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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOSE RODRIGUEZ on Habeas Corpus.	D057997 (Super. Ct. Nos. HC17289, CR87615)

Petition for writ of habeas corpus; relief denied. Robert F. O'Neill, Judge.

Michael Satris for Petitioner.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Phillip Lindsay and Amy M. Roebuck, Deputy Attorneys General, for Respondent.

Petitioner Jose Rodriguez is currently serving a sentence of 16 years to life in prison for a February 1, 1987 second degree murder with use of a deadly weapon. The victim was Richard Field, Sr. On February 8, 2010, a panel of the Board of Parole Hearings (Board)[1] found Rodriguez unsuitable for parole.

1 For ease of reference, we refer to a panel of the Board as the "Board." Pursuant to Penal Code section 3041.5, a panel of the Board may determine an inmate's suitability for parole.

Rodriguez filed this petition for writ of habeas corpus challenging the Board's decision. His primary contention is that the Board's decision violates his right to due process because the decision is not supported by "some evidence" he poses a current threat to public safety. Rodriguez also challenges the Board's reliance on a 2008 amendment to Penal Code[2] section 3041.5, subdivision (b)(3) which postponed his next parole hearing for three years. He claims the amended statute violates state and federal constitutional prohibitions against ex post facto laws.

We conclude the record before the Board at the February 8, 2010 parole hearing contains more than sufficient evidence to support the Board's finding Rodriguez's release poses a current risk to public safety. We also conclude the Board's decision to apply the 2008 amendment to section 3041.5, subdivision (b)(3) when scheduling Rodriguez's next parole hearing three years from the February 2010 hearing did not violate the constitutional prohibitions against ex post facto application of the law. Accordingly, we deny Rodriguez the habeas relief he requests.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Commitment Offense*

At the conclusion of the February 2010 parole suitability hearing, the presiding commissioner read into the record an excerpt from this court's opinion affirming Rodriguez's conviction in March 1991. The presiding commissioner also stated that in reaching its decision, the Board relied on material contained in the current clinical

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2 All further statutory references are to the Penal Code unless otherwise indicated.

evaluation and three past Board reports, which in turn relied on interviews conducted with Rodriguez. The Board also took into account the correctional counselor's statements and Rodriguez's versions of the crime. The Board characterized those versions of the crime as having "considerable overlap and some differences." Rodriguez entered no objection to the Board's consideration of any of these materials.

The summary of the life term offense contained in petitioner's most recent psychological evaluation prepared by Dr. Richard Kendall in March 2008 incorporates the facts contained in the probation report prepared at the time Rodriguez was sentenced.

According to Dr. Kendall's evaluation, at about 10:00 p.m. on February 1, 1987, police were summoned to Field's residence by a report two persons were injured by gunshots. On arriving police were met by Rodriguez in the driveway of Field's house. Rodriguez was shot in the stomach and bleeding profusely, nearly hysterical, and needed to be restrained. When police entered the home, they found 61-year-old Field dead in the living room, lying face up several feet in front of a green chair. There was a large amount of blood around his head and a pool of vomit was on the floor next to his mouth. The house was ransacked and the telephone cords cut.

In another part of the house police found a .38 caliber pistol on the floor of a bedroom. The pistol was cocked, and there was an odor of gunpowder in the air. A spent bullet casing was found on the floor about a foot away from the pistol. Rodriguez told police two persons committed the crimes and took his car from the front of the residence. Rodriguez was taken to the hospital.

The cause of Field's death was officially listed as multiple skull fractures with intra-cranial hemorrhage from blunt trauma to the head.

When interviewed by police at the hospital, Rodriguez stated that while Field was watching television, two men, one a masked Hispanic and one Caucasian, entered the home and demanded money from Rodriguez. When he refused, the Hispanic man shot him. He also thought he heard Field being shot. The two men left and Rodriguez then lost consciousness. Interviewed at the hospital the next day, Rodriguez recounted essentially the same story.

However, from the time they arrived at Field's residence, the police were suspicious of Rodriguez's story. The blood on the floor was dry, indicating some time had elapsed between Field's death and their arrival. The green chair was covered in blood and blood was splattered on the ceiling above the chair although Field's body was some distance from the chair. Although Rodriguez claimed he had been shot by the robbers, his shirt had no bullet hole and no blood was found in the room where Rodriguez claimed he was shot. The weapon purportedly used to shoot Rodriguez contained only Rodriguez's fingerprints.

Further information developed from Field's son and others confirmed the police officers' initial suspicions. Rodriguez became the chief suspect in Field's murder. In particular, police learned about an ongoing affair between Field's wife and Rodriguez, who was employed by Field and lived in his home. The situation was volatile. Field was unstable and recently threatened Rodriguez with a gun because of the affair. Field's wife reported her husband's conduct to her psychologist and police confiscated Field's guns.

The guns were later returned to him. For his part, Rodriguez made a statement to Field's wife that "If I hit him once, I could finish it up."

When confronted with inconsistencies in his version of events and the results of a polygraph test, Rodriguez confessed to killing Field. However, Rodriguez claimed he committed the killing in self-defense and that following Field's death he went to a local bar and convinced an acquaintance, Victor Arzate, to return to Field's house to help him make the scene look like a home invasion robbery had occurred.

In light of Rodriguez's new version of events, the police investigation turned to Rodriguez's accomplice, Arzate. With the assistance of Mexican police, Arzate was arrested in Mexico. Various items from the Fields' home were found in Arzate's possession, including gold jewelry, a diamond bracelet and a pistol with a clip. Contrary to Rodriguez's version of events, Arzate confessed to actually helping Rodriguez kill Field. Arzate recounted that after drinking at a local bar with Rodriguez, Rodriguez said he had fallen in love with his boss's wife. Enroute to Field's home, Rodriguez asked Arzate to help him kill Field. Rodriguez told him he would do the killing and Arzate would make the house look like a robbery had occurred. For this, Rodriguez promised to pay Arzate $500.

At the residence the two spied on Field through a window. Then Rodriguez took a metal bar from his car and the two entered the house quietly. As Field was sitting in a chair, Rodriguez hit him over the head with the metal bar. Arzate selected some jewelry and ransacked the house. Rodriguez told Arzate that Field was still alive and ordered Arzate to finish Field off by strangling him. Arzate complied and strangled Field for

about five minutes, during which time Field vomited on Arzate's hand. Arzate received about $160 of the promised $500. After strangling Field, Arzate drove Rodriguez's car to a trolley station, where he left it. Before Arzate left, Rodriguez told him he was going to shoot himself with a pistol to confuse the police.[3]

B. The 2010 Parole Hearing

At the 2010 hearing, the presiding commissioner asked Rodriguez whether there was anything he would like to "add or clarify" concerning the offense. Rodriguez's attorney responded, "I've advised him not to speak on anything but post-conviction factors." Thus, on advice of counsel, Rodriguez did not answer questions concerning the commitment offense and the events leading up to it.

