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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re VINCENT RUSSO on Habeas Corpus.	D057405 (Super. Ct. No. HC18275)

Original proceeding on a petition for writ of habeas corpus. Relief denied.

Keith Wattley for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Julie A. Malone and Jennifer L. Heinisch, Deputy Attorneys General, for Respondent.

Vincent Russo (petitioner) has been incarcerated since 1985, when he was sentenced to prison for life with the possibility of parole for pleading guilty to one count of kidnapping to commit robbery, one count of attempted murder and enhancements for

inflicting great bodily injury and use of a firearm.[1] In July 2009, at his tenth parole hearing, the Board of Parole Hearings (the Board) found petitioner not suitable for parole.

Petitioner challenges the Board's decision on the ground it violates his due process rights because the decision is not supported by "some evidence" that petitioner poses a current risk of danger to society. Petitioner also challenges the Board's reliance on a 2008 amendment to Penal Code section 3041.5, subdivision (b)(3), which postponed his next parole hearing for three years. He claims the amended statute violates state and federal Constitutional prohibitions against ex post facto laws.

As we explain, we conclude the record before the Board in July 2009 contains "some evidence" petitioner's release poses a current risk to public safety. We also conclude the Board's decision to apply the 2008 amendment to Penal Code section 3041.5, subdivision (b)(3) when scheduling petitioner's next parole hearing three years from the July 2009 hearing did not violate the constitutional prohibitions against ex post facto application of the law. Accordingly, we deny petitioner habeas relief.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Commitment Offense and Criminal History*

The facts relied upon by the Board at the July 2009 parole hearing were mainly derived from the August 2007 Life Prisoner Evaluation. We adopt those facts, as supplemented appropriately, for the purpose of our analysis of the record.

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1 At the time of the offense, attempted murder was not a life term offense. The trial court stayed the sentence for attempted murder and sentenced only for kidnapping for robbery.

On December 22, 1978, the victim, Dale Scott Eaton, was working the night shift at the Stage Stop liquor store in Ramona, California. At approximately 11:00 p.m., petitioner entered the store, put a .45 caliber pistol in Eaton's face and ordered Eaton to the floor. Petitioner took $515 from the register and ordered Eaton to accompany him to petitioner's vehicle. Eaton complied and sat in the front passenger seat. Petitioner drove, while continuing to hold the gun on Eaton.

About 35 minutes later, petitioner stopped the car in a rural area and ordered Eaton out of the vehicle. Petitioner told Eaton to move towards the rear of the vehicle and across the road. Petitioner next ordered Eaton to lie down on the ground. Petitioner placed the gun against the back of Eaton's head. According to Eaton, petitioner said "Merry Christmas" and pulled the trigger, twice shooting Eaton at pointblank range in the back of the head, once in the left bicep, once in the right forearm and once in the left cheek.

When petitioner saw headlights approaching, he promptly left the crime scene. Eaton rolled himself down an embankment and later crawled back up to the roadway where he was found by a passing motorist, taken to the hospital and miraculously survived. The shooting left Eaton grievously incapacitated.

Investigations revealed petitioner and James Baraibar, his roommate, had stolen three guns from the Camp Pendleton Marine Base—including the one used in the shooting of Eaton—where they both were stationed prior to petitioner's commitment of the life crime. Petitioner and Baraibar used the guns and donned ski masks to hide their

faces when they previously robbed the Stage Shop liquor store on November 25, 1978, and the U.S. liquor store on December 3, 1978.

On December 23, 1978, Baraibar was stopped by military police for a traffic violation. Two of the stolen guns were found in the vehicle. When deputies subsequently interviewed petitioner, he told them he had loaned his car to Baraibar. He denied any knowledge of the Stage Stop robbery and shooting of Eaton. Some time later, Baraibar told police about the robberies he and petitioner committed together and how petitioner alone committed the kidnap for robbery of Eaton.

In the meantime, petitioner fled California with his common law wife and her daughter. They subsequently moved from place to place, using various aliases to avoid detection and apprehension. They lived in Calgary, Canada, Texas, twice in New York, Florida and finally, in Beaver Falls, Pennsylvania, where petitioner was arrested by the FBI in January 1985, six years after the shooting.

