In the Supreme Court of the State of California

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

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

OPENING BRIEF ON THE MERITS

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INITIATIVE PROVISIONS

ISSUE PRESENTED

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

STATEMENT OF THE CASE

In 1983, Michael 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 counts of robbery, and several firearm charges. (*In re Vicks* (May 11, 2011, D056998) [pub. opn.], review granted July 30, 2011 [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 Vicks's initial parole-consideration hearing in 2009, one year before his minimum parole-eligibility date, the Board of Parole Hearings denied parole. The Board also set a five-year "deferral" before his next parole consideration hearing, a deferral three years longer than it could have imposed before the 2008 enactment of Marsy's Law. (*Id.* at pp. 2, 6.) In denying parole and deferring future consideration for five years, 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 that supported the Board's finding of inadequate insight and assessed Vicks as posing a medium-low risk of sexual recidivism and a low-moderate risk of violent and general recidivism. (*Id.* at pp. 3–6.)

Vicks challenged the Board's 2009 decision by filing a petition for writ of habeas corpus in the San Diego County Superior Court. (Slip opn. at p. 7.) When that was denied, Vicks filed a petition for writ of habeas corpus in the Court of Appeal, Fourth Appellate District, Division One,

arguing that the Board's decision was not supported by the 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 granted the petition, in part, in a published decision filed May 11, 2011. The panel unanimously upheld the Board's denial of parole; but, in a split decision, the majority held that the changes to the hearing-deferral periods enacted by Marsy's Law violate ex post facto principles. (*Id.* at pp. 17, 40.) This latter conclusion was premised, largely, on the majority's finding that the Penal Code, as amended by Marsy's Law, imposed a three-year "blackout" period before an inmate could request an advanced hearing. (E.g., *id.* at pp. 19, fn. 10, 32 ["an inmate is *expressly barred* from first seeking to trigger the safety valve for a minimum of three years"].) Acting Presiding Justice Nares dissented, concluding that the Marsy's Law amendments that allow the Board to advance a hearing date and permit the inmate to request an earlier hearing "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.) The majority vacated the portion of the Board's decision deferring Vicks's parole for five years and directed the Board to reschedule Vicks's hearing according to the parole scheme in effect before Vicks's conviction. (Slip opn. at p. 41.)

Respondent petitioned for re-hearing, arguing that the Court of Appeal had erred in concluding that Marsy's Law imposes a three-year blackout period during which the inmate cannot request an advanced hearing. The re-hearing petition pointed out that language in the advancement provision indicates that the three-year prohibition applies only to subsequent—not initial—requests for an earlier hearing (Pen. Code, § 3041.5(d)(3) ["the inmate shall not be entitled to submit *another* request"

(emphasis added)]). The petition also advised the court that the Board's implementation documents for Marsy's Law include a "Petition to Advance Hearing Date," contained in the record below, that 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; http://www.cdcr.ca.gov/BOPH/docs/BPH_1045%28A%29-Petition_to_Advance_Hearing_Date.pdf (emphasis added).) Respondent argued that the Board's reasonable interpretation of the Penal Code—in this respect more favorable to Vicks than the court's interpretation—was entitled to deference. The Court of Appeal denied the petition on June 3, 2011, noting that Acting Presiding Justice Nares would have granted the petition.

SUMMARY OF ARGUMENT

Marsy's Law, enacted by California voters through the initiative process, implements longer parole-hearing-deferral periods than previously provided. (Pen. Code, § 3041.5, subd. (b)(3).) But while they increase both the default and the minimum periods for deferring further parole consideration, the amendments to the Penal Code do not violate ex post facto principles. On its face, Marsy's Law does not implicate ex post facto concerns because it does not alter when inmates receive their initial parole consideration hearings, because it continues to allow the Board to tailor the timing of the next hearing to the inmate's individual circumstances, and because it allows inmates to request advanced hearings upon changed circumstances.

The Court of Appeal's finding of an ex post facto violation rested on its misconstruction of the provision allowing inmates to request advanced hearings; the panel improbably concluded that inmates may not request an advanced hearing for three years—despite the Board's written

interpretation, which is entitled to deference, expressly allowing an inmate to request an advanced hearing at any time. Moreover, Vicks has made no showing that Marsy's Law, as applied to his own sentence, created any significant risk of increasing his punishment. The Court of Appeal's decision should be reversed.

ARGUMENT

I. THE BOARD'S APPLICATION OF MARSY'S LAW TO DEFER PAROLE CONSIDERATION FOR FIVE YEARS DID NOT VIOLATE VICKS'S EX POST FACTO RIGHTS.

Marsy's Law does not violate ex post facto principles. Neither facially, nor as applied to Vicks, does it present a sufficient risk of increasing punishment. The Court of Appeal reached the contrary conclusion only by misconstruing portions of Marsy's Law in disregard of the Board's implementation.

Here, California voters—by enacting the Victims' Bill of Rights Act of 2008: Marsy's Law through the initiative process—altered some aspects of the Penal Code provisions governing parole-consideration procedures for life inmates. The Penal Code amendments challenged here as violating ex post facto principles changed the length of time the Board may and must defer further parole consideration for inmates denied parole. (Pen. Code, § 3041.5, subd. (b)(3).)