Despite an exemplary record in prison, various letters offered in support of his release, his parole plans, the absence of a criminal history, and moderate risk of violence in the future, the Board found Rodriguez unsuitable for parole.

C. The Petitions for Habeas Corpus

In 2010, Rodriguez filed a petition for habeas corpus in the San Diego Superior Court. The trial court denied the petition.

In August 2010, Rodriguez filed a pro per petition for habeas corpus in this court. This court issued an order to show cause, appointed counsel for Rodriguez and permitted counsel to file a supplemental petition. Rodriguez's appointed counsel filed a

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[3] Arzate was sentenced in Mexico to 20 years in the Baja California State Penitentiary in Tijuana.

supplemental petition on his behalf, the People filed a return to the order to show cause, and Rodriguez filed a traverse.

In his principal argument here, Rodriguez contends he is entitled to a new parole hearing because the record lacks sufficient evidence to support the Board's finding he is unsuitable for parole. We disagree.

DISCUSSION

I

The Record Contains Some Evidence Supporting the Board's Conclusion that Rodriguez is Currently Dangerous to the Public

A. Petitioner's Burden of Proof

In the analogous circumstance where a criminal judgment is challenged by way of a petition for a writ of habeas corpus, our Supreme Court has emphasized the heavy burden a petitioner carries:

"Our state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus. [Citations.] Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them. 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.' [Citation.]" (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

Here, in examining the record to determine if there is some evidence to support the Board's decision, Rodriguez's burden is no lighter: all presumptions favor the truth, accuracy and fairness of the Board's decision and Rodriguez must undertake the burden of overturning them.

B. Parole Suitability

Section 3041 provides in pertinent part: "(a) . . . One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall . . . meet with the inmate and shall normally set a parole release date as provided in Section 3041.5.

"(b) The panel or the board, sitting en banc, 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 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."

The decision whether to grant parole is an inherently subjective determination (*In re Rosencrantz* (2002) 29 Cal.4th 616, 655 (*Rosencrantz*)) that is guided by a number of factors identified in section 3041 and the Board's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) In making its suitability determination, the Board must consider "[a]ll relevant, reliable information" (Cal. Code Regs., title 15, § 2402, subd. (b)), such as the nature of the commitment offense including behavior before and after the crime; the prisoner's social history and mental state; criminal record; attitude towards the crime; and parole plans. (*Ibid*.) The circumstances tending to show unsuitability for parole include

the inmate (1) committed the offense in a particularly heinous, atrocious or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (Cal. Code Regs., tit. 15, § 2402, subd. (c)).

The criteria noted above are general guidelines. Their importance in a given case is left to the sound judgment of the Board, which is charged with the responsibility of predicting by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts. (*Rosenkrantz, supra*, 29 Cal.4th at pp. 654-655.) It is not the existence or nonexistence of specific suitability or unsuitability factors that forms the crux of a parole decision, but rather how the factors interrelate to support a decision an inmate is currently dangerous to the public. (*In re Lawrence* (2008) 44 Cal. 4th 1181, 1212 (*Lawrence*); see also *In re Prather* (2010) 50 Cal.4th 238, 258.)

C. Standard of Review

Our role on review of the Board's decision is extremely deferential. We may not substitute our own judgment for that of the Board. We may not reweigh the evidence, resolve conflicts in the evidence or consider whether the evidence establishing suitability for release outweighs evidence supporting denial of release. Thus, as tempting as it may be to reweigh the record, rebalance the Board's evaluations, compare the facts of one case to another, or adopt other plausible explanations for the life crime, our judicial review of the Board's decision in a parole suitability case is specific and confined. We may inquire only whether there is some evidence in the record before the Board supporting its

determination that an inmate is a threat to public safety and therefore unsuitable for release. (*Lawrence, supra*, 44 Cal.4th at p. 1212; *Rosencrantz, supra*, 29 Cal.4th at p. 677.) "Some evidence" means "a modicum of evidence." (*Rosenkrantz, supra*, 29 Cal.4th at pp. 664-665.)

The deferential standard of review is tied directly to maintaining a proper relationship between the executive and judicial branches. Although we are charged with assuring the propriety of parole proceedings, we are not charged with determining whether inmates are safe to return to the public. In this regard, our Supreme Court has noted, " '[r]equiring a modicum of evidence to support a decision [to deny parole] will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens.' " (*Rosenkrantz, supra*, 29 Cal.4th at p. 664, citing *Superintendent v. Hill* (1985) 472 U.S. 445, 455-456 [105 S.Ct. 2768].)

D. *The Basis of the Board's Decision*

Rodriguez asserts the Board concluded he was not suitable for parole based solely on "their boilerplate speculative Arbitrary, Capricious reliance that petitioner's commitment offense after 23 years has been brutal murder." In his traverse, Rodriguez further cites the Board's reliance on Dr. Kendall's evaluation. Dr. Kendall noted Rodriguez's decision to remain silent and Rodriguez's adherence to his claim the crime was an act of self-defense. Dr. Kendall concluded Rodriquez lacks insight into his offense. Thus, Rodriguez argues the Board denied him parole based upon his refusal to agree to the prosecution's theory of the life crime, his disagreement with the facts as contained in the police report and his refusal to speak with the psychological evaluator

about the facts of the crime. We find no defect in Board's conclusion that Rodriguez is not suitable for parole.

1. *The Board's Decision*

Although the Board offered Rodriguez the opportunity to address the life crime, and the psychologists who have examined Rodriguez have attempted to discuss the facts of the crime with him, at the February 8, 2010 board hearing, the commissioners were focused primarily on petitioner's inability or unwillingness to confront the internal factors that may have motivated him to commit the murder. Charged with having to predict whether his return to society would be without further violence, the record before the Board offered no reasons why the crime occurred and what steps had been taken by Rodriguez to assure it would not happen again if he were released. The need to understand the character traits that compelled Rodriguez to kill Field, and how those character traits had been dealt with by him while in prison was heightened because the crime came out of the blue.

