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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MICHAEL ALAN ARAGON on Habeas Corpus.	D058040 (Super. Ct. No. CR139857)

Petition for writ of habeas corpus. Norbert Ehrenfreund, Judge. Petition denied.

Tracey Renee Lum, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Phillip Lindsay and Linnea D. Piazza, Deputy Attorneys General, for Respondent.

I.

INTRODUCTION

In January 1993, Michael Alan Aragon fatally stabbed Michael Johnson during a gang fight. Aragon pled guilty to second degree murder, and he is currently serving a sentence of 15 years to life in prison. In October 2009, at Aragon's fourth parole

hearing—approximately 15 years after his June 1994 sentencing—a panel of the Board of Parole Hearings (Board)[1] again found Aragon unsuitable for parole.

Aragon, who is now 35, filed this petition for writ of habeas corpus challenging the Board's decision. Aragon's primary contention is that the Board's decision violates his right to due process because the decision is not supported by "some evidence" that he poses a current threat to public safety. Applying the extremely deferential "some evidence" standard of review, discussed by the Supreme Court in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), we reject Aragon's contention and conclude that the record contains some evidence that Aragon poses a current threat to public safety. Specifically, we conclude that there is some evidence to support the Board's decision that Aragon remains a current threat to public safety in light of the limited therapeutic gains that he has made in addressing a serious substance abuse problem related to his criminality.

Aragon also claims that the Board should have applied the "clear and convincing" burden of proof in determining whether he was suitable for parole, and that the Board's application of a change in the law extending the time between parole hearings constitutes an ex post facto violation.[2] We reject these contentions as well, and deny the petition.

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

2 In considering Aragon's ex post facto claim, we address two recent decisions of this court: *In re Vicks* (2011) 195 Cal.App.4th 475 (*Vicks*), and *In re Russo* (2011) 194 Cal.App.4th 144 (*Russo*).

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The commitment offense*

At Aragon's October 2009 parole suitability hearing, the presiding commissioner read a description of the commitment offense and the ensuing investigation into the record. The following is an excerpt of that description:

> "January 22, 1993, there was a confrontation near Mission Bay High School among several members of three different gangs and a group of Mission Bay High School students, including several gang members. There had been other confrontations between the two groups, one just the day before, arising from an ongoing dispute between Dwayne Madison . . . , a student from the high school, and Charles Mouzon . . . and George Pelayo, members of the smaller group. On the day of the incident, the students were in the gym watching a basketball game when they were informed that there was a group of young men at the west end of the school campus. The students, estimates ranging from 15 to 150, left the gym, crossing a street, and proceeded to where approximately 15 young men, including Michael Aragon were standing. There was an exchange of words and threats. Madison challenged both Mouzon and Pelayo to a fight before there was any physical contact. . . . In the resulting brawl, one student, Michael Johnson . . . was fatally stabbed by Michael Aragon and [an]other student, Sefe Martinez, . . . received non-life-threatening stab wounds. . . . The smaller Hispanic group [that Aragon was with] consisted of members of three different gangs, Magicians Club[,] that's TMC [Aragon's gang], Mission Bay Locos, and Dead End 132. Later that day, Michael Aragon and his co-companion went to a friend's house and [Aragon] started crying and told his girlfriend, 'I killed somebody.' A few days later, he again told his girlfriend that he had stabbed the person who had died during the fight and told her, 'I'm going to get caught sooner or later so if you're going to tell go ahead.' [Aragon] later told a police officer that he had stabbed Michael Johnson once in the chest with the kitchen knife he'd just recently started carrying for protection. He also admitted stabbing Martinez once in the arm. He also gave police the names of all the members of the smaller group. These

numbered approximately 12 and were members of three youth gangs. They were all eventually arrested."

B. *The criminal proceedings*

In January 1994, Aragon pled guilty to second degree murder (Pen. Code, § 187, subd. (a)). The court sentenced Aragon to an indeterminate sentence of 15 years to life in prison. This court affirmed Aragon's conviction in July 1995.

C. *Aragon's substance abuse history and his participation in substance abuse treatment programs*

1. *Aragon's self-reported substance abuse history*

A May 1993 report prepared for the purpose of determining Aragon's fitness to be treated as a juvenile with respect to the commitment offense states the following:

> "[Aragon] reported to the undersigned a positive history for both alcohol and drug use. [Aragon] stated that his initial involvement with both drugs and alcohol began approximately four years ago.[3] At that time, [Aragon] began experimenting with beer and marijuana. The context of his drug/alcohol use was in party situations, according to [Aragon].
>
> "[Aragon] reported that his drug and alcohol use intensified approximately two years later. At this point in time, [Aragon] reported experimenting with other drugs including cocaine, crystal methamphetamine, PCP and LSD. [Aragon] reported that his use of LSD and PCP was limited to one time and approximately three times respectively. [Aragon] reported more extended use of crystal and cocaine including smoking the former. [Aragon] reported that his use of marijuana, crystal, and cocaine occurred whenever it was available. [Aragon] also denied involvement in the sale of drugs[,] stating his friends were his source of drugs. [Aragon] characterized his drug use as a weekly activity primarily engaged [in] on weekends.

