board were employed – by means of subtle and not-so-subtle slurs – suggesting that Dr. Stark was “his [Shaputis'] own psychologist,” that she “accepted Shaputis' claim[s about the facts of his offense],” and erred in stating Shaputis did not have “unstable, tumultuous relationships.” (Opening Brief, p. 3.)

3. The Board has at all times been well aware that Dr. Barbara P. Stark, Psy.D., is widely recognized for her expertise and qualifications as a forensic evaluator. She has been retained as a contract psychologist by the Board and Department for more than 18 years, and assigned to perform recidivism evaluations on life term inmates for more than 10 years (please see attachment). Of the following 13 cases decided since 2003 in which Dr. Stark has been cited, with two exceptions her findings and conclusions were corroborated by one or more other forensic psychologists. In three cases Dr. Stark was qualified as an expert witness on psychological evaluation. In the one case (*People v. Underwood*) in which Dr. Stark's conclusion was contradicted by another

psychologist, the court adopted Dr. Stark's conclusions. In many cases, Dr. Stark's findings were pivotal in the court's decision⁴. Please see *People v. Starr* (2003) 106 Cal.App.4th 1202, 1204; *May v. Hunter* (C.D. Cal. 2006) 451 F.Supp.2d 1084, 1090, 1092; *People v. Holmgren*, 2008 WL 5395241 at *2-3; *People v. May*, 2005 WL 605064 at *2-3; *People v. Vanderlinde*, 2004 WL 1813605 at *1; *People v. Gergis*, 2007 WL 2391150 at *2; *People v. Solis*, 2006 WL 401218 at *1; *People v. Savage*, 2006 WL 11314 at *1, 2, 4; *People v. Stewart*, 2005 WL 3163928 at *1, 3; *People v. Stuber*, 2005 WL 3159706 at *1, 3, 4; *People v. Saenz*, 2005 WL 2791899 at *1, 3; *People v. Sarvey*, 2005 WL 704825 at *1; *People v. Underwood*, 2004 WL 2958302 at *2.

4. Contrary to the Board's superficial take on this issue, Dr. Stark's refusal to apply to Shaputis the Board's codified "unstable social history" unsuitability factor (15 CCR § 2402(c)(3)) was factually and legally correct. Dr. Stark acknowledged, and noted that Shaputis fully acknowledged, the violence, tumult, and instability inherent in his *criminality*. Dr. Stark (but apparently not the Board or its attorneys) understood that "unstable social history" as defined in the regulation does not apply to that inherent in the subject's *criminal* history, but to the subject's social history with individuals *other than the victims*. See *In re Roderick* (2007) 154 Cal. App. 4th 242, 267-269 [explaining why unstable *social* history must be distinguished from *criminal* history]; *In re DeLuna* (2005) 126 Cal.App. 4th 585, 595; *In re Cerny* (2009) 178 Cal.App. 4th 1303, 1311-1312 [unstable social history not indicative of current parole risk if the instability was due to substance abuse which has been addressed in an extended interim]; *In re Scott* (2004) 119 Cal.App. 4th 871, 896 [unstable social history applies to relationships with individuals other than

⁴ Shaputis does not cite the unpublished cases as authority, but simply to impart the extent of reliance by courts on Dr. Starks' assessments.

the victims]; *In re Gaul* (2009) 170 Cal.App. 4th 20, 37-38 [unstable social history is, like the offense, immutable, and does not indicate future parole risk if the causes have been addressed in and during an extended interim].

5. The Board now claims that Shaputis' deferral, upon his attorney's advice, to another brief interview by another Board-assigned psychologist, while awaiting a far more complete evaluation which would employ proven assessment tools and focus on a more in-depth probe of his insight, "blocked the Board from receiving a more recent, neutral assessment of his insight." (Opening Brief, p. 6.) To the contrary, Dr. Stark's evaluation provided the Board, *for the first time*, with an in-depth evaluation of Shaputis' current insight and acceptance of responsibility for his former behavior, and his current parole risk, based on a personal interview five times longer than those provided by the Board's assigned psychologists, performed by a forensic psychologist trusted by the Board and Department for nearly two decades to perform their evaluations, which for the first time utilized the assessment tools the Board requires.