Mid-way through the Board hearing, the Presiding Commissioner summarized his concerns as follows: "You came to the life crime with a blank slate, at least as far as the Panel is concerned, in terms of criminal history. No, I have no idea other than that which I've read in the record what could have led you to be willing to commit this murder for the gain you stood to realize from it, which was modest. And since the life crime, you've done a great job in prison in many respects. You've done an excellent job. And yet, unless I can draw a link between *who you were* and *who you are*, it becomes necessary for me to take a leap of faith now in concluding that you don't represent a threat. And

that's a leap of faith which I'm reluctant to make. So is there anything that you would like to tell the Panel now about the man that you are and what during the last 21-plus years has helped you to become the man that you are. That does not represent a threat to society in Mexico, or anywhere else for that matter. Anything you care to tell us?" (Italics added.)

Rodriguez's counsel attempted to explain the presiding commissioner's concerns to Rodriguez; counsel himself offering that the crime was the result of stress caused by Rodriguez's youth and the passionate affair with the victim's wife. With this prompting, Rodriguez responded that he has learned to deal with stressful situations by playing the guitar and reading materials from the Alternative to Violence Project. He also stated he uses the principles of "self-confrontation" he learned in another self-help class. Rodriguez stated he learned how to avoid problems in classes he took in prison. He agreed with the presiding commissioner his advancing age made it easier for him to avoid confrontations. Rodriguez also added that he had written but did not send letters to the victim's family. He said this step helped him to "recognize [his] many flaws, and made [him] responsible for the whole destructive part of [his] life." Rodriguez added writing the letters helped him to understand "the extreme harm that [he did] to others."

The preceding exchanges are the only ones in which Rodriguez addressed what *his counsel* described as a crime related to stress. Contrary to the dissent's characterization of the record, the foregoing represents "an identifiable and material deficiency in the inmate's understanding and acceptance of responsibility for his or her commitment offense." (*In re Rodriguez* (2011) 193 Cal.App.4th 85, 99, fn. 9.)

In this regard, in rendering the decision of the Board, the presiding commissioner fully explained the deficiency: "In reaching our decision, the Panel believes that Mr. Rodriguez is still not entirely credible concerning the life crime. Which is not in and of itself an issue, but it becomes a problem when the Panel is asked to make judgments concerning future dangerousness. And particularly, ironically, with an individual such as Mr. Rodriguez, who according to the record came to the life crime with no criminal history. And by all accounts, was working and had been accepted into what seems to be a household that would be unlikely to accept him into it if he did not have positive character traits. This, ironically presents a problem for the Panel because Mr. Rodriguez' behavior has, while he has been in custody, been by and large excellent. And so the Panel is asked to determine the extent to which he . . . currently represents a threat, or does not represent a threat, with virtually no information concerning the character flaws or character traits which he possessed at the time that he committed the life crime. That does, and so with that somewhat circular statement, I get back to the issue that the Panel had to consider, and that is there are, on the record, multiple versions of the life crime. And specifically, the extent to which this murder had elements of self-defense built into it. Or at least, anticipations of the potential for future harm, to Mr. Rodriguez, which could have potentially motivated his actions. The Panel is not suggesting that that is why the murder occurred, but at various points in the past, that has been suggested by Mr. Rodriguez to varying degrees. And so the panel is left having to reach its own conclusion. And having limited information available to it, to suggest that Mr. Rodriguez is not capable of out-of-the blue committing an act of extreme violence, it retains concern

regarding the extent to which that may be the case. The Panel believes that Mr. Rodriguez lacks insights into the causative factors of his conduct. As exhibited by, or as evidenced by, his inability, or unwillingness, to provide the Panel today with an understanding of whatever character flaws or traits existed prior to the life crime that he has successfully addressed over the past 21 or 22 years, that make him no longer a threat."

The presiding commissioner concluded by stating the panel was "left, in short, with lack of understanding of what could have made Mr. Rodriguez willing to engage in violence, to enlist the aid of a crime partner in committing that violence, and other than his behavior over the last ten-plus years, we are uncertain about what character traits no longer exist that led him to be able to commit this act of violence."

The concerns of the Board are reflected not only in Rodriguez's responses at the hearing, but also in the psychological evaluations performed during his incarceration and part of the record considered by the Board. In the 2008 psychological evaluation prepared for the Board, Dr. Kendall noted that in 2002 Rodriguez simply stopped talking about the crime[4] with the psychologists charged with making a determination of his dangerousness and suitability for parole. Dr. Kendall noted that in preparation of the most recent evaluation performed by him, he asked Rodriguez to describe the controlling

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4 In his 2003 assessment, Dr. Bob Ohrling stated: "Rodriguez explained 'The reason I don't want to discuss the crime is because of my version: it conflicts with the police report, I agree with the court. That's the reason I don't discuss the crime.' " When asked if the account of the index offense he offered to Dr. Elaine Mura at the time of his 2002 evaluation was accurate, Mr. Rodriguez responded obliquely, "When I talked to Dr. Mura, it later caused a lot of conflict and my attorney advised that I not talk about it."

offense. Rodriguez responded, "My version conflicts with the police department and the panel always relies on the police department. My counselor advised me that you should not talk about your crime because it incriminates you. The board is not going to believe me. He told me that I might as well keep my mouth shut." Rodriguez did not make any more statements regarding the controlling offense. Dr. Kendall stated "[i]t would seem that the inmate now chooses to remain silent because he continues to maintain that the crime was committed in self-defense despite all the evidence to the contrary." Dr. Kendall further stated, "[t]he inmate continues to display difficulty accepting and discussing his actions on the night of the controlling offense" and concluded, "[i]t is this examiner's opinion that the inmate's risk to recidivate is increased given his inability to discuss and accept his actions in the controlling offense."(Return Exhibit 10 page 7-9)! He concluded Rodriguez's overall risk for future violence is in the moderate range.

In a psychological evaluation written in 2003, Dr. Ohrling stated Rodriguez was "primarily focused on the external factors related to his commission of this offense with little or no awareness of internal factors. The inmate presents a high degree of psychological conflictedness [sic] as evidenced by a great deal of distress and defensiveness." Dr. Ohrling further concluded that while in a controlled setting Rodriguez's violence was less than the average inmate, when released into the community it would be difficult to infer such a low propensity for violence "without further awareness and insight from the inmate of the current offense."

Four years later, in 2007, the psychological assessment of Rodriguez did not change much. Doctor Katherine Kropf offered her opinion Rodriguez's account of the

crime was disingenuous and distorted; seeming to manifest a desire to excuse himself and gain public forgiveness for the crime.

Finally, we note that in October 2009, just four months prior to the parole decision at issue here, Rodriguez claimed the crime was the result of self-defense and his version of self-defense remained the same as he had described in the 2002 life prisoner evaluation.

