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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re HAROLD HARVEY HAWKS,
on Habeas Corpus.

E053072

(Super.Ct.No. 10006028)

OPINION

APPEAL from the Superior Court of Riverside County. Jorge C. Hernandez,
Judge. Affirmed.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Jessica N. Blonien, and Andrew R. Woodrow, Deputy Attorneys General, for Appellant.

Steve M. DeFilippis, under appointment by the Court of Appeal, for Respondent.

This is an appeal by the Attorney General of the State of California from the trial
court's order granting the petition for writ of habeas corpus filed by Harold Harvey
Hawks (hereafter petitioner) challenging the Board of Parole Hearings (BPH) decision to
deny parole to petitioner. The trial court found no evidence supported the BPH's denial

of parole to petitioner. Therefore, the trial court issued the writ and ordered the BPH to conduct a new parole hearing in accordance with the dictates of due process. We agree with the trial court and therefore will affirm.

1.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts and procedural details are not in dispute. In 1987, a jury found petitioner guilty of murder in the second degree and two counts of assault with a deadly weapon, as lesser included offenses to the charged crimes of attempted murder. The trial court sentenced petitioner to serve a term of 15 years to life in state prison on the second degree murder charge. At a parole hearing on June 5, 2008, a two-person BPH panel issued a split decision on whether petitioner was suitable for parole. The BPH conducted an en banc hearing on February 17, 2009, to break the tie, and this time unanimously voted to deny parole.¹

A. Facts of Commitment Offense

Petitioner's criminal convictions all stem from his act on the night of August 22, 1986, of firing a loaded shotgun at a van during an incident of so-called road rage. The events leading up to the shooting are not in dispute. As summarized by the BPH in its decision, and supplemented by statements at the hearing, on the night in question petitioner had gone to pick up his two-year-old son from his estranged wife for his court-

¹ The BPH had denied parole to petitioner at seven previous hearings.

ordered visitation. His wife and son were not at the agreed-upon meeting place, which apparently was the home of petitioner's in-laws. During the five hours petitioner waited for them, he drank six to eight beers and did not eat dinner. When they finally arrived, petitioner and his wife had a series of heated arguments after which petitioner took his son and drove off. About 20 minutes later, petitioner was driving in the fast lane on the freeway with his son in a car seat next to him when a vehicle came up behind him with its headlights flashing. When he realized the vehicle was a passenger van rather than a CHP car, petitioner did not move out of the fast lane. According to petitioner, the driver of the van pulled around him, threw something at petitioner's car, and then cut him off, which forced petitioner into the median.

Petitioner drove after the van and, while doing so, reached into the back seat to get his shotgun, which petitioner had with him because he had planned to shoot skeet the next day. Petitioner grabbed a shell, loaded the gun, and fired. Petitioner described the shot as a warning shot intended to scare the driver of the van. The shell petitioner loaded into the shotgun turned out to be a slug rather than skeet round, and rather than going over the van, as petitioner said he had intended, the bullet hit the back panel of the van. The bullet then passed through Patricia Dwyer, as she sat in a back passenger seat, and lodged in the throat of Wendy Varga, another passenger in the vehicle. Michael Dwyer, the driver of the van and Patricia's husband, was not injured.²

² The Dwyer's son, who apparently also was in the van, had been in a motorcycle accident and they were hurrying to get him to a hospital.

After firing the shotgun, petitioner pulled off the freeway, stopped to buy more beer, and drove to his cousin's home where he was arrested four days later. Petitioner did not know until his arrest that the shot he fired had hit the van. Because the van was paneled petitioner could not see inside the back of the van and therefore did not know anyone other than the driver was in the vehicle. Patricia Dwyer, the murder victim, was an officer with the Corona Police Department and apparently the first female officer in that department.

B. Parole Hearing

The evidence presented at petitioner's parole hearing on February 17, 2009, which is also the evidence presented at the June 5, 2008, hearing that resulted in the split decision, is undisputed. That evidence shows petitioner is a model inmate who has taken advantage of every service, program, and opportunity available to him in prison. During the more than 25 years petitioner has been incarcerated he has not received a single black mark (referred to as a CDC 115) or even a nondisciplinary write-up (a CDC 121A). He has earned his Associate of Arts, Bachelor of Arts, and Master's degrees, all with honors. He has completed four vocational programs and also earned a paralegal diploma. Petitioner has participated in every available self-help program including Victim Impact, Cage Your Rage, Healing the Angry Heart, Alternatives to Violence Project, and Effective Family Management. He joined and continues to attend Alcoholics Anonymous and has remained substance and alcohol free since the time of his arrest in 1986. Petitioner has also completed individual counseling, and at his own insistence,

continues to see a therapist every other month (which apparently is all he is allowed). In addition, petitioner has participated in every relevant group therapy program available to him.

