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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JESUS HERNANDEZ, on Habeas Corpus.	H036515 (Santa Clara County Super. Ct. No. 158358)

In May 1993, following a court trial, petitioner Jesus Hernandez was convicted of second degree murder and was found to have personally used a firearm in committing that murder. He was sentenced to 15 years to life, plus two years, for a total term of 17 years to life.

On April 22, 2010, the Board of Parole Hearings (Board) found Hernandez unsuitable for parole. The Santa Clara County Superior Court subsequently granted Hernandez's petition for a writ of habeas corpus and ordered the Board to conduct a new hearing for him within 30 days. The superior court found the Board used a comparative analysis formula rather than articulating a nexus between the life crime and its conclusion that Hernandez is unsuitable for parole. The court also found the Board erred in denying parole based on Hernandez's failure to admit responsibility for the life crime.

Respondent S.M. Salinas, warden of the Deuel Vocational Institution (Warden), appeals from the order. He argues that there is some evidence in the record to support the conclusion that Hernandez poses a current risk of danger to society. Alternatively, Warden argues the superior court improperly ordered the Board to conduct a new hearing within 30 days, despite the Board's statutory obligation to provide 90 days' notice of a parole hearing to interested parties.

Hernandez raises a constitutional challenge to the 2008 amendments that Marsy's Law made to Penal Code section 3041.5,[1] claiming those amendments violate the ex post facto clauses of the federal and California Constitutions. As explained below, we reject that argument.

We agree there was some evidence to support the Board's conclusion that Hernandez was unsuitable for parole and shall reverse. We need not, and do not, reach the alternative argument that the superior court erred in ordering the Board to conduct a new hearing within 30 days.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The 2010 Board hearing

1. The life crime

The Board incorporated by reference the facts relating to the commitment offense from the probation report, and summarized those facts as follows.

"On 10/24/82, deputies were dispatched to a makeshift race track in Morgan Hill, California. While en route, they discovered that family members had already transported the victim to the hospital. Deputies then split their resources. Some proceeded to the hospital while others responded to the race track to preserve any evidence and interview witnesses. At the hospital, the victim's son informed deputies that their father raced horses on a non-professional basis. While at the track earlier in the day, they tried to arrange a race. When this proved unsuccessful, he decided to play poker in the back of his pickup truck in the camper shell instead. Near twilight, the victim's son was standing about 50 yards from the truck when he heard two or three shots. When a friend yelled that his father had been hit, he went toward the truck, saw a man, later identified as

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[1] The Marsy's Law amendments to Penal Code section 3041.5 went into effect on November 5, 2008, after voters approved Proposition 9, otherwise known as the "Victims' Bill of Rights Act of 2008: Marsy's Law." (Pen. Code, § 3041.5; Cal. Const., art. I, § 28.)

Hernandez, walking away from [*sic*], against the flow of the gathering crowd. He approached Hernandez, who pulled a handgun and pointed it at him. He stopped and Hernandez ran to a vehicle and drove away. Sometime later, investigating officers were contacted by a witness who said that he heard some shots and saw Hernandez jump out of the pickup truck. When that witness yelled at him, Hernandez pulled out his handgun and pointed it at him. The witness ran to his horse trailer and hid while Hernandez ran to his vehicle and sped away. Further investigation revealed that the race track owner had overheard an individual claim that he knew the identity of the suspect. Deputies made contact with the individual, learned that he heard shots, and witnessed Hernandez jump out of the camper shell. He believed he heard Hernandez call out to a mutual friend for his car keys. This mutual friend identified Hernandez to deputies and gave his motel address. Deputies obtained a warrant, and proceeded to search Hernandez's motel room, and found the weapon that killed the victim. Hernandez never returned to the motel. Ten years later, Hernandez was attempting to purchase a handgun, and it came to the attention of investigators who then traced him to his daughter's residence where he was arrested without incident."

