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CERTIFIED FOR PUBLICATION

IN THE COURT OF APEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re RAYMUNDO MACIAS, on Habeas Corpus.	H033605 (Santa Clara County Super. Ct. No. 113003)

I. STATEMENT OF THE CASE

In 1988, petitioner Raymundo Macias pleaded guilty to second degree murder and was sentenced to prison.[1] On August 23, 2007, the Board of Parole Hearings (Board) conducted a hearing and found Macias to be unsuitable for parole for the fifth time. Macias sought a writ of habeas corpus alleging that the Board's decision denied him due process. He argued that the Board applied the wrong standard and that there was insufficient evidence to support its finding that he was currently dangerous. The superior court agreed that the Board's decision denied Macias due process and ordered it to conduct a new hearing within 35 days.

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[1] The basic facts of the commitment offense are as follows: On October 10, 1986, the victim, Darlene Sotello, was found naked and dead on the floor behind the driver's seat of a car. She had died of a drug overdose. A few days later, her friend, Debi Galvan, was found in her apartment. She had been beaten and sexually assaulted and was under the influence of PCP. She told police that she and Sotello had met two men, and they all went to her apartment to party. Galvan could not remember anything else that happened. Police eventually found and arrested Macias.

Macias admitted that he and a friend met the two women and provided them with cocaine which, unbeknownst to the women, was laced with PCP. They wanted to get the two women high to facilitate having sex with them. He said he did not learn that Sotello had died from the drugs until after he was arrested.

Respondent, Michael Martel, Acting Warden at Mule Creek State Prison (Warden), appeals from the order.[2] He claims the trial court erred in granting relief and further claims that even if relief were appropriate, the court erred in ordering a new hearing within only 35 days.

As we shall explain, subsequent events have rendered the court's order moot, and, therefore, we reverse it. Although this renders it unnecessary for us to address the propriety of the trial court's ruling or the Board's 2007 decision to deny parole, we exercise our discretion to discuss an issue of continuing public importance raised in this case: reliance on an inmate's "lack insight" into the commitment offense as an unsuitability factor to deny parole.

II. MOOTNESS

After the appeal was filed, we stayed the trial court's order directing the Board to conduct a new hearing. While the appeal was pending, the Attorney General informed us by letter that on August 12, 2009, the Board did commence a new hearing for Macias in accordance with the normal schedule for hearings. However, at the new hearing, Macias waived his right to a determination of suitability for parole and voluntarily stipulated to unsuitability for three years until his next hearing. He explained to the Board that he had received a disciplinary citation in March 2009 and needed the additional time to remain discipline free.[3]

We requested further briefing on whether the 2009 hearing and stipulation rendered the trial court's order or this appeal or both moot.

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[2] Although the habeas petition concerns the action of the Board, the respondent is the warden of the prison where Macias is incarcerated. (Pen. Code, § 1477.)

[3] Attached to the Attorney General's letter were a copy of the transcript of the 2009 parole hearing and a copy of the Macias's disciplinary citation. Macias does not challenge the authenticity of these documents or the information they reveal, and we have taken judicial notice of the hearing, Macias's stipulation, and the reasons for it without objection. (See Evid. Code, § 459.)

In his brief, the Attorney General claims the court's order is moot because Macias received the relief that was ordered by the trial court: an opportunity for a new hearing. Given the outcome of that hearing, the Attorney General argues that the propriety of both the trial court's order and the Board's 2007 decision to deny parole are moot. Accordingly, the Attorney General urges us to simply reverse the trial court's order.

Macias claims the trial court's order is not moot. He argues that if this court agrees that the Board's 2007 decision denied him due process, his stipulation should not be binding, and he should immediately be given a new parole hearing. He asserts that he would not have stipulated if, at that 2009 hearing, he faced only the disciplinary citation, which, he opines, was minor and would not have prevented him from demonstrating his suitability for parole. However, he complains that in addition to the citation, he also had to face the Board's 2007 decision to deny parole. According to Macias, that decision, which the trial court found had violated his right to due process, made it a foregone conclusion that the Board would again deny parole. Thus, because the Board's 2007 decision loomed over him, he claims the stipulation should not be given effect if and when this court upholds the trial court's ruling. Under the circumstances, he urges us to address the propriety of the Board's 2007 decision, affirm the trial court's order, and lift the stay. We are not persuaded.

At the hearing in 2009, the controlling issue before the Board would have been whether Macias was *currently* dangerous. The Board's focus would not have been on its previous denial of parole in 2007; rather the pertinent focus would have been on Macias's record, his conduct in prison, and his rehabilitation, with special attention paid to the period since his last hearing. It is true that any recommendations by the Board in 2007 would have been relevant in determining Macias's suitability for parole at the hearing in 2009.[4] Apart from such recommendations, however, the fact that the Board denied parole

[4] For example, at the hearing in 2005, the Board denied parole and recommended that Macias participate more in self-help programs. At the next hearing in 2007, that

in 2007 and had done so numerous times before that and the prior findings it had made concerning his suitability for parole would not have been particularly relevant or probative in determining whether in 2009, Macias was currently dangerous or suitable for parole.

Moreover, before the 2009 parole hearing, the trial court had ruled that the Board failed to apply the correct standard and that its 2007 decision denied Macias due process. Although the state's appeal from that ruling was pending in 2009, the trial court's ruling provided Macias with grounds to object if, at the 2009 hearing, he thought the Board was repeating the errors it had made at the 2007 hearing, applying the wrong standard, or improperly using its prior denial as a reason to deny parole again. Indeed, the trial court's ruling established a likelihood of judicial relief if the Board did so. Nevertheless, despite the trial court's ruling and its potential affirmance on appeal, Macias appeared before the Board, immediately elected to waive his right to a determination of suitability, and stipulated to a period of unsuitability.

