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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re JOEY WAYNE HATFIELD, on Habeas Corpus.	B210983 (Los Angeles County Super. Ct. No. BH005023)

APPEAL from an order of the Superior Court of Los Angeles County, Peter Paul Espinoza, Judge. Reversed with direction.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Jessica Blonien, Jacqueline Lopez and Kathleen R. Frey, Deputy Attorneys General, for Appellant.

Nancy L. Tetreault for Respondent.

Respondent and appellant, Board of Parole Hearings (hereafter, "the Board"), appeals from the superior court's ruling, in response to a habeas corpus petition filed by petitioner and appellee, Joey Wayne Hatfield, that the Board erred by deferring Hatfield's next parole suitability hearing for two years.

The order is reversed.

PROCEDURAL BACKGROUND

The Board is appealing the partial grant of a habeas corpus petition filed by Hatfield, who has been imprisoned since 1981 after being convicted of first degree murder. At a parole suitability hearing on October 3, 2007, a hearing panel of the Board found Hatfield unsuitable for parole. The panel also found there was no reasonable chance Hatfield would be suitable for parole within one year and postponed his next parole hearing until 2009. In response to this decision, Hatfield filed a pro se habeas corpus petition. The superior court issued an order to show cause and appointed counsel for Hatfield. Counsel subsequently filed a traverse in response to the Attorney General's return. Ultimately, the superior court upheld the Board's denial of parole, but concluded there was insufficient evidence to support its decision to postpone the next parole hearing. The superior court ordered the Board to conduct a new parole hearing in October 2008.

The Board appealed the superior court's ruling and filed a petition for writ of supersedeas asking for a stay. We granted the supersedeas writ and stayed the superior court's ruling pending our resolution of this expedited appeal.

THE COMMITMENT OFFENSE

Following a jury trial, Hatfield was convicted of first degree murder and sentenced to prison for a term of 25 years to life. The statement of facts from the September 30, 1985, court of appeal decision affirming Hatfield's conviction was read into the record at the parole suitability hearing.

Hatfield lived in the same apartment complex as Eugene Puzio and Dale Zolman. Hatfield gave Elizabeth Huston, another resident of the complex, the following account. Puzio had purchased half a gram of cocaine from his drug dealer, Timothy Sutton. It

turned out that not only had Sutton shorted Puzio on the quantity, but the drug made Zolman sick. To retaliate, Hatfield, Zolman and Puzio "were going to . . . 'burn' Mr. Sutton and steal his drugs." At 2:30 a.m. on October 29, 1980, Hatfield drove himself, Zolman and Puzio to Sutton's house. They got Sutton to come with them by agreeing to take him to buy cigarettes. When Zolman pulled out a gun, Sutton started wrestling with him. Hatfield "then swung around and hit Mr. Sutton in the side of his head with a beer bottle." After he was subdued, Sutton pleaded for his life and offered the three men $10,000 to let him live. "The men said no and drove to a hill between La Puente Road and Valley Boulevard in Walnut. They tied Mr. Sutton up with wire and injected him with battery acid. Surprised that he was still alive, they then made [Sutton] walk up the hill where he was shot and his body was later found." Hatfield told Elizabeth Huston that he had shot Sutton, and he "demonstrated by making [h]is fingers the gun barrel and inserting them in his mouth." Hatfield, Zolman and Puzio then drove back to Sutton's house, where Puzio broke in and stole drugs and money.

"Hatfield spoke with Mrs. Huston several more times during a week period about the incident. During the second conversation, Hatfield stated again that he pulled the trigger. A couple of days later, he changed his story and said that Zolman pulled the trigger."

Elizabeth's husband, Richard, saw Hatfield shortly after the murder. Hatfield was carrying a shotgun. Hatfield told Richard that "he, Zolman, and Puzio had shot Mr. Sutton over a bad drug deal. Hatfield . . . said that he shot Mr. Sutton by putting the gun in his mouth, tilting it towards the brain, and firing. Hatfield said he had the shotgun for fear of retaliation from Mr. Sutton's friends."