In short, apparently on advice of counsel, over the last two decades Rodriguez has made no attempt to deal with the very issues needed to be resolved in order to convince the Board that he was not a danger if released. In the end, although the Board identified factors which tended to show Rodriguez's suitability for parole, including excellent institutional behavior, low to moderate levels of projected risk, and solid plans if released, the Board concluded Rodriguez lacked insight sufficient to risk releasing him to the public. It remained concerned the record before it offered no assurance the personal character flaws that caused Rodriguez to murder Field and create an elaborate cover up had been addressed and dealt with by Rodriguez.

2. *Lack of Insight and Its Relationship to the Circumstances Surrounding the Murder of Field*

While the Board is precluded from requiring an inmate admit guilt, (§ 5011, subd. (b); Cal. Code Regs., tit. 15, § 2236), the Board may consider an inmate's lack of insight in determining suitability for parole. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260, fn. 18 (*Shaputis*); *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) Indeed, an examination of an inmate's insight is mandated by section 3041 and California Code of Regulations, title

15, section 2402, which state the Board must consider all relevant and reliable information available, including the inmate's past and present attitude about the crime. As the Supreme Court noted in *Lawrence*, "the attendant changes in a prisoner's maturity, understanding and mental state [are] highly probative to the determination of current dangerousness." (*In re Lawrence, supra*, 44 Cal.4th at p. 1220; see also, *In re Shaputis, supra*, 44 Cal.4th at pp. 47-49.) Thus the Board is entitled to look beyond an inmate's expressions of remorse and willingness to be accountable and examine an inmate's mental state and attitude about the crime to determine whether there is a truthful appreciation for the wrongfulness of the act.

Importantly, in determining whether an inmate understands the underlying reasons he or she committed the crime, the Board is entitled to compare the inmate's account of the crime with official accounts of the facts surrounding the commitment offense. Such a comparison may indicate the inmate does not understand the true nature of his or her conduct to a degree sufficient in the Board's opinion to warrant the inmate's release into the public. (*In re Shaputis*, *supra*, 44 Cal.4th at p. 1260.)

In *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110-1112 (overruled on other grounds in *In re Prather, supra*, 50 Cal.4th 238) although the court found that such a comparison in that case did not show any continuing danger, the court accurately summarized three other cases, *Shaputis*, *In re McClendon* (2003) 113 Cal.App.4th 315 (*McClendon*), and *In re Van Houten* (2004) 116 Cal.App.4th 339 (*In re Van Houten*) where such an analysis fully supported a decision to deny parole:

"In *Shaputis*, the inability of the inmate 'to gain insight into his antisocial behavior despite years of therapy and rehabilitative "programming," ' was some evidence of his dangerousness and unsuitability for parole [citation] because (1) his killing his wife 'was the culmination of many years of [his] violent and brutalizing behavior toward the victim, his children, and his previous wife' [citation], (2) his continuing claim that the killing was unintentional was contrary to undisputed evidence that the gun he used 'could not have been fired accidentally, because the hammer was required to be pulled back into a cocked position to enable the trigger to function, and the gun had a "transfer bar" preventing accidental discharge' [citation], and (3) his recent psychological reports reflected that his character, as shown by the killing and his 'history of domestic abuse,' 'remain[ed] unchanged' at the time of the parole hearing [citation.]

"In *McClendon*, the inmate arrived around midnight at the home of his estranged wife; was wearing rubber gloves and carrying a loaded handgun, a wrench, and a bottle of industrial acid; 'barged ... into' the residence; aimed the gun at his wife and the man with whom she was sitting on the couch and talking; shot his wife in the head; and, when the gun jammed, struck the man two or three times in the head with the wrench. [Citation.] The inmate claimed the shooting was unintended, and he showed no remorse for the killing and attack on the male victim. [Citation.] Accordingly, his failure to accept complete responsibility for killing his estranged wife—instead claiming it was unplanned, despite overwhelming evidence that it was a calculated attack—was some evidence of his continuing dangerousness at the time of the parole hearing. [Citation.]

"In *Van Houten*, the inmate, a disciple of Charles Manson, 'felt "left out" [because she was not asked to take part in the brutal murders of Sharon Tate, Voitcek Frykowski, Abigail Folger, Jay Sebring and Steven Parent] and wanted to be included next time.' [Citation.] Getting her wish, she participated in the fatal stabbings and 'gratuitous mutilation' of two victims, and said that ' "she had stabbed a woman who was already dead, and that the more she did it the more fun it was." ' [Citation.] Although she 'did not contest the Board's version of events' [citation], she minimized her culpability and 'deflect[ed] responsibility for her actions on Manson.' [Citation] In light of the 'egregious character of the offenses' and her 'unstable social history,' the inmate's 'attitude' about the murders was some evidence she remained 'an unstable person' in need of 'continued therapy and programming' to obtain 'further insight' concerning her 'vicious and evilly motivated' actions before it could be said that she no longer posed a risk to public safety. [Citation.]" (*In re Palermo, supra,* 171 Cal.App.4th at pp. 1111-1112.)[5]

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5 In *In re Palermo* the court concluded the inmate's unwillingness to accept the official version of the commitment crime did not make him unsuitable for parole and directed the Board to find that the inmate was suitable for parole: "Here, in contrast to the situations in *Shaputis* and *McClendon*, defendant's version of the shooting of the victim was not physically impossible and did not strain credulity such that his denial of an intentional killing was delusional, dishonest, or irrational. And, unlike the defendants in *Van Houten*, *Shaputis*, and *McClendon*, defendant accepted 'full responsibility' for his crime and expressed complete remorse; he participated effectively in rehabilitative programs while in prison; and the psychologists who evaluated him opined that he did not represent a risk of danger to the public if released on parole. Under these circumstances, his continuing insistence that the killing was the unintentional result of his foolish conduct (a claim which is not necessarily inconsistent with the evidence) does not support the Board's finding that he remains a danger to public safety." (*In re Palermo, supra*, 171 Cal.App.4th at p. 1112.)

Here, given the particular circumstances of Field's murder, Rodriguez's inability or unwillingness to confront the character issues which caused him to commit that crime is powerful evidence he is not suitable for parole. As the presiding commissioner noted, the extremely violent crime occurred completely out of the blue and for the years since it occurred Rodriguez has not suggested he understands the emotional forces or character flaws which caused him to commit it. Indeed, fairly recently he reiterated his wholly unsupported claim of self-defense, one which was impeached not only by circumstantial evidence but by the self-incriminating statements of his accomplice. On the one hand, given the violent and unexpected nature of the crime and on the other hand, the absence of any insight on Rodriguez's part, notwithstanding his lengthy incarceration, the record here more than amply supports the Board's conclusion Rodriguez is a continuing danger.