The Board also quoted from Hernandez's discussion of the life crime as set forth in his 2009 comprehensive risk assessment report, as follows: "Mr. Hernandez offered various, minimal information regarding his involvement in the life crime. He has consistently denied being the assailant, but rather maintained that he was a witness to the shooting. Mr. Hernandez indicated that the true assailant was an acquaintance of his that he liked to play cards with. He did not know that the man carried a weapon. On the day of the life crime, he and his friend began playing cards with the victim. When the two men began arguing about the game, Mr. Hernandez returned to his vehicle. As he was walking, he heard two shots and saw his friend walking to the car. Mr. Hernandez felt surprised. He asked his friend what had occurred, and learned there had been an argument. When asked why he did not try to help the victim or call the police, Mr.

Hernandez reported that someone was shooting at them, and they needed to escape quickly. Mr. Hernandez noted that his friend, the alleged true assailant, was never charged or arrested in connection with the crime."

Through an interpreter, Hernandez confirmed this was what he told the evaluator and, when asked by the Board why he never told the police who the shooter was, Hernandez responded, "Because they never asked me the question." He advised the Board the true assailant was a man named Manuel Ortega. According to Hernandez, the witnesses saw the car that Hernandez was driving and thought he was the shooter, but they did not realize Ortega was with him in the car. He told the police the truth about what happened when he was arrested 10 years later, but because he and Ortega were being shot at, they did not wait for the police when the killing occurred.

The Board asked how he felt about his sentence and Hernandez responded, "I feel bad because the investigator, they didn't do a deep analysis of what is supposed to be, and I feel bad about that." When asked what he thought about the victim, Hernandez said, "Well, it was the wrong thing to do. I feel bad that this happened." He repeated he was afraid someone was going to kill Ortega and thought they might kill him too. After dropping Ortega off in Salinas, Hernandez went to Fresno for two days. A friend told him "the place was surrounded by police," so he got scared and went back to Fresno. Hernandez never asked Ortega why he shot the victim and Ortega never told him.

2. Social history

Hernandez was born September 23, 1950, in Durango, Mexico. He is the youngest of nine siblings, four of whom are deceased. He finished the sixth grade in elementary school while in Mexico. He married in Mexico and had three children, two of whom died in childhood. Since his incarceration, he and his wife separated and they are no longer romantically involved.

Leaving his wife and surviving daughter behind, he entered the United States illegally in 1978 and has since been deported perhaps two or three times. Hernandez

admitted to using two or three false names. He claimed to keep in touch with his family members through letters, but also said they did not know why he was incarcerated and had never asked.

3. Prior criminal record

Hernandez was convicted in 1981 for carrying a concealed weapon in his vehicle. He explained to the Board that he was a passenger in the car and one of the other passengers handed him the gun when they were stopped by the police. Hernandez tried to hide the gun under the floor mat, which led the police to believe that it was his gun.

In 1983, Hernandez was convicted for felony possession of heroin and sentenced to three years in prison. In 1990, he was convicted of possessing cocaine for sale, but told the Board that the cocaine was for his personal use. At the time he was using drugs, he did not believe he had a drug problem, because he was only using small quantities of heroin and cocaine, "just enough not to harm myself."

4. Parole plans

Hernandez has an immigration hold and would be deported to Mexico if paroled. Hernandez's daughter, Judith, wrote a letter to the Board stating Hernandez would not return to the United States if paroled, but would have food, housing and work in Mexico. Fidelia Lares Hernandez wrote that Hernandez would live in Abuya, Sinaloa, Mexico, and "work the land owned by his mother." Fidelia also indicated Hernandez would "receive what the earth produces" and that "[h]is friends, family and brothers [were] willing to give all the help he needs."

5. Institutional record

At the time of his parole hearing, Hernandez's classification score was 19, the mandatory minimum. He has taken English as a second language class for 13 years, but still cannot speak English. Hernandez no longer attends school and has not obtained a GED. His TABE test scores indicated a reading level of 3.5 and a total grade point level of 2.4, even though his screening for developmental disability showed he had normal

cognitive function. Hernandez admitted that he has difficulty learning, though he tries very hard.

While incarcerated, Hernandez obtained laudatory chronos for participation in AA from 2006 through 2009. He admitted to not having read the steps, and when asked if it was important for him to know and work the steps, he replied, "The most important thing for me is not to drink today, nor tomorrow, never." His relapse prevention plan is to not drink or use drugs of any kind.

Hernandez has been working as an apprentice carpenter since 2005. He also attended Spanish-language classes in anger management and "Breaking Barriers."