A member of the hearing panel asked, "[D]id you and Zolman and Puzio do as the description gives us in the Appellate Decision? Did you participate in those activities? Hatfield replied, "There's a few twists and turns, but it's close enough." Hatfield then made the following clarifications: "Pretty much every statement that I ever made to Liz Huston or anybody else was a lie . . . . The only eye witness to the crime was Eugene Puzio and he testified against Dale Zolman as doing everything in the crime." Hatfield

testified Elizabeth Huston was the only person he told about the crime, that Richard Huston "got most of it from her. He didn't get it from me."

The hearing panel asked Hatfield about a statement he had given to a probation officer during the presentence investigation. According to this statement, Hatfield only knew about the details of Sutton's murder because Zolman later told him what had happened, i.e., that Zolman and Puzio had injected Sutton with battery acid and Zolman then shot Sutton in the mouth. Referring to this statement, the hearing panel asked Hatfield: "So are you saying that you weren't even there when all these things happened?" Hatfield answered: "No, I was in the car. I was in the driver's seat, but they were doing everything in the back seat. I wasn't watching what they were doing. I was driving the car."

Hatfield told the hearing panel he initially got involved in the incident when Puzio and Zolman "asked me to use my car to go over to Timothy Sutton's house, and I told them that I was hungry. I said I would drive you over there, and that's how it started." Actually, it was Zolman who drove over to Sutton's house because Hatfield had never been there before. In fact, Hatfield had never even met Sutton before that night. Hatfield testified they were returning to Sutton's house, apparently after having successfully lured Sutton into the car to go for cigarettes, when the assault occurred: "And as we were going back towards [Sutton's] house, [Zolman] hit me on the leg and was pointing at the steering wheel, and I was like . . . what? He hit me again and he showed me the gun and he's telling me to grab the steering wheel. [¶] So I reached over and grabbed the steering wheel and I had the beer bottle in my hand. And [Zolman] turned in the seat with the gun and Timothy Sutton was sitting behind him and Puzio was sitting behind me. When [Sutton] seen the gun, he reached and he grabbed for the gun, and [Zolman] slammed on the brake. And when he slammed on the brake, I fell into the dashboard. And they were fighting over the gun and it was basically waiving [*sic*] at my head. . . . And just out of instinct, I swung the beer bottle to get the gun away from my head and I hit Timothy Sutton in the head with the beer bottle."

A member of the hearing panel asked, "So once you guys got Sutton into the car and the tussling starts and . . . you hit him with a beer bottle . . . what did you think was going to happen to the victim?" Hatfield replied, "I never really thought about what was happening to him at the time. I was drunk and high on cocaine and drinking and everything else. And I didn't pay attention to really what was going on." Asked, "You hit somebody with a beer bottle but you're not paying attention to what's going on?", Hatfield said, "No. No, that's not what I'm saying. I hit him with the beer bottle because the gun was waiving [*sic*] at my head. I could have just as easily hit Dale Zolman with the beer bottle, but I didn't. I hit Timothy Sutton instead. And I wish I would have hit Dale Zolman with the beer bottle instead."

Zolman had a needle and Hatfield thought he was "making himself a shot of cocaine or a shot of speed. He . . . got out of the car and had the hood of my car up, and I could see he was doing something out in the front of it. I didn't know what he was doing. Later I found out . . . it was battery acid." "It wasn't until later that I found out he actually injected it into Timothy Sutton." Sutton wasn't resisting because "[h]e was tied up with the wire and laying on the floorboard." Hatfield testified he did not witness Sutton being pistol whipped. He remembered Sutton begging for his life and offering money. Asked how he had reacted to that, Hatfield testified: "I wasn't. I was just driving the car. I wasn't paying too much attention . . . ."

Hatfield testified he was not present when Sutton was taken up the hill. Zolman and Puzio had told Hatfield to leave and come back in five minutes. Asked what he thought was going to happen to Sutton when he left, Hatfield initially testified: "Well, I pretty much knew what was going to happen at that point in time from everything that had built up before that. I'm not going to say I didn't understand what was going on. I pretty much knew." But when he was subsequently asked, "[W]hen you say you pretty well knew what was going on, did you pretty well know he was going to get killed?", Hatfield replied: "I didn't really know if he was going to be killed. I didn't know if he was going to be beat or what at that point in time."

Richard Huston had seen Hatfield with a shotgun, but it had not been the morning after the murder: "[I]t wasn't actually the next morning. It was the day after that I heard people out in the carport. I thought somebody was breaking into cars."

