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In the Supreme Court of the State of California

In re **MICHAEL D. VICKS,** **On Habeas Corpus.**	**S194129** Case No. S_____

Fourth Appellate District, Division One, Case No. D056998
San Diego County Superior Court, Case No. CR 63419
The Honorable David M. Gill, Judge

PETITION FOR REVIEW

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INTRODUCTION

Randy Grounds, Warden of the Correctional Training Facility, respondent in the court below, and the Board of Parole Hearings (Board), real party in interest, petition this Court to grant review of the split decision of the California Court of Appeal, Fourth Appellate District, Division One, filed May 11, 2011. (Exh. 1 – Slip opn.) The Court of Appeal denied respondent's petition for rehearing on June 3, 2011; one justice would have granted rehearing.

This case presents the important issue of whether the Board may continue to apply the longer parole-deferral periods implemented by Marsy's Law, enacted by the California voters through the initiative process. Division One here found that the Board violated ex post facto principles by applying Marsy's Law's parole-deferral periods to inmates who were convicted before Marsy's Law took effect. The Court of Appeal's decision in this case, based in part on a misunderstanding of the Board's ability to advance hearing dates—and without regard to the Board's actual practice—subverts the voters' intent to avoid unnecessary hearings for inmates who are not likely to receive favorable parole decisions for several years. Additionally, different panels of Division One have published two cases finding that Marsy's Law's parole-deferral periods do not violate ex post facto provisions when applied to inmates sentenced before its enactment. Thus, there is a split of authority within Division One over the question whether Marsy's Law violates ex post facto provisions.

Review is therefore appropriate to settle this important question of law and resolve the disagreement within the Fourth Appellate District concerning the interpretation of Marsy's Law. (Cal. Rules of Court, rule 8.500(b)(1).) Alternatively, petitioner urges that this case be transferred to the Court of Appeal to consider Vicks's ex post facto challenge in light of the Board's actual implementation of the statute. (Cal. Rules of Court, rules 8.500(b)(4), 8.528(d).)

ISSUE FOR REVIEW

Can Penal Code section 3041.5, as amended by the "Victims' Bill of Rights Act of 2008: Marsy's Law," be applied to respondent Vicks without violating constitutional ex post facto guarantees?

STATEMENT OF THE CASE

In 1983, Vicks was convicted of two counts of rape, two counts of forcible oral copulation in concert, three counts of kidnapping, one count of kidnapping to commit robbery, multiple robbery counts, and several firearm enhancements. (Slip opn. at pp. 1, 3.) He was sentenced to 37 years 8 months to life, and has been incarcerated for approximately 28 years. (*Id.* at p. 1.) At his 2009 initial parole consideration hearing, one year before his minimum eligible parole date, the Board denied Vicks parole and set a five-year "deferral" before his next parole hearing. (*Id.* at pp. 2, 6.) In its parole decision, the Board relied on Vicks's commitment offenses; his criminal history; his record of misconduct in prison; his failure to gain adequate insight into why he committed his crimes; and a recent psychological evaluation, which assessed him as a "medium-low" risk of sexual recidivism and a "low to moderate" risk of violent and general recidivism. The psychological evaluation supported the Board's finding of inadequate insight. (Slip opn. at pp. 3–6.)

Vicks filed a petition for writ of habeas corpus in the San Diego County Superior Court, arguing that the Board failed to articulate the requisite nexus between the evidence and his current dangerousness. (Slip opn. at p. 7.) The superior court denied his petition. (*Ibid.*) Vicks then filed a habeas corpus petition in the Court of Appeal for the Fourth Appellate District, Division One, arguing that the Board's decision was not supported by some evidence, and that the application of Marsy's Law to set his parole-deferral at five years violated ex post facto principles. (Slip opn. at p. 2.) After formal briefing, oral argument, and three rounds of supplemental briefing, the Court of Appeal on May 11, 2011, granted the petition in part, in a published decision.

The court unanimously upheld the Board's denial of parole, but the panel split on the constitutional question. The majority held that the changes to the statutory parole-deferral periods enacted by Marsy's Law violate ex post facto principles. (Slip opn. at pp. 17, 40.) Presiding Justice Nares dissented, concluding that the provisions allowing the Board to advance a hearing date, and permitting the inmate to request an advancement "eliminate any ex post facto implications because they constitute qualifying provisions that minimize or eliminate the significant risk of prolonging a prisoner's incarceration." (*Id.*, dis. opn. at p. 5.)

Respondent petitioned for rehearing, arguing that the Court of Appeal erred in concluding that the amended statute imposes a three-year "blackout period" during which the inmate cannot request an advanced hearing. The petition pointed out that language in the statute indicates that the three-year prohibition applies only to subsequent, not initial, requests for advancement (Pen. Code, § 3041.5(d)(3) ["the inmate shall not be entitled to submit *another* request" emphasis added]). More importantly, the petition advised the court that the Board's implementation documents for Marsy's Law include a "Petition to Advance Hearing Date," which was contained in the

record below and clearly states: "You can make one initial request for an advanced hearing date following a denial of parole *at any time*, but from then on you can only submit requests once every three years." (Respondent's Pet. for Rehrg., pp. 3–4; see http://www.cdcr.ca.gov/BOPH/docs/BPH_1045%28A%29-Petition_to_Advance_Hearing_Date.pdf (emphasis added). Additionally, respondent argued that the Board's reasonable interpretation of the statute—which is more favorable to Vicks than the court's interpretation—was entitled to consideration. The Court of Appeal denied the petition on June 3, 2011, noting that Presiding Justice Nares would have granted the petition.

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW TO SETTLE THE SPLIT ON THE IMPORTANT QUESTION WHETHER THE LONGER DEFERRAL PERIODS OF MARSY'S LAW VIOLATE THE EX POST FACTO CLAUSE.

Before the passage of Marsy's Law, life-term inmates convicted of kidnapping to commit robbery, rape, and violent crimes other than murder could be denied parole for one to two years; murderers could be denied parole from one to five years. Marsy's Law amended the Penal Code so that the Board may deny parole to any life-term inmate for fifteen, ten, seven, five, or three years. (Pen. Code, § 3041.5, subd. (b)(3).) The amended statute allows the Board to advance a subsequent parole hearing on its own, or in response to the inmate's request. (*Id.* at subds. (b)(4), (d)(1).)

The statute indicates that the increased deferral periods apply to all parole-consideration hearings. (*Id.* at subd. (a).) The Court of Appeal for the Fourth Appellate District is internally split over the question whether Marsy's Law violates ex post facto concerns when applied to inmates

convicted before its effective date. In *In re Russo*, one panel of Division One (Benke, Haller, and Huffman, JJ.) found no ex post facto violation because Marsy's Law did not increase sentences and because the provisions allowing the Board to advance a hearing, and for the inmate to request an advancement, "constitute qualifying provisions that minimize or eliminate the significant risk of prolonging [petitioner's] incarceration." (*In re Russo* (2011) 194 Cal.App.4th 144, 158, pet. for review filed May 18, 2011 (No. S193197), quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 650 and citing *Garner v. Jones* (2000) 529 U.S. 244, 251, internal quotation marks omitted.)[1] The panel below rejected the reasoning of the *Russo* panel. (Slip opn., pp. 36–37, fn. 22.) And, shortly after the decision of the *Vicks* panel, yet a third panel of Division One (Aaron, McConnell, and Irion, JJ.), agreed with the *Russo* panel that Marsy's Law effects no ex post facto violation, criticizing the analysis of the *Vicks* panel. (*In re Aragon* (D058040, June 9, 2011) __ Cal.App.4th __, 2011 WL 2239564.)

In contrast to the *Russo* and *Aragon* panels, the panel here held that Marsy's Law amounts to an ex post facto law. (Slip. opn. at pp. 40–41.) In reaching that conclusion, the court focused largely on its theory that Marsy's Law increased the minimum deferral period yet did not allow the

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[1] The Ninth Circuit Court of Appeals has indicated its initial agreement with this analysis, holding that a district court abused its discretion in granting a preliminary injunction because there were no facts in the record implying that Marsy's Law created a significant risk of prolonged incarceration. (*Gilman v. Schwarzenegger* (2011) 638 F.3d 1101, 1110–1111; see also *id.* at p. 1108 ["Even assuming, without deciding, that the statutory changes decreasing the frequency of scheduled hearings would create a risk of prolonged incarceration, the availability of advance hearings is relevant to whether the changes in the frequency of parole hearings create a significant risk that prisoners will receive a greater punishment."].)

Board any discretion to advance a hearing during the initial three years.[2] (Slip opn. at pp. 31–35; see also *id.* at pp. 19–20, fn. 10.) The court here also found significance in the fact that the default deferral period is the maximum deferral period, rather than minimum deferral period, and that the Board's discretion to depart from that scheme is constrained. (*Id.* at pp. 35–40.)

Whether the longer deferral periods can be applied to life-term inmates convicted before the effective date of Marsy's Law is an important question with a significant impact on the public interest. The Board conducts thousands of hearings each year for life-term inmates.[3] The answer to the question of whether the law requires a minimum deferral period of one year between parole hearings (pre-Marsy's Law) or instead permits a minimum deferral period of three years (post-Marsy's Law) will significantly affect the number of hearings the Board conducts going forward. And as the Legislative Analyst noted in the Voters' Guide for the November 2008 election, the number of hearings has a significant fiscal effect on the state.

(http://www.voterguide.sos.ca.gov/past/2008/general/analysis/prop9-analysis.htm ["The provisions of this measure that reduce the number of parole hearings received by inmates serving life terms would likely result in state savings amounting to millions of dollars annually."].)

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[2] This is not the only permissible reading of the statute. (See *Russo, supra,* 124 Cal.Rptr.3d at pp. 454–455 [appearing to read statute as allowing inmate to request advancement at any time]; *Gilman, supra,* 638 F.3d at p. 1105 [same].) And as noted above in the Statement of the Case, the Board advised the panel in its petition for rehearing that this is not the interpretation that the Board gives the statute in practice—but to no avail.

[3] See http://www.cdcr.ca.gov/BOPH/docs/BPH_Suitability_Hearing_Summary_1978-2010.pdf [indicating that the Board convened between 4,900 and 7,100 hearings per year between 2005 and 2010].)

Moreover, because three panels of Division One of the Fourth Appellate District have already reached conflicting conclusions, this Court should grant review to prevent inconsistent outcomes in the superior courts and disparate treatment of life-term inmates.

II. ALTERNATIVELY THE COURT SHOULD GRANT REVIEW TO RETURN THIS CASE TO THE COURT OF APPEAL TO DETERMINE WHETHER MARSY'S LAW—AS IT IS INTERPRETED AND IMPLEMENTED BY THE BOARD—HAS AN IMPERMISSIBLE EX POST FACTO EFFECT ON RESPONDENT VICKS.

