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

In re ARCADIO ACUNA,

on Habeas Corpus.

H037335
(Santa Clara County
Super. Ct. No. 103259)

Arcadio Acuna has been incarcerated since 1985 for a series of gunpoint kidnappings, robberies, and vehicle thefts. In 2010, the Board of Parole Hearings (the Board) concluded he was unsuitable for parole because he would pose an unreasonable risk of danger or a threat to public safety if released from prison. Acuna challenged that decision in the superior court, which granted his petition for a writ of habeas corpus and ordered the Board to conduct a new hearing.

The Warden urges us to reverse the superior court's order because "some evidence" supports the Board's decision. We agree with his contention. We disagree with Acuna's contention that application of the 2008 amendments that Marsy's Law made to Penal Code section 3041.5¹ violated the ex post facto and due process clauses of the federal and California Constitutions because he committed his crimes before Marsy's Law was enacted. We reverse the superior court's order.

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.)

I. Background

A. The Crime Spree²

In October 1985, a Los Angeles drug dealer paid Acuna \$400 to deliver a cocaine sample to a contact in Redwood City. Acuna invited two friends, one of whom had a Buick, along. Unable to connect with the Redwood City contact, the three spent most of the \$400 and used most of the cocaine. They were on their way back to Southern California five days later when the Buick broke down around noon in San Jose.

A passerby in a Ford Pinto offered to drive Acuna to a service station. En route, Acuna took a nine-millimeter semiautomatic machine pistol from a bag he had with him, loaded a clip, and announced that he needed to steal the Pinto. Directing the victim to a rural area, Acuna ordered him out of the Pinto and drove off in it. The victim called police.

Acuna drove back to the stranded Buick. Deciding to return to Los Angeles by Greyhound, he and one cohort set off in the Pinto. The owner of the broken-down Buick stayed behind and was soon arrested.

Unable to find the bus depot and having problems with the Pinto, Acuna and his cohort happened upon two utility company workers in a Dodge Omni. They forced the workers into the backseat of the Omni at gunpoint, with Acuna screaming at his accomplice to “kill the son-of-a-bitches” when one tried to resist. Driving away, Acuna realized too late that the street ended in a cul-de-sac, hit the curb, and blew out a tire. Returning to the Pinto, he and his cohort forced the utility workers into the backseat of that car at gunpoint, with Acuna again ordering them killed for not complying quickly enough.

² The facts of the commitment offenses as stated in the probation report and Acuna’s statement of facts from the same report were incorporated by reference into the record of the parole suitability hearing, and a summary was read into the record. Asked if that was “what happened that day,” Acuna replied, “Yes.”

As they headed south on Highway 101, Acuna and his accomplice demanded the victims' wallets and stole \$446, credit cards, and a driver's license from them. The Pinto broke down in Morgan Hill. A passing motorist helped push it into a parking lot, then took Acuna and his accomplice to the Greyhound depot. The two were apprehended shortly after midnight in Ontario, California. All three of Acuna's victims positively identified him in photographic lineups. The motorist who took him to the bus depot was located, but at trial, he denied having been kidnapped.

After pleading guilty to possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)),³ Acuna was convicted by a jury of three counts of kidnapping for robbery (former § 209, subd. (b)), two counts of vehicle theft (former Veh. Code, § 10851), three counts of robbery (§ 211), and one count of attempted robbery (§ 211, former § 664). Numerous enhancement allegations were also found true. He was sentenced to a determinate term of eight years consecutive to three consecutive life terms.

B. Acuna's Prior History

Born in Southern California, Acuna was raised by both parents until his mother's death when he was 10 years old. He said his father became an alcoholic after that, and an older brother left for college, so it fell upon him to do household chores and make sure there was food in the house for the family, which included two younger brothers. At 10, Acuna started doing field work before and after school. "I did good," he said, "but it was too much responsibility." Losing his mother was "the most significant factor" in his youth. "It changed from everything good and all together, to everything falling apart." He "carried a lot of resentment," feeling that his childhood ended at 10. Still, he did well in school, with no discipline problems and "lots of friends." He was involved in sports and played the trumpet in his high school marching band. He graduated in 1969.

³ Further statutory references are to the Penal Code unless otherwise noted.

Acuna married at 18 and had a son; that marriage lasted four years. A second marriage produced a daughter and ended after four years. Acuna married again in 1980; that marriage ended in 2008.

Acuna got a job loading trucks after high school and over the next six years worked his way up to a traffic manager position. Fired after an argument with the general manager, he “got another good job.” But he was living with his brothers, who were abusing heroin, and “due to a number of frustrations in his life” at the time, he started abusing it too. He lacked regular employment after that, and continued abusing substances until his arrest for the life crimes.

Acuna has no juvenile arrest history. His adult record includes six felony convictions, a prior commitment to the California Rehabilitation Center (CRC), and two prior prison terms. He escaped from the CRC. He battered a correctional officer during a previous incarceration. His performance on parole was unsatisfactory. He was on parole for robbery when he committed the life crimes.