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3 Aragon was 17 years old at the time of the fitness interview.

> "Regarding alcohol use, [Aragon] reported his drink of choice was either beer or 'Cisco,' a type of bottled wine popular among teenagers. [Aragon] estimated that he had been drunk 'about twenty times.'
>
> "With respect to his drug/alcohol use, [Aragon] denied having a substance abuse problem."

A February 1994 probation report indicates that Aragon stated that he used marijuana, methamphetamine, and cocaine "at the rate of three times per week, 'if it was there.'"

A 2001 psychological evaluation indicates that Aragon stated that prior to his incarceration, he drank alcohol "often to the point of 'getting drunk and passing out.'" The 2001 report also states, "Aragon reports having smoked marijuana prior to the [commitment offense]."

A 2005 mental health evaluation states, "Aragon describes his past drug use as minimal and experimental, and he claims that he was never addicted to drugs or alcohol." The report continues, "[Aragon] noted that he drank alcohol to the point of drunkenness two or three times." The 2005 evaluation also states that Aragon "mentioned several times that he believe[d] that the joint [that he smoked prior to committing the murder] was dipped in some other type of more powerful drug, such as PCP."

A 2009 forensic evaluation states:

> "Earlier reports indicate that the inmate had acknowledged some drug and alcohol use in the past. No new or contradictory information was elicited in this evaluation. Mr. Aragon reported that in the past he drank alcohol and used marijuana about once a month from age fifteen to seventeen and that he tried cocaine, LSD, and PCP one time each."

2. *Aragon's substance abuse treatment record*

a. *Progress reports*

Although Aragon participated in a number of therapeutic programs during his first three years of custody, from 1994 through 1997, it does not appear that he participated in any substance abuse treatment programs. In 1998, Aragon completed a 120-hour program called "Life Plan for Recovery, Substance Abuse Education Program." From September 1998 through February 1999 he participated in the "'RAPHA' 12-step Program for Overcoming Dependency and Addictions." From February 1999 through December 2004, Aragon did not participate in any substance abuse treatment programs. In September 2003, Aragon was transferred to the California Substance Abuse Treatment Facility and State Prison. However, Aragon's progress reports do not indicate that this placement resulted in any additional substance abuse treatment until Aragon attended a Narcotics Anonymous (NA) meeting during the month of December 2004. In July 2007, Aragon completed a program entitled "Making Sense of Addiction." Beginning in the spring of 2007, Aragon began attending NA and Alcoholics Anonymous (AA) sessions regularly. It appears that Aragon continued this participation until approximately May 2009, the date of the last progress report in the record.[4]

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[4] A May 2009 forensic evaluation states that Aragon participated in AA and NA groups "in 2009 until these groups were cancelled as a result of recent budget cuts." At his 2007 parole hearing, a deputy commissioner told Aragon, "I would encourage you to . . . choose AA/NA, try to do it more consistently. If you're on a yard where they don't have it, check out a book, do a book report, do a couple of paragraphs. When you come

b. *Mental health evaluations*

A 2001 psychological evaluation states, "Mr. Aragon has attended AA meetings in the past and feels that drugs and alcohol are not a problem for him now. He stated repeatedly, with a smile, "'I've been scared straight.'" The 2001 evaluation diagnosed Aragon as having an Axis I diagnosis, "Polysubstance Abuse Disorder, in Institutional Remission." The evaluator stated that Aragon's risk for committing future violent acts would diminish if he were involved in a substance abuse treatment program.

A 2005 mental health evaluation indicates that Aragon "emphatically denies using any drugs or alcohol while incarcerated." In addition, the evaluation indicates that Aragon "has attended AA meetings in the past and feels that drugs and alcohol are not a problem for him." The evaluator expressed the opinion that, "[g]iven the information available," Aragon does not appear to need a "treatment program/placement at this time." However, the evaluator stated, "Prior to release it is recommended that Mr. Aragon attend AA or NA." The evaluator also cautioned, "The abuse of chemicals (drugs or alcohol) appears to be the most significant risk factor or potential precursor to violence or other criminal behavior."

The 2009 evaluation states that Aragon has "No Diagnosis on Axis I." The evaluation also states that Aragon participated in AA and NA "earlier in his incarceration," and that he had done so again in 2008 and 2009. The evaluator also noted that Aragon "stated that he is committed to living a clean and sober life whether in or out

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back to the Board, you know, three or four months, [*sic*] they didn't have substance abuse counseling, but this what I've done."

of prison and has been doing so since his arrest." As was stated in other mental health reports, the 2009 report stated that Aragon's risk of violent recidivism would increase "if he returned to the use of intoxicating substances . . . ."