Because the Board is the agency charged with implementing the statute, its reasonable interpretation is entitled to consideration. (*Garner*, *supra*, 529 U.S. at pp. 256–257 ["The Court of Appeals erred in not considering the Board's internal policy statement. . . . It is often the case that an agency's policies and practices will indicate the manner in which it is exercising its discretion."]; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, 12–15 [holding that an agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts].) Here, the court gave no consideration to the Board's interpretation that section 3041.5, subdivisions (d)(1) and (d)(3) do indeed authorize inmates to make an initial request for an advanced hearing—at any time after a denial of parole. Instead of considering the Board's reasonable interpretation of the advancement provision—and, indeed, the actual manner in which the Board implements Marsy's Law—the court chose to interpret section 3041.5(d)(3) in a manner unfavorable to inmates, thereby triggering the very ex post facto concerns that formed the basis for striking down the law as to every life-term inmate. (Slip opn., at p. 19 fn. 10; cf. *People v. Davis* (1981) 29 Cal.3d 814, 828–829 [holding that an ambiguous statute should be interpreted in the way most favorable to the criminal offender, and consistent with the statutory

language and purpose, to eliminate doubt as to the provision's constitutionality].) Accordingly, to eliminate the current split within Division One of the Fourth Appellate District, this Court should grant review and return this case to the court below for reconsideration of the constitutional issue in light of the Board's interpretation and implementation of the statute. (Cal. Rules of Court, rule 8.528(d).)[4]

[4] The Board is also going to request that the decision below be depublished. Although depublication would eliminate the split of authority within Division One, by leaving the judgment intact depublication would have the incidental effect of requiring the Board to give Vicks a new parole hearing annually. Accordingly, if the Court is inclined to vacate the decision below, a grant-and-transfer is the preferable method.

CONCLUSION

This Court should grant review to resolve the important question of whether Marsy's Law violates ex post facto concerns. Alternatively, review should be granted and the matter transferred to the Court of Appeal to reconsider the ex post facto issue in light of the Board's interpretation and implementation of the statute.

Dated: June 20, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,265 words.

Dated: June 20, 2011

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CERTIFIED FOR PUBLICATION

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MICHAEL VICKS

on

Habeas Corpus.

D056998

(San Diego County
Super. Ct. No. CR63419)

Petition for writ of habeas corpus from denial of parole. Relief granted in part.

Steve M. Defilippis, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Julie L. Garland, Assistant Attorney General, Anya M. Binsacca, Phillip Lindsay and Jennifer G. Ross, Deputy Attorneys General, for Respondent.

In 1983, Michael Vicks was convicted of two counts of rape in concert, two counts of forcible oral copulation in concert, three counts of kidnapping, one count of kidnapping to commit robbery, and multiple counts of robbery; many of these convictions included true findings on appended firearm enhancements. Vicks was sentenced to a total term of 37 years 8 months to life. Vicks, now 51 years old, has been incarcerated for more than 28 years.

At Vicks's first parole hearing, the Board of Parole Hearings (BPH) found him unsuitable for parole. The BPH found the commitment offense was particularly egregious under many indices and, considering numerous other factors (including Vicks's prior criminal record, his disciplinary record while incarcerated, his failure to gain insight into the commitment offense, and his psychological evaluation), concluded Vicks was not currently suitable for parole. The BPH further concluded a five-year denial of parole was appropriate under the circumstances.

Vicks petitioned the trial court for a writ of habeas corpus, but the court denied the writ, concluding the BPH's decision was supported by some evidence. Vicks then petitioned this court for a writ of habeas corpus. We issued an order to show cause, the People filed a return, and Vicks filed a traverse.

Vicks asserts the BPH's decision to deny parole violated due process because its conclusion that he posed an unreasonable risk of danger to society if released on parole was contrary to the only reliable evidence that he was not currently dangerous. He also asserts the imposition of a five-year deferral, pursuant to the amendments to Penal Code[1] section 3041.5, subdivision (b), adopted after the voters approved Proposition 9, otherwise known as the "Victims' Bill of Rights Act of 2008: Marsy's Law" (hereafter Marsy's Law), cannot be applied to him without violating ex post facto principles.

We conclude the BPH's decision to deny parole was supported by some evidence, pursuant to the guidance provided by *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*)

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1 All statutory references are to the Penal Code unless otherwise specified.

and *In re Shaputis* (2008) 44 Cal.4th 1241. We also conclude application 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.

I

FACTS

A. The Commitment Offense

In 1983, Vicks was convicted of participating in a crime spree in which he and two other defendants employed firearms while committing numerous offenses against multiple victims, including kidnapping and sexually assaulting, as well as robbing, the victims. Because the facts of the crimes support the BPH's determination that the commitment offenses were committed in a particularly heinous, atrocious, or cruel manner (Cal. Code Regs., tit. 15, § 2402, subd. (b)),[2] and Vicks does not dispute that this aspect of the BPH's determination is supported by the requisite level of evidence, we do not further detail the commitment offenses.

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2 Factors in support of the finding that the crime was committed "in an especially heinous, atrocious or cruel manner" (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

B. Vicks's Disciplinary Record in Prison

During his first 20 years in prison, Vicks received four "CDC 115's"[3] (the most recent was in 1999 for indecent exposure), although none of the four serious rule violations involved violence. During those first 20 years, he also received seven "CDC 128's," the most recent of which occurred in 2002. He was discipline free for the seven-year period prior to his parole hearing.

C. Vicks's Psychological Evaluation

A psychologist evaluated Vicks and his report was received by the BPH without objection. The psychologist interviewed Vicks and concluded he had a "tendency to minimize and discount his criminal history," to "discount or minimize the disciplinary infractions he has received during his incarceration," and to "limit his answers to the [psychologist's] questions regarding his criminal history, requiring further query and prompting." The psychologist noted Vicks denied being involved in the commitment offenses, and also denied the veracity of either the inculpatory evidence provided by Vicks's cousin or the identification by a victim of Vicks as one of the perpetrators. The psychologist "did not find [Vicks] to be a totally reliable or credible historian."

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3 "[A] CDC 115 documents misconduct believed to be a violation of law which is not minor in nature. A form 128 documents incidents of minor misconduct." (*In re Gray* (2007) 151 Cal.App.4th 379, 389.)

The psychologist also evaluated Vicks's potential for violence under two separate empirically-based assessment guides,[4] and evaluated Vicks's general risk of recidivism under two other empirically-based assessment guides.[5] Vicks's PCL-R score placed him the "low range," although it also suggested tendencies toward "Glibness/Superficial Charm, Pathological Lying, Conning/Manipulative, Lack of Remorse or Guilt, Shallow Affect, Callous/Lack of Empathy, and Impulsivity." Vicks's score on the HCR-20 placed him the "Moderate" risk category for violent recidivism. The LS/CMI placed him the "Moderate" category for risk of recidivism, and the STATIC-99 placed Vicks in the Medium-Low risk category.

The psychologist stated, based on his clinical assessment and the empirical guides, that Vicks presented a "Medium-Low risk for sexual recidivism and a Low to Moderate risk of violence or general recidivism."

D. Vicks's Criminal Background

Vicks had prior convictions for nonviolent offenses, and was on probation at the time of the commitment offenses.[6]

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4 The guides used to assess Vicks's potential for violence were the Psychopathy Checklist-Revised (PCL-R) and the History-Clinical-Risk Management-20 (HCR-20).

5 The guides used to assess Vicks's general risk of recidivism were the Level of Service/Case Management Inventory (LS/CMI) and the STATIC-99.

6 Vicks had one conviction in 1978 for which he received probation. In 1981, he was convicted of receiving stolen property and placed on 12 months' probation, but was subsequently arrested four months later for another theft-related offense, for which he received three months in jail and was placed on six years' probation.

E. Vicks's Rehabilitative Efforts

The evidence showed, and the BPH did not question, that Vicks's conduct while in prison has shown substantial progress. He had not been disciplined in any fashion for the prior seven years. His educational and vocational training was substantial, and he participated in numerous self-help and therapy groups.

F. Parole Plans

The evidence demonstrated, and the BPH did not dispute, that Vicks had viable parole plans, including a family support system, a job offer, and offers for living arrangements.

II

HISTORY OF PROCEEDINGS

A. The BPH Proceedings

Vicks's minimum eligible parole date was in 2010. At his 2009 parole hearing, the BPH considered Vicks's testimony at the hearing, as well as the written reports, and ultimately concluded he was unsuitable for parole because he posed an unreasonable risk of danger to society if released.

The BPH relied on the facts of the crime, his prior criminal record, his current level of insight into or acceptance of responsibility for the crime, his disciplinary record while in prison, and his psychological evaluation to conclude he was not currently suitable for parole. The BPH then set a five-year period for Vicks's next parole eligibility hearing pursuant to Penal Code section 3041.5, subdivision (b)(3)(C).

The Habeas Proceedings

Vicks petitioned the San Diego County Superior Court for a writ of habeas corpus, but the trial court denied the petition, finding there was some evidence to support the BPH's decision. Vicks then petitioned this court for a writ of habeas corpus.

III

LEGAL STANDARDS

A. The Parole Decision

The decision whether to grant parole is a subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that should be guided by a number of factors, some objective, identified in Penal Code section 3041 and the BPH's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) In making the suitability determination, the BPH must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b)), including the nature of the commitment offense; behavior before, during, and after the crime; the inmate's social history; mental state; criminal record; attitude towards the crime; and parole plans. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) 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).) 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).)

Circumstances tending to show *suitability* for parole include that the inmate: (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 or her life, especially if the stress had 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 on release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law on release. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

These criteria are general guidelines, illustrative rather than exclusive, and "the importance attached to [any] circumstance [or combination of circumstances in a particular case] is left to the judgment of the [BPH]." (*Rosenkrantz, supra,* 29 Cal.4th at p. 679; Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) The endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz,* at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the BPH may consider facts other than those found true by a jury or judge beyond a reasonable doubt. (*Id.* at p. 679.)

B. Standard for Judicial Review of Parole Decisions

In *Rosenkrantz*, the California Supreme Court addressed the standard for a court to apply when reviewing a parole decision by the executive branch. The court first held that "the judicial branch is authorized to review the factual basis of a decision of the [BPH] denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra,* 29 Cal.4th at p. 658.)