Other than an arrest for driving under the influence of alcohol in September 1977, petitioner had no juvenile or adult criminal history except for the life crime and the two uncharged armed robberies that he and Baraibar committed during the crime spree in 1978 when petitioner committed the life crime.

B. *The 2009 Parole Hearing*

Despite his positive prison behavior and parole plans, at the conclusion of the July 2009 hearing the Board found petitioner not suitable for parole. The Board denied parole on the ground petitioner "currently poses an unreasonable risk of danger if released from prison." The Board found the commitment offense weighed heavily against petitioner, as

petitioner's offense was committed in an "especially heinous, atrocious, and cruel manner because the offense was carried out in a dispassionate and calculated manner. The victim [Eaton] was abused, defiled, or mutilated during or after the offense. The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering, and the motive for the crime is very trivial in relationship to the offense."

The Board also found petitioner's "unstable" social history weighed against his suitability for parole. The Board focused specifically on petitioner's drug and alcohol use at the time of the life crime and petitioner's decision to involve both his common law wife, who was then pregnant with petitioner's daughter, and his common law wife's daughter, in his lengthy flight from arrest.

Most relevant in this writ proceeding, the Board found petitioner's present attitude toward the life crime also heavily weighed against his suitability for parole. Based on its review of "prior transcripts, decisions, and available documents" and petitioner's testimony at the July 2009 hearing, the Board found petitioner's current "insight into the causative factors associated with his involvement in the crime has not been fully explored by [petitioner]. . . . Hav[ing] a weapon and forcing the victim to lie on the ground and shoot him not once but five times would indicate an intent to harm, if not kill, the victim. The [Board] could not determine why the [petitioner] is reluctant to fully explore the significant factor of the life crime. The [petitioner's] claim that it was not his intent to harm [the] victim, yet shooting him five times, is not plausible. The [Board] perceives the [petitioner] as minimizing his involvement in the crime and clearly notes he requires further—it requires further exploration of insight. As such, the [Board] believes the

[petitioner] currently poses an unreasonable risk of danger if released from prison. In addition, the [Board] notes that the [risk assessment] report [prepared by Dr. Montalvo, discussed *ante*] . . . is not totally supportive of release in that . . . the [petitioner] presents a low to moderate risk for violent recidivism in the free community. Although all three assessment tools suggest a low risk, a somewhat higher risk is supported by [the petitioner's] history of evading arrest for six years, and his continuing minimization of responsibility, a factor which the [Board] found as well."

The Board set petitioner's next parole hearing three years from the denial of parole.

DISCUSSION

I

There is "Some Evidence" in the Record Supporting the Board's Conclusion that Petitioner Is Currently Dangerous to the Public

A. *General Criteria Governing Release on Parole*

As this court recognized in *In re Vasquez* (2009) 170 Cal.App.4th 370, "[t]he granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals as soon as possible and alleviate the cost of maintaining them in custodial facilities. [Citations.] Release on parole is said to be the rule, rather than the exception [citation] and the Board is required to set a release date unless it determines that 'the gravity of the current convicted offense . . . is such that consideration of the public safety requires a

more lengthy period of incarceration . . . .' [Citation.]" (*Id*. at pp. 379-380, italics omitted.)

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" (§ 2402, subd. (b)), such as the nature of the commitment offense including behavior before, during and after the crime; the prisoner's 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 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 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." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212 (*Lawrence*).) 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).)

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.)

Here, the Board recognized there were factors tending to show petitioner's suitability for parole, including his exemplary institutional behavior, his reasonable plans for the future and his strong support system in the community. It nonetheless found those factors, among others, were outweighed by a combination of the nature of petitioner's commitment offense, his unstable social history and perhaps most importantly, what the Board perceived to be his lack of adequate insight with respect to his culpability in the commission of the life crime.

Although parole cannot be conditioned on an inmate's admission of guilt (Pen. Code, § 5011, subd. (b);[2] Cal. Code Regs., tit. 15, § 2236[3]), or on the requirement an inmate accept the prosecution's version of the crime (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1110, disapproved on other grounds as stated in *In re Prather* (2010) 30 Cal.4th 238, 252), a Board may consider an inmate's lack of insight in determining suitability for parole. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260, fn. 18 (*Shaputis*); *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) Even when an inmate professes an understanding that his or her conduct was wrong and feels remorse for the crime committed, a comparison of the inmate's explanation of events surrounding the offense and official accounts of the facts surrounding the commitment crime may indicate the

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2 Penal Code section 5011, subdivision (b) provides: "The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed."