Petitioner has worked while in prison, most recently in the print shop for 35 hours a week, and has voluntarily participated in community outreach programs. His file is filled with commendations from correctional officers, prison staff, and mental health professionals. His last seven psychological evaluations were all extremely positive and support his release on parole.

In short, there is no factual dispute regarding any aspect of petitioner's conduct and programming while in prison, nor is there any dispute regarding the evidence that was presented at the February 17, 2009, parole hearing. Petitioner spoke at that hearing and was questioned by several commissioners. The BPH denied parole to petitioner.³ It cited the commitment offense, petitioner's lack of insight into his criminal conduct, his demeanor during the hearing, and his failure to demonstrate remorse as the reasons.⁴

³ BPH initially extended petitioner's commitment for three years under the recently enacted Marsy's Law. It later modified that to a one-year commitment after determining that petitioner was not subject to Marsy's Law because his parole hearing should have taken place before the enactment of that law. While this appeal was pending, the BPH conducted the next parole hearing and again found petitioner unsuitable.

⁴ The BPH also incorrectly referred to petitioner as having "antisocial personality disorder." The actual diagnosis set out in Dr. Atwood's psychological evaluation, as the Attorney General conceded in the trial court, is that by engaging in the criminal conduct that resulted in his murder conviction petitioner displayed "adult antisocial behavior."

C. Writ Petition in Superior Court

Petitioner challenged the BPH decision in a writ of habeas corpus, originally filed in Sacramento County Superior Court (the county in which the parole hearing was held) but then transferred to Riverside County Superior Court. The superior court issued an order to show cause based on petitioner's allegation that the BPH decision that petitioner poses a current unreasonable risk to public safety is not supported by evidence. The Attorney General filed an informal reply and then a return. After petitioner filed a traverse, the court conducted a hearing at which both sides argued their respective positions based on the evidence presented at the BPH hearing. The trial court did not conduct an evidentiary hearing. On December 30, 2010, the court found that the BPH findings were not supported by evidence. Therefore, the trial court granted the writ petition, and ordered the BPH to conduct a new parole hearing. The Attorney General appeals from that order, and in connection with the appeal, requested a stay of the trial court's order. We granted that stay.

2.

DISCUSSION

A. Standard of Review

“When a superior court grants relief on a petition for habeas corpus without an evidentiary hearing, as happened here, the question presented on appeal is a question of law, which the appellate court reviews de novo. [Citation.] A reviewing court independently reviews the record if the trial court grants relief on a petition for writ of

habeas corpus challenging a denial of parole based solely upon documentary evidence.’ [Citations.]” (*In re Ryner* (2011) 196 Cal.App.4th 533, 543, citing, among other cases, *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.)

B. Analysis

A BPH decision to deny parole to an inmate must be upheld if there is some evidence to support the BPH’s finding that the inmate is unsuitable because he or she is dangerous and as a result poses a current threat to public safety. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191, 1212 (*Lawrence*)). In order to give meaning to the directive in Penal Code section 3041, subdivision (a), that the BPH “shall normally” set a parole release date for a life prisoner “a reviewing court’s inquiry must extend beyond searching the record for some evidence that the commitment offense was particularly egregious and for a mere acknowledgement by the [BPH] . . . that evidence favoring suitability exists. Instead, under the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability [set out in Cal. Code Regs., tit. 15, § 2402]) establish unsuitability if, and only if, those circumstances are probative of the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.” (*Lawrence*, at p. 1212, italics omitted.) “Accordingly, when a court reviews a decision of the [BPH] . . . the relevant inquiry is whether some evidence supports the decision of the [BPH] . . . that the

inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]” (*Ibid.*, italics omitted; *In re Shaputis* (2011) 53 Cal.4th 192, 209 (*Shaputis II*.) “Only when the evidence reflecting the inmate’s present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process.” (*Shaputis II, supra*, 53 Cal.4th at p. 211.)

Application of the principles quoted above requires us first to review the undisputed evidence to determine whether it contains some evidence to support the BPH findings that (1) petitioner’s crime is particularly heinous, (2) petitioner lacks insight into that crime (referred to by the BPH and hereafter as the commitment offense), and (3) petitioner has failed to demonstrate remorse, as evidenced in part by his demeanor at the hearing. If any of those findings is supported by some evidence, we then must determine whether the finding or findings logically support the conclusion that petitioner is currently dangerous. (*Lawrence, supra*, 44 Cal.4th at p. 1212.)

