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

In re GREGORY SCOTT ASHBY  
on Habeas Corpus.

H036783  
(Santa Clara County  
Super. Ct. No. 101985)

In this appeal by the People, we review whether the superior court properly granted Gregory Ashby's petition for a writ of habeas corpus. Ashby's habeas petition arose from a December 1, 2009 decision by the Board of Parole Hearings (the Board), to denied Ashby parole. For reasons that follow, we reverse the superior court's March 1, 2011 order granting Ashby's habeas petition.

*Procedural Background*

On July 13, 2010, Ashby filed a petition for writ of habeas corpus in superior court challenging the December 1, 2009 decision of the Board to deny him parole. Thereafter, on October 6, 2010, the superior court issued an order to show cause. The People filed a return to the order to show cause on December 27, 2010, and Ashby filed his traverse on February 1, 2011. On March 1, 2011, the superior court granted Ashby's habeas petition. As noted, the People have appealed.

## *Factual Background*

### *The Commitment Offense<sup>1</sup>*

"On June 7, 1985, at approximately 1:10 p.m., a jogger contacted the Santa Clara County Sheriff's Office and reported citing [*sic*] a body off Clayton Road in San Jose. Fire and police personnel were dispatched to the scene and located a body, later identified [as] victim Kathleen Ashby, age 21. Officers noted the victim had multiple stab wounds and had incurred several blows to the head. The victim was partially clothed in a pink nightgown which was found around her waist. Additional blood stained bedding was located near the body and later identified as having been taken from the victim's residence. [¶] On this same date, the defendant contacted the Sheriff's Office, indicating he had read a newspaper article concerning a homicide victim, and stated it matched the description of his sister Kathleen, who had been missing since June 6, 1985. After positive identification was made, officers conducted an interview with the victim's parents, Vernon and Beverly Ashby, and her brother, the defendant. Each reported the victim disappeared from her apartment on the evening of June 6, 1985. [¶] The defendant indicated he had been living with his sister at her residence . . . on a temporary basis, having recently broken his shoulder, and another female roommate, Angela Davis Jordan, also resided there. The defendant stated he had been the last person to see the victim, indicating he had seen her at approximately 11:00 p.m., on June 6, 1985. He noted earlier in the evening, they had consumed a couple of six-packs of beer together while watching television and that his sister went to bed on the living room sofa bed shortly thereafter. He then retired to his own room, took some pain pills for his shoulder and fell asleep. He reported sometime later his sister woke him up, told him she was going out and asked him to watch her two-year-old daughter. The defendant was not able

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<sup>1</sup> The facts underlying the commitment offense are taken from the probation report in this case. Although the Board did not read the facts into the record, it incorporated them by reference.

to remember where she said she was going or with whom. [¶] The following morning, June 7, 1985, the defendant stated he was awakened by a phone call from his stepfather who reported the victim had not shown up for work and requested information concerning her whereabouts. He, too, became concerned about the victim's disappearance, later obtained a ride to his parents' residence with the victim's daughter, and subsequently read the newspaper article concerning the location of the victim's body.

[¶] An interview was also conducted with Angela Davis Jordan, who advised she had shared the apartment with the victim and her two-year-old daughter in addition to her own five-year-old son and the defendant. She stated she had recently moved in (two weeks) and been staying in the apartment approximately half the time while spending other days with her boyfriend or at a friend's house. Ms. Davis related that she and the victim and their children slept on a roll-away sofa located in the living room of the apartment while the defendant slept in the bedroom. [¶] On June 6, 1985, Ms. Davis stated she went to the apartment at approximately 8:00 p.m., and noted the victim sleeping on the roll-away bed. She stated the victim was dressed only in a pink nightie, and she was not covered as it was a hot night. Ms. Davis stated she showered and got ready to go out leaving sometime after 10:30 p.m., taking her son with her. She noted while at the apartment, the victim remained asleep the entire time. She stated the victim's two-year-old daughter was in the living room playing and by the time she left, she too, was asleep with her mother. Ms. Davis stated the defendant was still sitting on the edge of the bed reading and watching television. She stated on the following day, June 7, 1985, the defendant contacted her via telephone asking if she had heard from the victim.