In his oral argument to the hearing panel, the deputy district attorney focused on the indications that Hatfield had not fully accepted responsibility for his part in Sutton's murder: "[T]he Board is here to evaluate the credibility of the Inmate's statements to the Board and his honesty in dealing with . . . himself and his ability to develop insight into what he has done." "The same things that we've heard today have been stated by this Inmate in previous hearings. They've been stated over and over. [¶] And standing in very harsh juxtaposition to his statements about his very limited activity are findings of previous professionals. The probation officer . . . writes . . . 'Defendant has been convicted of first degree murder. His explanation as to the events that transpired prior to and subsequent to the murder stretch [*sic*] credibility to the breaking point. Despite the finding made by the jury, defendant minimizes his involvement and is of the opinion he is only guilty of aiding and abetting [*sic*] and not first degree murder.' [¶] I believe that's where he still is today. That's exactly where he is today. The Appellate Decision . . . says, 'It is plain that Hatfield was an active participant. Although the jury apparently concluded that he did not pull the trigger, it does not logically follow that it found the prosecution case incredible. . . . Hatfield's explanation at trial that he went along for the ride is not worthy of belief.' "

The deputy district attorney argued Hatfield had neither "accepted the findings of the court," nor "developed insight into his crime. As a result of that, I believe he continues to represent a threat to public safety and parole should be denied."

Hatfield's attorney replied, "[W]e always go back to this inconsistency between what happened and what [w]as said in 1980 and [1981] and what was said afterwards. [¶] Mr. Hatfield has been consistent in his story since 1981." Counsel pointed out one of the panel members at the 2004 parole suitability hearing had said, " '[G]oing back in the record, I find that in 1994, your story was the same as it was today. That you stopped at Jack-In-The-Box and got something to eat and you were sitting in the car eating. You

were also drinking a beer which puts [the] weapon that you said you used to hit the guy in your hand.' " Counsel then argued, "I think if anything, Mr. Hatfield was been incredibly consistent," and that "irrespective of the consequences, he's stuck to his story and he hasn't changed it for 26 years."

Hatfield himself then told the Board: "The only violence I have ever done in my life is when I hit Timothy Sutton with a bottle. And, like I said, I could have just as easily hit Dale Zolman, and I wish to God I would have hit Dale Zolman instead." "I have never lied to a Parole Board, and I never will. When I was convicted, it was because of the lies. If I would have told the truth in the beginning, I probably would have never spent a day in prison, at least it's a possibility. But I lied. [¶] And for all the lies that I told, I was sent to prison. And I've paid [for] that dearly."

THE BOARD'S FINDINGS

The hearing panel concluded Hatfield was not suitable for parole because his release would pose an unreasonable risk of danger to public safety. In explaining its decision, the panel began with the following statement: "And just as a first note, just because the story has been consistent, consistency does not always equate to truthfulness."

The hearing panel characterized the commitment offense as seriously aggravated: "The victim was abused, no doubt. He was hit with a beer bottle, specifically by you. He was pistol whipped. His wrists were bound with wire. He was injected with battery acid. Then led up a hill and a gun placed in his mouth . . . and he was shot. [¶] The offense was carried out in an exceptionally callous disregard for human suffering. If, in fact, a portion of your story is true where you said that you didn't participate in the actual shooting, that you drove away for five minutes and then came back, you had an opportunity to save a person's life, and you didn't do that. So that definitely shows a callous disregard for human suffering. You said at one point . . . you [knew] what was pretty much going to happen. But you didn't do anything about it."

The hearing panel pointed out Hatfield's motive for murdering Sutton was "inexplicable and very trivial in relationship to the offense. A drug deal gone bad . . . .

But we still didn't hear any type of motive for specifically why the crime was committed and specifically your involvement since you claim that you didn't even know this person." "This was a very senseless crime. Senseless. The offense was carried out in a very cruel and callous manner. The man was pleading for his life, offering money. You claim that you didn't even know the victim, and that makes your involvement even more callous and cruel." The hearing panel noted Hatfield's attempts to distance himself from responsibility. "You're stating that . . . you were driving at one point. Another point, you weren't. You were holding the steering wheel. All the while this man is being brutalized. And you say that you didn't know any of that was even going on."[1]