We further point out that when he volunteered his stipulation, Macias did not state that he felt compelled to do so or that his stipulation was motivated in large part by a belief that the Board's 2007 decision rendered another denial a foregone conclusion. He did not suggest that he would have not be voluntarily stipulating and would instead want a full hearing if he were facing only the one disciplinary citation. Macias also did not state or imply that he would be entitled to an immediate new hearing, notwithstanding the stipulation, if later, the trial court's order was upheld on appeal. Nor did he attempt to condition or qualify his stipulation on the outcome of the appeal. He did not even mention it. Rather, Macias immediately offered to stipulate to his unsuitability, explaining *only* that he had received a citation and felt that he needed the period of time

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recommendation was relevant in assessing Macias's conduct since 2005, and at the 2007 hearing, the Board commended his compliance with its recommendation and his participation in such programs.

until his next scheduled hearing to remain discipline free to establish suitability. He also said that his decision to waive a hearing on the merits of his current suitability and stipulate to unsuitability was knowing and voluntary.

Given the record, we are not convinced that the Board's 2007 denial of parole had any influence Macias's decision to stipulate. At the 2009 hearing, he had the right and opportunity to demonstrate suitability, and he had nothing to lose by proceeding with a hearing on the merits if he thought he had a reasonable chance for parole. This is especially so if, as he now claims, the disciplinary citation was insignificant and would not have posed an insurmountable barrier to a finding of suitability. However, we infer a different calculation concerning the effect of the citation at the time of the stipulation. Since the citation and the need to remain discipline free were the only reasons Macias gave for the stipulation, it is more reasonable to infer that, in Macias's view, the citation and the need to rehabilitate his institutional record rendered the denial of parole a foregone conclusion. Moreover, the fact that he voluntarily stipulated to unsuitability without qualifying his stipulation on the outcome of this appeal or suggesting that the trial court's order remained potentially viable and enforceable implies, in our view, an understanding the stipulation was binding and would remain so regardless of the outcome on appeal.

Under the circumstances, therefore, Macias's claim that the Board's 2007 denial of parole influences his decision to stipulate does not represent a compelling reason to address the propriety of that decision; and even if we did so, he does not convince us that the stipulation was qualified by the outcome of the appeal or should not be binding and, in effect, supersede the trial court's order.

Macias argues that if we were to agreedthat the Board's 2007 decision was defective, then that defective decision would constitute an actual injury—i.e., denial of due process—for which he should be entitled to the remedy of an immediate new

hearing. Otherwise, he argues, his constitutional injury would go unredressed. We disagree.

In his petition below, Macias did not claim the right to immediate release on parole as a remedy. He merely sought a new hearing that comported with due process. The trial court ordered that remedy. Although this court stayed the trial court's order, Macias actually got a new hearing and the opportunity to establish his suitability for release on parole. Although that hearing took place as part of the normal course of scheduled parole hearings, it had to comport with due process and thus was the functional equivalent of the remedy he sought and obtained from the trial court. Nevertheless, Macias knowingly and voluntarily waived his right to have the Board determine his suitability at that time. He did so because of the disciplinary citation and the need to remain discipline free for a period of time. That he elected to waive a hearing and stipulate to unsuitability for those reasons does not negate the fact that he was offered a full hearing.

In sum, we conclude that Macias's stipulation renders the trial court's order moot. Accordingly, we need not address the propriety of the Board's 2007 decision to deny parole.

Macias claims that even if the trial court's order is moot, we should address the propriety of the Board's 2007 decision. He argues that if, as the trial court found, the Board failed to apply the proper standard in denying parole, the Board could repeat that error in subsequent parole determinations. Thus, Macias urges us to review the previous decision to help guide his future hearings.

" 'An appellate court will not review questions which are moot and which are only of academic importance.' [Citations.] A question becomes moot when, pending an appeal . . . events transpire that prevent the appellate court from granting any effectual relief. [Citations.]" (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 419.) Such is the case here.

Furthermore, "[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912; accord, *Salazar v. Eastin* ((1995) 9 Cal.4th 836, 860.) Thus, courts regularly decline invitations to issue them. (See, e.g., *In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 53; *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1015.)

However, we note that even if a question or issue is technically moot, a reviewing court has discretion to address issues that have continuing public importance and may otherwise evade review, and courts are not hesitant to do so in order to provide necessary guidance in future proceedings. (E.g., *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001; *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 524, fn. 1.; *People v. Cheek* (2001) 25 Cal.4th 894, 897-898; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 746-747.)

Such an issue arises in this case. In denying parole in 2007, the Board found that Macias was currently dangerous, and it based that finding primarily on the heinous nature of the commitment offense and its view that Macias lacked insight into the seriousness of the offense and its causes. Although we need not discuss whether there was some evidence to support the Board's ultimate determination that Macias was currently dangerous and, therefore, unsuitable for parole, its reliance on the view that he lacked insight does raise the issue of what it means to "lack insight." We consider this to be an issue of continuing importance because "lack of insight" is an inherently vague concept and an inmate's "lack of insight" is increasingly relied on as a reason to deny parole. Accordingly, we exercise our discretion to discuss and clarify this issue in order to ensure both the propriety and consistency of findings of "lack of insight."