3 Section 2236 of the California Code of Regulations, title 15, provides: "The facts of the crime shall be discussed with the prisoner to assist in determining the extent of personal culpability. The board shall not require an admission of guilt to any crime for which the prisoner was committed. A prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner. Written material submitted by the prisoner under § 2249 relating to personal culpability shall be considered."

Neither Penal Code section 5011, subdivision (b) nor California Code of Regulations section 2236 is implicated in this case. Petitioner's commitment is based on a guilty plea. At the time of the hearing, petitioner fully acknowledged his guilt. Moreover, at no time did any Board member condition parole on acceptance of the prosecution's theory of the crime. Rather, while at the outset of the parole hearing petitioner's counsel stated that petitioner would not be addressing the facts of the life crime, petitioner was invited to speak to the conclusions reached by Dr. Montalvo in his 2009 report, and petitioner did so freely and voluntarily. Petitioner's counsel set the ground rules for questions directed to petitioner. The depth and degree of petitioner's discussions of the life crime were therefore actively supervised by his counsel, who was present throughout the hearing and who at times corrected, silenced, guided and focused petitioner in those discussions.

inmate does not understand the true nature of his or her conduct to a degree sufficient in the Board's opinion to warrant the inmate's release to the public. That is, while an inmate may accept legal accountability and may genuinely promise to make amends, he or she may still lack the required self-understanding or insight sufficient for release into the public. (See *Shaputis*, *supra*, 44 Cal.4th at p. 1260.)

B. *Use of "Insight" as a Parole Consideration*

The term "insight" is not easily defined. In its most basic level, it includes a sense of self-knowledge, that is, an understanding of the motivational forces behind one's actions, thoughts or behavior. It is synonymous with whether one understands or grasps the true nature of something. (Random House Dictionary of the English Language (2d ed. 1987) pp. 986-987.)

Although the specific term "insight" is not used in the statutes or regulations that form a basis for granting or denying parole, the concept of self-knowledge is clearly rooted in consideration of an inmate's attitude about the commission of the crime. As our Supreme Court has instructed, the existence of current dangerousness requires, by regulation and statute, that the Board consider multiple factors including "the facts of the commitment offense, the specific efforts of the inmate toward rehabilitation, and *importantly, the inmate's attitude concerning commission of the crime*, as well as the psychological assessments contained in the record." (*Lawrence*, *supra*, 44 Cal.4th at p. 1213, italics added.) Accordingly, the record must reflect there is something in the inmate's pre or post conviction history or in his or her current demeanor and mental state,

that is probative of the inmate's current threat to the public safety. (*Id.* at p. 1214; see also *id.* at p. 1220, fn. 19, citing Cal. Code Regs., tit. 15, § 2281, subd. (b).)

At the outset of the July 2009 hearing, the Board invited petitioner to respond to the 2009 risk assessment report prepared in anticipation of petitioner's July 2009 parole hearing by forensic psychologist Roberto E. Montalvo, Ph.D., as reviewed by senior psychologist Amy Parsons, Psy.D. Specifically, the Board referred petitioner to Dr. Montalvo's conclusion that petitioner continued to minimize his own wrongdoing by blaming Eaton for the shooting because Eaton allegedly failed to follow petitioner's command during the robbery that he put the money into a bag, and that petitioner shot Eaton after Eaton, who lay prone in the highway, brushed petitioner's leg with his hand. Dr. Montalvo also concluded that petitioner was "disingenuous" for professing responsibility yet suggesting the shooting was unintentional and accidental in the face of five shots, two of which were fired pointblank to the back of Eaton's head.