[¶] Ms. Davis gave officers permission to search their apartment and accompanied them to that location. Upon entering, Ms. Davis stated the apartment appeared to have been cleaned up and, during a subsequent interview, noted several unusual things to police officers. Investigation revealed the victim had been murdered in the apartment, and the bedding on which she had been sleeping was identified as the same bedding found with

the body. A piece of material matching the nightgown worn by the victim was also found in the kitchen sink drain as were some blood stains, wet clothing, and additional evidence related to the crime. Ms. Davis had noted to officers the sofa bed had been rolled up and put away although it was usually out, and that a broom and mop, normally kept against the wall near the kitchen table, were now behind the refrigerator. She stated a bed sheet kept over the door leading to the balcony had been changed and noted a lamp in the living room was on the floor rather than its normal place on the table. [¶] The victim's vehicle was later located a few blocks away from her residence, and investigation revealed it had been used to transport the body and bedding to the site where the victim had been found. [¶] On June 8, 1985, the defendant was again interviewed by investigating officers and continued to state he had been sleeping when he was awakened by the victim, asking him to watch her daughter as she was going out. He was unable to answer further questions regarding her intended destination, her clothing, and again indicated he first learned of her disappearance after reading the newspaper article of the unidentified female victim found on Clayton Road. [¶] The defendant did furnish information regarding his physical condition to police officers, indicating he had broken his shoulder approximately one month prior to his offense and had been wearing a brace. On the date of the offense, he had taken the brace off to have his mother wash it and, upon retiring that evening, had taken pain pills in conjunction with the consumption of beer shared with the victim. [¶] An autopsy performed on the victim concluded she died from stab wounds to the neck with contributory craniocerebral injuries. [¶] The defendant was subsequently arrested and charged with the murder of the victim on June 9, 1985 . . . ."

On November 17, 1986, a jury found Ashby guilty of second degree murder. He was sentenced to 15 years to life in state prison. His minimum eligible parole date was June 15, 1995.

*December 1, 2009 Board Parole Suitability Hearing and Decision*

At Ashby's court-ordered parole consideration hearing held on December 1, 2009, Ashby's attorney told the Board that Ashby would not discuss the life crime "or elements of remorse or elements of insight" into the life crime, because Ashby maintains, as he always has, that he was not guilty of murdering his sister.<sup>2</sup> However, Ashby was willing to discuss insight into his personality, substance abuse issues and anger issues.

Ashby told the Board that although he does get angry he has ways of dealing with anger in a controlled and safe way, such as meditation. The Board noted that Ashby had told the psychologist that he does not have any difficulty relating to anger, but there was historical evidence to the contrary. Doctor Smith, who conducted a psychological evaluation of Ashby in 2008, noted Ashby lacks insight into his angry feelings; she wrote that Ashby "tends to ignore even normal angry feelings and insists that he does not have any difficulty related to anger despite some historical evidence to the contrary." Ashby told Dr. Smith that he participated in anger management classes because "the Board told him to," but he " 'fought it' because he did not believe he had any problems in this area and 'handled anger well.' "

Ashby admitted that his conviction as a juvenile for malicious mischief—where he vandalized a car—involved anger. In addition, Ashby admitted that in the past he had chosen to break prison rules by engaging in business transactions with other inmates and secreting material from his jobsite to fix his "dental partial."<sup>3</sup>

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<sup>2</sup> On September 9, 2009, the Honorable Gilbert Brown granted Ashby's previous habeas petition. Judge Brown ordered that the Board provide Ashby with a new parole hearing within 95 days.

<sup>3</sup> Ashby was caught with an emery cloth from his jobsite, which he had hidden in his shoe.

With regard to the events that led up to a "2006 115 for mutual combat,"<sup>4</sup> Ashby explained that he had contracted to make a necklace for an inmate that involved "[s]o much money down and so much after it's been delivered." He found out that the particular inmate had a "habit of fighting instead of paying his debts." The inmate swung at him. Ashby said he did not throw the first punch, but did defend himself. However, he was placed in administrative segregation because he had a black eye and prison officials do not want "to let people on the mainline if you have signs of a fight." Ashby acknowledged that entering into a contract with other inmates was against "rules and regulations" and that he knowingly violated those rules and regulations.