3. *Concerns about Aragon's substance abuse raised at previous parole hearings, in finding Aragon unsuitable for parole*

In finding Aragon unsuitable for parole in November 2007, the Board focused heavily on Aragon's failure to fully address his substance abuse problem. The presiding commissioner stated, "[T]he panel finds that you have not consistently participated in beneficial self-help programs and much of the participation that is evidenced is very recent and you need to demonstrate an ability to continue that over a period of time." The presiding commissioner also stated, "Aragon seems to express a very simplistic view of how he will cope with substance abuse in the future and his work with AA is very recent . . . ." The presiding commissioner expressly told Aragon that "he must demonstrate a stronger grasp of preventative steps, as well as an idea of relapse prevention." Aragon was told that it was important that he understand the principles behind the "steps" of the substance abuse programs and be able to apply those principles to his life. In sum, the Board found that Aragon had "not demonstrated the skills necessary to convey confidence of a drug and alcohol free future in the free community."

In finding Aragon unsuitable for parole in November 2005, the Board began by stating, "[Y]ou've got to get some AA time under your belt, or NA time under your belt as well." The presiding commissioner also provided Aragon with instructions as to how to demonstrate his commitment to participating in substance abuse treatment if he were

released: "After you get involved with AA, start making some contacts outside. Start getting some sponsorships in the San Diego area. Find out where they meet. Have them send you a brochure and you come to the next hearing with that . . . to say this is where I would go [to] attend AA on the outside." At his first parole suitability hearing in 2002, the Board stated, "[Aragon has] not sufficiently participated in beneficial self-help and therapy programming at this time."

4. *Aragon's testimony at the October 2009 parole hearing concerning his substance abuse problem and his efforts to treat that problem*

At the 2009 parole hearing, the presiding commissioner questioned Aragon about his statement in the 2009 forensic evaluation that he had used "marijuana about once a month from age 15 to 17 and then tried cocaine, LSD, and PCP one time each." The presiding commissioner asked, "I thought I saw a little bit more use of marijuana than just once a month, and cocaine, you said whenever you could get it when it was around. Okay. Do you think you had a drug and alcohol problem?" Aragon responded, "I wouldn't say that I was a full-blown-addict, but I was going down the wrong road, yes, Sir." Aragon also testified that his use of drugs on the day of the commitment offense impacted his decisionmaking and stated that there was a "possibility" that he would not have committed the murder if he had not smoked marijuana laced with PCP.

With respect to his participation in substance abuse treatment programs in prison, Aragon agreed with the Board that he had been participating in AA/NA regularly since 2007. The presiding commissioner questioned Aragon about what he had learned from his participation in various substance abuse programs as follows:

"Presiding Commissioner O'Hara: . . . [Y]ou've been involved in Narcotics Anonymous and Alcoholics Anonymous extensively, various 12-Step Programs. Do you know your Steps?

"Inmate Aragon: No, Sir. I don't know them by memory."

"Presiding Commissioner O'Hara: All right. Have you done a searching and fearless moral inventory?"

"Inmate Aragon: No.

"Presiding Commissioner O'Hara: Now, you've just told me that this crime was impacted by the fact that you felt you were under the influence.

"Inmate Aragon: Yes, Sir.

"Presiding Commissioner O'Hara: And yet, you've been in these programs—I think you started [in] 2004, you're in for a little while, you took a sabbatical, and you've gotten back in, but I see these other 12-Step Programs here and there. You did AA and NA at the same time one year, I think it was 2008, and you haven't retained—Do you carry the card with you?

"Inmate Aragon: No, Sir.

"Presiding Commissioner O'Hara: Have you tried to make amends?

"Inmate Aragon: I was advised by the Board before that sometimes it's not too smart to send letters to the victim's family. I was advised by the Board."

"Presiding Commissioner O'Hara: No, no, that's absolutely correct, but the deal is this. Part of the steps, as you get into them, one is to make amends if it will not cause greater harm to do so."

"Inmate Aragon: Yes, Sir.

"Presiding Commissioner O'Hara: But there is the introspection that goes into creating a letter and writing that letter to like, his mother. You may never send it, but the idea is that you write it like you were going to stand in front of her and say it to her, and it really becomes a very hard thing for you to do and you should do it over a number

> of weeks, months, even years. As you gain insight, that letter will change. . . ."

With respect to Aragon's substance abuse treatment plans if he were paroled, a deputy commissioner asked Aragon, "Do you have a program worked out for the community in terms of your relapse prevention and what you're going to do in terms of your AA and NA situation?" After Aragon responded, "I'm going to still attend sir," the deputy commissioner asked, "Do you know where the meetings are?" Aragon responded, "Not at this time, not right now at this second." The deputy commissioner asked, "How crucial do you think AA and NA is to your life?" Aragon responded, "A lot, extremely a lot."[5] The deputy commissioner asked, "Have you made yourself a commitment yet?" Aragon acknowledged, "I don't have a sponsor yet, sir." Aragon thereafter explained that he did have a plan to get a sponsor, stating, "I believe [my counsel] has a brother that could act as my sponsor."