In *Lawrence,* the Supreme Court noted that its decisions in *Rosenkrantz* and *In re Dannenberg* (2005) 34 Cal.4th 1061, and specifically *Rosenkrantz's* characterization of "some evidence" as "extremely deferential" and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra,* 29 Cal.4th at p. 667), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra*, 44 Cal.4th at p. 1206.) *Lawrence* explained some courts interpreted *Rosenkrantz* as limiting the judiciary to reviewing whether "some evidence" exists to support an unsuitability factor cited by the BPH or Governor, while other courts interpreted *Rosenkrantz* as requiring the judiciary to instead review whether "some evidence" exists to support "the core determination required by the statute before parole can be denied—that an inmate's release will unreasonably endanger public safety." (*Lawrence,* at pp. 1207-1209.)

The *Lawrence* court, recognizing the legislative scheme contemplates "an assessment of an inmate's *current* dangerousness" (*Lawrence, supra,* 44 Cal.4th at p. 1205), resolved the conflict among the lower courts by clarifying that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is "whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212.) *Lawrence* clarified that the standard for judicial review, although "unquestionably deferential, [is] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors *with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision*—the determination of current dangerousness." (*Id.* at p. 1210, italics added.) Indeed, it is *Lawrence's* numerous iterations (and variants) of the requirement of a "rational nexus" between the *facts* underlying the unsuitability factor and the *conclusion* of current dangerousness that appears to form the crux of, and provide the teeth for, the standards adopted in *Lawrence* to clarify and illuminate "the precise contours of the 'some evidence' standard." (*Id.* at p. 1206.)

After clarifying the applicable standard of review, *Lawrence* addressed how one "unsuitability" factor—whether the prisoner's commitment offense was done in a particularly heinous, atrocious, or cruel manner—can affect the parole suitability determination, and whether the existence of some evidence supporting the BPH's finding that the offense was particularly heinous, atrocious, or cruel is alone sufficient to deny

parole. *Lawrence* concluded that when there has been a lengthy passage of time, the BPH may continue to rely on the nature of the commitment offense as a basis to deny parole only when there are *other* facts in the record, including the prisoner's history before and after the offense or the prisoner's current demeanor and mental state, that provide a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at pp. 1211, 1214, 1221.)

IV

ANALYSIS OF CHALLENGE TO UNSUITABILITY FINDING

Although the precise contours of Vicks's arguments are obscure, it appears he asserts there is no evidence of sufficient substantiality on which the BPH could properly rest its determination that he would pose an unreasonable risk of danger to the community if released on parole. First, he argues the BPH improperly relied on the commitment offenses because Vicks maintains he is factually innocent and this proclamation of innocence bars consideration of Vicks's current mental attitudes toward the crimes. He argues that because the applicable statute precludes the BPH from requiring an inmate to admit guilt for the offense as a condition to granting parole (see, e.g., Pen. Code, § 5011, subd. (b); *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491), an inmate's profession of factual innocence bars the BPH from relying on the inmate's lack of insight into or remorse for the offenses when considering whether to set parole. Vicks alternatively asserts any evaluative import that may have been gleaned from the commitment offenses has evaporated because of the passage of time. From these

predicates, Vicks argues there is no other evidence in the record to support a finding of unsuitability because (1) the conclusions reached by the psychologist were so fatally flawed that his opinion was inadmissible, and (2) no other evidence supported the finding of current dangerousness.

We conclude that, even assuming the BPH could not consider Vicks's attitude toward the commitment offenses, there is other evidence from which it could have concluded he was unsuitable for parole. There is no dispute the evidence permitted the BPH to conclude the crimes were especially egregious. However, because there has been a lengthy passage of time since those crimes were committed, *Lawrence* teaches that the BPH may continue to rely on the nature of the commitment offense as a basis to deny parole only when other facts in the record, including the inmate's history before and after the offense or the inmate's current demeanor and mental state, provide a rational nexus for concluding those offenses continue to be predictive of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at pp. 1211, 1214, 1221.) We conclude that, in this case, there is some evidence—including Vicks's history before and after the offense as well as his current demeanor and mental state—from which the BPH could rationally conclude the commitment crimes remain probative of Vicks's dangerousness.

A. Vicks's History Before and After the Offenses

Although Vicks's criminal record before the commitment offenses did not involve violence, his prior offenses were escalating in seriousness. More importantly, his history demonstrated that he had reoffended while on probation, and the fact he had been twice granted—and had twice violated—probation by committing crimes while on probation is

some evidence from which the BPH could conclude he posed an unreasonable risk of repeating that pattern if granted parole. Finally, although Vicks's *recent* disciplinary record in prison has been unblemished, he received 11 disciplinary citations while in the highly controlled setting of a prison, including a serious rules violation for using banned substances in 1993 and another serious rules violation for sexually inappropriate behavior in 1999. Because Vicks had shown that, despite 10 to 15 years of institutional programming, he could relapse into behavior patterns that may have contributed to the crimes of which he was committed, the BPH could conclude an additional period of discipline-free behavior was required to show that the influences and impulses leading to the crimes had been eradicated to a sufficient degree that he would not pose an unreasonable risk of relapsing into prior behavioral patterns.

B. Vicks's Current Demeanor and Mental State

In addition to Vicks pre- and postincarceration behavior, the BPH considered and was expressly discomfited by the facts and opinions contained in the psychological evaluation.[7] The psychologist concluded there were several factors that "increase the inmate's risk of violence in the community." The report stated:

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[7] Among the tendencies referred to in the psychological evaluation were tendencies for glibness or superficial charm, pathological lying, and being conning or manipulative, and the psychologist expressly stated Vicks was not "a totally reliable or credible historian." The BPH may have confirmed these tendencies for themselves at the hearing: after Vicks proclaimed that his reformation included his Christian faith and he had connected with an outside church through correspondence and prayer, a board member asked Vicks to identify his favorite New Testament book. When Vicks responded "Proverbs," the member noted that was an *Old* Testament book and again asked Vicks about his favorite *New* Testament book, to which Vicks replied "probably be Exodus,"

> "Of concern . . . are several factors that appear to contribute to an elevated risk status for the inmate in reference to violence and future offending. The inmate committed the life crimes at a relatively young age, and he has a substance abuse history which also began at a relative[ly] young age. The inmate appears to have demonstrated a pattern of increasing criminal activity, and has a history of failure while on supervised release prior to the commission of the [commitment offenses] . . . . The record suggests a significant level of indifference and violence demonstrated during the [commitment offenses]. Additionally, [Vicks] has a diagnosis of Cannabis Abuse by history. In reference to the [commitment offenses], [Vicks] continues to deny [guilt] . . . . Hence, he was not able to identify the impact his actions have had on the victims . . . . Therefore, the inmate appears to have limited insight into how his choices and decisions may have contributed to the [commitment offenses]. This form of thinking would be expected to cause difficulties with [Vicks's] ability to identify and change his poor decision-making . . . . [Vicks] has a past history of antisocial peer associations, if he were to find himself continuing to affiliate with such individuals in the community, this reasonably increases his chances of recidivism . . . . Additionally, [Vicks] appears to show a tendency to discount his criminal history and lacks insight into the underlying sources of his antisocial/criminal behavior. If he were to feel depressed or anxious or other negative emotions in combination with reduced behavior controls, he may be at significantly increased risk of future violence."

The psychologist's observations, and particularly that Vicks's tendency to discount his criminal history and his lack of understanding of the underlying sources of his antisocial/criminal behavior would be expected to cause difficulties with Vicks's ability to identify and change his poor decision-making and to avoid relapsing into antisocial

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which the Board member again noted was not from the New Testament. We make these observations not to denigrate the sincerity or fervor of Vicks's profession of a newly found spiritual awakening, but only to note that this exchange could provide some evidence from which a rational person might conclude the tendencies of manipulative behavior and lying were in fact present in Vicks.

peer associations, provide some evidence under *Shaputis* to support the BPH's finding he posed an unreasonable risk to the community if released on parole.

In this proceeding, Vicks argues the entire report should have been excluded based on flawed methodology or because certain conclusions exceeded the guidelines issued by the Department of Corrections. We are not persuaded by his arguments. First, although Vicks was represented by counsel at the BPH hearing, he raised no objection to the report, and therefore has waived any claim it was improperly admitted and considered by the BPH. (Cf. *People v. Neely* (2009) 176 Cal.App.4th 787, 794.) Second, many of the challenges raised by Vicks in this habeas proceeding, which assert that the reliability of some of the indices employed by the psychologist were of dubious validity, are founded on citations to articles and correspondence that were not part of the record below, and we therefore must disregard that material in this proceeding. (*People v. Jacinto* (2010) 49 Cal.4th 263, 272-273, fn. 5 [appellate court generally not the forum in which to develop an additional factual record and reviewing courts generally do not take judicial notice of evidence not presented below but only consider matters part of record at time judgment rendered].)

Most importantly, the core of Vicks's argument appears to assume that, insofar as some aspects of the report either expressed conclusions about his future dangerousness or incorporated measurements based on his PCL-R or HCR-20 score, the conclusions reached by the psychologist would be inadmissible because they do not pass muster

under the so called "*Kelly-Frye*"[8] rule. However, Vicks cites nothing to suggest that the strictures applicable to admitting evidence in a criminal proceeding apply with equal force to *parole* proceedings, and the analogous law is to the contrary. The courts have recognized that decisions to grant and to rescind parole are sufficiently analogous to warrant the application of similar standards for judicial deference to those decisions (see, e.g., *In re Ramirez* (2001) 94 Cal.App.4th 549, 562-564, disapproved on other grounds by *In re Dannenberg, supra,* 34 Cal.4th at p. 1100), and both federal and state law decisions in the parole revocation context have made clear that "there is no thought to equate [a parole revocation hearing] to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 489; accord, *Pope v. Superior Court* (1970) 9 Cal.App.3d 636, 640-641 [parole revocation proceedings by " 'the Adult Authority are wholly administrative in nature,' and its determination is not a judicial act [citation]. The Adult Authority is not limited to the same rules of evidence applicable in a judicial proceeding."].) Vicks cites nothing to convince us that a more stringent evidentiary standard should apply to the initial decision to grant parole, or that the BPH is sua sponte obligated to disregard evidence merely because that evidence might be inadmissible in a criminal trial under *Kelly-Frye*, and we therefore reject Vicks's claim that the BPH was precluded from relying on the psychologist's report in this proceeding.

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8 *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. U.S.* (D.C. Cir. 1923) 293 F. 1013.

We believe any deficiencies that might infect a psychologist's adverse report, although perhaps providing fertile grounds for an inmate to challenge the *weight* to be accorded that report, does not entirely *bar* the BPH from considering the report. We reject Vicks's claim that, as a matter of law, the psychologist's report provides no modicum of evidence to support the finding of unsuitability.