C. Postincarceration Record

Acuna has spent the majority of his incarceration, “about 16 years,” in administrative segregation (Ad Seg) or in indeterminate secure housing unit (SHU) placements “regarding gang validation issues.” He was initially evaluated as a member of the Mexican Mafia (La Eme) prison gang in 1990, identified as inactive 10 years later, and revalidated as a La Eme associate in 2007. The Del Norte County Superior Court rejected his challenge to that revalidation.

Acuna continues to dispute these gang findings, positing that they were made in retaliation for his long “career” as a jailhouse lawyer. He told the Board he had litigated the gang validation issue, “got one overturned, and they just rubber stamped it again.” Acuna maintains that he has never been in a street or prison gang. Yet he refuses to debrief, explaining that “[f]or me to successfully in their view disassociate, I have to

become an informant . . . with enough information on the people that I live around that they're going to want to kill me or my family. And I've told them I'm not going to do that."

Because of his Ad Seg and/or SHU status, Acuna has not worked much in prison, but when he did hold positions (e.g., as a law clerk, or on the grounds crew), he received above average to superior evaluations from his supervisors. He described himself as "a self-taught what they call a jailhouse lawyer," and said he spent "probably . . . 20 to 30 hours a week on law." He claimed to have "a lot of hands-on litigation experienc[e]," and reported having filed about 50 court petitions for other inmates.

Acuna completed a correspondence course entitled "The Way to Happiness and Getting Well" and told the Board he was working on another entitled "Conditions of Life." In 2001, he participated in a 12-session substance abuse and anger management program. He had "a few" certificates of completion for computer courses, and started but did not finish vocational courses in auto repair and computer programming. He has not taken any other courses or done other self-help programming during his 25 years of incarceration, although he claimed to have "followed and studied the NA [Narcotics Anonymous] criteria and the 12 Steps" on his own.

Acuna has received nine CDC 115 serious rules violations since 1985.⁴ Two of those were for violent conduct (fighting in 1987 and physical assault in 1990); another, for possession of narcotics and paraphernalia in 1988, included a positive drug test for

⁴ "In prison argot, [CDC 128-A] 'counseling chronos' document 'minor misconduct,' not discipline [Citation.]" (*In re Smith* (2003) 109 Cal.App.4th 489, 505.) A "CDC 115" rules violation report documents serious misconduct that is believed to be a violation of law or otherwise not minor in nature. (*In re Gray* (2007) 151 Cal.App.4th 379, 389.)

methamphetamine. His most recent “115” was for possession of half a gallon of “pruno” (inmate-manufactured alcohol) in 2001.⁵

Acuna has also received nine CDC 128-A counseling chronos, most recently in 2009 for talking in the law library without permission.

D. Psychological Evaluation

Having refused to participate in his initial evaluation in 1994, Acuna was not evaluated psychologically until 2010, when Dr. M. Lehrer conducted a comprehensive risk assessment. Acuna claimed he was “a changed person.” “I now know I need to stay sober,” he said, “and surround myself with supportive family members. I am a changed person from the one who would only seek pleasure for myself. Now, I have a need to help others, and divert them from drug use and gang activity; to do everything I can even to help one person.’”

Dr. Lehrer diagnosed Acuna with alcohol dependence, cannabis dependence, opioid dependence, amphetamine dependence, and cocaine dependence, all in a controlled environment. These were more accurate than a single diagnosis of polysubstance dependence since Acuna “seemingly always had preferences for his substance use, rather than using multiple substances with little regard for which substances he abused.” Dr. Lehrer found that Acuna’s “pattern of dangerous behaviors, irresponsibility and lack of behavior control was mostly related to substance abuse affecting his controls, rather than personality issues.”

Acuna told Dr. Lehrer he began smoking marijuana at 11 and used it daily until his arrest for the life crimes. At 14, he began consuming alcohol, and by 24, he was drinking daily with frequent intoxications. He experimented with barbiturates and used LSD “on a

⁵ Acuna’s other serious rules violations were for leaving work without permission, failing to report to work and resisting staff in 1990, and unauthorized talking in the law library in 1994 and 1995.

sporadic basis” in high school. He used methamphetamine daily between the ages of 19 and 23. He started using heroin at 26 and quickly became addicted, supporting his habit, which “sometimes cost him about \$400 per day,” with burglaries and drug deals. He experimented with PCP at 30. He began using cocaine at 32, increasing his usage until he was injecting it daily.

Acuna told Dr. Lehrer he had “never” read Alcoholics Anonymous (AA), NA, or other substance abuse related literature but had “spent a lot of personal time in self examination,” which had given him “good insight” into his substance abuse issues. He “d[id] not appear to feel [that] interactional self help programming, or spending periods of time . . . in programs such as AA, are, or would be, necessary to him.” Dr. Lehrer was concerned that Acuna’s statements about coming to terms with his substance abuse and being able to deal with it in the future “significantly minimize[d] his vulnerability when one considers his historical abuse of substances.”