(1.) *Heinous and Callous Nature of the Crime*

Section 2402 of the California Code of Regulations addresses parole suitability for persons serving life terms for murder or attempted murder. Subdivision (c) of that section sets out six circumstances or considerations that tend to show an inmate’s unsuitability. The first circumstance pertains to the commitment offense and states, “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.” (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

The BPH cited each of the above noted factors to conclude petitioner’s commitment offense was especially heinous, atrocious or cruel and therefore he remained a danger to society if released on parole. None of the factors are supported by evidence in the record.

At the outset we note that the jury found petitioner guilty of second degree murder and two counts of assault with a deadly weapon, as lesser included offenses to the charged crimes of attempted murder. Because attempted murder requires a specific intent to kill (*People v. Guerra* (1985) 40 Cal.3d 377, 386), the jury’s verdicts finding petitioner guilty of the lesser included offense of assault with a deadly weapon reflect their implied finding that petitioner did not harbor that intent. Instead the jury apparently had a reasonable doubt about petitioner’s intent and therefore found he intended to fire the shotgun but that he did not expressly intend to kill. Moreover, because they impliedly found petitioner did not intend to kill, the jury found petitioner guilty of second degree murder, rather than first degree murder. The two theories of second degree murder

presented to the jury were felony murder, i.e., that the death of Patricia Dwyer occurred during petitioner's commission of the felony of firing a shotgun at an occupied motor vehicle, and implied malice second degree murder, i.e., the death occurred as a result of petitioner's act of firing a shotgun at a vehicle on a freeway, which is ""an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."" (People v. Knoller (2007) 41 Cal.4th 139, 143.)

The evidence is undisputed that petitioner's crime was the result of road rage, an act based on an emotional state that by its very name suggests irrational anger, rather than dispassion and calculation. Petitioner committed the act of road rage after drinking a six pack or more of beer, and arguing with his estranged wife, all of which are facts that add to the conclusion that petitioner was not thinking clearly and rationally at the time he committed the crime. The evidence is also undisputed that petitioner did not intend to perpetrate the crime against multiple victims. The Dwyer's van did not have side windows and the windows in the back had screens on them so petitioner could not see into the vehicle. Petitioner did not see anyone but the driver in the van. The circumstance that Patricia Dwyer and Wendy Varga were also in the van was not one petitioner either calculated or on which he capitalized. In short, he acted with conscious disregard of those possibilities.

The BPH found that as a result of being hit in the throat by the bullet petitioner fired, Wendy Varga was "abused and mutilated" and "suffered immense pain and

injuries, and ended up committing suicide a number of years later.” The phrase “abused, defiled or mutilated” is used to define a heinous or atrocious crime and therefore must mean that the petitioner committed an intentional act of abuse or mutilation. (See, e.g., *In re Van Houten* (2004) 116 Cal.App.4th 339, 351 [Fourth Dist., Div. Two] [“The Board also found the victims were mutilated . . . which they were both before and after their deaths. The multiple stab wounds to Mrs. La Bianca’s lower back and buttocks made by Van Houten constituted at least a gratuitous mutilation, as did the fork in Mr. La Bianca’s stomach and the knife through his throat.”].) There is no evidence in this case that petitioner committed any act other than firing the shotgun. The result of that act, although tragic, is not an act of abuse or mutilation that renders this crime heinous or atrocious.

Similarly, there is no evidence that petitioner committed the crime in a manner that demonstrates an exceptionally callous disregard for human suffering. Petitioner’s act of firing his shotgun was the result of irrational anger, fueled by alcohol consumption. As such, petitioner’s conduct is the antithesis of *callous* disregard for human suffering, a concept that differs from the conscious disregard for human life petitioner displayed by firing the shotgun.

The BPH also found that petitioner’s motive for firing the shotgun “is inexplicable, or at the very least, very trivial Road rage is a pretty unexplainable action.” A motive is either inexplicable or trivial; it cannot be both. (*In re Barker* (2007) 151 Cal.App.4th 346, 374.) ““An “inexplicable” motive, as we understand it, is one that

is unexplained or unintelligible, as where the commitment offense does not appear to be related to the conduct of the victim[s] and has no other discernible purpose. A person whose motive for a criminal act cannot be explained or [whose motive] is unintelligible is therefore unusually unpredictable and dangerous.’ [Citation.]” (*Ibid.*) Petitioner explained his motive—road rage. Although that motive is not a justification for his crime, it nevertheless explains his conduct. Therefore, petitioner’s motive was not “inexplicable.”