Ashby admitted that he knew it was not wise to borrow or loan money while in prison; and conceded that making something for someone was the same as lending them money. When questioned by the Board as to his plans if someone did not pay, Ashby said that he would "write it off."

Ashby said after the other inmate swung at him, he hit the ground, but as he was getting up the other inmate kept hitting him. The Board pointed out that the official report differed from Ashby's account of the incident in that the correctional officer that witnessed the incident stated that the other inmate attempted, several times, to walk away from Ashby while Ashby was attempting to strike him with his fists.<sup>5</sup> Ashby explained

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<sup>4</sup> A CDC Form "115" documents misconduct believed to be a violation of law that is not minor in nature. (Cal.Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

<sup>5</sup> The official rules violation report written by the "Correctional Lieutenant" indicates the following: "On June 24, 2006, at approximately 1115 hours, I was performing my duties as Tower #2 Officer, I saw two (2) inmates later identified as Inmate ASHBY . . . and Inmate PENA . . ., involved in Mutual Combat. Both inmates were striking one another in the head and torso with their fist. I immediately called a 'Code I' via institutional radio. I then directed responding staff to the phones and the end [of] the railing for yard recall, where the two inmates were fighting. I maintained observation of Inmate PENA and ASHBY as responding staff placed both inmates in handcuffs and escorted them off the yard. During the physical altercation PENA

this discrepancy by saying that after he got up he walked toward the other inmate, but the other inmate was stepping back, which Ashby believed was not walking away. Ashby said that from the control tower across the yard, "it may look different."

Ashby admitted that he had "gotten in trouble over" drinking. He stated that on the night his sister was murdered "things would've been different if [he] wouldn't have been drinking." Ashby acknowledged that he had a DUI. Ashby told the Board that he attends Alcoholics Anonymous (AA) meetings and had learned from others. When asked what Step 1 was, Ashby admitted that was his hardest Step—trying to admit that he had a problem. Ashby said that he started AA in 1990, 1992, and attended whenever he could;<sup>6</sup> currently he was working on Step 8. Ashby said that he intended to stay in AA when he is released and planned on finding a sponsor, but because his parole plans had changed he had not started that process yet. With regard to his alcohol use on the night his sister was murdered, Ashby stated that if he "wouldn't have had that much beer" and had not "taken the extra pain pill" he "may have woken up." He "may have been able to prevent it." Doctor Smith's diagnostic impression was that Ashby abused alcohol.

The Board concluded that Ashby was not suitable for parole. Specifically, the Board stated, "Considerations which weighed heavily against suitability is the prisoner's prior criminality. It began as a juvenile and continued as an adult and consisted of self-admitted armed robbery, malicious mischief, minor in possession of alcohol, DUI and credit card forgery. The Panel then reviewed the prisoner's social history and deemed it to be unstable and as such, heavily weighs against consideration that tends to show suitability for parole. In that the prisoner has a history of unstable or tumultuous relationships with others, because of his . . . arrest and conviction history, which also

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attempted several times to walk away from inmate ASHBY who was attempting to strike him with his fists."

<sup>6</sup> Ashby explained that due to budget cuts some programs were cut or changed and there was a long waiting list to get into programs.