Acuna maintained that his actions at the time of the controlling offense were driven more by “panic” than by substance abuse. He told Dr. Lehrer he was “never” impulsive, and he denied having a temper or losing control. Reminded that his victims reported him screaming at his accomplice to kill them, Acuna “rationalized” that he believed the gun was jammed and would not fire, “even though later the police fired it successfully.” Dr. Lehrer concluded that Acuna “still ha[d] not completely processed or come to terms with his degree of loss of control or the role his substance abuse at the time might have contributed to the lessening of his controls.” In his controlled environment, “especially considering his years of [Ad Seg] and SHU placements . . . , he has not had significant time processing issues regarding the development of insight; or regarding his criminality in connection with others’ opinions; or for the most part with any self help programming.” That made it “very difficult” to assess to what degree his behavior was affected by his substance abuse.

Acuna's failure to demonstrate successful programming in prison and his rule violations for substance abuse led Dr. Lehrer to believe that his actions "may have been more significantly affected by his substance abuse than he has indicated. This also might indicate that his substance abuse, rather than personality disorder, . . . contributed to his becoming gang involved." Dr. Lehrer assessed Acuna's prognosis for avoiding substances in the free community as "guarded."

Dr. Lehrer was also concerned about Acuna's gang ties. He noted that "the patterns of [Acuna's] violence while incarcerated seemed related to his being gang involved.⁶ Since he still remains gang validated, he is presumed to be procriminally oriented." "[O]ne is left," Dr. Lehrer wrote, "with the clear impression that [Acuna] over many years has limited his ability and willingness to demonstrate behavioral change and good insight." He appeared "capable of making changes in himself, and developing better insight," but "[i]n the absence of time spent in the general population, it remain[ed] unclear to what degree [he was] capable of making the difficult decisions in himself that might allow him to avoid further gang involvements, to take and benefit from self help programming, and to avoid further rule violations."

Dr. Lehrer used three assessment guides, the Psychopathy Check List-Revised (PCL-R), the Historical-Clinical-Risk Management-20 (HCR-20), and the Level of Service/Case Management Inventory (LS/CMI), to assess Acuna's violence potential in the free community. Acuna's PCL-R score placed him in the moderate range for psychopathy compared to other male offenders. His history before his incarceration for the life crimes indicated a "need for stimulation, promiscuous sexual behavior, many short term marital relationships, poor behavioral controls, and irresponsibility."

⁶ Acuna told the Board his 1990 rules violation for physical assault occurred when "a guy tried to cut my throat." Asked why he was assaulted, he replied, "They say that he was from Northern California." The Board asked, "A Northerner attacking a Southerner?" "Yes," Acuna responded.

Dr. Lehrer found that Acuna “continue[d] to demonstrate a degree of glibness and lack of realistic long term goals, especially . . . his contention of having worked out his substance abuse issues by himself” He also noted Acuna’s “lack of empathy regarding the consequences of the controlling offenses upon his victims.” Acuna’s failure to accept responsibility for his actions was “seen in his lack of understanding of his controlling offense[s] in the context of his pattern of previous criminality and substance abuse.” He had a history of escape and revocation of conditional release, and his multiple convictions for the life crimes, coupled with his “previous and varied” prior convictions, demonstrated “criminal versatility driven by substantial alcoholism and substance abuse.”

Acuna’s overall score on the HCR-20 placed him in the moderate risk category for violent recidivism. Historical factors included “previous violence and violence at a young age (under 40).” Acuna’s relationship history “demonstrated considerable instability.” His employment history was stable “and then very destabilized in connection with his increasing substance abuse.” His history of parole failure and escape also had “some degree of correlation with elevated risk of violent recidivism.” Acuna’s most significant risk factor was his “history of significant substance abuse, affecting many areas related to increasing risk of violence.” The nature of his controlling offenses—his “continued violent and out of control behavior, going from one violent crime to another, and in the process, committing, and then being convicted of, three life crimes”—added to the risk. Historical factors indicating “some positive elements that might reduce the risk of violence” included no documented history of major mental illness, no known evidence of early maladjustment, and no diagnosis of a personality disorder.

Clinical factors included Acuna’s “lack of insight” into the life crimes, his substance abuse, and lack of relapse prevention planning. He had “negative attitudes related to his conviction and sentence,” as well as “unresolved issues related to prison gangs.” Although he had demonstrated “some” recent involvement in self-help

correspondence programming, there was “little to demonstrate” to what degree he had assimilated those materials.

Risk factors included the “numerous stressors and destabilizers” Acuna would likely encounter in the free community: family conflict, relationship difficulties, financial stress, “and especially exposure to alcohol and controlled substances.” Dr. Lehrer found “little to show to what degree he has learned new or useful ways to help deal with stress or lower his vulnerability in these areas.” Although Acuna appeared to have community and some family support, his parole planning “inadequately” addressed “many” issues related to parole, and “[h]is ability and or interest” in complying with parole remediation was “questionable, especially should he have any potential of being influenced by gang issues.”