III. DISCUSSION

A. Legal Framework for Parole Decisions

Penal Code section 3041 and title 15 of the California Code of Regulations govern the Board's parole decisions.[5] Under the statute, the Board "shall normally set a parole release date" one year prior to the inmate's minimum eligible parole release date, and shall set the date "in a manner that will provide uniform terms for offenses of similar gravity and magnitude *with respect to their threat to the public* . . . ." (Pen. Code, § 3041, subd. (a), italics added.) Moreover, the Board must set a release date unless it "determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the *public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." (Pen. Code, § 3041, subd. (b), italics added.)

"Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an *unreasonable risk of danger to society* if released from prison." (§ 2402, subd. (a), italics added.) In making its determination, the Board must consider all "relevant, reliable information." (§ 2402, subd. (b).) Specific factors that the Board must consider are listed in section 2402, subdivisions (c) and (d). Factors tending to show unsuitability include the nature and circumstances of the offense and the prisoner's history of violence, unstable social history, history of sadistic sexual assaults, history of mental problems, and history of serious misconduct in prison (§ 2402, subd. (c)(1)-(6).)

Factors, tending to show suitability are the lack of a juvenile criminal record, a stable social history; evidence showing an understanding concerning the nature and magnitude of the offense; evidence that the inmate was the victim of Battered Woman

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[5] All further unspecified section references are to title 15 of the California Code of Regulations.

Syndrome; evidence that the inmate committed the crime as the result of significant stress in his life; the lack of an adult criminal history; and the inmate's age, realistic plans for the future, and participation in institutional activities indicating an enhanced ability to function within the law upon release. (§ 2402, subd. (d)(1)-(9).)

B. The Board's Discretion

Parole release decisions are essentially discretionary and "entail the Board's attempt to predict by subjective analysis" the inmate's suitability for release on parole. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*).) Such a prediction requires analysis of individualized factors on a case-by-case basis. (*Ibid*.) In exercising its discretion, the Board "must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1219 (*Lawrence*).) "Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board]." (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

C. Judicial Review

Judicial review of the Board's decision is deferential. "Only a modicum of evidence" is required to support the Board's decision. (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.) "As long as the [Board's] 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 [Board's] decision." (*Ibid*., italics added.) In this regard, however, the relevant inquiry is whether "some evidence" supports the determination "that the inmate constitutes a *current* threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra*, 44 Cal.4th at p. 1212, italics added; accord, *In re Shaputis* (2008) 44 Cal.4th 1241, 1254 (*Shaputis*).)

D. Reliance on the Gravity of the Commitment Offense to Deny Parole

To explain why and when it is proper and appropriate to rely on "lack of insight" as an unsuitability factor, we find it helpful to first discuss the proper scope of reliance on the gravity of the commitment offense as an unsuitability factor.

As noted, the aggravated nature of a commitment offense and the circumstances surrounding its commission are among the factors listed in the governing regulation that the Board may consider as an indication of unsuitability for parole. (§ 2402, subd. (c)(1).)[6]

In *Rosenkrantz, supra*, 29 Cal.4th 616, the court held that the aggravated nature of a commitment offense, alone, can constitute a sufficient basis for denying parole. (*Id*. at p. 682.) However, the court opined that sole reliance on that factor could amount to a denial of due process—"for example, where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense." (*Id*. at p. 683.)

In *In re Dannenberg* (2005) 34 Cal.4th 1061, the court confirmed that if the Board relies solely on the commitment offense to deny parole, "it must cite 'some evidence' of aggravating facts *beyond the minimum elements of that offense*," that is, "the violence or viciousness of the inmate's crime must be more than *minimally necessary to convict* him of the offense for which he is confined." (*Id*. at pp. 1095-1096, fn. 16.) In upholding the denial of parole in that case, the court noted that Dannenberg bludgeoned his wife with a wrench and then pushed her into a tub or left her there to drown. The court found that

[6] Section 2402, subdivision (c)(1) provides, "Commitment Offense. The 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."

these circumstance supported findings that the crime was especially cruel, showed an exceptionally callous disregard for human suffering, and was a disproportionate response to a trivial provocation. (*Id.* at p. 1095.)

After *Dannenberg*, the Board consistently denied parole based primarily, and often solely, on the commitment offense, which reasonably, if not invariably, could be deemed especially callous, cruel, and heinous. In *Lawrence, supra*, 44 Cal.4th 1181, the court recognized this trend, observing that the "practical reality" after *Dannenberg* is that "in every published judicial opinion" in which parole was denied or a grant of parole was reversed, the decision "was founded in part or in whole upon a finding that the inmate committed the offense in an 'especially heinous, atrocious or cruel manner . . . .'"[7] (*Id.* at p. 1206, fn. omitted.)

Because of a conflict in the way appellate courts reviewed a Board's decision to deny parole based on the commitment offense, the court in *Lawrence* clarified why and when it was proper and appropriate to rely on that factor to deny parole. (*Lawrence, supra,* 44 Cal.4th at pp. 1206-1209, 1213.)

The court reiterated that "the fundamental consideration in parole decisions is public safety," and, therefore, "the core determination of 'public safety' under the statute and corresponding regulations involves an assessment of an inmate's *current* dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1205.) Consequently, the various factors enumerated in the regulations are not so much reasons in and of themselves to

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[7] In light of *Dannenberg*, it seems inevitable that courts would deny parole based solely on the commitment offense, especially in murder cases. Indeed, in *Lawrence*, the court observed that "there are few, if any, murders that could *not* be characterized as either particularly aggravated, or as involving some act beyond the minimum required for conviction of the offense." (*Lawrence, supra,* 44 Cal.4th at p. 1218; see *In re Smith* (2003) 114 Cal.App.4th 343, 366 [all implied-malice second-degree murders can be characterized as cruel and callous because they deliberate acts, knowledge of the danger, and conscious disregard for life, which implies a lack of emotion, sympathy, or sensitivity to suffering].)

deny parole; rather they are designed to guide an assessment of the current threat to public safety an inmate would pose if released. (*Id*. at p. 1206.) In other words, "[i]t is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Id.* at p. 1212.) Thus, relevance to the issue of the inmate's current risk to public safety is the key; and a decision to deny parole "requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Id*. at p. 1210.)