C. Conclusion

We conclude the BPH's unsuitability determination is supported by some evidence, and therefore affirm its determination on the issue of Vicks's current unsuitability for parole.

V

ANALYSIS OF EX POST FACTO CHALLENGE

The BPH concluded a five-year deferral before Vicks would again be considered for parole, as permitted under Penal Code section 3041.5, subdivision (b)(3), was appropriate. Vicks argues the amendments to Penal Code section 3041.5, subdivision (b), which implement aspects of Marsy's Law to permit the five-year deferral, when applied to him, violates ex post facto principles.

A. Background

Former Law

Vicks's commitment offenses occurred in 1983. At that time, section 3041.5 provided that when an inmate was denied parole, he or she was entitled to have the matter reviewed annually at a subsequent suitability hearing. However, that law gave discretion to the BPH to defer the subsequent suitability hearing for two years (for all life sentence

prisoners) or three years (for life sentence inmates convicted of murder) if the BPH found it was not reasonable to expect that parole would be granted sooner than two or three years, respectively.[9] (See Stats. 1982, ch. 1435, § 1, p. 5474.)

Current Law

In 2008, the voters enacted Marsy's Law, which amended section 3041.5 to provide longer deferral periods between parole hearings, and to modify the standards and considerations for determining which of the longer deferral periods would be selected by the BPH panel. Because it is the application of these changes to Vicks that assertedly offends the ex post facto clause, we detail those changes.

The most significant change is that, when the BPH denies parole, the amendments mandate longer deferrals for the subsequent suitability hearing than those permitted under the prior statutory scheme. Under current law, the subsequent suitability hearing date must be set at either 15 years or 10 years unless the BPH finds by clear and convincing evidence that the factors relevant to deciding suitability for parole "are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the prisoner" than either 15 or 10 years. (§ 3041.5, subds. (b)(3)(A) & (B).) Even if the BPH finds by clear and convincing evidence that neither the 10- nor 15-year deferral is necessary to protect the safety of the public or the victims, the BPH must

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9 Section 3041.5 was later amended to permit a five-year deferral of subsequent suitability hearings for life sentence inmates convicted of more than two murders, although it also provided that if such a longer deferral was imposed, the parole authority was required to conduct a file review within three years and had discretion based on that review to conduct an earlier parole hearing. (Stats. 1990, ch. 1053, § 1, pp. 4380-4381.)

select a seven-year deferral for the subsequent suitability hearing unless it concludes the suitability factors examined at the hearing "are such that consideration of the public and victim's safety . . . [do] not require a more lengthy period of incarceration for the prisoner than seven additional years," in which event the BPH may set the deferral at either five years or three years. (§ 3041.5, subd. (b)(3)(C).)

A second aspect of the changes adopted under Marsy's Law is that, although an inmate may request the BPH to advance the subsequent parole suitability hearing date to an earlier date because of changed circumstances or new information (§ 3041.5, subd. (d)(1)), the inmate may not obtain review pursuant to this provision earlier than three years after a decision denying parole has been made even if there are changed circumstances or new information.[10] (§ 3041.5, subd. (d)(3).) Additionally, if the

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10 Section 3041.5, subdivision (d)(3), appears to set a three-year "blackout" period for an inmate to trigger the advanced hearings safeguard, because that section states that "[f]ollowing *either* a summary denial of a request made pursuant to paragraph [(d)(1)], *or the decision of the board after a hearing described in [section 3041.5, subdivision (a)] to not set a parole date*, the inmate shall not be entitled to submit another request for a hearing pursuant to [section 3041.5, subdivision (a)] until a three-year period of time has elapsed from the summary denial *or decision of the board.* (§ 3041.5, subd. (d)(3), italics added.) Because a regularly scheduled parole suitability hearing results (as it did here) in a "decision of the board after a hearing described in [section 3041.5, subdivision (a)] to not set a parole date," the statute appears to impose a three-year blackout period for an inmate to petition for an advanced hearing when parole is denied following a regularly scheduled suitability hearing.

Certainly, section 3041.5, subdivision (b)(4), nominally appears to preserve the ability of the BPH 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 BPH would (absent a request from the inmate under § 3041.5, subd. (d)(1))

inmate petitions to advance the subsequent suitability hearing date and either his or her request is summarily denied or it is denied after a hearing on the merits, the inmate may not petition again to advance the subsequent suitability hearing date to an earlier date until three more years have elapsed from either the summary denial or the hearing on the merits.[11] (§ 3041.5, subds. (d)(1) &(d)(3).)

B. Ex Post Facto Principles

The core of ex post facto law is to bar application of laws that criminalize conduct not criminal when done, or increase punishment for a crime above the punishment the law specified at the time the crime was committed. In *Calder v. Bull* (1798) 3 U.S. (Dall.) 386, 1 L.Ed. 648, the court explained at page 390 that the ban against ex post facto laws under the federal Constitution[12] prohibits four general categories of laws: (1) a law

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become cognizant of the changed circumstances or new information that might trigger sua sponte action by the BPH to advance the hearing date.

11 Another change apparently operable under the current version of section 3041.5 is that the version of section 3041.5 operable at the time of Vicks's commitment offenses permitted the BPH to depart from the one-year deferral period and order a two-year deferral if it found it was not reasonable to expect that parole would be granted sooner than two years *and* stated the bases for that determination. (See Stats. 1982, ch. 1435, § 1, p. 5474.) No similar requirement of a statement of reasons is found in the current version of section 3041.5, subdivision (b)(3). Additionally, although the considerations guiding the finding (under the former version of § 3041.5) that would justify a longer deferral period were apparently limited to an assessment of the same factors that guide all suitability determinations, Marsy's Law now requires the BPH to set the deferral period "after considering the views and interests of the victim." (§ 3041.5, subd.(b)(3).)

12 Although *Calder v. Bull* examined the ex post facto clause of the federal Constitution, the ex post facto clause in the California Constitution is analyzed in the same manner as its federal counterpart. (*People v. Castellanos* (1999) 21 Cal.4th 785, 790.) We may therefore resort to federal law to evaluate Vicks's ex post facto arguments.

that makes criminal an action not criminal when done; (2) a law that aggravates a crime or makes it greater than it was when committed; (3) a law that increases the punishment for a crime after it was committed; and (4) a law that alters the legal rules of evidence and requires less or different evidence to convict the offender of a crime than the law required at the time the crime was committed.[13]

As the court explained in *John L. v. Superior Court* (2004) 33 Cal.4th 158:

> "[A]n ex post facto violation does not occur simply because a postcrime law withdraws substantial procedural rights in a criminal case. [Citation.] Even new methods for determining a criminal sentence do not necessarily involve punishment in the ex post facto sense. [Citations.]. . .
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> "Contrary to what petitioners imply, the ex post facto clause regulates increases in the ' " '*quantum* of punishment.' " ' [Citations.] Although no universal definition exists [citation], this concept appears limited to substantive measures, standards, and formulas affecting the time spent incarcerated for an adjudicated crime. For example, an ex post facto violation occurs where laws setting the length of a prison sentence are revised after the crime to contain either a longer mandatory minimum term [citation], or a higher presumptive sentencing range [citation]. Impermissible increases in punishment also have been found where a new postcrime formula for earning gain-time credits postpones an inmate's eligibility for early release [citation], or where retroactive cancellation of

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13 The language in *Collins v. Youngblood* (1990) 497 U.S. 37 created substantial doubt whether the fourth category remained viable for ex post facto purposes. Many subsequent California decisions interpreted *Collins*'s exclusive reference to the first three categories, and its statement that the fourth category did not prohibit the application of new evidentiary rules, to mean ex post facto principles were violated only by laws within the first three categories. (See, e.g., *People v. Frazer* (1999) 21 Cal.4th 737, 756; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 293-299.) However, the decision in *Carmell v. Texas* (2000) 529 U.S. 513 clarified that *Calder v. Bull's* fourth category has not been eliminated as part of the ex post facto doctrine and remains a category of laws prohibited from operating retroactively. (*Carmell,* at pp. 514-515, 537-539.)

overcrowding credits requires reimprisonment of an inmate who has been freed." (*Id.* at p. 181.)

C. Ex Post Facto Law and Changes to Parole Suitability Rules

Vicks contends section 3041.5, as amended by Marsy's Law, if applied to him violates ex post facto protections because it increased his sentence (i.e., punishment) beyond the term that applied when the crime was committed in 1983. He argues that, under the statutory scheme applicable in 1983, he would have been eligible for a new parole hearing not more than two years after the initial denial of parole, but must now wait at least three years (even if he could show changed circumstances or new information) or up to five years before his suitability for parole may be reexamined. Vicks argues the longer period before he may obtain his subsequent suitability hearing creates the risk that he will remain incarcerated longer than if his subsequent suitability hearing had been scheduled at the earlier date prescribed by the statutory scheme in effect at the time of his commitment offenses.

The *John L.* court explained, however, that "not every amendment having 'any conceivable risk' of lengthening the expected term of confinement raises ex post facto concerns. [Citation.] In [*California Dept. of Corrections v. Morales* (1995) 514 U.S. 499], a California law allowed the parole board, after holding an initial hearing, to defer subsequent parole suitability hearings up to three years for inmates convicted of multiple homicides, provided it found parole was not reasonably likely to occur sooner. (*Id.* at p. 503.) Finding no retroactive increase in punishment, the high court emphasized that there had been no change in the applicable indeterminate term, in the formula for earning

sentence reduction credits, or in the standards for determining either the initial date of parole eligibility or the prisoner's suitability for parole. (*Id.* at p. 507.). . . At bottom, no ex post facto violation occurred because the risk of longer confinement was 'speculative and attenuated' (*id.* at p. 509), and because the prisoner's release date was essentially 'unaffected' by the postcrime change. (*Id.* at p. 513; [citation].)" (*John L. v. Superior Court, supra,* 33 Cal.4th at pp. 181-182.)