During his incarceration, Hernandez received one CDC-115 (violations of institutional rules) in 1998 for unauthorized alteration of clothing. He received CDC-128As in 1995 and 1998 for failure to report to school.

6. 2009 psychological evaluation

In his 2009 evaluation, Hernandez told the psychologist that he never sold narcotics or engaged in criminal activity to support himself. He also told the psychologist that he participates in AA because "it is expected" of him.

In the section entitled "Remorse and Insight Into Life Crime," the evaluator wrote, "Despite overwhelming evidence, including eye witness testimony and possession of the murder weapon, Mr. Hernandez continues to deny responsibility for the life crime. Furthermore, even if Mr. Hernandez did not commit the crime, he has minimal remorse for the events that occurred and acknowledged that he is more focused on the injustice he has suffered than the consequences for the victim. It was also evident in Mr. Hernandez's descriptions of his involvement in other crimes, that he minimized his responsibility and downplayed the extent of his criminal behavior."

The evaluation concluded that Hernandez presented a medium risk of violent recidivism, a medium risk of general recidivism and an overall "moderate risk for violence in the free community."

7. Denial of parole

The Board denied parole to Hernandez for another seven years, finding that he posed an unreasonable risk of danger to society or threat to public safety if released from prison. The Board cited the following factors in support of its denial: the commitment offense; Hernandez's prior criminal history and failure to profit from prior efforts to correct his criminality; his unstable social factors, including drug and alcohol use and dropping out of school; his lack of a realistic relapse prevention plan; and his lack of credibility about the life crime. The Board also noted that the 2009 psychological evaluation found Hernandez presented a moderate risk of violent recidivism.

On the positive side, the Board commended Hernandez for his limited disciplinary history and his participation in AA, though it expressed concern that he was only attending AA in order to get out of prison.

B. Petition for writ of habeas corpus

On October 20, 2010, Hernandez filed a petition for writ of habeas corpus, alleging that the Board's decision to deny him parole was not supported by the evidence. He stated that the Board "failed to articulate a rational nexus between the unchanging factors of [his] offense, prior criminality and current dangerousness[; and] even assuming [his] insight is less than perfect there is no evidence that it makes him currently dangerous."

The superior court issued an order to show cause and, on January 10, 2011, granted the petition, faulting the Board for failing to "employ the new nexus test" of *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), and "[i]nstead . . . proceed[ing] pursuant to the disapproved comparative analysis formula whereby the crime itself is given 'weight' against parole if it involves more than the minimum elements." The court's order also found the Board improperly denied parole "based upon concerns with Petitioner's insight, remorse, and acceptance of responsibility which could only be

satisfied if Petitioner was to admit his guilt." The Board was ordered to provide Hernandez with a new hearing within 30 days.

Warden appealed and subsequently petitioned for a writ of supersedeas staying the superior court's order. We granted the petition.

II. DISCUSSION

A. Standard of review

"[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." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 (*Rosenkrantz*).)

"Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board's] decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some

evidence in the record that supports the [Board's] decision." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

Where the superior court grants habeas relief without an evidentiary hearing, we review the matter de novo. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

B. *Parole suitability and unsuitability criteria*

The general standard for a parole unsuitability decision is that "a life prisoner shall be found unsuitable for and denied parole if in the judgment of the [Board or the Governor] the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code of Regs., tit. 15, § 2402, subd. (a).)[2] A nonexclusive list of factors which demonstrate an inmate's unsuitability for parole include: the offense was committed in an especially heinous, atrocious, or cruel manner; the inmate possesses a previous record of violence; the inmate has an unstable social history; the inmate has a lengthy history of severe mental problems related to the offense; and the inmate has engaged in serious misconduct while in prison. (§ 2402, subd. (c).)