D. *The Board's October 2009 decision finding Aragon unsuitable for parole*

At the conclusion of the October 2009 hearing, the Board found Aragon unsuitable for parole. In rendering the Board's decision, the presiding commissioner stated, "The first consideration which weighed heavily against the finding of suitability is the commitment offense." The presiding commissioner stated that Aragon continued to minimize his responsibility for the murder, noting that the Board disbelieved a statement that Aragon made at the hearing, to the effect that he did not know that there was going to

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[5] At another point in the hearing, Aragon agreed with the presiding commissioner's statement that Aragon's participation in a substance abuse program upon release would be a "critical necessity."

be a fight at the high school at the time he left his friend's house on the day of the murder. The presiding commissioner also noted that Aragon had stabbed multiple victims, and that the manner in which he carried out the stabbings demonstrated a callous disregard for human suffering. The presiding commissioner added that the motive for the stabbings was inexplicable.

In addition to the characteristics of the commitment offense, the presiding commissioner provided several other reasons for finding Aragon unsuitable for parole. The presiding commissioner noted that Aragon had "some" prior record of criminality, including an attempted auto theft as a juvenile. The presiding commissioner also noted that Aragon had a troubled social history prior to the commission of the offense, including having a poor relationship with his stepfather, failing to complete high school, developing a "significant drug and alcohol use and addiction starting at a very early age," and engaging in "significant gang activity starting at an early age."

In addition to these historical factors, the presiding commissioner maintained that Aragon did not "have a lot of insight in[to] the causative factors of your conduct . . . ." In particular, the presiding commissioner focused on Aragon's inability to apply therapeutic lessons to his own life, particularly in the area of Aragon's substance abuse. The presiding commissioner stated that Aragon needed to be able to explain "how [he] started using the drugs, and why [he] continue[d] to use the drugs." The presiding commissioner noted that Aragon had indicated that "drugs played a significant role" in causing him to commit the murder, and yet, Aragon had not demonstrated a serious commitment to addressing this problem. In this regard, the presiding commissioner noted:

> "[Y]ou come in and say, well, I wouldn't have committed this crime if I wasn't on drugs that day or I hadn't smoke[d] that sherm.[6] . . . [A] sure-fire way for you to avoid this in the future is [to] not use drugs again. And you've been in all these programs and yet you can't give us any of the steps. And [your] Counsel is right. A lot of times it's not so much knowing the steps, but you haven't been living the steps. I gave you step four. Have you done a fearless and searching moral inventory? Nope. I mean, if you're going to these groups just to get donuts, and you know, coffee and hang[out] with the guys, and get a chrono, forget it. . . . [W]e're looking at a guy who claims he wouldn't have done this if he wasn't intoxicated or using drugs that day who doesn't know any of the steps to any of these programs. And so when we look at your crime, we're looking at a guy who really hasn't dealt with the underlying aspects of it, including the drug and alcohol [use], and that makes us conclude that you still have the propensity to do that."

The presiding commissioner summarized the Board's decision, stating, "[W]e do have one major qualm, and that is your self-help and therapy." The Board found Aragon unsuitable for parole, concluding, "We believe that you have programmed in a limited manner, but you haven't participated in beneficial self-help and therapy enough to enhance your ability to function with[in] the law upon release."

E. *Aragon's petitions for habeas corpus*

Aragon filed a petition for habeas corpus in the trial court in 2010.[7] In his petition, Aragon argued that the record lacked some evidence to support the Board's

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6 "Sherm" is a slang term for a marijuana cigarette laced with PCP.

7 Despite the fact that the California Rules of Court require that any petition for habeas corpus that was filed in the trial court must accompany any petition for habeas corpus pertaining to the same judgment filed in the Court of Appeal (Cal. Rules of Court, rule 8.384(b)), Aragon's petition is not in the record. We draw our summary of Aragon's claims from his descriptions of those claims contained in his petition for habeas corpus filed in this court.

finding that he was unsuitable for parole. The trial court rejected this claim, reasoning in part, "it was obvious to the [Board] (and is now clear to this Court) from reading the transcript that alcohol and drugs were a major factor in the commitment offense. But more importantly, it was what, and *how*, [Aragon] was attempting to overcome those problems that concerned the [Board] . . . ." The court found that there was "substantial information considered that [Aragon] was not yet ready for parole and that provided the requisite 'some evidence.'" Aragon also claimed that the Board failed to apply a clear burden of proof in determining whether he was suitable for parole and that the Board's application of a change in the law extending the time between parole hearings constituted an ex post facto violation. The trial court also rejected these claims as well and denied the petition.

Aragon filed a petition for habeas corpus in this court in August 2010. This court issued an order to show cause in November. The People filed a return to the order to show cause, and Aragon filed a denial to the return.

III.

DISCUSSION

A. *The record contains some evidence that Aragon poses a current threat to public safety*

Aragon claims that the record lacks any evidence that he poses a current threat to public safety.[8] We disagree.