In *California Dept. of Corrections v. Morales*, *supra*, 514 U.S. 499 (*Morales*) and again in *Garner v. Jones* (2000) 529 U.S. 244 (*Garner*), the United States Supreme Court evaluated ex post facto challenges to parole laws that bore some resemblance to the changes wrought by Marsy's law. "The controlling inquiry . . . [is] whether retroactive application of the change . . . created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.' " (*Garner,* at p. 250 [quoting *Morales,* at p. 509].) A sufficient risk is one that is "significant," (*Garner,* at p. 255) rather than merely "speculative and attenuated." (*Morales,* at p. 509.) The alteration in the legislative scheme may pose a sufficient risk either "by its own terms" or where "the rule's practical implementation . . . will result in a longer period of incarceration than under the earlier rule." (*Garner,* at p. 255.) However, neither case articulated a single formula for determining when the risk reached a level of sufficiency to offend ex post facto protections. (*Morales,* at p. 509.) We must examine the particular principles and rationales employed by *Garner* and *Morales* to guide our evaluation of whether Marsy's Law offends ex post facto protections by posing a sufficient risk, either by its own terms

or by its practical implementation, of resulting in a longer period of incarceration than under the old rule. (*Garner, supra.*)

Morales

In *Morales*, a California inmate challenged the 1981 amendments to section 3041.5. Prior to the amendments, all life prisoners whose sentences included the possibility of parole received annual parole hearings. The 1981 amendment authorized the BPH to defer subsequent suitability hearings for up to three years, but only for certain prisoners (those convicted of " 'more than one offense which involves the taking of a life' ") (*Morales, supra*, 514 U.S. at p. 503, quoting former Pen. Code, § 3041.5, subd. (b)(1)) and only if the BPH found " 'it [was] not reasonable to expect that parole would be granted at a hearing during the following years and state[d] the bases for the finding.' " (*Ibid.*)

Morales held that the risk of prolonged confinement posed by this amendment's terms was not sufficient to violate the ex post facto clause. (*Morales, supra,* 514 U.S. at p. 512.) The court provided three reasons for this conclusion. Most importantly, the court concluded the only group of inmates impacted by the increased deferral periods under the amendments (e.g. multiple murderers) would be unlikely to have been found suitable at an earlier date because, in general, inmates convicted of multiple murders were particularly unlikely to be found suitable for parole.[14] (*Morales, supra,* 514 U.S. at pp. 511-512.) Second, even among this subset of inmates, the additional deferral period

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14 In contrast, Marsy's Law applies to *all* inmates serving indeterminate terms, not merely the subclass of those offenders least likely to obtain parole at an earlier hearing.

was not mandatory but instead would be increased only where the BPH had made specific findings that an individual inmate was unlikely to be found suitable for parole in the deferral period, and the length of the increased deferral would be specifically tailored to the BPH's findings. (*Ibid.*) Finally, even assuming there were inmates (within the larger group the BPH had found were unlikely to be found suitable for parole if a subsequent suitability hearing were held within one year) who could show there *was* a change in circumstances sufficient to call into question the BPH's projection that suitability would be found at a one-year hearing, those inmates could seek to advance the hearing date. (*Id.* at p. 512; *In re Jackson* (1985) 39 Cal.3d 464, 475.)

Because the terms of the 1981 amendment increased deferral of subsequent suitability hearings only in cases in which the BPH projected it would be unlikely there would be an earlier finding of suitability, and because advanced hearings were available as a safety valve to bring about a hearing where changed circumstances undercut the BPH's projections, the court concluded that "the narrow class of prisoners covered by the amendment cannot reasonably expect that their prospects for early release on parole would be enhanced by the opportunity of annual hearings." (*Morales, supra,* 514 U.S. at p. 512; see also *Garner, supra*, 529 U.S. at pp. 250-251 [explaining *Morales* turned on the facts that deferral was increased only when the likelihood of release was low and that advanced reconsideration was available when circumstances changed].)[15]

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15 The concurring and dissenting opinion interprets *Morales* as supporting its conclusion that application of Marsy's Law to Vicks and others similarly situated does not offend ex post facto provisions, because it concludes *Morales's* holding was based on

Garner

The United States Supreme Court in *Garner* again considered an inmate's challenge to a change in parole regulations that decreased the frequency of parole hearings. Prior to the change, when an inmate was initially found unsuitable for parole, the Georgia parole board was required to conduct a further hearing every three years. (*Garner, supra*, 529 U.S. at p. 247.) The regulation was amended to provide for reconsideration "at least every eight years." (*Ibid.*, quoting the amended rule.)

Garner concluded that two features of the changed regulation, both of which were also present in *Morales*, militated against finding application of the new regulation to the inmate was barred by ex post facto principles. (*Garner, supra,* 529 U.S. at p. 254.) The first feature was that Georgia's parole board had discretion in setting the length of the deferral period and that board's policy was to impose a lengthened period when it was " 'not reasonable to expect that parole would be granted during the intervening years.' " (*Ibid.*) Absent such a finding, the Georgia parole board would apparently set hearings at

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four factors and "these same factors are also present in [Marsy's Law]." (Conc. & dis. opn., at p. 5, *post.*) Although *one* of the factors (no effect on the date of the initial parole hearing) is present, the other three factors are *not*: the new law in *Morales* gave the Board discretion to "tailor the frequency of parole hearing" by scheduling the same deferral period following a denial of parole (i.e., a one-year deferral) as existed under the prior law, but Marsy's Law *eliminates* that discretion; the new law in *Morales* constrained the Board's discretion to order a longer deferral (by requiring particularized findings justifying a more than one-year postponement), but Marsy's Law *mandates* a longer deferral; and the new law in *Morales* gave the prisoner the ability to in effect reinstate his previous right to a hearing at one-year intervals (by showing changed circumstances), but Marsy's Law imposes three-year blackout periods. Moreover, *Morales* was careful to note the new law applied only to those prisoners already particularly unlikely to be found suitable for parole (i.e., *multiple* murders), but Marsy's Law applies to even those prisoners (including Vicks) whose life offenses do *not* include murder.

the times provided by the old rule. The second feature was the regulation's explicit provision of " 'expedited parole reviews in the event of a change in [an inmate's] circumstance or where the Board receives new information that would warrant a sooner review.' " (*Ibid.*)[16]

The court illustrated the effect of these qualifications with the particular circumstances of the inmate in that case. (*Garner, supra,* 529 U.S. at p. 255.) The parole board had deferred the inmate's next parole suitability hearing for the maximum period of eight years. The inmate's history—including a prior escape from prison and a subsequent act of murder—made it unlikely that, even if the parole board were to conduct a suitability hearing in the intervening time, the inmate would be found suitable for parole. However, if a change in circumstances or new information arose that would call the parole board's assessment into question, the inmate could seek earlier review. (*Ibid.*)

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16 The concurring and dissenting opinion also relies on *Garner* to support its conclusion that application of Marsy's Law to Vicks and others similarly situated does not offend ex post facto provisions, because it concludes *Garner* relied on the "same factors . . . present in [Marsy's Law]." (Conc. & dis. opn., at p. 5, *post.*) However, as previously discussed, *Garner* concluded two factors of the changed regulation (both of which were also present in *Morales*) militated against finding application of the new regulation to the prisoner was barred by ex post facto principles. The first factor was that Georgia's parole board had *discretion* in setting the length of the deferral period by scheduling the *same* deferral period following a denial of parole that applied under the prior law, while Marsy's Law *eliminates* that discretion. The second factor noted by *Garner* was the regulation's explicit provision of expedited parole reviews in the event of a change in circumstances or new information, by which the prisoner could reinstate his previous right to a hearing at the prior intervals (by showing changed circumstances); in contrast, Marsy's Law sets three-year blackout periods that preclude the prisoner from initiating proceedings to reinstate his previous right to hearings at the prior one-year intervals. For these reasons, the salient factors relied on by *Garner* to conclude there was no ex post facto violation are not present in Marsy's Law.

Based on these provisions, the court concluded application of the changed regulation did not facially violate ex post facto protections. (*Id.* at p. 256.)[17]

Subsequent Decisions

Neither *Morales* nor *Garner* required that the risk of prolonged incarceration be precisely quantified as a predicate to whether application of the new parole rules would be barred by ex post facto protections. Instead, each looked to whether inmates who could expect release (or had a significant chance of being released) at an earlier time under the former rule had a significant risk of being released only at a later time under the new rule. In both cases, the court found that, because subsequent hearings would be delayed only when there was no appreciable likelihood of an earlier release, the new rules did not violate ex post facto protections.

Subsequent cases applying *Morales* and *Garner* have similarly examined whether changes in statutory or regulatory rules governing parole may be applied to existing inmates without violating ex post facto protections. Recognizing that the significant inquiry "looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual" (*Weaver v. Graham* (1981) 450 U.S. 24, 33), the Ninth Circuit in *Brown v. Palmateer* (9th Cir. 2004) 379 F.3d 1089 applied *Garner* and *Morales* to conclude the changed standards challenged in *Brown* created a

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17 The court left open the possibility that the Board's exercise of the discretion provided by the statute would, in practice, present a significant risk of increased punishment. (*Garner, supra,* 529 U.S. at pp. 256-257.) However, the court found no evidence to this effect in the record before it.

sufficiently significant risk of longer incarceration to violate ex post facto protections.[18] (*Brown v. Palmateer, supra,* 379 F.3d at pp. 1094-1096.) Similarly, in *Himes v. Thompson* (9th Cir. 2003) 336 F.3d 848, a prisoner argued application of the new rules was barred by ex post facto protections based on two changes in the rules governing a prisoner's eligibility for "rerelease" after a grant of parole had been revoked: changes in the factors to be considered in deciding "aggravation," and changes in the impact that an affirmative finding of aggravation would have on a prisoner's eligibility for rerelease. (*Id.* at pp. 854-863.) The court concluded, although the former changes did not create a sufficient risk of longer incarceration to trigger ex post facto concerns (*id.* at pp. 856-858), the latter change did trigger ex post facto concerns. Under the new rules, the parole authority was limited to a binary choice of either rereleasing the inmate after 90 days or (if it made an affirmative finding of aggravation) entirely denying rerelease to an inmate for the balance of his or her sentence. (*Id.* at p. 859.) In contrast, the former rules did not mandate outright denial of rerelease as the only available aggravation remedy, but allowed a selection among a graduated series of terms of confinement. (*Ibid.*) This

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18 In *Brown*, the former statute permitted the parole authority to postpone a scheduled release when there was a " 'psychiatric or psychological diagnosis of present severe emotional disturbance' " (*Brown v. Palmateer, supra,* 379 F.3d at p. 1091) of the inmate, thus posing a danger to the community, while the new scheme under which the inmate's release date was postponed permitted postponement " '[i]f the Board finds the [inmate] has a mental or emotional disturbance' " that would pose a danger to society. (*Ibid.*) Because the former statute required a medical diagnosis as a predicate to postponement, while the latter statute permitted the Board to postpone release if it found a mental or emotional disturbance regardless of the existence of (or even contrary to) a medical diagnosis, the court concluded the requisite risk of longer confinement was present for purposes of ex post facto protections. (*Id.* at p. 1095.)

constriction of available release dates, concluded *Himes*, was a sufficiently significant increase in the possibility of serving a more lengthy period of incarceration to preclude application of the new rules under ex post facto provisions. (*Id.* at pp. 863-864.)