indicates he failed to profit from society's previous attempts to correct his criminality. Those attempts included juvenile probation and juvenile camp. The Panel also notes problematic relationships, and that he had two failed marriages and obviously his sister is the victim of this crime, his alcohol and drug use, the fact that he was a high school dropout and the Panel does note he has a brother who has been incarcerated. The prisoner's past and present mental state and past and present attitude . . . towards the crime heavily weighs against consideration that tends to show suitability for parole. The prisoner chose not to speak about the crime, insight or remorse at today's hearing, which is absolutely his right. As a result, the Panel reviewed the probation officer's report, prior suitability hearings, psychological evaluations, Board reports and the prisoner's Central File. The Panel finds that the prisoner lacks adequate insight into his personality traits and behaviors, which pose him as an unreasonable risk of danger if released from prison. The prisoner's file is replete with actual and referred reference to the prisoner's demonstration of anger, yet the prisoner continues to maintain he doesn't have a problem with anger. The prisoner's relatively recent disciplinary history indicates differently. The prisoner, in 2006, received a 115 for mutual combat. The prisoner maintains his involvement in this disciplinary was reactionary, yet he failed to mention until the Panel noted on record, that he knowingly and willingly violated institutional rules and regulations by entering into a business relationship with the other prisoner. But more importantly, the prisoner's version significantly differs from the written disciplinary report authored by the witnessing correctional officer. The reporting officer notes the other inmate repeatedly tried to walk away and prisoner Ashby advanced towards him. The Panel finds the prisoner has not fully addressed the causative factors, underlying reasons which resulted in him engaging in recently violent behavior while incarcerated. It is also apparent during the hearing today, the prisoner has not fully explored his anger issues, triggers, nor has he obviously developed adequate coping skills. The Panel also wants to note in reference to the 115 for mutual combat, that the prisoner maintains the

other inmate had mental health issues, yet there is not any evidence in the prisoner's file to indicate this was disclosed to him."<sup>7</sup>

The Board went on to note that Ashby had a 2009 "115" for introducing contraband into the prison yard concealed in a shoe "in an attempt to circumvent institutional rules and regulations for his own personal gain."

The Board expressed concern regarding Ashby's "alcohol issues." The Board stated that with regard to AA Ashby "indicated to the psychologist that he was doing it at the Board's request . . . and that he does not appear to have been an active participant. He certainly does not appear to have been working the Steps and . . . there seems to be a total complete lack of insight into how alcohol has affected his life prior to his incarceration and to what extent did it contribute . . . with his life crime."

The Board noted that Ashby's 2008 psychological report was not "totally supportive of release. Dr. Scott notes the prisoner has difficulty getting along with others, as demonstrated in the 2006 mutual combat 115. She also notes that the prisoner lacks insight into his angry feelings. He tends to ignore them. He tends to ignore them; even normal angry feelings and insists that he does not have any difficulty related to anger despite some historical evidence to the contrary." The Board found that Ashby had a "complete lack of insight into how anger participates in his life."

#### *The Habeas Proceeding Below*

In granting Ashby's petition for writ of habeas corpus the court below noted that "Penal Code section 5011 (b) states 'the Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed.' Here the Board violated this rule by denying Petitioner parole based upon

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<sup>7</sup> The Board went on to note that Ashby was placed in administrative segregation for this incident, while the other inmate was allowed to stay in the general population. Based in part on this, the Board questioned Ashby's credibility regarding the circumstances of the incident.

concerns with Petitioner's insight, remorse and acceptance of responsibility which could only be satisfied if Petitioner were to admit his guilt. Directly on point is the recent case of *In re McDonald* (2010) 189 Cal.App.4th 1008, 1023, in which the Governor's decision was reversed for violating PC § 5011. As in this case, the parole denial was based on a purported lack of insight, remorse, and acceptance of responsibility which in turn was a result of the inmate assertion of his right to not admit and discuss the crime. The Court of Appeal held; 'Were this sufficient, however, it would permit the Governor to accomplish by indirection that which the Legislature has prohibited. Had his statement of reasons indicated that the Governor believed the inmate would pose a threat to public safety so long as the inmate continued to assert that he had not participated in the crime, reversal would be certain. The use of more indirect language, yielding the same result, cannot compel a different conclusion.' [Citations.]"

The court below went on to note that the Board denied Ashby parole, "in part, because of 'a total complete lack of insight into how alcohol has affected his life prior to his incarceration and to what extent did it contribute to his -- with his life crime.' (Decision page 5.) For any inmate who asserts their rights under Penal Code section 5011 (b) there can be no expression of insight into how anything [can] 'contribute to' or interact[] 'with' the 'life crime.' [¶] The Board's finding that 'The prisoner's past and present mental state and past and present attitude to -- towards the crime heavily weighs against considerations that tends to show suitability for parole,' (Decision page 2,) suffers from the same flaw. An inmate can never satisfy the Board with a positive 'past and present mental state and past and present attitude toward the crime' if they invoke section 5011 (b). The Board here was indirectly violating section 5011 (b) just as disapproved in *In re McDonald, supra*, 189 Cal.App.4th 1008."