With this in mind, the court opined that given "the statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1211.) Thus, although the Board may rely on the commitment offense to deny parole, "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Id.* at p. 1214.) Stated differently, "certain conviction offenses may be so 'heinous, atrocious or cruel' that an inmate's due process rights would not be violated if he or she were to be denied parole on the basis that the gravity of the conviction offense establishes current dangerousness. In some cases, such as those in which the inmate has failed to make efforts toward rehabilitation, has continued to engage in criminal conduct postincarceration, or has shown a lack of insight

or remorse, the aggravated circumstances of the commitment offense may well continue to provide 'some evidence' of current dangerousness even decades after commission of the offense." (*Id*. at p. 1228.) "At some point, however, when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness." (*Id*. at p. 1219.)

Thus, where "all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the [Board] has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Lawrence, supra,* 44 Cal.4th at p. 1227.)

"[T]he relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*Lawrence, supra,* 44 Cal.4th at p. 1221.) "In sum, the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]

Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Ibid*.)

D. Reliance on the Inmate's Lack of Insight to Deny Parole

Neither the governing statute nor the governing regulations list "lack of insight" as an unsuitability factor. However, in *Shaputis, supra*, 44 Cal.4th 1241, the companion case to *Lawrence* (see *Lawrence, supra*, 44 Cal.4th at p. 1191, fn. 2), the court upheld the denial of parole because the inmate's lack of insight into his offense and its causes together with the aggravated nature of the offense supported a finding that he was currently dangerous and thus unsuitable for parole. (*Shaputis, supra,* 44 Cal.4th at pp. 1258-1261 & fn. 20.)

Just as the heinous nature of the commitment offense became a standard reason to deny parole after *Dannenberg*, so too an inmate's lack of insight has become a standard reason after *Lawrence* and *Shaputis*, so much so that it is has been dubbed the " 'new talisman' " for denying parole. (*In re Shippman* (2010) 185 Cal.App.4th 446, 481 (dis. opn. of Pollak, J) [quoting a case that was later ordered not to be published] (*Shippman*).)[8]

As *Shaputis* illustrates, a "lack of insight" into past criminal conduct can reflect an inability to recognize the circumstances, forces, and impulses 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. (*Shaputis, supra*, 44 Cal.4th at pp. 1260, 1261, fn. 20; *Lawrence, supra,* 44 Cal.4th at pp. 1214, 1228; *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) Accordingly, the inmate's

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[8] Our search of published and unpublished parole cases reveals that after *Shaputis* there has been a precipitous spike in reliance on "lack of insight" findings to deny parole.

"lack of insight" can provide a logical nexus between the gravity of a commitment offense and a finding of current dangerousness.

Personal insight, of course, has long been recognized as a worthy goal.[9] However, we question whether anyone can ever fully comprehend the myriad circumstances, feelings, and current and historical forces that motivate conduct, let alone past misconduct. We also question whether anyone can ever adequately articulate the complexity and consequences of past misconduct and atone for it to the satisfaction of everyone. Indeed, the California Supreme Court has recognized that "expressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (*Shaputis, supra*, 44 Cal.4th at p. 1260, fn. 18.) In our view, moreover, one always remains vulnerable to a charge that he or she lacks sufficient insight into some aspect of past misconduct even after meaningful self-reflection and expressions of remorse.

We further consider the very concept of "insight" to be inherently vague and find that whether a person has or lacks insight is often in the eye of the beholder. Thus, although a "lack of insight" may describe some failure to acknowledge and accept an undeniable fact about one's conduct, it can also be shorthand for subjective perceptions

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[9] In his dissenting opinion in *Shippman, supra,* 185 Cal.App.4th 446, Justice Pollak observed that "[a]uthorities ranging from Socrates to Sigmund Freud have recognized the importance of acquiring personal insight." (*Id*. at p. 479, fn. omitted (dis. opn. of Pollack, J.).) In a footnote, he added, "In addition to Socrates's famous admonition, 'Know thyself,' and Freud's development of psychoanalysis, designed to make one aware of unconscious motivation, the literature is replete with exhortations to develop insight and laments about the attendant difficulties of doing so: 'The life which is unexamined is not worth living.' (Plato); 'Know then thyself, presume not God to scan; the proper study of mankind is man.' (Alexander Pope); 'It is as hard to see oneself as to look backwards without turning around.' (Henry Thoreau); 'There ain't no way to find out why a snorer can't hear himself snore.' (Mark Twain); 'Know thyself? If I knew myself I'd run away.' (Johann Wolfgang von Goethe)." (*Ibid*., fn. 13.)

based on intuition or undefined criteria that are impossible to refute. (See, e.g., *In re Dannenberg* (2009) 173 Cal.App.4th 237, 255-256 (*Dannenberg*.)