Rodriguez suggests the Board was precluded from considering the particular circumstances of the commitment offense itself. We disagree. Whether an inmate possesses sufficient insight to warrant release into the public cannot be viewed in a vacuum. The degree of insight required in a specific case is unavoidably tied to the severity of the circumstances attending the crime. In this regard "[w]e agree that an inmate cannot be denied parole based simply on the type of offense he committed. [Citation.] The law contemplates that persons convicted of murder may eventually become suitable for parole, and it would be contrary to the statutory scheme to deny parole simply because the commitment offense was murder. However, under the statutory scheme the gravity of the commitment offense is a significant consideration. [Citation.] Therefore, upon individualized consideration, the particular circumstances of

the inmate's commitment offense may be a basis for finding the inmate unsuitable for parole. [Citations.]" (*In re Morrall* (2003) 102 Cal. App.4th 280, 301-302 (*Morrall*).)

In this context the holding in *Morrall* is instructive. In *Morrall* the defendant was convicted of second degree murder and argued that in reversing the Board's suitability determination the Governor could not consider any circumstance that would have supported a finding of first degree murder. In rejecting this contention the court stated: "To convict a person of first degree murder on a premeditation and deliberation theory, a jury would have to be satisfied beyond a reasonable doubt that the person made a deliberate decision to kill after careful thought and weighing of the considerations for and against killing and while having in mind the consequences of killing. [Citation.] At the time of Morrall's trial, the jury would have had to be satisfied that he decided to kill after mature and meaningful reflection on the gravity of the act. [Citation.] There are a number of circumstances that, if proven, would tend to suggest premeditation and deliberation. [Citation.] But there is no precise evidentiary formula that is regarded as either necessary or sufficient. [Citation.] Circumstances attending the crime that might, with other evidence, tend to suggest premeditation and deliberation do not disappear when, based upon the entire record, the jury harbors a reasonable doubt whether the defendant in fact premeditated and deliberated. For example, in this case, Morrall shot his victim seven times, including what is described as a contact wound to the neck. This was an exacting manner of killing that could serve as one evidentiary component of a first degree murder charge. [Citation.] But that circumstance exists regardless of the jury's rejection of a first degree murder charge.

"In exercising his authority over paroles, the Governor can apply a preponderance of the evidence standard. [Citation.] The Governor's task is not to determine whether premeditation and deliberation attended the crime; instead, it is to evaluate the circumstances of the crime to determine what they indicate with respect to the public safety. [Citation.]" (*Morrall, supra,* 102 Cal. App.4th at pp. 301-302.)

The Board's role here was the same as the Governor's in *Morrall*: it was required to evaluate the circumstances of the crime to determine what they indicate with respect to the public safety. (§ 3041, subd. (b).) As expressed by the presiding commissioner, the circumstances of the crime which were of most concern to the Board were Rodriguez's willingness and ability to involve another person in a crime of violence, the absence of anything of significance Rodriguez was likely to gain, and the fact that nothing in Rodriguez's history or demeanor would have alerted Field or any other victim of Rodriguez's propensity for such extreme and carefully planned violence. Plainly, these circumstances bear directly on any determination of Rodriguez's insight and public safety. The Board could reasonably rely on them in determining Rodriguez's suitability for parole.

In this regard, and with due respect, we reject our colleague's apparent conclusion that because the homicide which gave rise to Rodriguez's conviction grew out of marital infidelity, it was a crime of passion which required no further explanation on Rodriguez's part. We first note that not all love triangles result in commission of a murder. Moreover, the record here shows that with the help of an accomplice Rodriguez carefully planned not only Field's execution but an elaborate scheme to escape detection and

responsibility. That crime plainly grew out of more than the "stress" Rodriguez's attorney suggested. Thus, the challenge which the Board was faced was identifying the reasons why *this* love triangle and Rodriguez's mental state resulted in the obviously deliberate murder of Field. These concerns were not addressed by Rodriguez.

In sum, the Board's conclusion is supported by the record.[6]

II

The Three-Year Minimum Denial Period for Parole Consideration Does Not Violate the Prohibition Against Ex Post Facto Laws

At the conclusion of the 2010 parole hearing, the Board announced Rodriguez would be eligible for another hearing in three years, in accordance with recently amended section 3041.5, subdivision (b)(3).[7] Rodriguez contends this statute, which was amended

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6 We likewise reject Rodriguez's argument the denial of parole on February 8, 2010, violated his federal right to due process. The federal habeas inquiry is limited to determination of whether Rodriguez was allowed an opportunity to be heard and was provided a statement of the reasons parole was denied. (*Swarthout v. Cooke* (Jan. 24, 2011) ___ US___, 131 S.Ct. 859, 2011 US LEXIS 1067.) The proceedings before the Board clearly met this standard.

7 Subdivision (b)(3) of section 3041.5 provides: "The board shall schedule the next hearing, after considering the views and interests of the victim, as follows: [¶] (A) Fifteen years after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the setting of parole release dates enumerated in subdivision (a) of Section 3041 are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the prisoner than 10 additional years. [¶] (B) Ten years after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the setting of parole release dates enumerated in subdivision (a) of section 3041 are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the prisoner than seven additional years. [¶] (C) Three years, five years, or seven years after any hearing at which parole is denied, because the criteria relevant to the setting of parole release dates enumerated in subdivision (a) of Section

in 2008 pursuant to Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law,"[8] violates state and federal constitutional protections against ex post facto laws. We disagree.

The amendment to section 3041.5, which now gives the Board discretion to schedule a parole hearing three, five, seven, ten or fifteen years after any hearing at which parole is denied, effects no change in Rodriguez's crime. (See *In re Brown* (2002) 97 Cal.App.4th 156, 160.) Nor does the amendment increase Rodriguez's sentence; rather, the amendment merely changes the "*administrative method* by which a parole release date is set . . . ." (*Ibid.*, citing *Cal. Dept. of Corrections v. Morales* (1995) 514 U.S. 499 [115 S.Ct. 1597] [concluding no ex post facto violation occurred when then-applicable section 3041.5, subdivision (b)(2)(B) allowed the parole board to defer subsequent hearings for up to three years for inmates convicted of multiple homicides because there was no retroactive increase in punishment]; and *In re Jackson* (1985) 39 Cal.3d 464, 473 [the 1982 amendment to section 3041.5, which allowed the parole board to schedule parole suitability hearings biennially instead of annually, did not violate ex post facto clauses of the state and federal Constitutions when applied to an inmate who committed his offense before the effective date because the "amendment did not alter the criteria by which parole suitability is determined"; it did not "change the criteria governing an

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3041 are such that consideration of the public and victim's safety requires a more lengthy period of incarceration for the prisoner, but does not require a more lengthy period of incarceration for the prisoner than seven additional years."