Acuna’s overall score on the LS/CMI, which focuses on the risk of general recidivism rather than violence per se, placed him in the high risk category. Factors that increased his risk included multiple prior convictions, three or more charges in the controlling offenses, incarceration, and institutional misconduct. Other factors that further increased the risk included current and frequent unemployment, lack of parental support, past abuse of alcohol and drugs, a history of physical assault and violence with the use of a weapon, assault on an authority figure, gang participation, and acquaintances with criminal histories. “[N]ot being available” to engage in programming, “a lack of engagement in organized activities, and a lack of allocating available time effectively toward prosocial attitudes and behaviors” increased the risk still further.

Overall, Dr. Lehrer assessed Acuna’s risk of violence in the free community as moderate to high. That risk would likely increase with “substance use, aggressive/violent behaviors, procriminal activities, gang related association, or inability to respond appropriately to institutional schedules, guidelines and commands.” Acuna could decrease his risk, however, “by continuing to clarify and validate his parole planning, by demonstrating compliance with institutional guidelines, by engaging in prosocial

activities . . . [and] by engaging in substance abuse programming over time, and by participation in self-help programming.”

E. October 2010 Parole Consideration Hearing

Acuna’s minimum eligible parole date was January 7, 2012. This was his initial parole consideration hearing. He was 59 years old.

The Board asked Acuna, “[s]o why did you do this?” Explaining that he “was going to provide protection for some guy that was going to do a big drug deal,” Acuna said he “was in a complete state of panic because I was so far from home. I knew that I violated my parole, and I knew I was going back to prison for a long time. It was fear and panic The gun was inoperative That’s why I knew that we were never going to kill anybody. I was just trying to scare them into doing what I asked.” Acuna “wasn’t thinking straight.” “It was completely irrational.”

The Board reviewed Acuna’s “extensive” criminal history and questioned him about his gang involvement, which he categorically denied. It reviewed the psychological report and Dr. Lehrer’s concerns and conclusions. The Board discussed Acuna’s substance abuse, challenging his “fundamental lack of understanding” of NA and AA—programs the Board advised him he “need[ed] to learn more about.” The Board also challenged Acuna’s “pretty limited” self-help programming, rejecting his assertion that there was “not too much of a difference” between his study of the law and self-help work. “[T]hat’s all external to you. Self-help work has to do with understanding yourself, your dynamics, your interpersonal relationships, your interpersonal contacts,” the Board told him. The Board also reviewed Acuna’s parole plans.

The Board found Acuna unsuitable for parole and issued a 10-year denial. In concluding that circumstances disfavoring parole “heavily outweigh[ed]” the positive aspects of his case, the Board began by noting the gravity of the commitment offense,

Acuna's unstable social history, his extensive criminal history, which included violence and an attack on a correctional officer, and the fact that he had "failed miserably" on parole. It pointed to his drug and alcohol "use and addiction" both in and out of prison, to his disciplinary history, and to the unfavorable psychological report, which was "supportive" of its determination that he lacked insight into the causative factors of his conduct and minimized his crime and its effects on his victims. "[Acuna] does not take responsibility for his actions."

The Board also questioned Acuna's credibility, noting that he told them he believed his sentence was fair, but had told Dr. Lehrer just a few months earlier that it was unfair because he "did not take a human life" yet had served more time than required for first degree murder. "That's called minimization," the Board told him, referencing Dr. Lehrer's conclusion that Acuna had not yet "come to terms with" the inherent irresponsibility of the lifestyle he was living when he committed his crimes, "the effects of cocaine and other substances he was abusing at the time, affecting his thoughts and actions," or with his "significant substance abuse history, and what rehabilitative efforts it might necessitate."

On the positive side, the Board commended Acuna for "practicing your faith and your spirituality." It noted "numerous letters of support from family and friends," and found his parole plans "realistic" and "viable." It recommended that he remain discipline-free, participate in available self-help and educational programs, and cooperate in future clinical evaluations. "And getting out of your SHU situation certainly is going to be helpful." "So you've got some soul searching to do," the Board told him, "but it's up to you. You know what the challenges are." The Board expressed "hope" that Acuna would "come to the next hearing more prepared in some of the areas that we've discussed."

II. Superior Court Proceedings

Acuna challenged the Board's decision in the superior court, which granted his habeas corpus petition and ordered the Board to conduct a new hearing. The court faulted the Board for "repeatedly misappl[ying] the nexus rule by denying parole based on a 'nexus' between [Acuna's] crime and his even older criminal history." The Board "turned the nexus rule on its head," the court asserted, "by giving the crime independent 'weight' and then looking backwards, instead of forwards in time, from the life crime." This was "such a fundamental error," the court concluded, that "*notwithstanding other evidence in the record*, it cannot be seen as harmless." (Italics added.) The court found the Board's and Dr. Lehrer's reliance on Acuna's current gang validation "[a]dditionally problematic," since a validation made "for reasons of internal security, does not automatically translate into evidence of current dangerousness."