1. *Governing law*

In *Russo, supra*, 194 Cal.App.4th at page 151, this court summarized the law governing the Board's decision whether to grant an inmate parole, and this court's review of the decision:

> "The decision whether to grant parole is an inherently subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that is guided by a number of factors, some objective, identified in Penal Code section 3041 and the Board's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) In making the suitability determination, the Board must consider '[a]ll relevant, reliable information' (*id*., § 2402, subd. (b)), such as the nature of the commitment offense including the prisoner's behavior before, during and after the crime; social history; mental state; criminal record; attitude towards the crime; and parole plans. (*Ibid.*) The circumstances that tend to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a

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8 Aragon also claims that the Board failed to take into consideration the fact that he was 17 years old at the time of the murder. Aragon's age at the time of the offense was discussed by his counsel at the October 2009 hearing. Further, in rendering the Board's decision finding him unsuitable for parole, the presiding commissioner stated, "You were a young man when you committed this crime, 17 years of age." Thus, we reject Aragon's contention that the Board failed to consider his age at the time of the commitment offense.

> lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (Cal. Code Regs., tit. 15, § 2402, subd. (c).)
>
> "These criteria are general guidelines. The importance attached to any circumstance or combination of circumstances in a given case is left to the sound judgment of the Board, which is charged with trying to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts. (*Rosenkrantz*, *supra*, 29 Cal.4th at pp. 654-655.) 'It is not the existence or nonexistence of 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].) Thus, a factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (Cal. Code Regs., tit. 15, § 2402, subd. (b).)
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> "Judicial review of the Board's decision is limited. 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, our review is restricted to ascertaining whether there is 'some evidence' in the record that supports the decision of the Board that the inmate is a current threat to public safety. (*Lawrence*, *supra*, 44 Cal.4th at p. 1212; *Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)"

2. *The Board's decision that Aragon remains a current threat to public safety in light of his limited therapeutic gains in addressing his substance abuse problem is supported by some evidence in the record*

We start with a common sense observation: predicting whether an inmate with a significant substance abuse history that is causally related to his criminality will use drugs or alcohol upon release, and whether any such potential use will lead to further criminality, is not an exact science. We are also mindful of the deferential standard of review that applies to our review of the Board's decision and consider here only whether "some evidence" supports the Board's decision that Aragon constitutes a current threat to public safety. (*Lawrence*, *supra*, 44 Cal.4th at p. 1212; see also *Shaputis*, *supra*, 44

Cal.4th at p. 1260 ["It may be reasonable to conclude . . . that petitioner's many years of sobriety . . . suggest he never again will consume alcohol, will not relapse into violent conduct, and thus does not remain a risk to public safety. . . . [H]owever, 'the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board]. . . . 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."].) In light of these principles, and for the reasons discussed below, we conclude that while the record indicates that Aragon has made some efforts to ameliorate his substance abuse problem, the Board's decision that Aragon remains a current threat to public safety in light of his limited therapeutic gains in this area is supported by some evidence.

At the outset, we acknowledge, to Aragon's credit, that there is no evidence in the record that Aragon has used alcohol or drugs while in prison. We consider this an important, although not determinative, indication of Aragon's ability to remain sober upon release. (Compare *In re Powell* (2010) 188 Cal.App.4th 1530, 1538-1539 [inmate's "unstable history" including his abuse of drugs and alcohol did not constitute evidence of current dangerousness in part because "[o]ver the last 29 years while incarcerated he has committed no violent or assaultive act, nor has he has abused drugs or alcohol"] with *In re Roderick* (2007) 154 Cal.App.4th 242, 305, fn. 34 (dis. opn. of Sepulveda, J.) ["The majority relies upon Roderick's alcoholism being in 'remission,' as negating concern about his potential for returning to his habit of drinking and engaging in violent conduct. While he may be considered a recovering alcoholic, characterizing Roderick's alcoholism

as 'in remission' hardly seems appropriate, especially given the lack of local bars or other establishments in state prison where alcohol would be readily available to him."].)

We also acknowledge that Aragon has a significant history of participation in substance abuse treatment programs. As discussed above, Aragon has attended several 12-step substance abuse programs during his time in prison. However, the record also reflects that Aragon's participation has been intermittent, beginning around 1998 and continuing through 1999, waning in the 1999-2007 period, and resuming in earnest in 2007. In addition, Aragon's most consistent period of participation began just two and a half years before the October 2009 parole hearing. (Compare with *In re Cerny* (2009) 178 Cal.App.4th 1303, 1310 [noting that inmate had participated regularly in NA for nearly 20 years in prison, and concluding that in light of "long-standing treatment for drug abuse, [inmate's] commitment offense no longer provides evidence that he is currently dangerous or that his release would unreasonably endanger the public"].)