D. Marsy's Law

The decisions in *Garner* and *Morales*, as well as the application of those cases in other courts, turned on the particular features of the laws under consideration. (See, e.g., *Morales, supra*, 514 U.S. at p. 509, fn. 5 [expressly declining to consider whether alternative enactments changing the timing of parole hearings could be unconstitutional].) Here, Vicks asserts the changes effectuated by Marsy's Law present a distinct set of changes outside the boundaries of the changes that *Garner* and *Morales* found not to violate ex post facto principles.

Unlike *Garner* and *Morales*, which considered *permissive* extensions of the maximum possible parole hearing date, Marsy's Law effectuates numerous significant changes: (1) it *mandates* increases in the minimum deferral date and appears to constrain the ability of the BPH to consider and act on new information or changed circumstances, (2) it reduces the BPH's discretion to order a deferral for less than the maximum possible term and *entirely* eliminates the BPH's discretion to order a deferral for less than the minimum term, and (3) it increases the maximum deferral date. Because *Garner's* ex post facto analysis carefully examined each category of change (*Garner, supra*, 529 U.S. at pp. 251-252; see also *Morales, supra*, 514 U.S. at p. 513), we examine each alteration enacted by Marsy's Law.

Increased Minimum Deferral Periods

Garner and *Morales* both emphasized that, under the new laws they considered, a longer deferral would be imposed only when the parole board found it unreasonable to expect parole would be granted in the interim. (*Garner, supra*, 529 U.S. at p. 254; see also *Morales, supra*, 514 U.S. at pp. 511-512.) In contrast, Marsy's Law increases the minimum deferral period for all inmates (from one to three years) regardless of the BPH's expectation about whether the inmate may become eligible for parole at an earlier date. (§ 3041.5, subd. (b)(3)(C).) Thus, unlike the laws reviewed by *Garner* and *Morales* (which provided the relevant parole boards with *discretion* to impose the pre-amendment deferral period), there appears to be no discretion under Marcy's Law to tailor the deferral to either a one- or two-year deferral even where the BPH believes an individual inmate will likely achieve sufficient progress in his or her rehabilitation to warrant parole in one or two more years.

The People appear to argue the risk of an increased period of incarceration created by lengthier mandatory deferrals between suitability hearings is ameliorated by the inmate's ability to request (and the BPH's ability to order) that a deferred hearing date be advanced on a showing of changed circumstances or new information. Although the People's argument is somewhat murky, the unstated predicates to the argument appear to be (1) any deferral occurs only when the BPH concludes the inmate is not presently suitable for parole, (2) a subsequent hearing will not result in the inmate's release unless some fact changes to render him or her suitable, and (3) under the former system the BPH would schedule the next hearing in one year if it thought the requisite change would

possibly occur in that time, or two years if the BPH thought it was not reasonable to expect this possibility would come to fruition. The People appear to argue that, although the three-year minimum prevents the BPH from presently scheduling an earlier hearing based on this possibility, if the requisite change *actually occurs* then the occurrence will entitle the inmate to an advanced hearing. Thus, as best we can discern, the People argue that in all the circumstances in which an inmate would have actually been released under the former system, the inmate will also be released under the new system, albeit pursuant to a different procedure, and therefore there is no substantial risk of increased incarceration by applying Marsy's Law to all inmates.

Although the People correctly note that the possibility of advanced hearings serving as a safety valve was one of the several factors considered in *Garner* and *Morales*, neither case suggested that the ability to advance a hearing was itself sufficient to ameliorate ex post facto concerns. (*Garner, supra*, 529 U.S. at p. 251 [looking at totality of the factors]; *Morales, supra*, 514 U.S. at p. 509 [same].) More importantly, neither *Garner* nor *Morales* evaluated a system like the statutory regime presented by Marsy's Law, in which an inmate is *expressly barred* from first seeking to trigger the safety valve for a minimum of three years (and is also expressly barred from *thereafter* seeking to trigger the safety valve for another minimum of three years) *even if there are changed circumstances or new information that would have resulted in a favorable suitability determination* at a regularly scheduled one- or two-year deferred hearing in

which the new information or changed circumstances would be considered.[19] (§ 3041.5, subd. (d)(1).) Although the former statutory scheme would permit annual (or biennial) examinations of changed circumstances or new facts supporting a release on parole, inmates must now wait at least an additional year (or two years) before changed circumstances or new facts supporting a release on parole will be considered, resulting in a significant risk that an inmate will spend a longer period of incarceration under Marsy's Law than under the former system.[20]

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19 As previously noted (see fn. 10, *ante*), although Marcy's Law nominally appears to allow the BPH sua sponte to advance a subsequent suitability hearing date based on changed circumstances or new information, the absence of any statutory or regulatory requirements (as was present under the 1990 enactment requiring the parole authority to conduct a file review within three years and to act on that information to conduct an earlier parole hearing when appropriate, see fn. 9, *ante*) by which the BPH might obtain information for that action appears de facto to relegate advanced hearings to those triggered by the "inmate request" provisions. Because there is no mechanism by which the BPH might sua sponte *generate* new information, or any mechanism by which the BPH might sua sponte *learn* of either new information or changed circumstances on which it might act, an inmate who would have obtained a new hearing as early as one year after his or her last hearing must now wait a *minimum* of three years before obtaining a new hearing. Thus, although sua sponte advanced hearings are nominally available, it appears "the rule's practical implementation . . . will result in a longer period of incarceration than under the earlier rule" (*Garner, supra,* 529 U.S. at p. 255) because of the absence of any practical method for triggering this advanced hearing.

20 We are loathe to characterize the risk of increased incarceration as insubstantial because we apprehend that inmates who do obtain rehabilitation sufficient for parole presumably do so over a time continuum. That is, some inmates will achieve the requisite rehabilitation during the first year after denial, while a second group of inmates will achieve the requisite rehabilitation after the first year but during the second year after denial, while the third group requires three years. Under the old system, although the last of these three groups will not incur any additional incarceration as a result of the minimum deferrals required by Marsy's Law, the first and second groups will be *certain* to suffer an additional incarceration under the minimum deferrals required by Marsy's Law, because they would have been heard at an earlier date but are now barred from

In summary, Marsy's Law, unlike the changes considered in *Morales* and *Garner*, increases the minimum deferral period and removes the ability of the BPH to select among a graduated series of deferrals of less than three years. (*Himes v. Thompson, supra,* 336 F.3d at p. 864 [the switch "from a flexible continuum to a compelled determination that the inmate be returned for his entire remaining sentence . . . increased the 'mandatory minimum' punishment for a particular category of inmates, [citation] creating a 'sufficient risk' of increasing the measure of punishment" under *Morales*].) The changes will necessarily increase the period of incarceration for those inmates currently found unsuitable for parole but who have a significant chance of becoming suitable in less than two years and, having served their base terms, would be granted immediate release if found suitable. (Cf. *Morales, supra*, 514 U.S. at p. 513.) Finally, the possibility of an advanced hearing is an inadequate substitute for a scheduled hearing when the BPH reasonably expects that an inmate will become suitable for parole in less than two years, or when circumstances unexpectedly change or new facts unexpectedly develop during the additional two-year period that would demonstrate suitability. Accordingly, the change in the minimum deferral period itself creates a significant risk of

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being heard until after an additional one or two years. We acknowledge that there exists the fourth category of inmates—those who would not have achieved the requisite rehabilitation even during those three years and would suffer no immediate harm from a three-year denial. However, because the fourth group of inmates would again be subjected to a mandatory three-year denial, the cyclical continuum would recommence and many of those inmates would eventually become members of the first, second, and third groups, two of which groups will be certain to suffer an additional incarceration under the minimum deferrals required by Marsy's Law.

prolonged incarceration for inmates who would have received shorter deferral periods under the former statute.

Limits on BPH's Discretion and Increase In Default Maximum Deferral

A second aspect of Marsy's Law that incrementally adds to the risk of a longer period of incarceration is the added constraint placed on the BPH's discretion. First, as discussed above, there appears to be no discretion under Marcy's Law (unlike the laws considered in *Garner* and *Morales*) to tailor the deferral to either a one- or two-year deferral even if the BPH believes an individual inmate will likely achieve sufficient progress in his or her rehabilitation to warrant parole in one or two more years.

Second, in addition to *raising* the minimum deferral period, Marcy's Law also increases the default deferral period to 15 years while simultaneously limiting the BPH's ability to reduce the maximum deferral period. Under the scheme applicable in 1983, the default was the minimum one-year period and the Board had discretion to impose a longer deferral only when it was "not reasonable to expect that parole would be granted at a hearing during the following year[s]." (See Stats. 1982, ch. 1435, § 1, p. 5474.) Moreover, because this longer deferral was permissive only, the BPH had discretion to impose less than the maximum even when it was not reasonable to expect parole would be granted sooner.

Under Marsy's Law, however, the default deferral is now the maximum 15-year deferral (§ 3041.5, subd. (b)(3)(A)), and the BPH's discretion to depart from that maximum period is constrained: it may depart from that default and set a lesser deferral

only where it finds, by "clear and convincing evidence,"[21] that "consideration of the public and victim's safety does not require a more lengthy period of incarceration." (§ 3041.5, subd. (b)(3)(A).) Because this aspect of Marsy's Law imports (into the departure from the default 15-year deferral) "consideration of the public safety," which is also the determinant of parole suitability, Marsy's Law appears to allow a deferral for less than the maximum only when clear and convincing evidence indicates parole will *actually* be granted at the next hearing. Thus, the BPH no longer has the discretion (which it apparently had under the former scheme) to depart from the maximum deferral periods and schedule an earlier hearing when it does not expect parole to be granted at an earlier hearing.

Because Marsy's Law *constrains* the discretion to set *earlier* hearings (and entirely *eliminates* the discretion to set hearings earlier than three years), rather than *expands* the discretion to set *deferred* hearings, it bears scant resemblance to the schemes considered by *Garner* or *Morales*.[22] Those cases examined changes that, like California's prior

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21 Neither party has identified whether this aspect of Marsy's Law changes the quantum of proof previously governing BPH determinations, which precludes us from assessing whether this change might also raise ex post facto concerns under *Calder v. Bull's* fourth category (see fn. 13, *ante*).