Dr. Montalvo noted petitioner explained his reason for committing the life crime " 'as being messed up in the head . . . and caught up in materialism.' [Petitioner] reportedly wanted to shower his [common law wife] . . . with gifts as he strongly believed love was demonstrated by giving material things, as his parents had done for most of his life. In recounting the details of the crime, [petitioner] made a point of saying that the victim, Mr. Eaton, had displayed some resistance to [petitioner's] directives in not wanting to place the money in the bag [during the liquor store robbery], instead holding the bag and having [petitioner] handle the money. This seemed to be an attributing of blame to the victim for [petitioner's] anger and subsequent actions. [Petitioner] also

reported that when Mr. Eaton was on the ground on the road, [petitioner] felt something touch his leg and he assumed that Mr. Eaton had tried to grab him. This apparently justified [petitioner] swinging the .45 caliber gun down and across Mr. Eaton's head as the gun went off. In his retelling of the details, it appears that [petitioner] does not agree with official accounts that describe him holding the gun to the back of Mr. Eaton's head and pulling the trigger twice. Instead, he suggests that the gun was swung at Mr. Eaton's head and went off in such a manner that [petitioner] was not clear where the bullets hit. He stated that he only realized later, seeing blood on his own clothing, that Mr. Eaton had been hit and that he meant to go back to help Mr. Eaton but left abruptly when he saw headlights approaching. . . . In a Life Prisoner Evaluation report dated 2006 [petitioner's] version of the offense stated 'then he fired the gun five times in an attempt to scare Eaton. ' "

Dr. Montalvo also noted that although petitioner expressed remorse for the life crime and even wrote Eaton asking for forgiveness because Eaton "did nothing which warranted what [petitioner] did to [Eaton]," that statement contradicts petitioner's suggestion in his version of the life crime that Eaton's resistance during the robbery was "to a small degree the reason for petitioner's actions. . . . [Although] [o]ver the years [petitioner] has gained some insight into the man he was at 24 [years of age]," "[a]s for insight into his life crime, it appears more work is needed here. It is strongly suggested that [petitioner] tell a consistent version of his life crime, particularly around the five bullet wounds and that he consider taking responsibility for aiming at Mr. Eaton and deliberately firing at him as he lay on the round. Under the circumstances, his levels of

confusion, fear, agitation and anger would suggest his intention may well have been to shoot and kill Mr. Eaton."

Dr. Montalvo therefore found in his report that a somewhat higher level of risk was supported by petitioner's "history of evading arrest for six years and his continuing minimization of responsibility for his attempted murder of Mr. Eaton."

Petitioner's comments during the July 2009 hearing are not inconsistent with the conclusions reached by Dr. Montalvo and to a large degree frame petitioner's current attitude toward the life crime.

At the outset of the July 2009 hearing, Presiding Commissioner Petrakis invited petitioner to respond to Dr. Montalvo's report. Petitioner, in the presence of his counsel, volunteered that his crime was the result of certain "triggers": "What I was trying to explain to him was these were my triggers. Dale Scott Eaton is a complete victim in this. He did nothing wrong. I walked into a store and I robbed that store. These were the things that were going on with me, the stress, the anger, the frustration that was within me. This had nothing at all to do with Dale Scott Eaton. And I remember certain triggers that night as I laid down later that night, the morning of the 23rd, and these were things that just kept on coming up in my mind. So whenever I retell or try to explain what took place that night, I'm just explaining what my triggers were." Thus, petitioner's principal explanation for his kidnapping and shooting of Eaton was that his acts were the result of "triggers" over which he apparently had little control.

Petitioner's mindset surfaced most notably when, early in the proceeding, he was asked if he wanted to reply to Dr. Montalvo's conclusion that he was "disingenuous" in

professing to take responsibility for his conduct. As noted previously, Dr. Montalvo reached this conclusion on the ground petitioner denied any intention of shooting Eaton despite the fact five shots were fired, including two at the victim's head. In response, petitioner stated that he did not agree with the state's version of events.

Rather, petitioner offered that the shooting was the result of a "trigger" response to movement he felt at the back of his leg when he thought Eaton was pulling at him. According to petitioner, the movement caused the weapon "to come across" and he fired. Petitioner replied that the truth was "too blurry" and reiterated he "never went out to hurt" Eaton, even though he admitted that he did fire the weapon (he had been trained to use) more than once and did clear the weapon after the shooting.

Understandably, one of the commissioners, Deputy Commissioner Smith, followed up on petitioner's explanation that the shooting of Eaton was unintentional. In doing so, he reminded petitioner that he did not need to answer the question. Petitioner voluntarily responded that the events of the shooting remained "very distorted and very confused thinking and I agree with you. And so when I try to explain what's my *current* mindset, what I'm trying to say is that it's unintentional, accidental." (Italics added.) He immediately added that he was not trying to minimize his conduct. When asked once again, "Is your view of the event now that it was accidental, unintentional and you didn't intend to shoot him?" petitioner responded, "I think that's a double-edge sword." The meaning of this statement is unexplained, as petitioner's counsel interjected that it was not an accident, and further questioning on the matter stopped.