The record also does not support a finding that petitioner’s motive was trivial. “‘The offense committed by most prisoners serving life terms is, of course, murder. Given the high value our society places upon life, there is no motive for unlawfully taking the life of another human being that could not reasonably be deemed “trivial.” The Legislature has foreclosed that approach, however, by declaring that murderers with life sentences must “normally” be given release dates when they approach their minimum eligible parole dates. . . . The reference in Board regulations to motives that are “very trivial in relationship to the offense” therefore requires comparisons; to fit the regulatory description, the motive must be materially less significant (or more “trivial”) than those which conventionally drive people to commit the offense in question, and therefore more indicative of a risk of danger to society if the prisoner is released than is ordinarily presented.’ [Citation.]” (*In re Barker, supra*, 151 Cal.App.4th at p. 374.)

Sadly, the cases are legion in which people commit murder for reasons or motives far less compelling than petitioner’s motive of road rage. Again, although the motive is

not justifiable, in that it does not excuse petitioner's crime, it nevertheless is not trivial when compared either to other cases of road rage that result in death or to other cases of second degree murder.

In summary, there is no evidence in this record to support any of the noted factors the BPH relied on to find petitioner's crime was particularly heinous or atrocious. But even if we were to conclude otherwise, that finding does not support the pertinent conclusion—that petitioner remains a danger to society and therefore should not be paroled. The circumstances of the commitment offense are significant, as the Supreme Court explained in *Lawrence*, as a starting point: “An evaluation of the circumstances of the crime in isolation allows a fact finder or reviewing court to determine whether a commitment offense was particularly egregious—a designation that we have seen applied in nearly every murder case considered by the [BPH] or the Governor—and to conclude that the prisoner was a danger to the public *at around the time of his or her commission of the offense*. Absent affirmative evidence of a change in the prisoner's demeanor and mental state, the circumstances of the commitment offense may continue to be probative of the prisoner's dangerousness for some time in the future. 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.” (*Lawrence, supra*, 44 Cal.4th at p. 1219.)

The record here consists of nothing other than affirmative evidence that petitioner over the course of his more than 25 years of incarceration has changed his demeanor and mental state. Simply stated, petitioner is not the person he was in 1986 when he committed the crime. He no longer drinks, and has not done so since his arrest in 1986. He actively participates in Alcoholics Anonymous, and has arranged for a sponsor outside of prison. Petitioner no longer allows his emotions to control his actions, a finding supported not only by the number of anger management related courses and programs petitioner completed while in prison but also by his sterling record of behavior in prison. The fact of his crime and its tragic consequences are immutable, but the record demonstrates that petitioner has changed every circumstance under his control that caused him to commit that crime.

(2.) Lack of Insight Finding

The BPH also found petitioner lacked insight into the commitment offense because he minimized his conduct as evidenced by his insistence that he only intended to fire a warning shot from behind and over the van but he did not intend to hit the van. The BPH was of the view, given all the circumstances under which petitioner fired the shotgun, that the bullet would not have hit the van unless petitioner had intended that result. Therefore, they found petitioner minimized his criminal conduct and as a result lacked insight.

“Lack of insight” is not a statutory or regulatory factor for determining an inmate’s suitability for parole. The Supreme Court coined the phrase in *In re Shaputis*

(2008) 44 Cal.4th 1241 (*Shaputis I*), “which held that that petitioner’s failure to gain insight into his antisocial behavior was a factor supporting denial of parole.” (*Shaputis II, supra*, 53 Cal.4th at p. 217.) In *Shaputis I*, the inmate insisted repeatedly that he accidentally shot his wife, despite significant contrary evidence. As the Supreme Court observed, “the murder was the culmination of many years of [Shaputis’s] violent and brutalizing behavior toward the victim, his children, and his previous wife.” (*Shaputis I, supra*, 44 Cal.4th at p. 1259.)