The hearing panel then ruled "in a separate decision," that Hatfield's next parole suitability hearing should be postponed until 2009 because "it is not reasonable to expect that parole would be granted at a hearing during the following two years. And those reasons . . . are specifically the commitment offense. This was a horrible, heinous crime. And regardless of whether you want to admit full culpability or you want to minimize it, you were held accountable in court, not only during a court trial but in [the] appeals process, . . . [¶] That in and of itself, the callous nature, the cruelty involved, the dispassionate nature. The fact that the victim was abused, pistol whipped, hit upside the head with a beer bottle, wrists were bound. This was an execution, okay? And he was injected with battery acid and then shot in the mouth. [¶] The motive for the crime is inexplicable. And those conclusions of fact are drawn from the Appellate Decision, Second District, that I read into the record."

During his testimony, Hatfield had been asked if he was still enrolled in his alcohol and drug abuse programs. Hatfield said he "gave up [his] seat to somebody"

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[1] The panel also said Hatfield's prior record, although fairly minor, demonstrated an escalating pattern of criminal conduct. The Board found Hatfield had "an unstable social history" and an "extensive substance abuse history." While acknowledging Hatfield's good prison behavior, the Board also noted that at a prior parole suitability hearing Hatfield had been asked to "participate in self-help. And you just recently renewed your membership in the lifers group in April 2007." His psychological evaluation had been favorable and his parole plans were "adequate."

when he thought he was going to be paroled in 2004. However, this parole date was subsequently reversed by the Governor and Hatfield had apparently not yet returned to regular attendance in the programs. When the panel's decision was announced, one of the members told Hatfield, "You've made self-help efforts, particularly in AA/NA and you need to get back in because you've been out for a little bit."

SUPERIOR COURT'S FINDINGS

The superior court concluded "the record contains 'some evidence' to support the Board's finding that the Petitioner presents an unreasonable risk of danger to society and is unsuitable for parole. [¶] However, the Court also concludes that the record does not contain some evidence to support the Board's determination that it is unreasonable to expect that parole would be granted during the two-year postponement period." "[S]everal factors indicate that the two-year denial is unwarranted. The committing offenses took place 27 years ago. The Petitioner, although involved in the offenses, did not shoot the victim. His previous criminal record did not involve violence or an attempt to inflict serious injury. His institutional behavior is exemplary . . . . His psychological report is also favorable."

LEGAL PRINCIPLES

Penal Code section 3041, subdivision (a),[2] provides: "One year prior to the inmate's minimum eligible parole release date a panel [of the Board of Parole Hearings] shall . . . meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates."

Subdivision (b) of section 3041 provides that the panel "shall 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

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[2] All further statutory references are to the Penal Code unless otherwise specified.

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."

Former section 3041.5, subdivision (b)(2), provided, in pertinent part: "Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated. [¶] The board shall hear each case annually thereafter, except *the board may schedule the next hearing no later than the following*: [¶] (A) *Two years after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the bases for the finding*." (Italics added.)

Decisions of the Board of Parole Hearings are accorded great deference. "[P]arole release decisions concern an inmate's anticipation or hope of freedom, and entail the Board's attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts. [Citation.] 'The [Board's] exercise of its broad discretion "involves the deliberate assessment of a wide variety of individualized factors on a case-by-case basis, and the striking of a balance between the interests of the inmate and of the public." [Citation.]' [Citation.] 'The [Board's] discretion in parole matters has been described as "great" [citation] and "almost unlimited" [citation].' [Citation.] [¶] Nevertheless, our past decisions also make clear that 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." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.)

"[T]he 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 . . . 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.]" (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 658.)

Our Supreme Court recently affirmed that "the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191.) However, *Lawrence* also set forth the following clarification: "[W]ith regard to the aggravated circumstances of a commitment offense, we conclude that to the extent our decisions . . . have been read to imply that a particularly egregious commitment offense always will provide the requisite modicum of evidence supporting the Board's or the Governor's decision, this assumption is inconsistent with the statutory mandate that the Board and the Governor consider all relevant statutory factors when evaluating an inmate's suitability for parole, and inconsistent with the inmate's due process liberty interest in parole that we recognized in *Rosenkrantz*." (*Ibid*.)

"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. [¶] 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. [Citations.]" (*In re Lawrence, supra,* 44 Cal.4th at p. 1212.) "[T]he 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." (*Id*. at p. 1221.)