In addition to Aragon's relatively recent sustained participation in AA and NA, there is some evidence in the record that he has not internalized the therapeutic lessons of these programs. He was unable to name the steps associated with the treatment programs at the October 2009 Board hearing despite having been told at his prior parole hearing that he needed to "demonstrate a stronger grasp of [the] preventative steps." Aragon also acknowledged that he had not completed at least one of the steps (making a "searching and fearless moral inventory"), despite having been told at the prior parole hearing that it was important that Aragon apply the principles of these substance abuse programs to his life. In light of Aragon's testimony, the Board could have reasonably been concerned that

Aragon had not achieved sufficient therapeutic insight into his substance abuse problems, particularly in light of the 2007 Board's admonishments that it was important that he be able to demonstrate a grasp of the lessons of such programs. (Cf. *In re Reed* (2009) 171 Cal.App.4th 1071, 1085 [inmate's failure to follow Board's directive provided at prior parole hearing constituted some evidence that inmate would be unable to follow laws upon release].)

The Board could also have reasonably been concerned that Aragon continued to minimize the extent of his substance abuse problem. As the district attorney argued at the October 2009 parole hearing, Aragon's statements concerning the extent of his substance abuse have been inconsistent.[9] Near the time of the commitment offense, Aragon reported that he used marijuana, methamphetamine and cocaine approximately three times per week, or "whenever it was available." In contrast, in 2009, Aragon told a forensic evaluator that, prior to the commitment offense, he used marijuana about once a month, and that he had tried cocaine once.

Finally, the Board could also have reasonably concluded that Aragon had not developed a "relapse prevention" plan, as recommended by the Board at prior parole hearings. As of the 2009 hearing, Aragon did not have an identified sponsor and was unable to demonstrate any knowledge of substance abuse programs that would be available to him upon release.

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9 The district attorney argued, "We go from a history of abuse and disorder being the operative words when describing his relationship to drugs and alcohol down to a point where he's had occasional use or he doesn't think it was a problem."

In addition to this mixed record of rehabilitation, there is evidence that Aragon's serious drug problem was causally related to his commission of a brutal murder, and undisputed evidence that Aragon had other significant social problems prior to the commitment offense, including participating in a gang. For these reasons, we conclude there is some evidence to support the Board's finding that Aragon's commission of a brutal gang murder remains probative of his current dangerousness. (See *Lawrence*, *supra*, 44 Cal.4th at p. 1214 [commitment offense may continue to be relevant to determination of parole suitability where there is "something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, [that] indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative"].) We further conclude that Aragon's commission of a brutal murder while under the influence of drugs, combined with evidence of Aragon's failure to fully address his drug and alcohol problem, constitutes some evidence to support the Board's finding that Aragon remains a current threat to public safety.[10]

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10 In light of our conclusion, we need not consider whether the Board's conclusion that Aragon's "minimization" of his responsibility for the murder supports the Board's decision that Aragon remains a public safety risk.

B. *The Board did not err in failing to apply the "clear and convincing" burden of proof in finding Aragon unsuitable for parole*

Aragon claims that the Board erred in failing to apply the "clear and convincing" burden of proof in finding him unsuitable for parole. Aragon argues that in light of the heightened liberty interest of the inmate that is at stake in a parole suitability hearing, as well as the inmate's presumptive right to parole, this court should require the Board to find an inmate suitable for parole unless it finds, by clear and convincing evidence, that he is unsuitable for parole.

Evidence Code section 115 provides:

> "'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.
>
> "*Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence*." (Italics added.)

Aragon has not suggested that any other provision of law provides that the clear and convincing burden of proof applies to the Board's determination as to whether an inmate is suitable for parole.

In *In re Morrall* (2002) 102 Cal.App.4th 280, 302, the court cited Evidence Code section 115 in stating, "In exercising his authority over paroles, the Governor can apply a

preponderance of the evidence standard."[11] Courts have held that same standard of proof applies whether the Board or the Governor is determining whether an inmate is suitable for parole. (See *In re Twinn* (2010) 190 Cal.App.4th 447, 462 ["While parole unsuitability factors need only be found by a preponderance of the evidence, the Governor's decision, like the Board's decision, must comport with due process"]; *In re Tripp* (2007) 150 Cal.App.4th 306, 312 ["parole unsuitability factors need only be found by a preponderance of the evidence"].)

In light of Evidence Code section 115 and the case law quoted above, we conclude that the Board did not err in failing to apply the clear and convincing burden of proof in finding Aragon unsuitable for parole.

C. *The Board's application of Marsy's Law to schedule Aragon's next parole hearing three years from the date of the October 2009 hearing does not violate the prohibition against the application of ex post facto laws*

In 2008, the voters of California enacted Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law" (hereafter Marsy's Law). Marsy's Law amended the California Constitution (Cal. Const., art. I, § 28) and former Penal Code section 3041.5, subdivision (b)(3),[12] to give "the Board discretion to schedule a parole hearing three, five, seven, ten or fifteen years after any hearing at which parole is denied . . . ." (*Russo*,

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11 "[W]hen the Board determines an inmate convicted of murder is suitable for parole, the Governor has the constitutional authority to conduct a de novo review of the Board's decision." (*In re Rodriguez* (2011) 193 Cal.App.4th 85, 92.)