The court granted Ashby's habeas petition and ordered the Board to vacate its decision, hold another hearing within 100 days, and proceed in accordance with due process. By order dated May 20, 2011, this court granted the People's petition for a writ

of supersedeas and stayed enforcement of the trial court's order until final determination of this appeal.

On appeal, the People argue that this court should vacate the decision of the superior court because the Board properly relied on Ashby's insight into the circumstances surrounding his life crime without violating Penal Code section 5011 and some evidence supported the Board's decision that Ashby remained unsuitable for parole.

#### *Standard of Review*

The California Supreme Court addressed the judicial review standard that applies to parole decisions by the Board in *In re Rosenkrantz* (2002) 29 Cal.4th 616 (*Rosenkrantz*). In *Rosenkrantz*, our Supreme Court held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law. [Citations.]" (*Id.* at p. 658, italics added.)

"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." (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192 (*Lazor*); see also *Rosenkrantz, supra*, 29 Cal.4th at p. 677; *In re Criscione* (2009) 180 Cal.App.4th 1446, 1458 (*Criscione*)).

### *Discussion*

"One of the Board's functions is to set parole dates for prisoners serving indeterminate sentences. (Pen. Code, §§ 3040; 3041, subd. (a); 3000, subd. (b)(4) & (7).) Penal Code section 3041, subdivision (b) requires the Board to '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 public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.' This statute creates a conditional liberty interest for a prospective parolee. [Citations.]<sup>8</sup> The Board has broad discretion, sometimes called ' "great" ' and ' "almost unlimited,' " ' to identify and weigh the factors relevant to predicting 'by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.' [Citation.] However, 'the requirement of procedural due process embodied in the California Constitution (Cal. Const., art. I, § 7, subd. (a)) places some limitations upon the broad discretionary authority of the Board.' [Citation.] A prisoner is entitled to 'an individualized consideration of all relevant factors.' [Citation.]" (*In re DeLuna* (2005) 126 Cal.App.4th 585, 591.)

California Code of Regulations, title 15, section 2402, subdivision (b) sets forth the manner in which suitability determinations are to be made. Section 2402, subdivision (a)<sup>9</sup> states that "[r]egardless 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."

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<sup>8</sup> The California Supreme Court reached the issue whether there was "some evidence" supporting a parole suitability determination in *In re Dannenberg* (2005) 34 Cal.4th 1061, 1095-1096 (*Dannenberg*). Thus, the California Supreme Court implicitly indicated that due process requirements still apply to parole determinations in California.

<sup>9</sup> Unless noted, all undesignated regulation and section references are to Title 15 of the California Code of Regulations.

To assess that risk and thus determine the prisoner's suitability for parole, the Board must consider "[a]ll relevant, reliable information available to the panel . . . ." (§ 2402, subd. (b).)

"Included in the relevant information that the Board may take into account in determining suitability for parole are circumstances that have been termed 'parole suitability factors.' [Citation.]" (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1231 (*Board of Prison Terms*)). Included in the applicable regulations are the following parole suitability factors: (1) no juvenile record; (2) a stable social history; (3) signs of remorse; (4) the motivation for the crime was significant life stress; (5) battered woman syndrome; (6) no history of violent crime; (7) age; (8) realistic plans for the future; and (9) institutional behavior. (§ 2402, subd. (d).) However, these parole suitability factors are not exclusive. Pursuant to section 2402, subdivision (b), in addition, the Board may consider "any other information which bears on the prisoner's suitability for release."