"The Board's decision to defer the annual hearing must be guided by the same criteria used to determine parole suitability. [Citation.] Thus, the reasons for refusing to set a parole date need not be completely different from the reasons for excepting an inmate's case from annual review. 'The latter decision involves a prediction that at least during the period of the postponement, an inmate will not likely become suitable for parole. That prediction may involve some of the same facts on which the unsuitability determination is based. What is required, however, is an identification of reasons which justify the postponement.' [Citations.]" (*In re Burns* (2006) 136 Cal.App.4th 1318, 1326.) "Because a hearing postponement 'may involve some of the same facts on which the [parole] unsuitability determination is based' [citation], we may consider the Board's discussion of parole unsuitability for the purpose of illuminating the Board's reasons justifying the postponement." (*Id*. at p. 1328; see also *In re Lugo* (2008) 164 Cal.App.4th 1522, 1539, fn. omitted ["[W]hen a petitioner who previously received a one-year denial challenges a multiyear denial and claims his due process rights were violated as a result of the postponement of his next scheduled parole date, the court's review is limited to determining whether some evidence supports the Board's findings."].

CONTENTIONS

1. The superior court erred because it granted habeas relief on an issue that had not been raised in Hatfield's habeas corpus petition.

2. The superior court erred because there was some evidence in the record supporting the Board's decision to postpone Hatfield's next parole suitability hearing until 2009.

DISCUSSION

1. *Trial court lacked authority to reach the postponement issue.*

The Attorney General contends the superior court erred by granting Hatfield relief on a claim that had not been raised in his habeas corpus petition. This claim has merit.

a. *Legal principles.*

The general rule in habeas corpus proceedings is that the issues to be decided by the court are those raised in the petition and the return. "[T]he petition states the grounds for the claimed illegality of the restraints on the petitioner's liberty, and the return must be responsive to these grounds.[Citation.] [¶] The return, which must allege facts establishing the legality of the petitioner's custody, 'becomes the principal pleading' [citation] and is 'analogous to the complaint in a civil proceeding' [citations]. Thus, the return 'is an essential part of the scheme' by which relief is granted in a habeas corpus proceeding. [Citation.]" (*People v. Romero* (1994) 8 Cal.4th 728, 738-739, fn. omitted.)

"The court will determine the appropriate disposition of a petition for writ of habeas corpus based on the allegations of the petition as originally filed and any amended or supplemental petition for which leave to file has been granted. [¶] . . . When an order to show cause does issue, it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues. While the traverse may allege additional facts in support of the claim on which an order to show cause has issued, attempts to introduce additional claims or wholly different factual bases for those claims in a traverse do not expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief." (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.)

b. *Discussion*.

The order to show cause issued by the superior court in this case simply ordered the respondent "to show cause why the [habeas corpus] petition should not be granted." The Attorney General now argues that, because Hatfield's habeas petition only challenged the decision finding him unsuitable for parole, not the decision postponing the next suitability hearing, the superior court should not have reached the postponement issue. The Attorney General has a valid point. The postponement issue was not raised until Hatfield's traverse was filed by subsequently appointed counsel. "[A]ttempts to introduce additional claims . . . in a traverse do not expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief." (*In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.) The rules governing habeas corpus procedure have been applied to pro se habeas corpus petitions. (See, e.g., *Board of Prison Terms v. Superior Court (Ngo)* (2005) 130 Cal.App.4th 1212, 1237 [superior court's order directing Board to address new claim not expressly or implicitly raised by pro se habeas petition violated "the well-established rules of habeas corpus procedure"].)

Hatfield argues the superior court had authority to decide the issue because he "filed his habeas proceeding without the assistance of an attorney. It has long been a maxim of habeas law that pro se petitions to the superior court must be construed liberally. [Citations.] Petitioner's pro se petition . . . challenged the Board's 2007 decision. *Though the petition provided points and authorities addressing the Board's denial of a suitability finding*, the petition argued that the decision, generally, violated due process and was an 'arbitrary and irrational "no parole" policy.' These concepts are broad enough to include the Board's improper and factual [sic] unsupported decision to defer petitioner's parole hearing for two years. The Superior Court had jurisdiction to review all aspects of the Board's decision." (Italics added.)