However, it is settled that the Board may not base its findings on hunches, speculation, or intuition. (*Lawrence, supra,* 44 Cal.4th at p. 1213; *Rosenkrantz, supra*, 29 Cal.4th at p. 677.) Thus, to determine what constitutes a "lack of insight" in the context of a parole hearing and to ensure consistency and proper reliance on such a finding to deny parole, we turn to a number of cases that help give substantive objective meaning to the concept.

In *Shaputis, supra,* 44 Cal.4th 1241, Shaputis murdered his wife. He had a long history of domestic abuse and violence toward his two wives. He had a history of acting violently when drunk, and he had an elevated blood-alcohol level on the night of the murder. (*In re Shaputis, supra*, 44 Cal.4th at pp. 1246-1247.) However, he characterized himself as a mellow drinker. And, despite undisputed, if not conclusive, evidence to the contrary, he insisted that the killing was accidental. He also downplayed his history of domestic abuse. Moreover, despite years of rehabilitative and substance-abuse programming, his latest psychological evaluations revealed a reduced ability to achieve self-awareness and an abusive character that remained essentially unchanged. The court found that these circumstances reflected a failure to take any responsibility for the crime and past abusive conduct and a lack of insight into the causes of that conduct which together constituted some evidence that Shaputis remained currently dangerous. (*Id*. at pp. 1246-1248, 1259-1261, fn. 20.)

In *In re Rozzo* (2009) 172 Cal.App.4th 40 (*Rozzo*), Rozzo acknowledged that he participated in the kidnapping and beating of the murder victim and expressed remorse about his death. However, he denied participating in the killing and further denied that it was racially motivated or that he harbored a racial animus despite compelling evidence to the contrary, including Rozzo's own racially charged statements. Moreover, Rozzo failed to engage in any effective post-incarceration rehabilitative therapy designed to address

his racial hatred. (*Id*. at pp. 61-62.) These circumstances constituted some evidence that he lacked insight concerning his criminal conduct and the racial hatred that motivated it, and this lack of insight together with the seriousness of the offense supported a finding of current dangerousness. (*Id*. at p. 63.)

In *In re Smith* (2009) 171 Cal.App.4th 1631 (*Smith*), Amy, Smith's two-year-old daughter, was punched, slapped, bitten, and beaten as discipline for refusing to sit on the couch instead of the floor to eat her snack. She died from her injuries. Smith admitted to hospital authorities and then confessed to the police that she had beaten Amy. At trial, however, she recanted, saying she confessed to protect her boyfriend who was on probation. She said she was only a bystander. Smith's other daughter Bethany gave incriminating testimony, and Smith was convicted of second degree murder and child abuse. At her parole hearing, she continued to deny that she hit Amy. She expressed remorse only for not preventing her boyfriend from beating Amy. (*Id*. at pp. 1633-1637.) Given Smith's confessions and her daughter's trial testimony, the Board found that Smith's failure to admit and accept responsibility for her own violent conduct against Amy and her attempt to blame all of the abuse on her boyfriend established a lack of insight concerning her offense. This together with the trivial motivation for the murder and its horrific nature constituted some evidence that she remained dangerous. (*Id*. at pp. 1637-1639.)

In *In re Van Houten* (2004) 116 Cal.App.4th 339 (*Van Houten*), Van Houten, a disciple of Charles Manson, felt deprived because she had not been asked to help out in murdering five people, she said she wanted to be included in the next killing spree. (*Id*. at pp. 344, 345.) She got her wish and participated in the fatal stabbings and "gratuitous mutilation" of two victims. She admitted that she continued to stab a dead victim because it was fun to do so. (*Id*. at pp. 346, 350, 351.) Although she did not challenge the Board's description of her crime, she minimized her culpability and deflected most of the responsibility onto Manson. (*Id*. at p. 355.) The "egregious character of the

offenses" and Van Houten's " 'unstable social history,' " her current "attitude" about the murders was some evidence that she remained "an unstable person" who needed "continued therapy and programming" to obtain " 'further insight' " concerning her "vicious and evilly motivated" actions before it could be said that she no longer posed a risk to public safety. (*Id*. at pp. 353, 355-356.)

In *In re McClendon* (2003) 113 Cal.App.4th 315 (*McClendon*), McClendon barged into the home of his estranged wife, wearing rubber gloves and carrying a loaded handgun, a wrench, and a bottle of acid. He immediately shot her and then beat her male companion with a wrench. (*Id*. at pp. 319-320.) McClendon showed no remorse and claimed the shooting was unintended and unplanned despite overwhelming evidence of premeditation. (*Id*. at p. 322.) His refusal to acknowledge his intent and accept responsibility for a deliberate and premeditated murder demonstrated a lack of insight into his conduct and offense. (*Ibid*.)

In *Shaputis*, *Rozzo*, *Smith*, *Van Houten*, and *McClenden*, there was a factual discrepancy between the undisputed, or at least compelling, evidence of the inmate's conduct and its causes and the inmate's own version of them. That discrepancy involved highly material, if not elemental, aspects of the commitment offense, such as the requisite acts, the mental elements, and motivation. Thus, the inmate's version demonstrated not only a failure to acknowledge his or her misconduct but also an effort to minimize (or even deny) it and mitigate his or her mental state or culpability despite strong evidence to the contrary. Also in these cases, there was little, or no, psychological evidence or expert testimony to contradict a finding that the inmate lacked insight, and in some cases, there was a failure by the inmate to engage in meaningful rehabilitative programming or and a demonstrable inability to benefit from it.

In short, what all of these cases have in common is an inmate who manifested a blindness concerning the nature of his or her conduct and/or the very pressures, circumstances, and impulses that triggered it. The finding that the inmate lacked insight

was based on a factually identifiable deficiency in perception and understanding, the deficiency involved an aspect of the criminal conduct or its causes that was significant, and the deficiency by itself or together with the commitment offense had some rational tendency to show that the inmate currently posed an unreasonable risk of danger.