Relevant factors, also nonexclusive, tending to demonstrate suitability for parole include the inmate's lack of a prior record of violent crime; the inmate's stable social history; the inmate's expressions of remorse; the inmate is of an age that reduces the probability of recidivism; the inmate has made realistic plans for release or has developed marketable skills that can be put to use upon release; and the inmate has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)

The factors serve as generalized guidelines and " 'the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board].' " (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 654.) Parole release decisions are

[2] Unspecified section references are to title 15 of the California Code of Regulations.

essentially discretionary; they "entail the Board's attempt to predict by subjective analysis" the inmate's suitability for release on parole. (*Id*. at p. 655.) Such a prediction requires analysis of individualized factors on a case-by-case basis and the Board's discretion in that regard is " ' "almost unlimited." ' " (*Ibid*.) However, as the California Supreme Court later clarified, "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.) Accordingly, in exercising its discretion, the Board "must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation." (*Id*. at p. 1219.) That "requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision--the determination of current dangerousness." (*Id*. at p. 1210.)

Although *Lawrence* did not alter the standard of judicial review of parole decisions set forth in *Rosenkrantz*, it did emphasize that the standard is "not toothless." (*Lawrence*, *supra*, 44 Cal.4th at p. 1210.) "[J]udicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights. If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry." (*Id*. at p. 1211.) "Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212.) Stated another way, not only must there be some evidence to support the Board's factual

findings, there must be some connection between those findings and the conclusion that the inmate is currently dangerous.

An inmate's lack of insight into his crime and failure to take responsibility for it may constitute some evidence that he currently poses an unreasonable danger to society. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1261.) Section 2402, subdivision (d)(3) provides that a circumstance tending to show suitability for parole is the following: "Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense." Conversely, a lack of remorse can therefore be considered as a factor tending to show an inmate's *un*suitability for parole.

C. There was sufficient evidence to show Hernandez's current dangerousness

In denying parole, the Board relied upon the following factors: the commitment offense; Hernandez's prior criminal history and failure to profit from prior efforts to correct his criminality; his unstable social factors, including drug and alcohol use; his lack of a realistic relapse prevention plan; his lack of credibility about the life crime; and his most recent psychological evaluation.

The superior court's order vacating the Board's decision focused on the Board's statement that it was " 'weighing the considerations provided in the California Code of Regulations, Title 15.' " Having seized on what it apparently viewed as a damning admission by the Board that it was ignoring *Lawrence* and had "returned to a formula in order to deny parole," the superior court consequently neglected to consider the remainder of the Board's decision where it explained the basis for its conclusion that Hernandez was unsuitable for parole. This was error.

The "nexus" analysis described in *Lawrence* is straightforward. The Board must discuss the factors that demonstrate why a particular inmate is or is not suitable for parole and connect those factors to its ultimate conclusion that the inmate would present a

danger to public safety if released. "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.)

While the Board initially--and perhaps formulaically--listed the commitment offense as its "first consideration," saying that it showed "an exceptionally callous disregard for human suffering," this statement reflects nothing more than the Board's adherence to the order in which the factors are set forth in the regulations. Unsuitability factors are listed in section 2402, subdivision (c), and the first unsuitability factor mentioned is the commitment offense. (§ 2402, subd. (c)(1).) The Board can hardly be faulted for discussing the factors in the same order in which they appear in the regulations.

After listing the various unsuitability factors, the Board noted "the primary issue for this decision is the obvious. You know, Mr. Hernandez, you blame others for this crime. You blame your friend. You said that he is the one who killed the victim. You continue to maintain your innocence despite the evidence that was presented in court. *You're not very credible about the crime*. Your story does not make any sense to this Panel. Your actions after the situation do not make any sense of how you handled the situation. You have absolutely no insight into the causative factors of your conduct. When I asked you to explain why you did what you did, *frankly*, *none of it made any sense*. You left. You ran, but you weren't the one who committed the crime." (Italics added.)

There is some evidence to support the Board's findings about Hernandez's lack of credibility. He denies responsibility for the shooting, though three separate witnesses saw him, not someone else, either leaving the camper or leaving the area of the camper immediately after the shooting. Two of those witnesses said that Hernandez, not someone else, pointed a gun at them as he fled the scene. The murder weapon was found

in his motel room. Hernandez told the Board that he drove the real shooter from the crime scene to Salinas, but Hernandez never once asked him during that drive why he shot the victim.

Neither the superior court, nor this court, can disturb the Board's finding that Hernandez was not credible. (*In re Tripp* (2007) 150 Cal.App.4th 306, 318.) Although lack of credibility does not appear as one of the regulatory unsuitability factors, it is an appropriate factor for consideration nonetheless. Where there is evidence that the inmate is deceitful and deflects blame for his own actions onto others, that evidence is indicative that the inmate constitutes a risk of current dangerousness to public safety if released.