On the other hand, the Board must consider " 'parole unsuitability factors,' which are circumstances that 'each tend to indicate unsuitability for release.' ( . . . § 2402, subd. (c).) Parole unsuitability factors include: (1) the commitment offense [that is whether "the prisoner committed the offense in an especially heinous, atrocious or cruel manner"]; (2) a previous record of violence; (3) an unstable social history; (4) sadistic sexual offenses; (5) psychological factors; and (6) serious misconduct in prison or jail. ( . . . § 2402, subd. (c).)" (*Board of Prison Terms, supra*, 130 Cal.App.4th at p. 1232.)

Since "[c]ircumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability" (§ 2402, subd. (b)), the presence of several unsuitability factors may have a cumulative effect.

The parole suitability and unsuitability factors are "general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board]." (§ 2402, subds. (c) & (d).) To put it another

way, "the precise manner in which the specified factors relevant to parole suitability are considered and balanced" lies within the discretion exercised by the Board in making its decision regarding parole suitability. (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

Nevertheless, individualized consideration of a prisoner's suitability for parole is required. "[T]he first responsibility of the parole authorities is to evaluate the suitability of an *individual* inmate for *safe* release, and, in making that assessment, to take into account all pertinent information and input *about the particular case* from the inmate's victims, the officials familiar with his or her criminal background, and other members of the public who have an interest in the grant or denial of parole to *this prisoner*." (*Dannenber, supra*, 34 Cal.4th at p. 1086.)

As noted, due process of law requires that the Board's decision be supported by some evidence in the record. In applying the some evidence standard, we are precluded from independently resolving conflicts in the evidence, determining the weight to be given the evidence, or deciding the manner in which the specified factors relevant to parole suitability are to be considered and balanced, because these are matters exclusively within the discretion of the Board. (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.) Without doubt, "[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Ibid.*) Nevertheless, the inferences that the Board draws from the evidence must be supportable. (*Dannenber, supra*, 34 Cal.4th at p. 1095, fn. 16.)

That being said, the standard of judicial review of parole decisions " 'certainly is not toothless.' [Citation.] '[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights.'" (*Criscione, supra*, 180 Cal.App.4th at p. 1458.) Simply pointing to the existence of an unsuitability factor is not sufficient. "[N]ot only must there be some evidence to support the Board's factual findings, there must be some connection between the findings and the conclusion that the inmate is currently dangerous." (*Ibid.*)

In denying Ashby parole, the Board found that Ashby currently poses an unreasonable risk of danger if released based on his prior criminality, unstable social history including problematic relationships, his alcohol and drug use, his past and present mental state and past and present attitude toward the crime, lack of insight into his personality traits and behavior, a relatively recent disciplinary history and anger and alcohol related issues.

Initially, the People argue that the superior court incorrectly concluded that the Board could never discuss or find sufficient insight without violating Penal Code section 5011, subdivision (b). Further, the People assert that contrary to the superior court's suggestion, the Board can rightfully evaluate the adequacy of the prisoner's insight into the circumstances of the life crime even when the prisoner maintains his innocence. The People contend that this is especially true in this case where the Board specified that it was concerned with Ashby's lack of insight into his personality traits, namely his anger and alcohol problems. The People point out that the Board found that Ashby had not fully addressed the underlying reasons or causative factors regarding why he had recently engaged in violent behavior with another inmate.

Neither Penal Code section 3041, nor the governing regulations list "lack of insight" as an unsuitability factor. However, in *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), the Supreme 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 therefore unsuitable for parole. (*Id.* at pp. 1258-1261 & fn. 20.)

"Just as the heinous nature of the commitment offense became a standard reason to deny parole after *In re Dannenberg* (2005) 34 Cal.4th 1061 . . . , so too an inmate's lack of insight has become a standard reason after [*In re*] *Lawrence* [(2008) 44 Cal.4th 1181] and *Shaputis*, so much so that it has been dubbed the ' "new talisman" ' for denying parole. [Citation.]" (*In re Ryner* (2011) 196 Cal.App.4th 533, 547 (*Ryner*).)