The Warden filed a timely notice of appeal and petitioned for a writ of supersedeas. We granted the petition and stayed the superior court's order pending resolution of this appeal.

III. Discussion

A. Standard of Review

Our standard of review is well established. "[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*).

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] the prisoner will pose an unreasonable risk of danger to society if released from prison.” (Cal. Code Regs., tit. 15, § 2281, subd. (a).)⁷ Factors tending to establish unsuitability for parole are that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; (4) previously has 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 in prison or jail. (Regs., § 2281, subd. (c).) An offense is considered “especially heinous, atrocious, or cruel” if it “was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering” or “[t]he motive for the crime is inexplicable or very trivial in relation to the offense.” (Regs., § 2281, subd. (c)(1).)

Factors tending to establish suitability for parole are that the prisoner (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress has built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (Regs., § 2281, subd. (d).)

⁷ Subsequent references to “Regs.” will be to this title.

“[T]he underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1211.) The nature of the commitment offense “does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.” (*Id.* at p. 1214.) “[W]hen there is affirmative evidence, based upon the prisoner’s subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner’s current dangerousness.” (*Id.* at p. 1219.) Where, on the other hand, there is a history of domestic abuse and, “despite years of therapy and rehabilitative ‘programming,’” the prisoner has been demonstrably “unable to gain insight into his antisocial behavior,” the Board may properly conclude that the prisoner “remains dangerous and is unsuitable for parole.” (*In re Shaputis* (2008) 44 Cal.4th 1241, 1259-1260 (*Shaputis I*); *In re Shaputis* (2011) 53 Cal.4th 192, 214 (*Shaputis II*) “[T]he same evidence that we found sufficient in *Shaputis I* was sufficient here to meet the ‘some evidence’ standard, given the lack of a reliable record of his current psychological state.”].)

In *Shaputis II*, the California Supreme Court “reaffirm[ed] the deferential character of the ‘some evidence’ standard for reviewing parole suitability determinations.” (*Shaputis II, supra*, 53 Cal.4th at p. 198.) That standard “is meant to serve the interests of due process by guarding against arbitrary or capricious parole decisions, without overriding or controlling the exercise of executive discretion.” (*Id.* at p. 199.) “The reviewing court does not ask whether the inmate is currently dangerous.

That question is reserved for the executive branch.” (*Id.* at p. 221.) “The court is not empowered to reweigh the evidence.” (*Ibid.*) “[I]t is not for the reviewing court to decide *which* evidence in the record is convincing.” (*Id.* at p. 211.) “The ‘some evidence’ standard does not permit a reviewing court to reject the Board’s reasonable evaluation of the evidence and impose its own judgment.” (*Id.* at p. 199.) The reviewing court considers only “whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness.” (*Id.* at p. 221.)

E. “Some Evidence”

The Board’s conclusion that Acuna would pose an unreasonable risk of danger or a threat to public safety if released from prison was based primarily on findings that he had not yet come to terms with “his significant substance abuse history” in and out of prison “and what rehabilitative efforts it might necessitate,” remained “in denial about his gang validation,” lacked credibility, and minimized and lacked insight into his crimes. Some evidence supported these findings.

Both the probation report and Dr. Lehrer’s report described Acuna’s extensive history of substance abuse and unsuccessful attempts at counseling. By his own account, Acuna started smoking marijuana at 11 and progressed to daily usage that continued until his arrest for the life crimes. He used LSD “on a sporadic basis” in high school, ingested methamphetamine daily between the ages of 19 and 23, became addicted to heroin at 26, and started using cocaine at 32. He experimented with barbiturates and PCP along the way. He admitted using methamphetamine in prison.

Dr. Lehrer documented Acuna’s lack of insight into his substance abuse, noting that although he had “worked out *some* understanding about *some* aspects of his previous substance abuse issues,” he appeared to have “glibly trivialized” his need for substance abuse programming, and his statements about how he would deal with such issues on parole appeared to “significantly minimize his vulnerability” (*Italics added.*) Acuna

confirmed Dr. Lehrer's assessment at the hearing. He claimed to have studied the tenets of AA and NA on his own, but he exhibited a "fundamental lack of understanding" of those programs. He told the Board he would deal with high risk situations "through counseling and prayer" and by "not putting [himself] in those spots to begin with." Although he acknowledged using drugs in the past to escape family stresses, he asserted that he was simply "not going to do that anymore. That's not going to happen." The Board could reasonably have concluded from all of this evidence that Acuna lacked insight into his substance abuse.