In contrast to these cases is *In re Singler* (2008) 169 Cal.App.4th 1227 (*Singler*). There, Singler shot his wife during a heated argument and was convicted of second degree murder. Despite an impressive rehabilitative record, the Board denied parole, in part, because he did not demonstrate sufficient insight into what caused him to react so violently to his wife and failed to explain why he decided to kill her rather than simply scare her. (*Id*. at p. 1241.) However, the reviewing court noted that Singler fully explained his wife's conduct and the circumstances that led up to the argument, he explained how they caused him to be overcome with rage, and he acknowledged that he " 'blew it,' " heartbroken at the loss of his dreams for the future. (*Ibid*.) The court further noted uncontradicted evidence that Singler had participated in programs and therapy, recognized that his response to anger and heartbreak had been unacceptable, and had learned more about his anger and ways to ameliorate it and control his reactions. Singler's psychological evaluations confirmed this rehabilitative effort and change. (*Id*. at pp. 1241-1243.) In short, the Board's finding was not based on a demonstrable lack of insight or lack of sufficient insight into a material aspect of offense and its causes. (*Id*. at p. 1243.)

In *Dannenberg, supra*, 173 Cal.App.4th 237, the Governor reversed the Board's finding that Dannenberg was suitable for parole based on a finding that he lacked insight into his offense. However, there was no factual basis to support that finding other than the prosecutor's opinion that Dannenberg lacked insight, which, this court opined, was not evidence. Moreover, all of the psychological reports reflected that Dannenberg had gained a great deal of insight into his offense over the years, and had acquired skills to enable him to avoid violence in the future. All of these reports also found that he has no

need for further therapy. (*Id.* at pp. 255-256 & fn. 5.) Although the Governor believed that these reports were wrong, the Governor's view was also not evidence that Dannenberg lacked insight or, more importantly, that he was currently dangerous.

In *In re Rico* (2009) 171 Cal.App.4th 659 (*Rico*) (abrogated on other grounds in *In re Prather* (2010) 50 Cal.4th 238, 252-253), the court rejected a claim a lack of insight could be inferred from Rico's failure to discuss his crime, insight, or remorse. The record revealed that Rico had discussed his crime, accepted responsibility for his conduct, and expressed sincere and genuine remorse. Accordingly, the Board could not rely on Rico's alleged lack of insight to support its conclusion that he was currently dangerous. (*Id.* at pp. 678-679.)

In *In re Roderick* (2007) 154 Cal.App.4th 242 (*Roderick*), the Board considered Roderick's explanation for why he had led a life of crime to be inadequate and thus an indication that he lacked insight. In rejecting this view, the court stated, "Certainly, Roderick's responses were unsophisticated and lacked analytical depth. But is his inability to articulate a more insightful explanation as to why he committed multiple crimes some evidence that Roderick poses a danger to public safety? The record does not support that conclusion. The evidence does show that Roderick has a limited capacity either to understand or to explain the mechanisms that led to his criminality. But this limitation is a known quantity and has been factored into his risk assessment . . . . [¶] Roderick provided a less than incisive explanation for his chronic criminality, but his responses also reflected acceptance of his alcoholism, acknowledgement of responsibility for his crimes, remorse, and shame. Ignoring the unanimous clinical evidence to the contrary presented by trained experts—since 1999 all psychological reports conclude he would pose no more danger to society than the average citizen—the Panel's arbitrary pronouncement that Roderick's limited insight poses an unreasonable risk to public safety cannot be considered some evidence to support a denial of parole." (*Id.* at pp. 271-272, fn. omitted.)

Singler, Dannenberg, Rico, and Roderick confirm our view that when "lack of insight" is invoked as a reason to deny parole, such a finding must be based on an identifiable and material deficiency in the inmate's understanding and acceptance of responsibility for his or her commitment offense. Conversely, where undisputed evidence shows that the inmate has acknowledged the material aspects of his or her conduct and offense, shown an understanding of its causes, and demonstrated remorse, the Board's mere refusal to accept such evidence is not itself a rational or sufficient basis upon which to conclude that the inmate lacks insight, let alone that he or she remains currently dangerous.

E. This Case

As noted, we need not determine the propriety of the trial court's order or the propriety of Board's denial of parole in 2007 underlying the court's decision. However, we believe that a discussion of the Board's view that Macias lacked insight will further a general understanding of when it is proper and appropriate to invoke a "lack of insight" as a reason to deny parole.

Here, the Board commended Macias for his institutional behavior and significant accomplishments. It acknowledged the latest psychological evaluation, which concluded that Macias suffered from no diagnosable disorders and posed a low risk of future violence. The Board also acknowledged that Macias had shown remorse, and it found that he had viable plans if released. However, the Board noted that Macias had a history of gang involvement and a tumultuous childhood. It considered the motive for the murder to be trivial and opined that he committed it in a cowardly, cruel, calculated, and dispassionate manner that demonstrated callous disregard for human suffering. And it considered his version of the incident to be too simple and felt that he needed "deeper understanding as to why [he] committed such brutality." It said that he needed to "get to the bottom of [his] criminality," and it felt that he "still [had] farther to go on the journey

of introspection to realize what was going on with you that permitted you to do this" and "fully understand the nature and magnitude of his crime . . . ."

The Board's quasi-psychological jargon reflects a conclusion that Macias lacked insight into his offense and the motivation for it. Thus, we turn to the factual basis, if any, for this conclusion.