In *Shaputis, supra*, 44 Cal.4th 1241, the defendant shot and killed his wife. The California Supreme Court determined that "some evidence in the record support[ed] the Governor's conclusion that [Shaputis] remain[ed] a threat to public safety in that he ha[d] failed to take responsibility for the murder . . . , and despite years of rehabilitative programming and participation in substance abuse programs, ha[d] failed to gain insight into his previous violent behavior . . . ." (*Id.* at p. 1246.) Although the evidence was to the contrary, Shaputis nevertheless insisted the shooting had been an accident. The Supreme Court determined that, due to Shaputis's attitude and prior conduct, the commitment offense was not "an isolated incident, committed while [Shaputis] was subject to emotional stress that was unusual or unlikely to recur. . . . Instead, the murder was the culmination of many years of [Shaputis's] violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Id.* at p. 1259.) In addition, Shaputis had "found 'inexplicable' his daughters' prior allegations of molestation and domestic violence [and] had a flat affect when discussing these allegations[.]" (*Id.* at p. 1252.)

As *Shaputis* 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. (*Shaputis, supra*, 44 Cal.4th at pp. 1260, 1261, fn. 20; *Lawrence, supra*, 44 Cal.4th at pp. 1214, 1228; *Lazor, supra*, 172 Cal.App.4th at p. 1202.) Thus, an inmate's "lack of insight" can provide a logical nexus between the gravity of a commitment offense and a finding of current dangerousness. However, "Shaputis's lack of insight into his crime was rationally indicative of current dangerousness because it showed that he had not accepted full responsibility for his crime." (*Ryner, supra*, 196 Cal.App.4th at p. 547.)

Here, the Board relied in part on Ashby's past and present mental state, past and present attitude toward the crime and how his prior alcohol use contributed to the life

crime to deny Ashby parole. This suggests to this court that the Board was dissatisfied with Ashby's denial of responsibility for the murder and refusal to discuss the circumstances of the life crime. By implication this violates Penal Code section 5011 and section 2236, which provides in relevant part: "The board shall not require an admission of guilt to any crime for which the prisoner was committed. A prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner."

In *In re McDonald, supra*, 189 Cal.App.4th 1008, the petitioner, Michael McDonald, denied responsibility for killing the victim, Alexander Geraldo. Nonetheless, he was convicted of second degree murder. (*Id.* at p. 1013.) At his parole hearing, McDonald denied involvement in planning or carrying out Geraldo's murder, and claimed that the Aces of Spades, a secret group of which McDonald was a member, killed Geraldo. (*Id.* at pp. 1016–1017.) Even so, McDonald said "he felt responsible for Geraldo's death because the Aces of Spades used him [McDonald] to get Geraldo to let his guard down." (*Id.* at p. 1016.)

Although the Board found McDonald suitable for parole, the Governor reversed its decision in part because of "McDonald's lack of insight based on his claim of limited responsibility." (*McDonald, supra*, 189 Cal.App.4th at p. 1017.) The Court of Appeal vacated the Governor's decision on the ground that there was no evidence that McDonald posed a current danger to public safety. (*Id.* at pp. 1023, 1026.)

In reaching this decision, the *McDonald* court stated: "[L]ack of insight into the nature and magnitude of the offense, is, without question, a proper factor for the Governor's consideration in determining whether the inmate poses a current threat to public safety. [Citation.] However, the conclusion that there is a lack of insight is not some evidence of current dangerousness unless it is based on evidence in the record before the Governor, evidence on which he is legally entitled to rely. That evidence is lacking here, as the Governor cannot rely on the fact that the inmate insists on his

innocence; the express provisions of Penal Code section 5011 and section 2236 of Title 15 of the California Code of Regulations prohibit requiring an admission of guilt as a condition for release on parole. [¶] The Governor's finding in this case is phrased in terms of McDonald's denial of involvement in the crime; he suggests no other basis on which to find a lack of insight. Were this sufficient, however, it would permit the Governor to accomplish by indirection that which the Legislature has prohibited. Had his statement of reasons indicated that the Governor believed the inmate would pose a threat to public safety so long as the inmate continued to assert that he had not participated in the crime, reversal would be certain. The use of more indirect language, yielding the same result, cannot compel a different conclusion." (*McDonald, supra*, 189 Cal.App.4th at p. 1023.)