Hatfield's argument that pro se habeas petitions must be liberally construed is not, in this situation, persuasive.[3] As the italicized language noted in the previous paragraph demonstrates, Hatfield acknowledges his petition did not raise the postponement issue. We cannot see how Hatfield's claim, that the denial of parole suitability violated due process because the denial was part of a general "no parole" policy, somehow encompassed a claim that postponing his next parole suitability hearing also violated due process.

Hence, it appears the superior court should not have reached the postponement issue. However, as discussed below, we also conclude that even if we were to construe Hatfield's pro se habeas petition as having properly raised the postponement issue, we would still reverse the superior court's ruling.

2. *Board's decision to delay Hatfield's next parole hearing was supported by some evidence*.

The Attorney General contends that, because there is some evidence to support the Board's decision to postpone Hatfield's next parole suitability hearing for two years, the superior court's decision must be reversed. We agree.

The aggravated circumstances of a commitment offense may satisfy the "some evidence" standard if there is a nexus between the commitment offense and the Board's determination that the inmate remains a danger to public safety. In this case, the record contains ample evidence that Hatfield's crime had been particularly egregious and that he has not yet taken full responsibility for what he did.

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[3] As authority for his assertion that we should liberally construe his habeas corpus petition, Hatfield relies on *Haines v. Kerner* (1972) 404 U.S. 519, and *In re Serna* (1978) 76 Cal.App.3d 1010. Neither case helps him much. Hatfield cites the dissenting opinion in *Serna*, which concluded the trial court had properly taken jurisdiction of a procedurally defective habeas corpus petition under the irreparable injury exception to the exhaustion of remedies doctrine. But the majority opinion reversed the trial court's grant of habeas relief "because petitioners failed to exhaust their administrative remedies." (*In re Serna,* at p. 1014.) *Haines* did not even involve a habeas corpus petition; in that case, the inmate had filed a civil rights action for damages under title 42 United States Code section 1983.

The California Code of Regulations sets out a series of factors to be considered in measuring the seriousness of a commitment offense. "Circumstances tending to indicate unsuitability [for parole] include: (1) 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." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

Of the five enumerated factors tending to show a commitment offense was particularly egregious, Hatfield's hearing panel referenced *every one* except the "multiple victim" factor, which could not have applied. Hatfield does not contest the panel's findings that Sutton's murder had essentially been an execution, that Sutton had been abused during the crime, or that Hatfield's conduct had demonstrated a callous disregard for human suffering. The superior court, too, found the evidence in the record supported these findings.

Hatfield does contest the hearing panel's finding that the motive for the murder was inexplicable: "Contrary to the Board's finding, the explanation for the murder was that a known drug dealer sold petitioner's friend cocaine in a lesser amount, and of a quality that made the man [*sic*][4] physically ill. In other words, this was a murder related to a bad drug deal. While this certainly did not lessen petitioner's culpability, it provided an explanation for the murder."

We disagree. Even if the "bad drug deal" scenario could reasonably explain the participation of Puzio and Zolman, because they had been betrayed by their drug dealer,

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[4] It appears from the record hearing that Puzio purchased the cocaine, which made Zolman sick.

this drug deal had nothing to do with Hatfield. Hatfield testified he bought his drugs from somebody else and that he had never even met Sutton before. Hatfield's secondhand connection to Sutton does make his motive for participating in the murder somewhat inexplicable.

Moreover, Hatfield's testimony before the hearing panel amounted to a concerted effort to minimize his role in the murder. According to the court of appeal decision affirming Hatfield's conviction, he had been an active participant in the murder and his explanation at trial that he had merely gone along for the ride was not credible. Yet, the overwhelming import of Hatfield's testimony at the parole hearing was that he had not really been guilty of anything, that had he not accidentally hit Sutton with the beer bottle and subsequently told various lies in an attempt to inflate his role in the murder, he would not have even been convicted.

During his testimony, Hatfield continually tried to give an exculpatory twist to the trial evidence. He testified that at first he had no idea what Zolman and Puzio were planning, and that he only got involved because they asked to borrow his car. He testified he hit Sutton with the beer bottle by accident while he was trying to avoid getting hit with Zolman's gun. He testified that even after he hit Sutton he had no idea what Zolman and Puzio were planning, that he was drunk and high on drugs and not paying attention to what was going on. He only found out later that Zolman had injected Sutton with battery acid; at the time, he thought Zolman was going to shoot himself up with drugs. He did not see Sutton get pistol-whipped. Hatfield's exculpatory revisions even extended to his conduct after the killing. Whereas Richard Huston apparently testified Hatfield told him he was carrying a shotgun shortly after the murder because he feared retaliation from Sutton's friends, Hatfield told the hearing panel he had the shotgun because he thought someone was trying to burglarize cars at the apartment complex.