In addition, the Board relied on Hernandez's most recent psychological evaluation, which found that he presented a medium risk of violent recidivism, a medium risk of general recidivism and an overall moderate risk for committing violence if released. This unfavorable report further supports the Board's conclusion that Hernandez is unsuitable for parole.

The Board also specifically expressed its concerns about Hernandez's lack of a realistic relapse prevention plan. The 2009 psychological evaluation noted that Hernandez reported he was only attending AA because it was required. The Board believed this statement to be true since Hernandez admitted at his parole hearing to not knowing the steps despite having certificates showing attendance at AA meetings from 2006 through 2009. Hernandez advised the Board that his strategy to avoid relapse was, in effect, to not relapse. He would simply not drink or do drugs. This evidence supports the Board's conclusion that Hernandez is "in total denial about [his] drug problem, and [is] doing nothing to address [his] substance abuse issues."

Based on this record, there is sufficient evidence to support the Board's conclusion that Hernandez is presently dangerous and unsuitable for parole at this time.

D. Hernandez's denial of responsibility for the life crime

Penal Code section 5011, subdivision (b) provides: "The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed."[3] Accordingly, under the statute, "[t]he Board is precluded from conditioning [an inmate's] parole on an admission of guilt." (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1110 (*Palermo*), disapproved on other grounds in *In re Prather* (2010) 50 Cal.4th 238, 252.)

A similar prohibition can be found in section 2236, which provides in part: "The facts of the crime shall be discussed with the prisoner to assist in determining the extent of personal culpability. 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."

The superior court found the Board violated Penal Code section 5011 by using Hernandez's failure to admit his guilt as evidence of his lack of insight. This issue was addressed in both *Palermo* and *In re McDonald* (2010) 189 Cal.App.4th 1008 (*McDonald*), but we think those cases are dissimilar.

In *Palermo*, the petitioner, Darin Palermo, shot and killed his former girlfriend. At trial, Palermo admitted that he shot the victim, but claimed it was accidental. The jury rejected Palermo's claim and convicted him of second degree murder, rather than manslaughter. (*Palermo*, *supra*, 171 Cal.App.4th at p. 1100.) At his parole hearing, evidence was introduced showing that Palermo still believed a conviction for manslaughter was " 'more appropriate' " because " '[h]e never meant to kill her.' " (*Id.* at p. 1104.) The Board denied Palermo parole due in part to his lack of " 'insight' " into

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[3] As of July 1, 2005, any reference to the "Board of Prison Terms" in the Penal Code refers to the Board of Parole Hearings. (Pen. Code, § 5075, subd. (a).)

the commitment offense, and encouraged Palermo " 'to continue to work in the area of self-help to continue to build insight.' " (*Id.* at p. 1105.) The Court of Appeal held that the decision to deny parole was erroneous and rejected the argument that "the Board's concerns about [Palermo's] insight were appropriate and were not an indirect requirement he admit he is guilty of second degree murder." (*Id.* at pp. 1110-1111.)

In reaching its decision, the *Palermo* court examined other cases in which the inmate maintained his innocence, stating: "Here, in contrast to the situations in *Shaputis* and [*In re McClendon* (2003) 113 Cal.App.4th 315], [Palermo'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 [*In re Van Houten* (2004) 116 Cal.App.4th 339], *Shaputis*, and *McClendon*, [Palermo] 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." (*Palermo*, *supra*, 171 Cal.App.4th at p. 1112.)