6. The Board has neglected to inform the Court of recent decisions finding the requirements for and methods employed by its psychologists in ordered psychological assessments of future risk to be unenforceable and ineffective. Specifically:

(a) In November 2010, the California Office of Administrative Law (OAL) determined that the Board's guidelines for its "Psychological Report Process" were unenforceable underground regulations. (OAL Determination No. 27; (2010), file No. CTU2010-0506-03.)

(b) Last week the OAL disapproved the Board's proposal for new psychological evaluation guidelines in part because the Board did not specify

instruments to be employed by its psychologists to assess future violence. (OAL File No. 2011-0316-01 S; (May 5, 2011), pp. 3, 5.)

(c) Just prior to those actions, the California Inspector General (IG) determined that the psychologists hired by the Board to perform parole risk assessments on term-to-life prisoners were inadequately trained, and called into question the accuracy and factual errors inherent in their assessments. The IG reported numerous errors in future risk assessments wherein the psychologists hired by the Board were not monitored or properly trained, and whose reports lacked adequate documentation. (*The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements*; Office of the Inspector General; (July 2010), Special Report.)

Shaputis respectfully suggests that the Board, the State, its taxpayers, and the Court might properly be thankful that his hearing attorney had the foresight and commitment to independently retain a qualified forensic psychologist to properly assess Shaputis' public safety risk and, in consideration of the judicial decisions to date, to accurately determine his level of insight into and acceptance of responsibility for his former criminality.

7. Nor does any evidence support the Board's notion that Dr. Stark "accepted Shaputis' claim[s] regarding the facts of the shooting of his wife. (Opening Brief, p. 3.) Dr. Stark's report included Shaputis' recollection of the facts of his commitment offense, but she *also reviewed* versions of the offense contained in the Probation Department report, in the appellate decision adopted in previous parole hearings, and in Board reports prepared by caseworkers from the record. (Exhibit C, p. 2.) Thus, Dr. Stark studied the offense and pre-offense facts as reported in several documents. She also *reviewed* Shaputis' version of the offense, and acknowledged "inconsistencies," but found that Shaputis "has continued to accept responsibility for the offense. This has been

misinterpreted as a lack of insight and remorse when he stated his version of the index offense . . . [he] does express deep feelings of sorrow. He related remorse about the events that have caused great pain and suffering to his family, stating, ‘I feel deep sorrow for what occurred. My sorrow will always be with me.’” No evidence supports the Board’s speculation that Dr. Stark accepted the offense facts recalled by Shaputis.

8. Finally, the Board mis-states that the Court of Appeal re-weighed the evidence before it. In applying the some evidence standard of review, the Court merely reviewed as required the record to determine whether the Board set forth any reliable evidence to support its decision that Shaputis’ parole currently posed an unreasonable danger to public safety, and whether the Board articulated a rational nexus from the commitment offense by which its notions on insight and responsibility drastically elevated Shaputis’ forensically determined low current parole risk to that level.

The Court of Appeal correctly answered both questions, “no.” Unequivocally, the only scientifically *valid* assessment of Richard Shaputis’ insight and acceptance of responsibility is Dr. Stark’s forensic evaluation. The record proves that the only evaluation – accurate or otherwise – of Richard Shaputis’ *current* parole risk is Dr. Stark’s forensic evaluation.

CONCLUSIONS

1. The Board failed to set forth any evidence demonstrating that Richard Shaputis’ parole still poses an unreasonable risk of danger to public safety, and failed to articulate a rational nexus by which any of its applicable findings markedly elevate his forensically determined low parole risk to that level.