The previous scheme provided for annual hearings, except that the Board could defer the next hearing for up to five years for murderers and up to two years for other life inmates upon finding it was "not reasonable to expect that parole would be granted at a hearing during the following years." (See former Penal Code § 3041.5, enacted by 1976 Cal. Stats 1139, amended by 1994 Cal. Stats. 560.) The amended Penal Code now provides for deferral periods of 15, 10, 7, 5, or 3 years; and it mandates that the Board shall set the longest deferral unless it finds by clear and convincing

evidence under the criteria for setting parole release dates that "consideration of the public and victim's safety does not require a more lengthy period of incarceration" than the next lowest deferral period. (Pen. Code, § 3041.5, subd. (b)(3).)

A. Marsy's Law, on Its Face, Does Not Produce a Sufficient Risk of Increasing Punishment to Implicate Ex Post Facto Concerns.

The ex post facto clauses of the California and federal Constitutions are analyzed identically (*People v. McVickers* (1992) 4 Cal.4th 81, 84), and prevent retroactive increases in the punishment for a crime. (*Collins v. Youngblood* (1990) 497 U.S. 31, 43.) The United States Supreme Court has noted that, given the discretion vested in parole boards, determining whether a particular change in the law effects an ex post facto violation in the context of parole determinations is particularly difficult. (*Garner v. Jones* (2000) 529 U.S. 244, 250 (*Garner*).) There is no precise formula to apply. Rather, the controlling question is whether the challenged amendment "produces a sufficient risk of increasing the measure of punishment." (*Cal. Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 509 (*Morales*).) Which changes are "'of sufficient moment to transgress the constitutional prohibition' *must* be a matter of 'degree.'" (*Ibid.*, quoting *Beazell v. Ohio* (1925) 269 U.S. 167, 171.)

Although Marsy's Law lengthens the minimum deferral period and makes the longest deferral period the default option, any ex post facto concerns are ameliorated by several other aspects of the law. First, Marsy's Law makes no change to the calculation of minimum eligible parole dates, so that all life-term inmates will continue to receive their initial parole consideration hearing at the same time they would have under the prior scheme. The United States Supreme Court has indicated this is a relevant consideration in ex-post-facto clause analysis. (*Morales, supra,* 514 U.S. at

p. 511 [noting "the amendment has no effect on any prisoner unless the Board" first determines that the prisoner is unsuitable for parole].)

Second, the Board under the amendment retains discretion to set a deferral period appropriate for each individual case. (Pen. Code, § 3041.5, subd. (b)(3).) Again, the Supreme Court has noted that individualized consideration weighs against finding an ex post facto violation. (*Morales, supra,* 514 U.S. at pp. 511–512; *Garner, supra,* 529 U.S. at p. 254 ["These qualifications permit a more careful and accurate exercise of the discretion the Board has had from the outset. Rather than being required to review cases *pro forma,* the Board may set reconsideration dates according to the likelihood that a review will result in meaningful consideration as to whether an inmate is suitable for release."].)

Third, Marsy's Law allows the Board to advance a parole consideration hearing, and allows an inmate to request an earlier hearing, "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 . . . ." (Pen. Code, § 3041.5, subds. (b)(4), (d)(1).) As the Supreme Court has indicated, expedited hearings "would remove any possibility of harm." (*Morales, supra,* 514 U.S. at p. 513.) Further, the Board's denial of an inmate's request to advance a hearing is subject to judicial review for abuse of discretion. (Pen. Code, § 3041.5, subd. (d)(2); cf. *Morales, supra,* 514 U.S. at p. 523 (dis.opn. of Stevens, J.) [expressing view that amendment vesting "unreviewable discretion in the Board to dispense with annual hearings" implicates ex-post-facto-clause concerns].)

These provisions are similar to those the Court in *Morales* and *Garner* found sufficient to forestall ex post facto concerns. Because the amendment here did not change the method for calculating the minimum eligible parole date, permits the Board to tailor the deferral length based on

individual case factors, and allows for hearings to be advanced when circumstances warrant, it creates "only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." (*Morales, supra,* at p. 514; see also *id.* at pp. 510–513; see also *Garner v. Jones*, *supra*, 529 U.S. at pp. 251-254.)

Instead, the Marsy's Law amendment is "designed for the better exercise of the discretion [the Board] had from the outset." (*Garner*, *supra*, 529 U.S. at p. 255.) As recognized in Marsy's Law, there are significant disadvantages to conducting frequent parole consideration hearings where there is no likelihood the inmate will be found suitable for parole. (Prop. 9, Section 3, Statement of Purposes and Intent, para. 2 ["Invoke the rights of families of homicide victims to be spared the ordeal of prolonged and unnecessary suffering, and to stop the waste of millions of taxpayer dollars, by eliminating parole hearings in which there is no likelihood a murderer will be paroled . . . ."].) Nor is this a case of "vindictive legislation" aimed at imposing greater punishment on past conduct against specific individuals. (*Miller v. Florida* (1987) 482 U.S. 423, 429; *James v. United States* (1961) 366 U.S. 213, 247, fn. 3 (conc. & dis. opn. of Harlan, J.).) Rather, the amendment spares victims' families unnecessary trauma and conserves scarce state resources by limiting parole hearings to times when review is likely to "result in meaningful consideration[] as to whether an inmate is suitable for release." (*Garner, supra,* 529 U.S. at p. 254.)