With respect to Dr. Montalvo believing petitioner was placing the blame on Eaton because he resisted petitioner's demand he put money in a bag, petitioner again explained his actions were the result of "triggers." He acknowledged that in a letter to Eaton's mother, he hinted that if her son had not hesitated when putting the money in the bag, the crime would not have occurred. Petitioner called the letter "a poison letter" that probably should not have been sent. He stated however that, again, what he was trying to explain to Eaton's mother was that he took Eaton from the store because of the triggers that caused his conduct on the night of the crime.

Significantly, petitioner explained that when he hinted the crime would not have occurred if Eaton had not resisted, he meant something other than the usual meaning of the word "resisted." Petitioner summed up the misunderstanding others might have with his vocabulary: "And as I see resistance, I don't see it as resistance. I don't believe he resisted. I believe these were my triggers being triggered . . . ."

The record likewise reflects petitioner's belief that it is "triggers" that continue to control and explain his general conduct. He recalled that "not too long ago," while talking with his children during a visit, his daughter said "something about drugs, and my son says, oh, and right away I react, you know. I've got all these thoughts. I don't want him to go down the wrong path, but that was my trigger. He did nothing wrong, and that's the best way to explain really what took place [on the evening of the life crime]."

Petitioner's current attitude, as explained by him, is that his actions on the night of the life crime were unintentional and even accidental, because his actions were caused by forces over which he ostensibly had no control. Unfortunately, his abstract explanation

minimizes his involvement and presents conflicts with official accounts of the facts and circumstances surrounding the life crime.

Moreover, petitioner's eagerness to embrace his accountability, however genuine that may be, does not cure the inconsistency and ambiguity in his mental state and attitude. In its role in protecting the public, the Board was required to look beyond petitioner's deterministic explanation of his responsibility and his limited acceptance of legal accountability. The Board was required to evaluate whether petitioner's mental state, that is, his attitude toward the crime, included a truthful appreciation of the wrongfulness of the acts. Without this assurance, the Board could justifiably conclude that if released, petitioner would be unable to exercise his personal judgment and conform his conduct to the law.

Because the evidence in the record supports the finding of the Board that petitioner has not yet accepted "full responsibility" for his life crime (see *Shaputis*, *supra*, 44 Cal.4th at p. 1261, fn. 20)—a finding also supported by the fact that petitioner remained a fugitive for six years after the life crime, when he and his family moved from place to place and lived under various aliases to avoid detection and apprehension (see Cal. Code Regs., tit. 15, § 2402, subd. (b)) [a factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability]), we conclude there is "some evidence" in the record of petitioner's current dangerousness to the public to support the Board's decision to deny him parole.

II

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

At the conclusion of the July 2009 parole hearing, the Board announced that petitioner would be eligible for another hearing in three years, in accordance with recently amended Penal Code section 3041.5, subdivision (b)(3).[4] Petitioner contends this statute, which was amended in 2008 pursuant to Proposition 9, the "Victims' Bill of Rights of 2008: Marsy's Law,"[5] violates state and federal constitutional protections against ex post facto laws. We disagree.

The amendment to Penal Code section 3041.5, which now gives the Board discretion to schedule a parole hearing three, five, seven, ten or fifteen years after any

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

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

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

Moreover, we note the amended statutory language of Marsy's Law is subject to two new qualifying provisions, to wit: subdivisions (b)(4) and (d)(1) of Penal Code section 3041.5. Subdivision (b)(4) of that statute provides: "The board may in its discretion, after considering the views and interests of the victim, advance a hearing set pursuant to paragraph (3) to an earlier date, when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and

victim's safety does not require the additional period of incarceration of the prisoner provided in paragraph (3)."