22 For this reason, we respectfully disagree with the holding in *In re Russo* (Apr. 8, 2011, D057405) ___ Cal.App.4th ___ [2011 WL 1332164]. In *Russo,* a panel of this court rejected an ex post facto challenge to Marsy's Law by relying on *Garner* and *Morales*. However, *Russo's* analysis contains no extended evaluation of the salient rationales underlying the holdings in *Garner* and *Morales,* and therefore could not apply those cases to determine whether (considering the reasoning of *Garner* and *Morales*) the features of Marsy's Law might call for a different conclusion. (See, e.g., fn. 14, *ante.*) Additionally, *Russo* stated that "the parole board may grant, *and the inmate may request*

system, granted the BPH discretion to postpone subsequent parole hearings when the BPH made specific findings that an earlier release was unlikely, which convinced those courts that application of the new rules did not create a sufficiently significant increase in the possibility of serving a more lengthy period of incarceration to offend ex post facto protections. (*Garner, supra*, 529 U.S. at p. 254 [longer deferral permitted where " 'it is not reasonable to expect that parole would be granted during the intervening years' "]; *Morales, supra*, 514 U.S. at p. 507 [longer deferral only where no reasonable probability to expect that parole would be granted at a hearing during the following year].)

. . . an earlier parole hearing" (*Russo,* at p. *9, italics added), which *Russo* concluded "eliminate[s] any ex post facto implications because they constitute 'qualifying provisions that minimize or eliminate' [citation] the 'significant risk of prolonging [petitioner's] incarceration.' " (*Ibid.*) However, *Russo* overlooked that because an inmate *must* wait three years to invoke that safeguard (see § 3041.5, subd. (d)(1)), that "qualifying provision" does *not* minimize or eliminate the risk of prolonging the period of incarceration for inmates who achieve rehabilitation earlier than three years after their last hearing. (See fns. 19 & 20, *ante*.) For similar reasons, we are also unpersuaded by the recent decision in *Gilman v. Schwartzenegger* (9th Cir. Jan. 24, 2011, No. 10-15471) ___ F.3d ___ [2011 WL 198435]. The *Gilman* court, although acknowledging that "the changes required by Proposition 9 appear to 'create[s] a significant risk of prolonging [Plaintiffs'] incarceration' " (*id.* at p. *6), concluded the availability of the advanced hearings " 'would *remove any possibility of harm*' to prisoners who experienced changes in circumstances between hearings." (*Ibid.*, quoting *Morales, supra,* 514 U.S. at p. 513, italics added by *Gilman*.) This conclusion again ignores that the "possibility of harm" remained extant during the three-year blackout period for prisoner-initiated requests. Indeed, when the *Gilman* court rejected the plaintiffs' argument that there would " 'necessarily be a delay between any meritorious request for an advance hearing and the grant of such hearing' " (*Gilman,* at p. *7) as unsupported by the evidence, *Gilman* did so because the plaintiffs "fail[ed] to explain how these statutory requirements make it 'virtually impossible' for a prisoner to receive an advance hearing within one year of the denial of parole—the previous default deferral period." (*Ibid.*) However, the *explanation* for why it is "virtually impossible" for a prisoner to successfully pursue an advance hearing within *one* year of the denial of parole is that the statute *bars* an inmate-initiated request for an advanced hearing for *three* years.

We must assess whether this second set of changes—imposing a longer default maximum deferral period while simultaneously limiting the BPH's discretion to depart from that maximum by requiring (as a condition to departing from the maximum) that there be clear and convincing evidence supporting a prediction that the inmate will achieve rehabilitation before that maximum deferral period term would expire—increases the probability that application of the new rules will cause inmates to serve more lengthy periods of incarceration than they would have served under the old rules. Because ex post facto principles may preclude application of new rules even when an inmate " 'cannot show definitively that he would have gotten a lesser sentence' " (*Miller v. Florida* (1987) 482 U.S. 423, 432), and instead "[t]he controlling inquiry . . . [is] whether retroactive application of the change . . . created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes' " (*Garner, supra*, 529 U.S. at p. 250), we must assess whether these changes do create such a risk.

We appreciate that it is hard to predict when many inmates will become suitable for parole and, in a significant number of cases, the evidence will not support a prediction (one way or the other) regarding future suitability for parole. Under the former rules, yearly (or bi-yearly) hearings were held to reevaluate suitability and afforded the BPH the ability to respond flexibly to unforeseeable progress at these periodic hearings; the former rules also provided the BPH with discretion to schedule a one-year hearing even if it believed it was unlikely sufficient progress would be achieved but the BPH nevertheless wished to preserve its ability to respond to unexpected progress. Marsy's Law, however, eliminates this discretion and appears to place on the inmate the burden of

proving, clearly and convincingly, that future suitability will be attained earlier than 15 years. If it is frequently impossible to make any confident prediction as to whether an inmate will (or will not) achieve the requisite progress, reallocating the burden of proof and simultaneously imposing a 15-year default deferral if that burden is not met effectively removes the prior presumption of periodic scheduled hearings and restricts the BPH's ability to respond timely to change.

In *Miller v. Florida, supra*, 482 U.S. 423, the court concluded application of a new set of rules could be barred by ex post facto principles even if the change did not automatically lead to a more onerous period of incarceration than under the prior rules. In *Miller*, the court considered a challenge to application of Florida's new sentencing guidelines. (*Id.* at p. 425.) The former guidelines provided a presumptive range of three and one-half to four and one-half years for the crime; a sentence within the presumptive range could be imposed with no statement of reasons and, although a judge could depart from the range to impose a higher or lower term, he or she could only do so by providing clear and convincing written reasons for the departure. The new guidelines imposed a higher presumptive range of five and one-half to seven years for the crime, but were otherwise similar to the prior system. (*Id.* at pp. 424, 426-427.) The petitioner was sentenced to seven years under the new presumptive range, and the court found application of the new guidelines would violate the ex post facto clause—despite the fact the petitioner could have received the same sentence under the former law—because the changes imposed a higher presumptive minimum while constraining the judge's discretion to impose the lower sentence to cases in which clear and convincing reasons

could be articulated for imposing a lower sentence. (*Id.* at pp. 428, 435.) Marsy's Law similarly lengthens the presumptive period of incarceration, and limits the BPH's discretion to depart from that presumptive period to cases in which clear and convincing evidence supports a departure from the lengthened presumptive period. These interrelated aspects of Marsy's Law further contribute to the risk of prolonged incarceration.

E. Conclusion

Increasing the minimum deferral date and constraining the ability of the BPH to consider and act upon new information or changed circumstances will adversely impact those inmates whose rehabilitative progress during the two years after an unsuccessful parole hearing may have otherwise warranted parole but must now wait until the three-year blackout period imposed under Marsy's Law has lapsed. Additionally, lengthening the presumptive period of incarceration and limiting the BPH's discretion to depart from that presumptive period to cases in which clear and convincing evidence supports a departure incrementally increases the risk of a more lengthy incarceration for those inmates who, although not ready for parole before the end of the two-year hiatus under the former rules, have been sufficiently rehabilitated during the ensuing years but were unable to provide clear and convincing evidence to have obtained a parole hearing earlier than the presumptive 15- or 10-year deferrals. *Garner* teaches that changes must be reviewed "within the whole context of [the state's] parole system" (*Garner, supra*, 529 U.S. at p. 252), and that ex post facto principles bar application of new rules when they create a significant (rather than a speculative and attenuated) risk of increasing the

measure of punishment attached to the covered crimes. (*Garner*, at pp. 250-251.) We conclude the risk of increased incarceration is real and significant, rather than speculative or attenuated, and therefore the changes to section 3041.5 enacted pursuant to Marsy's Law may not be applied to inmates whose crimes predated the effective date of Marsy's Law.

DISPOSITION

The relief requested in the petition for writ of habeas corpus is granted in part. The 2009 order is vacated to the extent it defers Vicks's subsequent parole suitability hearing for five years under section 3041.5 as amended pursuant to Marsy's Law, and the BPH is directed to issue a new order rescheduling the hearing under section 3041.5 in effect in 1983. In all other respects, relief is denied.

McDONALD, J.

I CONCUR:

McINTYRE, J.

NARES, J, concurring and dissenting:

I concur in the majority's decision that some evidence supports the Board of Parole Hearing's (Board) decision to deny parole. However, I respectfully dissent from the majority's decision that the Victims' Bill of Rights Act of 2008: Marsy's Law (hereafter Marsy's Law) (Pen. Code,[1] § 3041.5) violates state and federal constitutional protections against ex post facto laws.

The United States Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law." (U.S. Const., art. I, § 10.) A law violates the ex post facto clause of the United States Constitution if it: (1) punishes as criminal an act that was not criminal when it was committed; (2) makes a crime's punishment greater than when the crime was committed; or (3) deprives a person of a defense available at the time the crime was committed. (*Collins v. Youngblood* (1990) 497 U.S. 37, 52 [110 S.Ct. 2715].) The ex post facto clause " 'is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts.' " (*Himes v. Thompson* (9th Cir. 2003) 336 F.3d 848, 854 (*Himes*), quoting *Souch v. Schaivo* (9th Cir. 2002) 289 F.3d 616, 620; *see also Cal. Dep't of Corr. v. Morales* (1995) 514 U.S. 499, 504 [115 S.Ct. 1597] (*Morales*). The ex post facto clause is also violated if: (1) state regulations have been applied retroactively to a defendant; and (2) the new regulations have created a "sufficient risk" of increasing the punishment attached to the defendant's crimes. (*Himes,* 336 F.3d at p. 854.)

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1 All further statutory references are to the Penal Code.

However, not every law that disadvantages a defendant is a prohibited ex post facto law. The retroactive application of a change in state parole procedures violates ex post facto principles only if there exists a "significant risk" that such application will increase the punishment for the crime. (*See Garner v. Jones* (2000) 529 U.S. 244, 255 [120 S.Ct. 1362] (*Garner*).)

Before Proposition 9 (otherwise known as Marsy's Law) was enacted, the length of a parole hearing deferral was determined by section 3041.5, subdivision (b)(2). That section provided:

> "The board shall hear each case *annually* . . . , except the board may schedule the next hearing no later than the following: [¶] (A) *Two years* after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the bases for the finding. [¶] (B) Up to *five years* after any hearing at which parole is denied if the prisoner has been convicted of murder, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding in writing." (Italics added.)

As the majority discusses, Proposition 9 substantially changed the law governing deferral periods. The most significant changes are as follows: the minimum deferral period is increased from one year to three years, the maximum deferral period is increased from five years to 15 years, and the default deferral period is changed from one year to 15 years. (§ 3041.5, subd. (b)(3).) Additionally, before Proposition 9 was enacted, the deferral period was one year unless the Board found it was unreasonable to expect the prisoner would become suitable for parole within one year. (§ 3041.5, subd. (b)(2).) After Proposition 9, the deferral period is 15 years unless the Board finds by

clear and convincing evidence that the prisoner will be suitable for parole in 10 years, in which case the deferral period is 10 years. (§ 3041.5, subd. (b)(3)(A-B).) If the Board finds by clear and convincing evidence that the prisoner will be suitable for parole in seven years, the Board has discretion to set a three-, five-, or seven-year deferral period. (§ 3041.5, subd. (b)(3)(B-C).)