8 Ballot Pamp., Gen. Elec. (Nov. 4, 2008).

inmate's release on parole"; and "[m]ost important, the amendment did not entirely deprive an inmate of the right to a parole suitability hearing."].)

Moreover, we note the amended statutory language of Marsy's Law is subject to two new qualifying provisions, to wit: subdivisions (b)(4) and (d)(1) of section 3041.5. Subdivision (b)(4) of that statute provides: "The board may in its discretion, after considering the views and interests of the victim, advance a hearing set pursuant to paragraph (3) to an earlier date, when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the prisoner provided in paragraph (3)."

Subdivision (d)(1) of section 3041.5 states: "An inmate may request that the board exercise its discretion to advance a hearing set pursuant to paragraph (3) of subdivision (b) to an earlier date, by submitting a written request to the board, with notice, upon request, and a copy to the victim which shall set forth the change in circumstances or new information that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration of the inmate."

These amendments show the Board may grant, and the inmate may request (subject to certain other conditions/criteria set forth in subdivision (d) of section 3041.5) an earlier parole hearing. These additional procedural safeguards eliminate any ex post facto implications because they constitute "qualifying provisions that minimize or eliminate" (see *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 650) the "significant risk of

prolonging [petitioner's] incarceration." (See *Garner v. Jones* (2000) 529 U.S. 244, 245 [120 S.Ct. 1362] [in addressing the claim that application of the new parole board policy violated the ex post facto clause, the U.S. Supreme court emphasized that the governing regulations vested the Board "with discretion as to how often to set an inmate's date for reconsideration, with eight years for the maximum" (*id.* at p. 254) and that the parole board's "policies permit 'expedited parole reviews in the event of a change in [the inmate's] circumstance[s] or where the Board receives new information that would warrant a sooner review.' " (*Ibid.*)].)

DISPOSITION

The relief sought in the petition for writ of habeas corpus is denied.[9]

BENKE, Acting P.J.

I CONCUR:

IRION, J.

9 Because we deny Rodriguez's requested relief, we need not consider his additional argument the granting of a new parole hearing would require the Board at such a new hearing grant parole absent additional evidence.

Aaron, J., dissenting:

INTRODUCTION

The majority bases its conclusion that the record contains "some evidence" of Jose Rodriguez's current dangerousness on the " 'new talisman' for denying parole" (*In re Ryner* (2011) 196 Cal.App.4th 533, 547 (*Ryner*)), i.e., Rodriguez's purported lack of insight into what led him to kill Richard Field, Sr. However, the majority reaches this conclusion without discussing, much less distinguishing, *any* of the numerous cases that have been decided in the wake of *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*) in which courts have rejected the Board of Parole Hearing's (Board's) use of this criterion to deny an inmate parole. (See, e.g., *Ryner, supra*, at p. 550; *In re Rodriguez* (2011) 193 Cal.App.4th 85, 99 (*Rodriguez*); *In re Rico* (2009) 171 Cal.App.4th 659, 678–679 (*Rico*), abrogated on other grounds in *In re Prather* (2010) 50 Cal.4th 238; *In re Singler* (2008) 169 Cal.App.4th 1227, 1243.) These cases establish that, " 'lack of insight' when it is invoked as a reason to deny parole must be based on an identifiable and material deficiency in the inmate's understanding and acceptance of responsibility for his or her commitment offense." (*Rodriguez, supra*, at p. 99, fn. 9.) Because the record is devoid of any evidence of such a material deficiency in this case, and there is no other evidence in the record from which one could conclude that Rodriguez "constitutes a current threat to public safety" (*Lawrence, supra*, at p. 1212), I dissent.[1]

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1 The Attorney General does not dispute that Rodriguez lacks a criminal record other than the commitment offense, has a stable social history, and has shown signs of remorse for his commitment offense. The Attorney General does not deny that Rodriguez has viable parole

A. *The record contains no evidence that Rodriguez lacks insight into the reasons that he killed Field*

The record in this case unequivocally demonstrates that Rodriguez has long understood that the precursors to his killing Field were Rodriguez's affair with the victim's wife and the ensuing emotional turmoil that Rodriguez experienced when the victim discovered that affair and threatened Rodriguez at gunpoint in the weeks prior to the murder. Just days after the murder, Rodriguez told the police that "his sexual relationship with Rebecca" led to his killing Field. A 1991 psychiatric evaluation states, "*[Rodriguez] seems to understand the causative factors of his crime*" (italics added), and "the inmate reports that the crime was a crime of passion; he was having an affair with the victim's wife and the victim tried to kill him." In a 2002 life prisoner evaluation, Rodriguez indicated that the killing stemmed from "his affair with the victim's wife." A 2002 psychological report states, "[There was] considerable stress in the home before the murder due to the victim's suspicions of the affair and his teasing threats to kill Mr. Rodriguez." In a section entitled "Inmate Understanding of Life Crime," a 2007 mental health evaluation states that "[Rodriguez's] motivation was related to the affair he had

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plans and concedes that Rodriguez has comported himself in prison in a manner that will assist him in functioning within the law upon release. In addition, Rodriguez committed the crime as the result of significant stress in his life, and his advancing age reduces the probability of recidivism. Thus, Rodriguez meets *all* of the applicable regulatory criteria for parole suitability. (Cal. Code Regs., tit. 15, § 2402, subd. (d).) Further, the Board did not indicate that *any* unsuitability regulatory factors exist. (*Id.*, subd. (c).)

been having with the [43-year-old] victim's wife." Finally, at the 2010 suitability hearing, Rodriguez testified that the killing stemmed from his affair with Field's wife.

In short, the majority is simply incorrect when it asserts that, "the record before the Board offered no reasons why the crime occurred." Rather, the record demonstrates beyond a shadow of a doubt—as did the record in *Lawrence*—that the inmate has long understood that the killing occurred under "the stress of an emotional love triangle." (*Lawrence*, *supra*, 44 Cal.4th at p. 1225.)

The majority's attempt to justify the paramount importance that it accords to the lack of insight criterion in this case is similarly unpersuasive. In this vein, the majority parrots the language that the presiding commissioner used in denying Rodriguez parole, arguing that Rodriguez committed an "out of the blue" murder. Specifically, the majority states, "The need to understand the character traits that compelled Rodriguez to kill Field, and how those character traits had been dealt with by him while in prison was heightened because the crime came out of the blue."