Some evidence also supported the Board's finding that Acuna was "in denial" about his gang validation. Although he maintained that he was "never part of that" lifestyle, the record reflects that he has spent much of his incarceration in Ad Seg or SHU placements. The 10 years between his initial evaluation as a member of La Eme in 1990 and his identification as an "inactive associate" in 2000 "indicat[e] a long association" with that gang, and he was revalidated as an associate in 2007. The revalidation was upheld by the Del Norte County Superior Court. Thus, Dr. Lehrer was entitled to rely on it in concluding that "[s]ince [Acuna] still remains gang validated, he is presumed to be procriminally oriented," and that it remained "unclear to what degree [he was] capable of making the difficult decisions in himself that might allow him to avoid further gang involvements," especially since he "ha[d] not considered issues of gang pressures on parole, and might be vulnerable to such pressures." The Board could reasonably have relied on Dr. Lehrer's conclusions.

Some evidence also supported the Board's conclusion that Acuna lacked credibility. Three examples establish the point. Asked about having battered a correctional officer, he initially claimed it was part of a "deal" after officers "threatened" to charge his wife with bringing drugs into the prison. He admitted the battery only after a commissioner remarked that "the criminal justice system, you know, has checks and balances in it, so you can't just make stuff up." Second, Acuna told the Board he was *not*

on drugs when he committed the life crimes. But he had told the probation officer that “the whole matter was rather hazy in his mind due to his cocaine induced state.” Finally, Acuna told the Board he believed his sentence was fair. He had told Dr. Lehrer, however, that he thought it was unfair, since he did not kill or intend to kill anyone. The Board could reasonably have concluded that Acuna was not truthful but was instead just telling them what he thought they wanted to hear.

Some evidence, specifically, the psychological assessment, also supported the Board’s finding that Acuna minimized and lacked insight into his crimes. Dr. Lehrer interpreted Acuna’s statements about the gun being inoperable, even though the police had later fired it successfully, as “rationaliz[ing]” and his statements about not having intended to kill anybody as minimizing his offenses, “where under the worst of circumstances, a number of victims might have been seriously injured or killed” at his direction. In Dr. Lehrer’s judgment, Acuna “ha[d] not had significant time processing issues regarding the development of insight; or regarding his criminality in connection with others’ opinions; or for the most part with any self-help programming.”

From all of this evidence, the Board could reasonably have concluded that Acuna remained currently dangerous and was, therefore, not yet suitable for parole. Acuna contends, however, that “[a]s the superior court properly found,” the Board “turned the nexus rule on its head.”

We think the Board could have done a better job of articulating a nexus between its findings and Acuna’s current dangerousness. To the extent some of its confusing statements⁸ can be read to suggest the nexus rule is satisfied by linking the commitment

⁸ As reflected in the transcript of the hearing, the presiding commissioner confusingly stated, after summarizing the Board’s findings, “Now, what does that mean in terms of what we have here in terms of a nexus? The nexus is, is that there’s a nexus between the criminal history and the commitment offense, and this part of the [psychological] evaluation, which is the mental health and how he looks at the life crime.” A few sentences later, after summarizing Acuna’s substance abuse in and out of

offense and the inmate’s criminal history, moreover, the Board was simply wrong. (*Lawrence, supra*, 44 Cal.4th at p. 1210 [“‘due consideration’ of the specified factors requires . . . reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness”].) But that does not mean the Board’s determination must be overturned.

This court has previously explained that *Lawrence* does not require some pro forma recitation on the record; it calls instead for reasoning. (*In re Criscione* (2009) 180 Cal.App.4th 1446, 1461; see *Shaputis I, supra*, 44 Cal.4th at pp. 1255, 1259-1261 [holding that Shaputis’s lack of insight and the circumstances of his commitment offense made him currently dangerous without expressly explaining, or requiring the Board to explain, why that was so].) The Board’s reasoning can be discerned here, notwithstanding its several confused misstatements, and that reasoning supports the conclusion that Acuna remains currently dangerous.⁹

prison, the same commissioner stated, “So his disciplinary history has a nexus between the commitment offense and his criminal history today.”

⁹ We reject Acuna’s assertion that the Board “relied *almost entirely* on old static facts in a woefully inadequate effort to articulate a nexus to current dangerousness.” (Italics added.) The record does not support that assertion, nor does it support his assertion that “the *primary basis for the Board’s decision* was a purported nexus” between the commitment offense and Acuna’s prior criminal history. (Italics added.) Although the Board included the gravity of the commitment offense, Acuna’s unstable social history, his extensive criminal history, and the fact that he had “failed miserably” on parole among the many factors disfavoring parole, it also included (and in our view relied primarily on) his *current* gang validation, his lack of substance abuse programming and demonstrated misunderstanding of NA and AA, his minimization of and lack of insight into his crimes, his lack of credibility, and his unfavorable psychological report. Because the Board would have denied parole based on these factors alone, its mistaken attempt to link Acuna’s commitment offense and his criminal history was harmless error. (See *In re Reed* (2009) 171 Cal.App.4th 1071, 1086-1087 [even assuming circumstances of commitment offense were not some evidence justifying parole denial, the error would be harmless where it appeared the Board would have denied parole on another stated ground].)