Accordingly, the well-reasoned decision of the Court of Appeal should be AFFIRMED.

2. No evidence supports the notion that a prospective parolee's alleged lack of insight into decades-old criminality is some evidence that the subject's release to supervised parole creates an unreasonable risk of danger to public safety. Accordingly, denial of parole based on a recital of that notion by a lay parole board or politician does not satisfy the some evidence standard of review and therefore denies due process. This is particularly so when (1) the recital is based on alleged inconsistencies or inaccuracy of the subject's recollection or version of the prior criminality, (2) a forensic psychologist who considered that fact found the subject to pose a low such risk, or (3) when the subject has accepted responsibility therefor.

3. In view of Shaputis' documented age and failing health, the uncontested disproportion between the length of his imprisonment and prison term set by the Board for the particular facts of his offense, the determination that his parole poses a low if any risk of danger to society by a plethora of the State's forensic psychologists, and the waste of a bankrupt State's tax dollars expended to incarcerate one who poses no such danger, the Court is respectfully requested to fashion expedient habeas corpus relief.

Dated: May 11, 2011

Respectfully submitted,



Marc Elliot Grossman
Counsel for Richard Shaputis

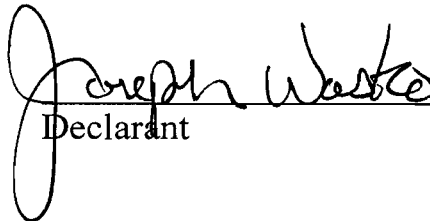
ATTACHMENT

Rule 8.504, subsection (e), permits attachments not exceeding ten pages. Shaputis respectfully attaches the three-page addendum attached by Dr. Stark to her 2009 risk assessment report reviewed by the Board. Apparently, the addendum was omitted from copies of the report lodged as exhibits in the Court of Appeal by the parties. The attachment, a summary of Dr. Stark's experience and qualifications, is significant because the matter has been called into question in the Board's opening brief.

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 14 point Times Roman font and, exclusive of tables, contains 8,218 words.

Dated: May 11, 2011


Declarant

ATTACHMENT

BARBARA P. STARK, PSY. D.
Forensic Psychology
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California License Number PSY 12764

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PROFESSIONAL BACKGROUND

- 1992 to Present **Forensic and Clinical Psychology, Private Practice**
Specialization in Forensic and Clinical Psychology. Mentally
disordered offender evaluations and court testimony.
Conducted evaluations for the Conditional Release Program in
Los Angeles County, California. Conduct Life Term Inmate
Suitability Hearings.
Contract Psychologist Wasco State Prison-Reception Center
- 1994 to 2002 **Senior Supervising Clinical Psychologist,**
Santa Barbara County Department of Mental Health
Responsible for training and supervising clinical staff and
doctoral interns to perform clinical evaluations of severely
mentally ill individuals. Performed psychological and
neuropsychological assessments of patients. Conducted
evaluations for determining suitability for outpatient
treatment. Conducted Crisis Evaluations regarding Welfare
and Institutions Code 5150.
- 1992 to 1995 **Clinical Psychologist, Conditional Release Program, Los**
Angeles County
Responsible for evaluation of patients committed to state
hospital as to their suitability for placement in the community.
Conducted evaluations of patients in the outpatient CONREP
Program to determine their readiness for discharge.
- 1993 to 1995 **Clinical Psychologist, California Assessment Project.**
Administered the Hare Psychopathy Checklist-Revised,
Rorschach, and MMPI to Conditional Release Program
Outpatients.
- 1990 to 1992 **Staff Psychologist, Atascadero State Hospital, Atascadero**
California
Clinical psychologist for Mentally Disordered Offenders
committed to Atascadero State Hospital pursuant to Penal
Code 2962. Responsible for psychological assessments and
group psychotherapy. Provided testimony for the California
Board of Prison Terms and the San Luis Obispo Superior
Court.
- 1988-1990 **Psychology Intern, Camarillo State Hospital, Camarillo**
California
- EDUCATION:** **Doctor of Psychology in Clinical Psychology, Pepperdine**
University American Psychological Association Fully
Accredited Program-1986 to 1990.
Dissertation: A five-year controlled longitudinal research
study comparing the treatment effects on those individuals

suffering from undifferentiated schizophrenia and those individuals suffering from paranoid schizophrenia.