And even when Hatfield did say something significantly inculpatory, he immediately took it back. Thus, although he acknowledged he had been present when Sutton was being assaulted inside the car, he then said, "I was in the driver's seat, but

they were doing everything in the back seat. I wasn't watching what they were doing. I was driving the car." Asked what he thought was going to happen to Sutton when Zolman and Puzio made him get out of the car and walk up the hill, Hatfield first testified: "Well, I pretty much knew what was going to happen at that point in time from everything that had built up before that. I'm not going to say I didn't understand what was going on. I pretty much knew." But when he was then asked, "[W]hen you say you pretty well knew what was going on, did you pretty well know he was going to get killed?", Hatfield replied: "I didn't really know if he was going to be killed. I didn't know if he was going to be beat or what at that point in time."

The deputy district attorney argued Hatfield's testimony showed he had not yet accepted responsibility for his role in Sutton's murder,[5] and that this demonstrated he remained a threat to re-offend. (See *In re Lawrence, supra,* 44 Cal.4th at p. 1214 ["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 to the statutory determination of a continuing threat to public safety"]; see also *In re Shaputis* (2008) 44 Cal.4th 1241, 1260 and fn. 18 [inmate properly found unsuitable for parole because his "own statements at his parole hearing characterizing the commitment offense as an accident and minimizing his responsibility for the years of violence he inflicted on his family" showed he had been "unable to gain insight into his antisocial behavior"].) The

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[5] The superior court agreed the record showed Hatfield had been an active participant in the murder. Even on an aiding and abetting theory, this means Hatfield, with knowledge of the perpetrator's intent to murder Sutton, and with the intent of facilitating that crime, aided, promoted, encouraged or instigated the crime. (See *People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) "[N]either presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission." (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

same factors provided some evidence to support the Board's conclusion it was not reasonable to expect Hatfield would be granted parole during the following year.

The superior court's decision failed to acknowledge Hatfield's failure to accept responsibility for his crime, or the fact that this evidence of Hatfield's current mental state was important for predicting his future behavior.

Hatfield argues, "In determining that petitioner would not become suitable for parole within two years from the 2007 hearing, the Board disregarded his overwhelming record of rehabilitation and relied instead on the immutable factors of the commitment offense. That omission revealed the Board's failure to make an individualized evaluation of all of the relevant facts and violated due process. [Citation.] It is apparent what happened here. The Board in 2004 found that petitioner met the standard for parole suitability. The Governor reversed the Board's finding, so, in all of the subsequent parole proceedings, the Board has complied with the Governor's wishes by finding petitioner unsuitable. . . . Hence, the decision to defer the parole hearing was improper, unfair, and a violation of due process." Hatfield asserts, "The Board could not point to one circumstance in petitioner's record indicating he continued to pose a threat to public safety 27 years after the commission of the offense."

But, as we have noted, this ignores the evidence that the hearing panel made an individualized determination that Hatfield's version of what happened during the murder was not credible, that Hatfield was still trying to minimize his participation, and that he had not yet accepted full responsibility.[6]

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[6] Hatfield also complains that the "very same factors [relied on by the hearing panel in 2007] were present when the Board found petitioner suitable for parole in 2004. Petitioner is at a lost [sic] to understand how the Board could find him suitable for parole in 2004, yet in 2007 find him unlikely to become parole suitable until 2009 based on the same factors as were present at the 2004 hearing." But Hatfield has not offered any authority or reasoned argument to support the proposition that some kind of "law of case" analogy applies to successive parole determination decisions. In any event, this hearing panel did note Hatfield had stopped attending his substance programs regularly after the 2004 parole suitability hearing.

Hence, we conclude that, because some evidence supports the Board's determination that Hatfield's next parole suitability hearing should be postponed until 2009, the superior court erred by ruling the next hearing must be held earlier.

DISPOSITION

The order is reversed. The Board is directed to hold Hatfield's next parole suitability hearing in 2009 as scheduled.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.