Here, the Board had numerous bases for concluding that Acuna remained currently dangerous. It identified his being “in denial about” his gang ties as “a correlation between his propensity for violence in a free community.” Dr. Lehrer’s concerns about Acuna’s ability to resist gang pressures on parole, Acuna’s failure to consider those pressures in his relapse prevention plan, and his assertion at the hearing that “I mean, there’s no way, you know, because just the whole thing about me going to go to a Christian home, I’m not even going to be around any of this” supported the Board’s conclusion that he remained vulnerable to gang pressures and, therefore, currently dangerous. Although the Board based its decision on far more than the gang validation, we think Acuna’s gang issues alone could provide the “‘modicum’” of evidence required to support the Board’s determination. (*Shaputis II, supra*, 53 Cal.4th at p. 210.)

The superior court’s suggestion that the gang validation and Dr. Lehrer’s reliance on it were not “reliable” enough “to pass muster in the context of parole suitability” was error. “Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board]” (*Shaputis II, supra*, 53 Cal.4th at p. 210.) “While the evidence supporting a parole unsuitability finding must be probative of the inmate’s current dangerousness, it is not for the reviewing court to decide *which* evidence in the record is convincing. [Citation.] Only when the evidence reflecting the inmate’s present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process.” (*Shaputis II*, at p. 211.)

It cannot be said here that the evidence led to “but one conclusion.” (*Shaputis II, supra*, 53 Cal.4th at p. 211.) Although the Board did not expressly articulate a nexus between Acuna’s lack of substance abuse programming and “fundamental misunderstanding” of NA and AA, his minimization of and lack of insight into his crimes, his lack of credibility, and his unfavorable psychological report, the *additional*

link to current dangerousness that those factors provided was implicit in its decision. Acuna went on a crime spree, kidnapping three people at gunpoint, stealing two of their cars, their money, and their credit cards, all the while screaming at his accomplice to kill them. His only insight was that he acted out of “fear and panic” and “wasn’t thinking straight.” He may have been “in a cocaine-induced state” as well. The psychological report and Acuna’s statements at the hearing evidenced a lack of insight into his crimes and their causes, only “limited” understanding and insight into his substance abuse issues, a demonstrated inability to follow institutional rules, and a moderate to high risk of violent recidivism. The Board’s implied conclusion from all of the evidence is obvious: until Acuna sufficiently understands the underlying causes of his actions, addresses his substance abuse issues, demonstrates an ability to follow society’s rules by following institutional rules, and severs his gang ties, he remains currently dangerous.

F. Marsy’s Law

Acuna contends that application to his case of the 2008 amendments to section 3041.5 violated the ex post facto clauses of the federal and California Constitutions because he committed his crimes before Marsy’s Law was enacted.¹⁰

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

¹⁰ 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.)

the disadvantage of the defendant or constitutes a burden is not necessarily ex post facto. [Citations.]” (*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 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.¹¹ (§ 3041.5,

¹¹ In pertinent part, amended section 3041.5 provides that “(b) . . . [¶] (2) Within 20 days following any meeting where a parole date has not been set, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated. [¶] (3) 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 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. [¶] (4) 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

subd. (b)(2).) This means that instead of issuing one- to five-year denials, as in the past, the Board now issues three- to 15-year denials. Acuna argues that applying the new law to him is unconstitutional, because “the increased deferral periods and the elimination of the Board’s discretion to deny parole for less than three years impermissibly increases the risk” of prolonging his incarceration. We disagree.

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 when applied to inmates convicted preamendment. (*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 section 3041.5. (*Morales, supra*, 514 U.S. at p. 514.) The 1981 amendment authorized the Board to defer parole suitability hearings for

provided in paragraph (3). [¶] . . . [¶] (d)(1) 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. [¶] (2) The board shall have sole jurisdiction, after considering the views and interests of the victim to determine whether to grant or deny a written request made pursuant to paragraph (1), and its decision shall be subject to review by a court or magistrate only for a manifest abuse of discretion by the board. The board shall have the power to summarily deny a request that does not comply with the provisions of this subdivision or that does not set forth a change in circumstances or new information as required in paragraph (1) that in the judgment of the board is sufficient to justify the action described in paragraph (4) of subdivision (b). [¶] (3) An inmate may make only one written request as provided in paragraph (1) during each three-year period. Following either a summary denial of a request made pursuant to paragraph (1), or the decision of the board after a hearing described in subdivision (a) to not set a parole date, the inmate shall not be entitled to submit another request for a hearing pursuant to subdivision (a) until a three-year period of time has elapsed from the summary denial or decision of the board.” (§ 3041.5, subd. (b).)

up to three years for prisoners convicted of more than one murder if the Board found it was not reasonable to expect parole to be granted before that and stated the bases for its findings. (*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 amendment left the defendant's indeterminate sentence and the substantive formula for securing any reductions to that sentence untouched. (*Ibid.*) It did not affect the setting of his minimum eligible parole date, nor did it change the standards for determining his suitability for parole. (*Ibid.*) It simply "'alter[ed] the method to be followed' in fixing a parole release date under identical substantive standards." (*Id.* at p. 508.)