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

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

In reaching this decision, the *McDonald* court stated: "[L]ack of insight into the nature and magnitude of the offense, is, without question, a proper factor for the Governor's consideration in determining whether the inmate poses a current threat to public safety. [Citation.] However, the conclusion that there is a lack of insight is not some evidence of current dangerousness unless it is based on evidence in the record before the Governor, evidence on which he is legally entitled to rely. That evidence is lacking here, as the Governor cannot rely on the fact that the inmate insists on his innocence; the express provisions of Penal Code section 5011 and section 2236 of title 15 of the California Code of Regulations prohibit requiring an admission of guilt as a condition for release on parole. [¶] The Governor's finding in this case is phrased in terms of McDonald's denial of involvement in the crime; he suggests no other basis on which to find a lack of insight. Were this sufficient, however, it would permit the Governor to accomplish by indirection that which the Legislature has prohibited. Had his statement of reasons indicated that the Governor believed the inmate would pose a threat to public safety so long as the inmate continued to assert that he had not participated in the crime, reversal would be certain. The use of more indirect language, yielding the same result, cannot compel a different conclusion." (*McDonald*, *supra*, 189 Cal.App.4th at p. 1023.)

The present case is more analogous to *Shaputis* than it is to *Palermo* and *McDonald*. The Board denied parole based, in part, on its findings that Hernandez's version of the life crime was simply not credible and there is sufficient evidence to support the Board's findings on this issue. Hernandez said he had left the camper and

was already at his car when the shooting occurred. The real shooter--Hernandez's friend--gave him the gun sometime afterwards and Hernandez left it in his motel room. However, as we discussed above, three independent witnesses saw Hernandez--not someone else--leaving the scene immediately after the shooting. Two of those witnesses said that Hernandez--not someone else--pointed a gun at them when they tried to stop him. The murder weapon was found in Hernandez's motel room. While Hernandez's version of events is not physically impossible, the Board was certainly justified in finding that it strained credulity.

In addition, unlike in *McDonald*, Hernandez's denial of responsibility for the commitment offense was only one of several factors that the Board relied on. Here, the interrelation of Hernandez's unrealistic approach to preventing future drug and alcohol abuse, the circumstances of his commitment offense, and his most recent psychological assessment provide some evidence supporting the Board's decision, even if we ignore his lack of insight into the crime. The Board's conclusion that Hernandez lacks credibility by denying responsibility for the crime is not, under these circumstances, unlawful.

E. Ex post facto challenge to Marsy's Law

Hernandez contends the 2008 amendments that Marsy's Law made to Penal Code section 3041.5 violate the ex post facto clauses of the federal and California Constitutions.[4] Hernandez argues that the amendments made his punishment "more burdensome," because they "add[] to the penalty already imposed." We disagree.

Both the federal and state Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) This prohibition is based on the principle that "persons have a right to fair warning of that conduct which will give rise to criminal

[4] The California Supreme Court is currently considering this issue. (*In re Vicks* (2011) 195 Cal.App.4th 475, review granted July 20, 2011, S194129; *In re Russo* (2011) 194 Cal.App.4th 144, review granted July 20, 2011, S193197.)

penalties . . . ." (*Marks v. United States* (1977) 430 U.S. 188, 191.) Thus, laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts" are unconstitutional. (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; *People v. Alford* (2007) 42 Cal.4th 749 (*Alford*).)

However, "[a] change in the law that merely operates to the disadvantage of the defendant or constitutes a burden is not necessarily ex post facto." (*People v. Bailey* (2002) 101 Cal.App.4th 238, 243.) California's ex post facto law is analyzed in the same manner as the federal prohibition. (*Alford*, *supra*, 42 Cal.4th at p. 755.)

Pre-Marsy's Law versions of Penal Code section 3041.5 provided for annual parole suitability hearings for inmates who had been denied parole, but gave the Board discretion to defer subsequent hearings for two years (and up to five years for life term inmates convicted of more than one murder) if it was not reasonable to expect parole would be granted before that. (See *In re Brown* (2002) 97 Cal.App.4th 156, 158 [relating the history of section 3041.5].) The 2008 amendments gave the Board discretion to schedule subsequent suitability hearings 15, 10, seven, five, or three years after a parole denial. (Pen. Code, § 3041.5, subd. (b)(3).)[5] This means that instead of issuing one- to

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[5] Penal Code section 3041.5, subdivision (b)(3) 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 . . . 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 . . . 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 . . . are such that consideration of the public and victim's safety requires a more lengthy period of (continued)

five-year denials, as in the past, the Board now issues denials ranging from a minimum of three years to a maximum of 15 years.