12 The Legislature amended Penal Code section 3041.5, subdivision (b)(3) again in October 2009, effective January 1, 2010, in ways not material to this petition. (Stats. 2009, ch. 276, § 2.)

supra, 194 Cal.App.4th at p. 157.) Aragon contends that the Board's application of Marsy's Law to schedule his next parole hearing three years from the date of the October 2009 hearing violates the prohibition against the application of ex post facto laws.

In *Russo*, this court denied an identical challenge to the application of Marsy's Law. (*Russo*, *supra*, 194 Cal.App.4th at pp. 157-159.) The *Russo* court cited *In re Jackson* (1985) 39 Cal.3d 464, *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499 (*Morales*), and *Garner v. Jones* (2000) 529 U.S. 244 (*Garner*), in which the California Supreme Court and the United States Supreme Court rejected various claims that the retroactive application of laws permitting the extension of intervals between parole hearings constituted an ex post facto violation. (*Russo*, *supra*, at pp. 157-159.) The *Russo* court also noted that additional provisions of Marsy's Law provide that an inmate may request that a parole hearing be conducted at a date earlier than the hearing date scheduled by the Board under the law, and that the Board may grant such a request. (*Russo*, *supra*, at pp. 158-159.) The *Russo* court noted that these provisions supported the conclusion that the Board's application of Marsy's Law to schedule a parole hearing three years from the date of a hearing at which parole is denied does not constitute an ex post facto violation, reasoning, "These additional procedural safeguards eliminate any ex post facto implications because they constitute 'qualifying provisions that minimize or eliminate' [citation] the 'significant risk of prolonging [petitioner's] incarceration.' [Citation.]" (*Russo*, *supra*, at p. 158; see also *Gilman v. Schwarzenegger* (9th Cir. Jan. 24, 2011, No. 10-15471) ___ F.3d ___ [2011 WL 198435, *8].) [concluding district court abused its discretion in granting plaintiff's motion for preliminary injunction precluding

implementation of Marsy's Law "[b]ecause on the current record [Marsy's Law] does not create a significant risk of prolonging Plaintiffs' incarceration on any of the theories Plaintiffs assert"].) We agree with the *Russo* court, and conclude that the Board's application of Marsy's Law to set Aragon's next suitability hearing three years from the October 2009 hearing date does not constitute an ex post facto violation.[13]

In *Vicks, supra,* 195 Cal.App.4th at page 483, another panel of this court held, "[A]pplication of the amendments to [Penal Code] section 3041.5, subdivision (b), to inmates whose commitment offense was committed prior to the effective date of Marsy's Law violates ex post facto principles." We decline to follow *Vicks* in this case for three primary reasons. First, the holding in *Vicks* was based at least in part on the panel's conclusion that provisions in Marsy's Law that authorize the Board to advance parole hearings did not sufficiently "ameliorate ex post facto concerns." (*Vicks, supra,* at p. 502.) We disagree with the *Vicks* court's reasons for rejecting the ameliorative effect of these provisions. Most importantly, we disagree with the *Vicks* court's interpretation of Penal Code section 3041.5, subdivision (d)(3) as "impos[ing] a three-year blackout period for an inmate to petition for an advanced hearing when parole is denied following a regularly scheduled suitability hearing." (*Vicks, supra,* at p. 494, fn. 10.)

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13 In light of our conclusion, we need not consider the People's claim that the Board applied Marsy's Law prospectively, rather than retroactively, because Aragon's October 2009 parole suitability hearing took place after the enactment of Marsy's Law.

Penal Code section 3041.5, subdivision (d)(3) provides:

> "An inmate may make only one written request as provided in paragraph (1) [to advance a hearing] 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." (Italics and underscore added.)

The *Vicks* court interpreted the italicized portion of the statute to refer to *any* hearing denying parole, rather than to a parole suitability hearing held in response to an inmate's request for an advanced hearing. In our view, the text of Penal Code section 3041.5, subdivision (d)(3), underlined above, makes it clear that the italicized phrase in the statute refers only to a parole suitability hearing held in *response* to an inmate's *request* for an advanced hearing. We therefore reject the *Vicks* panel's conclusion that it is " 'impossible' for a prisoner to successfully pursue an advance[d] hearing within one year of the denial of parole . . . [because] the statute bars an inmate-initiated request for an advanced hearing for three years." (*Vicks*, *supra*, 195 Cal.App.4th at p. 504, fn. 22, italics omitted.)