However, Proposition 9 also authorized the Board to advance a hearing date on its own accord or at the request of a prisoner. "The board may in its discretion . . . advance a 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 . . . ." (§ 3041.5, subd. (b)(4).) Also, a prisoner may request an advance hearing by submitting a written request that "set[s] 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." (§ 3041.5, subd. (d)(1).) A prisoner is limited to one such request every three years. (§ 3041.5, subd. (d)(3).) Moreover, although the minimum deferral period is three years, there is *no* minimum period the Board must wait before it holds an advance hearing. (§ 3041.5, subd. (b)(4).)

As will be discussed, *post*, I believe that these protections eliminate any "significant risk" application of Marsy's Law will increase a prisoner's punishment for his or her crime. In analyzing whether these changes violate ex post facto principles, we are guided by United States Supreme Court precedent that has addressed similar changes in laws governing parole.

In *Morales, supra,* 514 U.S. at pages 502-503, the defendant was sentenced to 15 years to life for a murder committed while on parole from a prior murder sentence. As noted, *ante*, section 3041.5, subdivision (b)(2) at that time provided for annual subsequent parole reviews. (*Morales,* at pp. 502-503.) In 1981, the law was amended to allow the Board to delay a subsequent hearing for up to three years if the prisoner had been convicted of more than one offense involving the taking of a life and the Board found it unreasonable to expect that parole would be granted in intervening years. (*Ibid.*) The initial parole hearing for Morales occurred in 1989. (*Id.* at p. 502.) The Board found Morales unsuitable for parole and that it was not reasonable to expect that he would be found suitable for parole in 1990 or 1991. (*Id.* at p. 503.) The Board set the next parole hearing for 1992. (*Ibid.*) Morales filed a federal habeas corpus petition, arguing that the 1981 amendment, as applied to him, constituted an ex post facto law. (*Id.* at p. 504.)

The high court in *Morales* rejected that contention, concluding that the 1981 amendment "creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause." (*Morales, supra,* 514 U.S. at p. 509.) In doing so, the court noted (1) the amendment did not affect the date of the initial parole suitability hearing; (2) the Board retained discretion to tailor the frequency of parole hearings to the circumstances of individual prisoners; (3) the Board was required to make particular findings justifying the postponement of a subsequent hearing more than a year in the future; and (4) an

expedited hearing could occur if a prisoner experienced such a change in circumstance as to make suitability for parole likely. (*Id.* at pp. 510-513.)

Similar protections are also present in the current version of section 3041.5. While *Morales* did not involve a change to the minimum deferral period, the default deferral period, or the burden to impose a deferral period other than the default period, the procedural safeguards in subdivisions (b)(4) and (d)(1) allowing an advance hearing by the Board would remove any possibility of harm to prisoners because they would not be required to wait a minimum of three years for a hearing. Those subdivisions eliminate any ex post facto implications because they constitute qualifying provisions that minimize or eliminate the significant risk of prolonging a prisoner's incarceration.

The Supreme Court also addressed retroactive changes in laws governing parole in *Garner, supra,* 529 U.S. 244. When the defendant committed his offense and was sentenced, the rules of Georgia's parole board required reconsideration of parole to take place every three years. (*Id.* at p. 247.) In 1985 the board amended its rules to provide that reconsideration for inmates serving life sentences would take place at least every eight years. (*Ibid.*) Although Georgia's amended parole rules permitted extension of parole reconsideration by five years (not just the two years in *Morales*), applied to all prisoners serving life sentences (not just to multiple murderers), and afforded fewer procedural safeguards than in *Morales,* the Court found that these differences were "not dispositive." (*Id.* at p. 251.) In finding that Georgia's amended parole rules did not violate ex post facto principles, the Court noted under Georgia's amended statute that the parole board maintained the discretion to deny parole for a range of years and permitted

an expedited review if a change of circumstances or new information indicated that an earlier review was warranted. (*Id.* at p. 254.)

Again, similar protections are present in the current version on section 3041.5 that eliminate any ex post facto implications.

Our high court has also addressed the constitutionality of retroactive changes to periods for parole review. In *In re Jackson* (1985) 39 Cal.3d 464, the court examined an amendment to an earlier version of section 3041.5 that increased the maximum parole denial period from one year to two years. Our high court concluded that becasue the amendment only changed the frequency of hearings and did not alter the criteria for determining parole suitability, it was a "procedural change outside the purview of the ex post facto clause." (*Id.* at p. 472, fn. omitted.)

Here too the amendments to section 3041.5 are a procedural change that impacts only the frequency of parole hearings. Vicks retains the right to a hearing with numerous procedural protections, and the criteria for determining parole suitability remains unchanged.

Most recently, the Ninth Circuit addressed an ex post facto challenge to Marsy's Law overturning a district court decision granting a preliminary injunction to plaintiffs in a class action seeking to prevent the board from enforcing the amended deferral periods established by section 3041.5. (*Gilman v. Schwarzenegger* (9th Cir. Jan. 24, 2011, No. 10-15471) ___ F.3d ___ [2011 WL 198435].) The court found it unlikely that plaintiffs would succeed on the merits of their underlying challenge premised on the ex post facto

clause. In doing so, the court initially compared and contrasted Marsy's Law with *Morales* and *Garner*:

> "Here, as in *Morales* and *Garner*, Proposition 9 did not increase the statutory punishment for any particular offense, did not change the date of inmates' initial parole hearings, and did not change the standard by which the Board determined whether inmates were suitable for parole. However, the changes to the frequency of parole hearings here are more extensive than the change in either *Morales* or *Garner*. First, Proposition 9 increased the maximum deferral period from five years to fifteen years. This change is similar to the change in *Morales* (i.e., tripled from one year to three years) and the change in *Garner* (i.e., from three years to eight years). Second, Proposition 9 increased the minimum deferral period from one year to three years. Third, Proposition 9 changed the default deferral period from one year to fifteen years. Fourth, Proposition 9 altered the burden to impose a deferral period other than the default period. . . . Neither *Morales* nor *Garner* involved a change to the minimum deferral period, the default deferral period, or the burden to impose a deferral period other than the default period." (*Gilman, supra,* 2011 WL 198435, at p. 5.)

The Ninth Circuit found these distinctions insignificant, however, due to the availability of advance parole hearings at the Board's discretion (sua sponte or upon the request of a prisoner, the denial of which is subject to judicial review), reasoning that, "as in *Morales,* an advance hearing by the Board 'would remove any possibility of harm' to prisoners because they would not be required to wait a minimum of three years for a hearing." (*Gilman, supra,* 2011 WL 198435, at p. 6, quoting *Morales,* 514 U.S. at p. 513.) The court concluded that the plaintiffs had failed to demonstrate a significant risk that their incarceration would be prolonged by application of Marsy's Law, and thus found that plaintiffs had not established a likelihood of success on the merits of their ex post facto claim. (*Gilman, supra,* at p. 6.)

I conclude, as did the court in *Gilman*, that amended section 3014.5 does not violate ex post facto principles. As in *Morales* and *Garner,* Proposition 9 did not increase the statutory punishment for any particular offense, did not change the date of inmates' initial parole hearings, and did not change the standard by which the Board determined whether inmates were suitable for parole. Further, the fact that advance parole hearings are available at the Board's discretion, either initiated by the board or upon the request of a prisoner, and the prisoner is not required to wait a minimum of three years to have a hearing, ex post facto principles are not implicated because the amendments create "only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." (*Morales, supra,* 514 U.S. at p. 514.)

The majority minimizes the protections afforded by the ability to have advance hearing dates by focusing on the fact there is a three-year "blackout" period for prisoners to request an advance hearing following a denial of parole and that the Board is "constrained" from considering new information or changed circumstances because there is no explicit mechanism for the Board on its own motion to set an advance hearing. However, the criteria for advanced hearings and the Board's discretion to advance a hearing on its own are clearly set forth in the statute itself and do not require any clarification, regulations, or procedures necessary for the Board to advance a hearing. (§ 3041.5, subd. (b)(4).) The Board is in no way is "constrained" from considering or acting on new information or changed circumstances. Indeed, in *Morales, supra,* 514 U.S. at page 512, the Supreme Court found no ex post facto implications even though

expedited hearings were not provided by statute or regulation, but only the Board's "'practice'" of "'reviewing for merit any communication from an inmate asking for an earlier suitability hearing.'"

The majority also focuses on the fact the "default" deferral is now 15 years and opines that the Board does not have the discretion to depart from that deferral period when it does not expect parole to be granted at an earlier hearing. However, as can be seen from what occurred in Vick's case, the Board does retain substantial discretion to set a deferral period of less than 15 years based upon the individual circumstances of the prisoner. Here, the Board set the deferral period at five years, the second shortest period possible. In doing so, the Board made the following comments, demonstrating that in practice it acted upon an individualized assessment of the prisoner's status:

> "In terms of your denial length, we do not feel that a time frame of ten or fifteen years is appropriate in your case. The Commissioner and myself discussed at length what we thought would be appropriate and at this point we have reached a conclusion that a five-year denial is the appropriate denial that we are going to give you here. Now, I know that's a long time, but it is the second lowest denial that we can give someone. So you need to take heart in that and you need to understand that we're offering something that is not often given. Under Prop 9 our lowest is three years, then it goes five, seven, ten and fifteen."

As the majority notes in concluding that there was some evidence to support the denial of parole, the Board could reasonably conclude "an additional [5-year] period of discipline-free behavior was required to show that the influences and impulses leading to the crimes had been eradicated to a sufficient degree that he would not pose an unreasonable risk of relapsing into prior behavioral patterns." (Maj opn., p. 13.) As can

be seen by the Board's decision in this case, section 3041.5 as amended allows for the Board's exercise of discretion and an individualized assessment of the prisoner's suitability for parole.

NARES, Acting P. J.

DECLARATION OF SERVICE

Case Name: **In re Vicks**

Lower Court No.: **D056998**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **June 20, 2011,** I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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San Diego, CA 92101

Court Clerk
San Diego County Superior Court
c/o The Hon. David M. Gill (SD-28)
Main Courthouse
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San Diego, CA 92101

On **June 20, 2011**, I caused one (1) original and thirteen (13) copies of the **Petition for Review** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102** by **Personal Delivery**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 20, 2011**, at San Francisco, California.

M. Luna
Declarant

M. Luna
Signature