“As *Shaputis [I]* illustrates, a ‘lack of insight’ into past criminal conduct can reflect an inability to recognize the circumstances that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to those circumstances and, if confronted by them again, would likely react in a similar way. [Citations.]” (*In re Ryner, supra*, 196 Cal.App.4th at p. 547, citing *Shaputis I, supra*, 44 Cal.4th at pp. 1260, 1261, fn. 20; *Lawrence, supra*, 44 Cal.4th at pp. 1214, 1228; and *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) “Thus . . . the presence or absence of insight is a significant factor in determining whether there is a ‘rational nexus’ between the inmate’s dangerous past behavior and the threat the inmate currently poses to the public safety. [Citations.]” (*Shaputis II, supra*, 53 Cal.4th at p. 218.) However, evidence that an inmate lacks insight into the causes or circumstances of the commitment offense is indicative of an inmate’s current dangerousness “only if it shows a *material* deficiency in an inmate’s understanding and acceptance of responsibility for the crime.” (*In re Ryner, supra*, at p. 548, fn. omitted.)

Unlike Shaputis, petitioner has never denied that he intentionally fired the shotgun; he has only denied that he intended to hit the van. Petitioner has consistently stated that he did not know until he was arrested that his shot hit the van. The jury in petitioner's trial believed petitioner did not intend to kill anyone as evidenced by the fact that they found him guilty of second degree murder in killing Patricia Dwyer, rather than first degree murder, and two counts of assault with a deadly weapon, as lesser included offenses to the charged crimes of attempted murder, with respect to Michael Dwyer and Wendy Varga. The BPH has consistently ignored the significance of the jury's verdicts. (See *In re Moses* (2010) 182 Cal.App.4th 1279, 1302.)

The BPH's theory about the manner in which the crime must have occurred does not equate to a lack of insight by petitioner into his criminal conduct and thus indicate his present dangerousness. Petitioner consistently has stated that his response was completely unjustified and entirely out of proportion to the incident. He has consistently explained that he reacted based on his pent up anger at his estranged wife which was magnified by the effect of alcohol. Petitioner has repeatedly acknowledged had he not been angry or intoxicated that most likely he would not have committed the crime. The role anger and alcohol played in the crime motivated petitioner to focus on those issues in order to change his life and in effect atone for his criminal conduct.

Moreover, the BPH finding is at odds with the only other evidence on the issue, namely, the opinions of the two psychologists who submitted psychological evaluations of petitioner for the parole hearing and who both found petitioner acknowledged the

seriousness of his crime, admitted his individual responsibility in committing the offense, and did not minimize his involvement. One psychologist stated in his evaluation that petitioner “appears to have spent sufficient time exploring his thought process leading up to the controlling offense, as well as has identified his errors in judgment that led to the victim’s death. He appears to have spent time considering the victim, as well as how his actions have affected the victims[’] families[’] lives, and the significance of him causing the death of another human being. [Petitioner’s] insight appeared to be at a high level with an affective understanding of empathy and remorse, and his expression of empathy appeared internal and emotional. Also, it appears he has examined his history of substance abuse, which was increasing and was a factor in the life crime. The undersigned opines that [petitioner] has taken responsibility for the controlling offense.” The other psychologist found that petitioner had acknowledged how horrible the crime was and “spoke at length about the impact that the victim’s death has had on his life. He said that ‘the only way I can prove that I am truly sorry for what I did is to change my life and begin living in a positive direction.’”

In addition to the most recent psychological evaluations, the BPH had evaluations from previous parole hearings that also stated petitioner had insight into the circumstances of the crime. Dr. B. Zika, a psychologist with the California Department of Corrections and Rehabilitation (CDCR), stated in a report prepared in 2007, “As is well known to the Board, the inmate has attended approximately 14 different self-help groups and/or programs, even though they were not recommended by any of the previous

clinicians who saw him. He also attended one-to-one therapy with Dr. Bakeman, Dr. Howlin, and Dr. Fishback. All of the clinicians have written very positive chronos which should be reviewed by the Board Dr. Howlin ended his 08/05/04 chrono stating, ‘He should have a very low risk of reoffending.’ [¶] With the greater awareness that inmate Hawks has obtained through the above programs, he has written letters of apology to the victims and the victims’ families. He has participated in a magazine article, which should be read in its entirety by the Board to better understand this inmates’ complete understanding of the crime he committed, the pain it has caused other people, and how it has motivated his own personal growth.” Dr. Joe Reed, another CDCR psychologist, stated in an evaluation dated August 29, 2000, that petitioner “showed excellent insight into his poor anger control problem and alcohol abuse problem. He showed excellent empathy towards the damage done to the victims and seemed genuinely penitent for his crime.”⁵

In short, the psychologists’ reports do not support the BPH finding that petitioner lacks insight into his criminal conduct. In finding otherwise, the BPH focused first, and at length, on the commitment offense, and then on petitioner’s refusal to adopt their version of how that crime must have occurred.⁶ As discussed at length above, petitioner

⁵ Two earlier psychological evaluations do not directly address the issue of insight, but both conclude petitioner’s level of dangerousness if released on parole was “below average.”