If the majority intends to suggest that Rodriguez committed a random act of violence that was entirely unexplained (i.e., an "out of the blue" murder), that contention is belied by the undisputed facts of this case. Indeed, elsewhere in its opinion, the majority acknowledges that the murder stemmed from a "volatile" domestic situation, and that the "unstable" victim had "recently threatened Rodriguez with a gun because of the affair." If, however, the majority means that Rodriguez's commission of an act of violence was out of character for him, then that is a circumstance that would *support*, rather than detract from, his parole suitability. The majority cannot reasonably rely on

the fact that Rodriguez committed no violent acts prior to the commitment offense to justify the denial of parole.

The majority's conclusion that this court may uphold the Board's denial of parole on the nebulous ground that Rodriguez lacks insight because he has failed to demonstrate "the emotional forces or character flaws which caused him to commit [the murder]" is inconsistent with its apparent acknowledgement that Rodriguez's commission of the commitment offense was *not* representative of his basic character. In any event, there is simply no evidence in the record that Rodriguez poses a current threat to public safety because of a purported inability to explain the precise psychological mechanisms that might have led him to commit the crime. (*Rodriguez, supra,* 193 Cal.App.4th at p. 97 [inmate's failure to describe how "revenge or cultural or family loyalty issues" might have affected his decision to permit his brother "to bring a rifle into the car is not a material deficiency in [the inmate's] understanding and acceptance of responsibility for the crime" (*id*. at p. 100)].) On the contrary, Rodriguez's well documented recognition that the killing stemmed from his relationship with Field's wife and the conflict with Field that this relationship engendered, demonstrates that he cannot be deemed a threat to public safety because of a purported failure to understand the reasons for the killing.

In sum, in light of the undisputed evidence that Rodriguez has long understood that he committed the killing under "the stress of an emotional love triangle" (*Lawrence*, *supra,* 44 Cal.4th at p. 1225), and the undisputed evidence that he has not committed a single act of violence either before or since, the majority's endorsement of the Board's

speculation that, if paroled, Rodriguez might commit an "out-of-the blue . . . act of extreme violence" is, at best, unpersuasive.

B. *Rodriguez's refusal to admit that he committed a crime of which he was acquitted is not evidence that he lacks insight into the commitment offense*

In the absence of any evidence that Rodriguez lacks insight into the reasons for his commission of the commitment offense, the majority is reduced to arguing that Rodriguez's purported "lack of insight" can be found in his refusal to admit, either to the Board or to prison psychologists, that he premeditated the murder—notwithstanding the fact that the jury found him *not guilty* of first degree murder. The majority cites Dr. Richard Kendall's report in which he states, "It would seem the inmate now chooses to remain silent because he continues to maintain that the crime was committed in self-defense"; Dr. Katherine Kropf's statement that Rodriguez's "account of the crime was disingenuous and distorted"; and Rodriguez's October 2009 statement that the "crime was the result of self-defense." The majority proceeds to conclude, "[O]ver the last two decades Rodriguez has made no attempt to deal with *the very issues needed to be resolved* in order to convince the Board that he was not a danger if released." (Maj. opn. at p. 16, italics added.) Thus, notwithstanding the majority's acknowledgement that the Board "is precluded from requiring an inmate to admit guilt," it is clear that Rodriguez's failure to admit that he premeditated the murder is the unresolved "issue[]" that the majority states the Board may insist be "resolved" before it grants Rodriguez parole.

In so holding, the majority effectively replaces the sensible requirement that Rodriguez demonstrate "insight" into the reasons for his commission of the crime at issue (i.e., demonstrate an understanding of the motivational forces behind one's actions, thoughts, or behavior) with a requirement that he admit facts that demonstrate his commission of an offense even more serious than the offense of which he was convicted. Such a holding is in conflict with administrative regulations that preclude the Board from denying parole based on an inmate's refusal to discuss the facts of the crime,[2] and with numerous cases that have held that a petitioner's refusal to admit that a crime was committed in a particular manner does not constitute some evidence of present dangerousness. (See, e.g., *In re Jackson* (2011) 193 Cal.App.4th 1376, 1391 [inmate's continued insistence that he did not commit murder did not constitute evidence that he lacked insight into the crime and remains a danger to public safety]; *In re Twinn* (2010) 190 Cal.App.4th 447, 467 ["Twinn's failure to accept a version of the facts is not evidence in and of itself that Twinn continues to pose a danger to public safety"]; *In re Moses* (2010) 182 Cal.App.4th 1279, 1310 ["Moses's recollection of events, to the extent it differed from other evidence, is insignificant in light of his acknowledgment that he murdered Rhodes and [his] repeated expressions of remorse"]; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112, overruled on other grounds in *In re Prather*, *supra*, 50 Cal.4th

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2 California Code of Regulations, title 15, section 2236 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."

238 [inmate's "continuing insistence that the killing was the unintentional result of his foolish conduct (a claim which is not necessarily inconsistent with the evidence) does *not* support the Board's finding that he remains a danger to public safety"]; *Rico, supra*, 171 Cal.App.4th at p. 678 [rejecting as unpersuasive the Warden's argument "that '[b]ecause Rico did not discuss the crime or his insight and remorse, the Board may reasonably assume' he has not gained sufficient insight into the crime, making the commitment offense probative of current dangerousness"].)

C. *The majority's holding that the Board may deny parole because Rodriguez's version of the crime differs from an alleged accomplice's hearsay statements that lack any indicia of reliability, is particularly unjust*

The majority's failure to apply the case law discussed above is particularly unjust in this case because it is far from certain that Rodriguez committed a premeditated murder. The majority's suggestion that Rodriguez committed first degree premeditated murder, notwithstanding the fact that the jury acquitted him of that crime, is *not* based on the Board's description of the facts of the commitment offense, this court's opinion affirming Rodriguez's conviction, or even the evidence presented at Rodriguez's trial. Rather, the majority relies on the hearsay statements of alleged accomplice, Victor Arzante, that were obtained by Mexican authorities and that appear only in a probation report. Indeed, there is nothing in the record that indicates that the People relied on Arzante's statements in any manner in prosecuting Rodriguez.