The Board believed that Macias's version of the incident was too simple and thus reflected an effort to minimize his conduct and a failure to fully acknowledge how brutal and aggravated it was. More specifically, Macias denied that he beat or used force against Sotello. However, the Board implicitly found that Macias brutalized her. Macias said that she was alive and getting dressed when he left her. However, the Board found that he stuffed her dead, naked body between the front and back seats before leaving the scene. Macias denied knowledge of threatening telephone calls that some unidentified men made to Galvan's and Sotello's mothers after the incident concerning their daughters. However, the Board implicitly found that Macias knew about and perhaps had something to do with the calls. Thus, because Macias failed to admit these details of the incident, the Board, in essence, concluded that he lacked insight and needed more time for introspection.

The record does not contain some evidence to support the Board's implicit factual findings. First, although the probation report stated that Sotello's face, eyes, and legs were bruised, evidence from a medical examiner, which had been presented at a prior parole hearing, established that the bruising was not the result of external trauma but attributable to the fact that Sotello had been lying face down for an extended period after her death. The district attorney had agreed with that assessment. Moreover, there was no other evidence to suggest that Macias beat or brutalized Sotello. Although the probation report noted that Galvan had been beaten, there is no evidence linking Macias to her injuries or suggesting that he knew she had been beaten. Moreover, the Board did not cite the injuries to Galvan in connection with its view that Macias had brutalized Sotello.

Simply put, there is no evidence that Macias beat or otherwise brutalized Sotello. Accordingly, his failure to admit beating, injuring, or using force against her does not reasonably imply an attempt to minimize his conduct or the incident or a refusal to acknowledge and accept responsibility for his conduct. In other words, the failure to admit that he brutalized Sotello does not constitute some evidence that Macias lacked insight into his offense, conduct, or motivation.

Next, although it is theoretically possible that Sotello died from an overdose *before* Macias left her and that he then "stuffed" her dead body between the seats, the record does not support the Board's implicit finding to this effect. There is no direct medical evidence or circumstantial evidence establishing when Sotello died. Moreover, the district attorney acknowledged that the investigative reports stated only that Sotello's body was found "lodged" between the front and back seats. The circumstantial evidence does not provide any clue as to how Sotello's body got there; and her bruises do not reasonably suggest that someone had forcibly stuffed her between the seats. In our view, therefore, the finding that Macias had done so is, at best, a speculative inference that is no more or less reasonable to draw than the possibility that Sotello was alive when Macias left her and thereafter simply rolled off the back seat in a semi-conscious state and become "lodged" between the seats.

We recognize that the Board has the discretion to resolve legitimate conflicts in the *evidence*. However, the circumstantial evidence here is inconclusive, and the Board may not base its findings on hunches, speculation, or intuition. (*Lawrence, supra,* 44 Cal.4th at p. 1213; *Rosenkrantz, supra*, 29 Cal.4th at p. 677.) Thus, the evidence here does not necessarily, clearly, or even persuasively refute Macias's statement that Sotello was alive, albeit under the influence, when he left her. Accordingly, his failure to admit the Board's speculative inference that he "stuffed" her body behind the seat before leaving does not reasonably indicate a failure to acknowledge and accept responsibility for his conduct or constitute some evidence that he lacked insight into his offense. (Cf. *In*

re Palermo (2009) 171 Cal.App.4th 1096, 1112 [given lack of criminal history, expression of remorse, acceptance of responsibility, the passage of time, and other positive factors, inmate's failure to accept official version of incident does not establish lack of insight or constitute evidence of current dangerousness].)

Finally, the record contains no evidence to support the Board's implicit finding that Macias must have known something about the threatening, possibly retaliatory, phone calls. There is no evidence that he or his friend knew Sotello or Galvan before the incident; no evidence that they targeted Sotello and Galvan for some retaliatory purpose; and, although Macias admitted that he may have boasted to gang members about having had sex with Sotello, there is no evidence that Macias made, suggested, encouraged, or knew anything about the threatening phone calls. The caller was never identified, the calls were never formally attributed to him, and he was not charged with making threats.

In short, the record does not undermine Macias's statement that he knew nothing about the calls, and the Board's belief that Macias somehow knew about them was, at best, a hunch. Thus, Macias's failure to explain and accept responsibility for the calls does not imply an attempt to minimize his conduct or a refusal to acknowledge and accept responsibility for his offense; nor does it constitute some evidence that he lacked insight into it.

Although the record does not support the Board's findings that Macias brutalized Sotello and stuffed her body between the seats or that he had some knowledge about the phone calls, the record does refute one detail in Macias's version of the incident. The Board found it "difficult . . . to believe" Macias's statement that Sotello was putting her bathing suit back on and thus fully or partially clothed when he left because the undisputed evidence revealed that she was naked when found.

The discrepancy concerning whether Sotello was fully or partially clothed, however, is different from the demonstrably false claims in the cases discussed above concerning material and fundamental aspects of the offenses—e.g., Shaputis's claim that

he killed his wife unintentionally and accidentally; Rosso's claim that the killing was not racially motivated and that he did not even participate in it; Smith's claim that her boyfriend was solely responsible for the beating that killed her child; Van Houten's claim that Charles Manson was the more culpable perpetrator; and McClendon's claim that he did not plan to kill his estranged wife. Those claims reflected an unapologetic attempt to make the commitment offenses seem less aggravated than it was and to mitigate the perpetrator's mental state.