The United States and California Supreme Courts have previously held that statutes amending procedures to decrease the frequency of parole suitability hearings do not violate the ex post facto clause. (*California Dept. of Corrections v. Morales* (1995) 514 U.S. 499 (*Morales*); *In re Jackson* (1985) 39 Cal.3d 464 (*Jackson*).) In *Morales*, the United States Supreme Court rejected an ex post facto challenge to the constitutionality of a 1981 amendment to Penal Code section 3041.5. (*Morales*, *supra*, at p. 514.) The 1981 amendment authorized the Board to defer parole suitability hearings for up to three years for prisoners convicted of more than one murder. (*Ibid*.) The court reasoned that there was no ex post facto violation because the amendment did not increase the statutory punishment for the defendant's crime of second degree murder, which was 15 years to life both before and after the amendment. (*Id*. at p. 507.) The defendant's indeterminate sentence and the substantive formula for securing any reductions to that sentence were the same both before and after the 1981 amendment. The amendment did not affect the setting of his minimum eligible parole date, nor did it change the standards for determining his suitability for parole. (*Ibid*.) Rather, it simply " 'altered the method to be followed in fixing a parole release date under identical substantive standards.' " (*Id*. at p. 508.)

In *Jackson*, the California Supreme Court rejected an ex post facto challenge to the constitutionality of a 1982 amendment to Penal Code section 3041.5 which authorized the Board to schedule biennial, rather than annual, parole suitability hearings. (*Jackson*, *supra*, 39 Cal.3d at p. 472.) The court held that the amendment effected only "a procedural change outside the purview of the ex post facto clause." (*Ibid*.) The

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incarceration for the prisoner, but does not require a more lengthy period of incarceration for the prisoner than seven additional years."

amendment “did not alter the criteria by which parole suitability [was] determined . . . [n]or did it change the criteria governing an inmate’s release on parole.” (*Id*. at p. 473.) “Most important,” the court emphasized, “the amendment did not entirely deprive an inmate of the right to a parole suitability hearing.” (*Ibid*.) It simply “changed only the frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability.” (*Ibid*.)

We see no reason why *Jackson* and *Morales* do not apply here. The 2008 amendments to Penal Code section 3041.5, like the amendment at issue in *Morales*, did not increase the statutory punishment for Hernandez’s crime. (*Morales*, *supra*, 514 U.S. at p. 507.) His indeterminate sentence and the substantive formula for securing credits were not changed by the amendments, nor did they affect his minimum eligible parole date, change the standards for determining his suitability for parole, or “entirely deprive [him] of the right to a parole suitability hearing.” (*Jackson*, *supra*, 39 Cal.3d at p. 473; *Morales*, *supra*, at p. 507.) Instead, Marsy’s Law simply “ ‘alter[ed] the method to be followed’ in fixing a parole release date under identical substantive standards.” (*Morales*, *supra*, at p. 508.) Such procedural changes are outside the purview of the ex post facto clause. (*Jackson*, *supra*, at p. 472.) Accordingly, we reject Hernandez’s ex post facto claim.

III. DISPOSITION

The January 10, 2011 order granting Hernandez's petition for a writ of habeas corpus is reversed. The matter is remanded to the superior court with directions to vacate that order and enter a new order denying Hernandez's petition for a writ of habeas corpus.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.

Filed 11/22/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JESUS HERNANDEZ, on Habeas Corpus.	H036515 (Santa Clara County Super. Ct. No. 158358)

BY THE COURT:

The opinion which was filed on October 26, 2011, is certified for publication.

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Premo, Acting P.J.

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Elia, J.

The written opinion which was filed on October 26, 2011, has now been certified for publication pursuant to rule 8.1105(b) of the California Rules of Court, and it is therefore ordered that the opinion be published in the official reports.

Dated: ________________ ______________________________
Premo, Acting P.J.

Trial Court:	Santa Clara County Superior Court Superior Court No. 158358
Trial Judge:	Hon. Eugene Hyman
Counsel for Plaintiff/Appellant: S.M. Salinas, Warden of Correctional Training Facility	Kamala D. Harris Attorney General Julie L. Garland Senior Assistant Attorney General Anya M. Binsacca Supervising Deputy Attorney General Steven G. Warner Deputy Attorney General
Counsel for Defendant/Respondent: Jesus Hernandez	Under appointment by the Court of Appeal Traci S. Mason