The *Vicks* court also suggested that a provision in Marsy's Law (Pen. Code, § 3041.5, subd. (b)(4))[14] that authorizes the Board to advance an inmate's parole hearing sua sponte did not ameliorate ex post facto concerns:

> "Certainly, [Penal Code] section 3041.5, subdivision (b)(4), nominally appears to preserve the ability of the [Board] on its own motion to advance a subsequent suitability hearing date to a date earlier than that set, as long as there are changed circumstances or new information that establish a reasonable likelihood the inmate will be found suitable for parole. However, neither the statute nor the administrative regulations explain the mechanism by which the [Board] would (absent a request from the inmate under [Pen. Code,] § 3041.5, subd. (d)(1)) become cognizant of the changed circumstances or new information that might trigger sua sponte action by the [Board] to advance the hearing date." (*Vicks, supra*, 195 Cal.App.4th at p. 494, fn. 10.)

However, the United States Supreme Court made it clear in both *Morales* and *Garner* that courts may "presume [a parole board] follows its statutory commands and internal policies in fulfilling its obligations." (*Garner, supra,* 529 U.S. at p. 256 [noting that "[i]n *Morales,* we relied upon the State's representation that its parole board had a practice of granting inmates' requests for early review"].) Unlike in *Morales*, in which the Supreme Court relied on a "representation" in briefing that the Board had a "practice" of reviewing inmate requests for advanced parole hearings (*Morales, supra,* 514 U.S. at

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14 Penal Code section 3041.5, subdivision (b)(4) provides in relevant part:

> "The board may in its discretion, after considering the views and interests of the victim, advance a [parole suitability] hearing . . . 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 . . . ."

pp. 512-513), under Marsy's Law, the Board is statutorily authorized both to grant requests for an advanced hearing, and to advance a parole hearing sua sponte. (Pen. Code, § 3041.5, subds. (b)(4), (d)(3).) Thus, in the wake of *Morales* and *Garner*, the lack of a "mechanism" (*Vicks, supra,* 195 Cal.App.4th at p. 494, fn. 10) by which the Board would learn of information upon which it could exercise its discretion to advance a suitability hearing sua sponte does not reduce the efficacy of Penal Code section 3041.5, subdivision (b)(4) in ameliorating ex post facto concerns that the increased deferral period raises.

Second, as stated by the *Russo* court, relevant United States Supreme Court case law—in particular, *Garner, supra,* 529 U.S. 244—supports the conclusion that the Board's setting a parole date three years from the October 2009 hearing did not constitute an ex post facto violation. At the time of Aragon's commitment offense, California law provided inmates like Aragon with an annual parole hearing, unless the Board found it not reasonable to expect that parole would be granted in the one-year period, in which case, the Board could order a two-year deferral period. (Stats.1990, ch. 1053, § 1.) In the wake of Marsy's Law, Aragon was subjected to a three-year parole hearing deferral period, with the possibility that an earlier hearing could be held upon a change in circumstances or the discovery of new information establishing a reasonable likelihood that he would be found suitable for parole. (See Pen. Code, § 3041.5, subds. (b)(4), (d)(3).) In *Garner*, the Supreme Court concluded that the application of an administrative regulation that increased an inmate's parole hearing deferral period from three years to eight years (a *five-year* increase in the deferral period) did not constitute an

ex post facto violation. (*Garner, supra,* at pp. 246-248.) Thus, *Garner* strongly supports the conclusion that the Board's setting Aragon's next parole hearing three years from the October 2009 hearing did not constitute an ex post facto violation.[15]

Finally, the inmate at issue in *Vicks* was subject to a *five-year* deferral. (*Vicks, supra,* 195 Cal.App.4th at p. 492.) In contrast, Aragon, like the inmate in *Russo*, is subject to a *three-year* deferral. We decline to express any opinion as to whether the Board's application of Marsy's Law to set an inmate's parole hearing *more* than three years from the date of the parole hearing at which parole is denied would constitute an ex post facto violation, since, in our view, this case does not present that issue.[16]

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15 We are aware that Marsy's Law alters more than the minimum deferral period between parole hearings. However, Aragon does not address in detail any such changes in his petition, stating instead that he "preserves this argument succinctly . . . in light of the issue being now litigated in the federal courts in the case of *Gilman v. Schwarzenegger,* USCA 9 No. 10-15471." Accordingly, we do not discuss those changes in this opinion. As noted in the text, the Ninth Circuit recently concluded that a district court abused its discretion in granting a preliminary injunction precluding implementation of Marsy's Law. (*Gilman v. Schwarzenegger, supra*, 2011 WL 198435, *8.)

16 Although the inmate in *Vicks* "argue[d] . . . [that] the five-year deferral, *when applied to him*, violates ex post facto principles" (*Vicks, supra,* 195 Cal.App.4th at p. 492, italics added), the *Vicks* court broadly held that none of the changes to section 3041.5, enacted pursuant to Marsy's Law, may be constitutionally applied to an inmate whose commitment offense predated the effective date of Marsy's Law. (*Vicks, supra,* at p. 507 ["[T]he changes to [Pen. Code, §] 3041.5 enacted pursuant to Marsy's Law may not be applied to inmates whose crimes predated the effective date of Marsy's Law"].)

IV.

DISPOSITION

The petition is denied.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.