Master of Science in Clinical Psychopharmacology- (Prerequisite Licensure as a Psychologist) California School of Professional Psychology-Two year program completed in 2002.

Southern California Institute of Psychoanalytic Study-
1996-1998

Master of Science in Psychology, Pepperdine University-
1984-1986

Bachelor of Science in Education and Psychology,
University of California at Los Angeles

Judicial Citations:

Cited in State of California Second Appellate District Division Six-The People v, Robert Starr. Pedophilia falls within the definition of a severe mental disorder pursuant to Penal Code Section 2962.

MEMBERSHIP IN PROFESSIONAL ASSOCIATIONS

- American Psychological Association
- California Psychological Association

Barbara P. Stark, Psy.D.
Forensic and Clinical Psychology
CA. License Number: PSY 12764

Qualifications:

The reader may not be familiar with this evaluator; I have been working in the California Department of Corrections and Rehabilitation as a Contract Psychologist for over 18 years. I began as a CONREP Evaluator in Los Angeles evaluating inmate/patients for release to the community. I have evaluated inmate's regarding the Mentally Disordered Offender Commitment including Difference of Opinion Evaluations, Certification Evaluations, Placement and Annual Evaluations. I have conducted Competency Evaluations on inmates for their refusal to sign Conditions of Parole. Additionally I was a member of the California Assessment Team and conducted numerous evaluations on parolees regarding risk of recidivism. I did Contract with the FAD performing Comprehensive Risk Assessments. For the last few years I have been doing Private Psychological Evaluations for Life-Term Inmates. In my work with the CDCR I have been to almost every prison. I have been writing BPH Lifer Evaluations at Avenal State Prison, Chuckawalla Valley State Prison, SATF, Pleasant Valley State Prison, CCI Tehachapi, and Correctional Institution for Women (CCWF), California Men's Colony (CMC) and Ironwood State Prison. I have for the last three years been on staff at Wasco State Prison as a Contract Psychologist.

Dr. Carl Gicano supervised and certified my expertise in the administering and scoring Psychopathy Checklist while at Atascadero State Hospital during my Post-doctoral Internship. I have performed the risk assessment instruments that the Forensic Assessment Divisions has endorsed for many years. My qualifications and evaluations are open to review.

DECLARATION OF SERVICE BY MAIL

Case : **In re Richard Shaputis, No. S188655**

I declare that I am a citizen of the United States. I am over the age of 18 and am not a party to the within title cause.

On MAY 12, 2011, I served the attached

ANSWER BRIEF ON THE MERITS

on the parties listed below by enclosing same in an envelope to which adequate postage was affixed, and depositing same at the United States Post Office in Walnut, California for mailing.

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San Francisco, CA 94102-7004

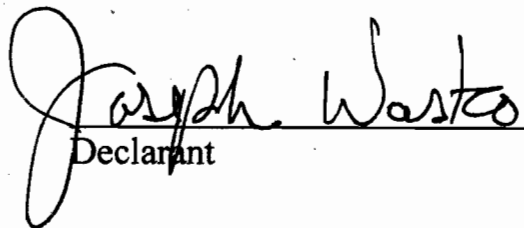
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Richard Shaputis (D64814)
P.O. Box 9 (350-1-80-L)
Avenal, CA 93204

I declare, under penalty of perjury, that the facts I have stated above are true and correct.

Dated MAY 12, 2011, at Walnut, California


Declarant