Here, in contrast, the fact that Sotello was completely naked and not, as Macias stated, partially clothed or at least getting dressed when he left, does not change the nature of the offense or make his conduct more aggravated than he was willing to acknowledge and accept responsibility for. On the contrary, Macias unequivocally admitted the critical and most damning conduct—i.e., that he purposefully drugged Sotello and Galvan with PCP without their knowledge; he intentionally exploited Sotello's compromised state to have sex with her; and then, while she was still under the influence, he left her alone in the car and went on his way and later boasted about his conquest. Moreover, in pleading guilty to second degree murder, Macias admitted that he acted with implied malice—i.e., he intentionally engaged in conduct, knowing that it endangered Sotello's life and consciously disregarding that danger.

The discrepancy concerning whether Sotello was dressed also does not reasonably reflect an attempt to mitigate his mental state, minimize his culpability, or shift responsibility for Sotello's death to someone else nor does it suggest that he failed to gain any insight into his prior misconduct. Macias expressly acknowledged that the drugs he had laced with PCP killed Sotello; he accepted full responsibility for causing her death and the collateral victims of his conduct, including Sotello's son and family and his own wife and family; and he did not try to shift any amount of blame or culpability to his friend. Moreover, in addition to admitting that he drugged Sotello to facilitate having sex with her, Macias told his psychologist that his offense was about more than a desire for

sex. He realized that it was also the result of his youthful recklessness, involvement with drugs, association with the gang members, need to control others and boast about it, and desire to be accepted by his gang peers. The psychologist agreed. Last, concerning the factual discrepancy, he explained that the incident happened long ago, he had been drinking, and he had forgotten many details.

In short, viewed in light of Macias's admissions, his explanation of the offense, his acceptance of responsibility, and his expressions of remorse and regret, the factual discrepancy concerning Sotello's state of dress is not some evidence that he lacked insight into the offense or that he currently posed an unreasonable risk of danger. Indeed, the Board did not articulate how this discrepancy established the requisite link or nexus between the seriousness of the offense and its finding of current dangerousness, and we fail to perceive such a link. (Cf. *People v. Moses* (2010) 182 Cal.App.4th 1279, 1307, 1309-1310 [Governor failed to articulate rational link between discrepancies in the inmate's version of events and current dangerousness].)

In discussing his offense with the psychologist and the Board, Macias explained that it was more about control and peer acceptance than about having sex, and his psychologist agreed with that assessment. Moreover, given Macias's long standing relationship with his wife, the psychologist further opined that Macias did not suffer from any psychosexual problem. The Board acknowledged the psychologist's opinion but questioned his assessment that Macias did not suffer from a psychosexual disorder.

The Board was not bound by the psychologist's opinion. However, in rejecting it, the Board did not reveal its understanding of what constitutes a psychosexual disorder or problem. It did not explain why, contrary to professional opinion and the lack of a formal diagnosis, it concluded that Macias had a psychosexual disorder or problem. And it did not identify or explain the inadequacy in Macias's understanding of why, as a very young man, he used to drug women to facilitate having sex.

Moreover, it does not appear that the Board based its disagreement with the psychological assessment on anything Macias said or did not say about his prior sexual conduct. Rather, its evidentiary basis, if it had one, appears to be an inference from comments by the psychologist to the effect that Macias was making good progress, would continue to make progress, and could and would benefit from continuing his writing, rehabilitative work, and 12-step programs. However, when read in context, these comments were hopeful and laudatory and reflect the psychologist's view that Macias had gained and was quickly gaining ever greater insight. These comments are not some evidence that Macias suffered from a psychosexual problem or, more importantly, that he lacked insight into his prior behavior or currently posed a risk of committing sexual offenses again. Nor do the psychologist's comments have a tendency to taint or undermine Macias's expressions of remorse or his acceptance of responsibility for his offense. More importantly, the Board did not articulate, and we fail to see, the interrelationship between some unspecified *additional* insight it felt that Macias needed to gain concerning an unidentified psychosexual disorder and a finding that he posed an unreasonable risk of danger to public safety. (Cf. *In re Dannenberg, supra*, 173 Cal.App.4th at p. 256 [where all psychological reports show that the inmate had gained insight, Governor's unsupported belief that reports were wrong does not constitute " 'some *evidence*' " of current dangerousness].)

In sum, the psychologists comments that Macias could and would make further progress must be viewed in light of the whole record, which includes the uncontradicted, professional opinion that Macias did not currently (if ever) suffer from a psychosexual disorder, Macias's explanation concerning why he used drugs to facilitate having sex, the psychologist's opinion that Macias's past sexual misconduct was about control rather than sex, and the psychologist's detailed evaluation of risk factors and conclusion that Macias posed a low risk of danger to public safety. So viewed, the psychologist's

comments do not reasonably constitute some evidence that Macias lacked insight and was currently dangerous.

In short, this case, like those discussed above, and illustrates and confirms our conclusion that if a "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.

IV. DISPOSITION

The order granting Macias's petition for a writ of habeas corpus and directing the Board to conduct a new hearing is reversed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.

In re Raymundo Macias on Habeas Corpus
H033605

Trial Court:	Santa Clara County Superior Court No.: 113003
Trial Judge:	The Honorable Linda R. Condron
Attorneys for Petitioner Raymundo Macias:	Charles F.A. Carbone
Attorneys for Respondent The People:	Edmund G. Brown, Jr., Attorney General Dane R. Gillette, Chief Assistant Attorney General Julie L. Garland, Senior Assistant Attorney General Anya M. Binsacca, Supervising Deputy Attorney General Brian C. Kinney, Deputy Attorney General

In re Macias
H033605