⁶ The Attorney General incorrectly states with respect to the BPH discussion of the crime that petitioner had military experience, which bolsters the BPH view that petitioner must have intended to hit the van when he fired the shotgun. The Attorney
[footnote continued on next page]

cannot change the fact of the crime. The fact that petitioner will not adopt the BPH's version of how the shooting occurred, or admit that he committed first degree murder rather than second degree murder, does not demonstrate that he lacks insight into his criminal conduct. (*In re Twinn* (2010) 190 Cal.App.4th 447, 466 ["an inmate need not agree or adopt the official version of a crime in order to demonstrate insight and remorse"]; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110 ["The Board is precluded from conditioning a prisoner's parole on an admission of guilt."]; Pen. Code, § 5011, subd. (b); Cal. Code Regs., tit. 15, § 2402.)

(3.) *Lack of Remorse Finding*

The BPH found that petitioner "come[s] across as very superficial, well rehearsed, scripted"; he "appear[s] almost robotic in [his] response," and "lack[s] . . . an emotional affect." In the presiding commissioner's words, "You're cold, you're calculated in what you say, and I understand that you've been to many of these hearings, but all of us felt the same way. We feel nothing from you." With regard to remorse, the commissioner stated, "I know you claim you're remorseful, I certainly know you're regretful, and I know you say you're remorseful, but again, there's nothing behind it. It's they're empty words, and it's very hard to know that you really understand what you're remorseful for."

[footnote continued from previous page]

General bases that statement on an incorrect interpretation of the record in which a BPH commissioner refers to his own military experience while posing a question to petitioner.

Remorse is a circumstance tending to show suitability for release on parole. (Cal. Code Regs., tit. 15, § 2402, subd. (d)(3).)⁷ Both psychologists who evaluated petitioner for the current parole hearing found he displayed genuine remorse and that his demeanor is appropriate.⁸ Psychologists who evaluated petitioner for prior parole hearings also found petitioner expressed genuine and deep remorse for his conduct. At the parole hearing petitioner clearly expressed his feelings of remorse and regret about what he had done.⁹

There is no evidence in the record on appeal to support the BPH finding that petitioner lacks insight or remorse. In fact the evidence is all to the contrary. The issue then is whether that evidence is trumped by the BPH commissioners' impressions of petitioner's demeanor at the hearing. Those impressions are necessarily subjective because there is no standard against which sincerity or remorse can be judged. As the Supreme Court observed in *Shaputis I*, "[E]xpressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (*Shaputis I, supra*, 44 Cal.4th at p. 1260,

⁷ "Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense."

⁸ Dr. Atwood spent a little over two hours with petitioner; Dr. Macomber spent three hours.

⁹ His statement is set out in full in his opening brief and we will not repeat it here.

fn. 18.) But even if the commissioners' subjective impressions were accurate, at best those impressions are evidence of petitioner's emotional and mental state at the time of the hearing. As such, they have very little if any probative value on the dispositive question of whether petitioner is currently dangerous and therefore unsuitable for parole.

The Supreme Court stated in *Lawrence* and reiterated in *Shaputis II*, that although deferential, "the 'some evidence' standard [of review] 'certainly is not toothless.'" (*Shaputis II, supra*, 53 Cal.4th at p. 215, citing *Lawrence, supra*, 44 Cal.4th at p. 1210.) If we must defer to the BPH members' vague subjective impressions of petitioner's demeanor at the parole hearing, that are otherwise contradicted by the entire record, as "some evidence" to support denial of parole, then review is indeed toothless. Such subjective evaluations are incapable of judicial review since demeanor and affect do not show in a black and white record.

CONCLUSION

In summary, we conclude the BPH findings upon which it based its determination that petitioner is currently dangerous and as a result unsuitable for parole are not supported by any evidence in the record. Therefore, we must conclude the BPH decision to deny parole to petitioner is arbitrary and capricious and as such constitutes a violation of due process. (*Shaputis II, supra*, 53 Cal.4th at pp. 199, 211; *Lawrence, supra*, 44 Cal.4th at pp. 1204-1205.)

DISPOSITION

The superior court's order granting Hawk's petition for writ of habeas corpus is affirmed. We hereby lift our stay of that order.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P.J.

We concur:

RICHLI
J.

MILLER
J.