Rejecting the defendant's view that the ex post facto clause "forbids *any* legislative change that has *any conceivable risk* of affecting a prisoner's punishment," the *Morales* court held that the relevant inquiry was whether the amendment "produce[d] a sufficient risk of increasing the measure of punishment attached to the covered crimes" to fall within the constitutional prohibition. (*Morales, supra*, 514 U.S. at pp. 508-509, italics added.) The 1981 amendment did not do so. It applied only to prisoners "for whom the likelihood of release on parole [was] quite remote" (*id.* at p. 510) and only if the Board concluded, after a hearing, that "'it [was] not reasonable to expect that parole would be granted . . . during the following years.' [Citation.]" (*Id.* at p. 511.) Moreover, the Board "retain[ed] the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner" (*ibid.*), and inmates given two- or three-year denials were not precluded from asking, based on changed circumstances, for earlier hearings. (*Id.* at pp. 513-514.) Thus, the amendment created "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes" (*Id.* at pp. 509, 512-513.)

In *Jackson*, the California Supreme Court rejected an ex post facto challenge to the constitutionality of a 1982 amendment to section 3041.5 that 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 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 “changed only the frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability.” (*Ibid.*) That there was a “hypothetical” chance that an inmate’s suitability for parole might “drastically improve during the period of the postponement” did not undermine the *Jackson* court’s conclusion that it was unlikely, in general, that a longer postponement would affect an inmate’s right to an early parole release, since it was “conceivable that the Board could advance the suitability hearing and order immediate release.” (*Id.* at p. 475.)

Jackson and *Morales* are controlling here. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) The 2008 amendments to section 3041.5, like the amendment at issue in *Morales*, did not increase the statutory punishment for Acuna’s crimes. (*Morales, supra*, 514 U.S. at p. 507.) The amendments left his indeterminate sentences and the substantive formula for securing credits untouched, did not affect his minimum eligible parole date, did not change the standards for determining his suitability for parole, and did not “entirely deprive [him] of the right to a parole suitability hearing.” (*Jackson, supra*, 39 Cal.3d at p. 473; *Morales*, at p. 507.) Marsy’s Law simply “‘alter[ed] the method to be followed’ in fixing a parole release date under identical substantive standards.” (*Morales*, at p. 508.) Such procedural changes are outside the purview of the ex post facto clause.¹² (*Jackson*, at p. 472.)

¹² Acuna cites *Miller v. Florida* (1987) 482 U.S. 423 (*Miller*) and *Lynce v. Mathis* (1997) 519 U.S. 433 (*Lynce*), but both cases are inapposite here. In *Miller*, unlike here, the revised sentencing guidelines law at issue effected substantive rather than merely

Acuna argues, however, that the new law “has already greatly disadvantaged” him, “because it eliminated the Board’s discretion to defer further parole consideration for less than three years.” His argument ignores the United States Supreme Court’s holding in *Garner v. Jones* (2000) 529 U.S. 244 (*Garner*) that application of an administrative regulation increasing the parole denial period from three years to eight years (a five-year increase—three years longer than the increase Acuna complains of here) did not violate the ex post facto clause of the federal Constitution where the regulation at issue vested the parole board with discretion and also permitted expedited reviews in the event of a change in circumstances “‘or where the [b]oard receive[d] new information that would warrant a sooner review.’” (*Garner*, at p. 254.) The Marsy’s Law amendments to section 3041.5 include similar qualifications. (§ 3041.5, subs. (b)(4) & (d)(3).)

We reject Acuna’s ex post facto claim.

procedural changes. (*Miller*, at p. 434.) As the *Miller* court explained, that case was “not a case where we can conclude . . . that ‘the crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.’ [Citation.]” (*Miller*, at p. 435.) In *Lynce*, the court considered an ex post facto challenge to Florida’s retroactive cancellation of 1,860 days of overcrowding (early release) credits that had been awarded to the inmate, resulting in his release. (*Lynce*, at pp. 435, 446-447.) Distinguishing *Morales*, which, like this case, involved changes in the timing of parole suitability hearings, the *Lynce* court held that the law at issue in the case before it “did more than simply remove a mechanism that created an *opportunity* for early release for a class of prisoners whose release was unlikely; rather, it made ineligible for early release a class of prisoners who were previously eligible—including some, like petitioner, who had actually been released.” (*Lynce*, at pp. 443-444, 446-447.) That violated ex post facto principles. (*Lynce*, at p. 447 & fn. 17.)

IV. Disposition

The superior court's August 22, 2011 order is reversed, and the court is directed to enter a new order denying Acuna's habeas corpus petition.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.