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

These amendments show the parole board may grant, and the inmate may request (subject to certain other conditions/criteria set forth in subdivision (d) of Penal Code section 3041.5) an earlier parole hearing. These additional procedural safeguards eliminate any ex post facto implications because they constitute "qualifying provisions that minimize or eliminate" (see *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 650) the "significant risk of prolonging [petitioner's] incarceration." (See *Garner v. Jones* (2000) 529 U.S. 244 [in addressing the claim that application of the new parole board policy violated the ex post facto clause, the U.S. Supreme court emphasized that the governing regulations vested the parole board "with discretion as to how often to set an inmate's date for reconsideration, with eight years for the maximum" (*id.* at p. 524) and that the parole board's "policies permit 'expedited parole reviews in the event of a change in [the inmate's] circumstance[s] or where the Board receives new information that would warrant a sooner review.' " (*Ibid.*)].)

DISPOSITION

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

BENKE, Acting P.J.

I CONCUR:

HALLER, J.

HUFFMAN, J., concurring.

Thirty-one years prior to the parole hearing in question the inmate (Russo) committed a terrible crime. He committed a robbery using a firearm stolen from the Marines. He kidnapped the clerk and then shot him five times, execution style, and left the victim by a rural roadway. By a miracle the victim survived. Russo fled and was apprehended six years later. Although the crime was callous and the victim suffered grievous wounds, this was not a homicide case. As the majority notes, Russo was convicted of attempted murder and kidnapping for purposes of robbery. The life crime in this case is the kidnapping offense. Russo first became eligible for parole in 1991.

The immutable historical facts are that the crime was heinous and Russo was a fugitive for six years. However grave those facts may be, they would not provide some evidence of dangerousness in 2009 without something else. What might that be?

The record reflects that Russo had no criminal record, except a drunk driving arrest, prior to the several months of crimes committed by Russo in 1978. As best we can tell Russo has committed no other crimes. The record also reflects virtually no discipline since his imprisonment in 1985. Indeed, he has been a model prisoner throughout his entire incarceration. He has engaged in numerous self-help programs. He has suitable parole plans and has repeatedly expressed extreme remorse for his offenses, which he maintains were entirely his fault.

In addition to the circumstances of the crime and the flight from arrest, the Board relied on Russo's unstable social history. The questions one might have are when that

instability was demonstrated? As best one can tell from this record it was prior to 1978. Since that time he has maintained close, stable relationships with his family. So, the bulk of the factors cited by the Board relate to the period of 1978 to 1985. Respectfully, those historic facts would not justify continued denial of parole for a nonhomicide offense for which parole was possible 18 years before the latest hearing. What then is the basis of the denial?

The Board recognized (as does the majority) that an inmate cannot be required to admit guilt, or the validity of the prosecution's version of the crime as a condition of parole. The Board did find that the historical facts, together with Russo's denial of an intention to harm the victim, demonstrated a "lack of insight" into the offense, which somehow adds up to an unreasonable risk of current dangerousness. I find that conclusion difficult to accept and, if I was free to apply my own analysis of the facts and controlling law, I would find the Board should have granted parole. I conclude, however, that I am bound to view this record from the Board's perspective and then determine if there is "some evidence" to support the Board's view. This takes me then to the question of the meaning of lack of insight.

The majority makes a credible effort to try to explain what the term insight might mean, and perhaps they are right. Surely, Russo's statement of his version of the events is inconsistent with the evidence underlying this gross offense, unless of course, one gives some credit to his discussion of his aberrant thought process during the one period of his life where he appears to have been "out of control." While his comments could easily be considered as demonstrating a lack of insight into the actual commission of the offense,

as opposed to reflecting his efforts to explain his past irrational behavior, I must agree that the Board and the majority could take Russo's explanation of the crime in light of the nature of the crime and his former fugitive status to demonstrate some form of current risk.

My reason for this lengthy concurrence is my concern about the amorphous nature of the factor of "lack of insight." It almost seems to be a talisman which is produced whenever a board, governor or court thinks a person should not be paroled, but lack anything other than historical facts, and an ugly crime. I can only hope the Supreme Court will have the opportunity to take up the question of the proper role of this nonstatutory factor for assessing suitability for parole. Until that happens I think we will continue to have grossly disparate applications of this concept in parole cases.

For the reasons stated I concur in the result in this case, except for the portion of the opinion addressing the so-called Marsy's Law limitations on the setting of new parole hearing dates. As to that portion, I agree with the analysis and the result.

HUFFMAN, J.