Further, the majority's assertion that Rodriguez's version of the commitment offense is "wholly unsupported" is simply incorrect. Rodriguez's contention that he killed the victim in self-defense cannot be deemed to "strain credulity" (*In re Palermo, supra,* 171 Cal.App.4th at p. 1112)—the standard that the majority appears to adopt in determining whether the Board may rely on its disbelief of an inmate's version in denying parole. (See maj. opn. at p. 19, fn. 5, citing and quoting *In re Palermo*.) This is particularly so in light of the undisputed fact that the victim threatened Rodriguez at gunpoint in the weeks before the killing. To support its assertion that parole was properly denied because Rodriguez's version of the commitment offense differs from the hearsay version of the alleged accomplice, the majority provides a lengthy quotation from *In re Palermo,* describing the facts of two other cases, *Shaputis*, *supra*, 44 Cal.4th 1241 and *In re McClendon* (2003) 113 Cal.App.4th 315 (*McClendon*), in which courts concluded that the Board may deny parole in part based on a comparison of the "inmate's account of the crime with official accounts[3] of the facts surrounding the commitment offense."[4] (Maj. opn. at pp. 17-18.) However, the majority fails to provide any discussion of the

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3 In this case, the "official accounts" to which the majority euphemistically refers, are the unsubstantiated hearsay statements of an alleged accomplice obtained by foreign authorities, which were not presented at the inmate's criminal trial.

4 The majority also quotes the *In re Palermo* court's discussion of a third case, *In re Van Houten* (2004) 116 Cal.App.4th 339, in which the inmate's version of the factual circumstances of the offense did not differ from the Board's.

applicability of these cases to the present case.[5] The cases are clearly distinguishable. In *Shaputis*, the defendant's version of the commitment offense was "contrary to undisputed evidence" (*In re Palermo*, *supra*, 171 Cal.App.4th at p. 1111), while in *McClendon*, the defendant's claim that the killing was unplanned was contrary to "overwhelming evidence." (*In re Palermo*, *supra*, at p. 1111.) In this case, in stark contrast, Rodriguez's version of the offense is *not* contrary to undisputed or overwhelming evidence, and in fact, arguably comports with the undisputed fact that the victim was "unstable" and that the parties to the love triangle were in emotional turmoil at the time of the commitment offense.

D. *The majority's statement that Rodriguez has failed to take "steps" to ensure that he would not commit future acts of violence is contrary to the record and to the Board's own findings*

Lacking any evidentiary support to uphold the Board's finding that Rodriguez lacks insight into his *past* actions, the majority briefly suggests, *contrary to the Board's own findings*, that Rodriguez has failed to take "steps" to ensure that he will not commit an act of violence in the *future*. In this regard, the majority states that the record contains no evidence of "what steps had been taken by Rodriguez to assure [the Board] it [i.e., future violence] would not happen again if he were released." Yet, two paragraphs later, the majority outlines the steps that Rodriguez has taken to reduce his risk for committing

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[5] The majority here is apparently heeding its own admonition that this court must resist the temptation to "compare the facts of one case to another."

future acts of violence, including reading materials from a course entitled, Alternatives to Violence, and using the principles of "self-confrontation" that he learned in another self-help class. In addition, as the majority notes, Rodriguez testified at the parole hearing that he had learned how to avoid problems in classes that he had taken in prison. Rodriguez also agreed with the presiding commissioner that his advancing age made it easier for him to avoid confrontations.

At the conclusion of Rodriguez's parole hearing, the panel members commented that Rodriguez had been "a very positive performer during his incarceration," and noted that Rodriguez had been involved in basic education courses and various self-help and religious programs.[6] Thus, the majority's assertion that the record contains no evidence of Rodriguez's efforts to reduce his risk of committing future violent acts is belied by both the record and the Board's factual findings.

CONCLUSION

In what is the single most telling statement of the majority's opinion, the majority contends that this court must resist the temptation to "compare the facts of one case to another," apparently in an attempt to dilute the significance of the obvious similarities of this case to *Lawrence*. The majority's approach creates an arbitrary and inconsistent

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6 A 2008 mental health evaluation summarizes this record by stating, "In regards to therapy and self-help groups the inmate has continually participated in AA [Alcoholics Anonymous], NA [Narcotics Anonymous], anger management and parenting classes. He has received five certificates for his participation in AA. He has received 41 . . . chronos commending him on his positive behaviors such as his AA participation, NA participation, remaining discipline free, programming in a positive fashion and his work in religious services."

parole denial jurisprudence that is directly at odds with our own Supreme Court's seminal decisions in this context. (See *In re Shaputis*, *supra*, 44 Cal.4th at p. 1259 [stating "[t]his is not a case, like *Lawrence*," and proceeding to compare the facts in *Lawrence* to the facts in *Shaputis*].) Courts have frequently undertaken such comparisons in their consideration of parole denial decisions, as courts commonly do in many areas of the law. (See, e.g., *In re Dannenberg* (2009) 173 Cal.App.4th 237, 254 (*Dannenberg*) [comparing the facts of *Lawrence* with those at issue in *Dannenberg* stating "it is arguable that the record before us even more strongly negates current dangerousness than did the record in *Lawrence*"].)

A faithful application of *Lawrence*, which the majority's unique judicial philosophy relieves it from undertaking, makes clear that Rodriguez's case for parole is equally, if not more, compelling than Lawrence's. To begin with, like Lawrence, Rodriguez had no criminal history prior to the commitment offense, has followed the rules in prison, and has participated in numerous self-help and vocational programs while in prison. Further, the record unequivocally demonstrates—as did the record in *Lawrence*—that the commitment offense was perpetrated under "the stress of an emotional love triangle." (*Lawrence*, *supra*, 44 Cal.4th at p. 1225.) Moreover, the Supreme Court noted that Lawrence's murder of her lover's wife was "an isolated incident, committed while petitioner was subject to emotional stress that was unusual or unlikely to recur." (*Shaputis*, *supra*, 44 Cal.4th at p. 1259.) The record establishes that Rodriguez's murder of Field was committed while he was in a similar emotionally stressful situation that is not likely to recur.

Lawrence committed a *first degree murder* by planning to shoot and stab a completely blameless victim (her lover's wife) multiple times, and executing that plan. (*Lawrence*, *supra*, 44 Cal.4th at p. 1193.) Rodriguez, in contrast, committed a *second degree murder* by bludgeoning to death a man who had recently threatened to kill him, at gunpoint. Lawrence callously described the killing to family members as a "birthday present," remained a fugitive for many years, and upon being arrested by the police, claimed that the victim's husband had committed the murder. (*Ibid.*) Rodriguez confessed to the killing within days of the offense and has long expressed his remorse for his actions. While Lawrence displayed features of three psychological disorders—borderline personality disorder, antisocial disorder, and avoidant personality disorder during the initial period of her incarceration (*id*. at pp. 1194-1195), there is no evidence that Rodriguez has ever suffered from any mental illness.

In short, the fact that Sandra Lawrence was released on parole while Jose Rodriguez will remain behind bars based solely on the makeweight rationalization that he "lacks insight" into his crime, lays bare the arbitrariness of the majority's application of the law governing the denial of parole in California.

AARON, J.