The Board did not directly state that Ashby was unsuitable for parole due to his refusal to discuss the commitment offense—indeed, the Board stressed that Ashby was not required so to do. Instead, the Board denied parole based in part on Ashby's past and present mental state and past and present attitude towards the crime, but the only evidence of Ashby's past and present mental state and past and present attitude towards the crime was Ashby's refusal to discuss the facts of the crime. Use of this evidence is expressly prohibited by Penal Code section 5011, subdivision (b) and section 2236.<sup>10</sup>

That being said, parole release decisions are essentially discretionary. They "entail the Board's attempt to predict by subjective analysis" the inmate's suitability for release on parole. (*Rosenkrantz, supra*, 29 Cal.4th at p. 655.) Nevertheless, as the California Supreme Court has clarified, "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

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<sup>10</sup> It is illogical to expect that Ashby can maintain his innocence and provide insight into the life crime or any factors that the Board believes may have contributed to the life crime.

dangerousness to the public." (*Lawrence, supra*, 44 Cal.4th at p. 1212.) Accordingly, although in exercising its discretion, the Board "must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation" (*id.* at p. 1219), a conclusion of current dangerousness "requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for [that] ultimate decision . . . ." (*Id.* at p. 1210.)

"If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry." (*Lawrence, supra*, at p. 1211.) "Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212.) In other words, as we have said before, "not only must there be some evidence to support the Board's factual findings, there must be some connection between the findings and the conclusion that the inmate is currently dangerous." (*Criscione, supra*, at p. 1458.)<sup>11</sup>

Nonetheless, even if we ignore the "lack of insight" factor, as noted, the Board relied on Ashby's prior criminality, unstable social history— including problematic relationships, his prior alcohol and drug use, his lack of insight into his personality traits and behavior, a relatively recent disciplinary history and anger and alcohol related issues

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<sup>11</sup> As our Supreme Court has clarified, "Under the 'some evidence' standard of review, [the Board's] interpretation of the evidence must be upheld if it is reasonable, in the sense that it is not arbitrary, and reflects due consideration of the relevant factors. [Citations.]" (*In re Shaputis* (2011) 53 Cal.4th 192, 212.)

to conclude that Ashby currently poses an unreasonable risk of danger to the public if released.<sup>12</sup>

Here, ignoring everything else the Board relied upon to deny Ashby parole, the interrelation of Ashby's inability to conform his behavior to society's rules, as evidenced by his then relatively recent disciplinary history, some of which involved violence, his blatant disregard for institutional rules and regulations, and his lack of acceptance that he has an anger management problem, provide some evidence supporting the Board's decision that in 2009 he posed an unreasonable risk of danger to the public if released.<sup>13</sup> An inmate's continuing disciplinary problems, even those not involving violence, may be relevant to the ultimate determination of whether an inmate will be able to function within the law upon release and is currently dangerous. (*Lazor, supra*, at p. 1202.)

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<sup>12</sup> As to the lack of insight factor, we reiterate that "we have to question whether anyone can ever fully comprehend the myriad circumstances, feelings, and current and historical forces that motivate conduct, let alone past misconduct. Additionally, we 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.' [Citation.] More importantly, in our view, 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. Moreover, we 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. Hence, 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 based on intuition or undefined criteria that are impossible to refute. [Citation.] However, it is settled that the Board may not base its findings on hunches, speculation, or intuition. [Citations.]" (*Ryner, supra*, 196 Cal.App.4th at p. 548.)

<sup>13</sup> That is not to say that if Ashby makes efforts to conform his behavior to institutional rules and regulations and accepts that he has anger issues, the Board will be able to rely on the unchangeable circumstance of his disciplinary history to deny him parole ad infinitum. The inference of current dangerousness that can be drawn from this evidence will necessarily diminish over time barring any repeat events.

*Disposition*

The March 1, 2011 order granting Ashby's petition for a writ of habeas corpus is reversed. The matter is remanded to the superior court with directions to vacate that order and enter a new order denying Ashby's petition for a writ of habeas corpus.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.