B. Marsy's Law Does Not Impose a Three-Year Blackout Period Before an Inmate Can Request an Advanced Hearing.

The Court of Appeal's ex-post-facto-clause analysis stressed its view that Marsy's Law imposed a blanket three-year blackout period during which an inmate may not request an advanced hearing. In the appellate court's view, that is, no inmate could ever have a hearing sooner than three

years after the prior hearing. (Slip opn. at p. 19, fn. 10; see also *id.* at pp. 17-19, 27-33.) But the Court of Appeal's interpretation of Marsy's Law in this respect was incorrect: it failed to give meaning to the full language of the advancement provision and is contrary to the Board's implementation of Marsy's Law.

Marsy's Law allows inmates, after a parole denial, to request that their next parole-consideration hearing be held sooner than the Board scheduled it if there is a "change in circumstances or new information that establishes a reasonable likelihood that consideration of public safety does not require the additional period of incarceration." (Pen. Code, § 3041.5, subd. (d)(1).) In fact, the Board allows inmates to make an initial request for an earlier hearing at any time following a parole denial. (Form BPH 1045(A), "Petition to Advance Hearing Date"] [Form BPH 1045], http://www.cdcr.ca.gov/BOPH/docs/BPH_1045%28A%29-Petition_to_Advance_Hearing_Date.pdf ["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."] (emphasis added).) After a first request for an earlier hearing, subsequent requests for earlier hearings are limited to once every three years. (Pen. Code § 3041.5, subd. (d)(3).) Thus, an inmate who receives the maximum fifteen-year hearing deferral may immediately request an earlier hearing and may subsequently request earlier hearings every three years.

The Board's implementation is consistent with the language of Marsy's Law. Penal Code section 3041.5, subdivision (d)(3), states that an inmate may request that a hearing be advanced once every three years. The subsequent language is, admittedly, more difficult to penetrate:

> Following either a summary denial of a request made pursuant to paragraph (1), or the decision of the board after a hearing described in subdivision (a) to not set a parole date, the inmate shall not be entitled to submit *another* request for a hearing

> pursuant to subdivision (a) until a three-year period of time has elapsed from the summary denial or decision of the Board.

(Pen. Code, § 3041.5, subd. (d)(3) [emphasis added].) The reference to "paragraph (1)" is to paragraph (1) of subdivision (d), which allows an inmate to request an advanced hearing based on changed circumstances or new information. A "hearing described in subdivision (a)," to which the quoted language also refers, is a parole consideration hearing.

Ignoring the word "another," the Court of Appeal read subdivision (d)(3) to mean that an inmate could not submit a request to advance a hearing for three years after a parole denial. In contrast, giving meaning to the word "another," the Board has construed the three-year bar to apply only to requests submitted after a first request to advance a hearing. Thus, "another request" indicates that "a hearing described in subdivision (a)" is a hearing held in response to an inmate's request for an earlier hearing, not simply a regularly scheduled parole consideration hearing.

As the agency charged with implementing Marsy's Law, the Board's interpretation of it is entitled to deference. (*Good Samaritan Hosp. v. Shalala* (1993) 508 U.S. 402, 414; *Garner*, *supra*, 529 U.S. at pp. 256-257 ["The Court of Appeals erred in not considering the Board's internal policy statement. At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations . . . . It is often the case that an agency's policies and practices will indicate the manner in which it is exercising its discretion."].) This Court has also held that an agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, 12-15.) The Court of Appeal, however, failed to consider the Board's interpretation of the statute as evidenced by

implementing documentation in the record, and pointed out in the petition for re-hearing below.

The Board's interpretation of the advancement provision is the most advantageous to parole-eligible inmates and also consistent with the statutory scheme and principles of statutory interpretation. (See *People v. Davis* (1981) 29 Cal.3d 814, 828-829 [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].) In contrast, the Court of Appeal construed the advancement provision in a manner unfavorable to inmates, unnecessarily triggering what it viewed as an ex post facto violation. (Slip opn., at p. 19, fn. 10.)

No other court has concluded that the Marsy's Law amendments impose a blackout period for inmates to make an initial request for an earlier hearing. To the contrary, a different panel of the very same Court of Appeal that issued the decision below reached the opposite conclusion. (*In re Aragon* (2011) 196 Cal.App.4th 483, 501–502.) The Ninth Circuit also has concluded that there is no impediment to an inmate requesting an advanced hearing sooner than three years after a denial. (*Gilman v. Schwarzenegger* (2011) 638 F.3d 1101, 1109–1111[district court erred in granting preliminary injunction because no evidence in the record implied that Marsy's Law created a significant risk of prolonged incarceration].) As the Ninth Circuit noted, "[I]n *Morales*, no statute or regulation provided for advance hearings, yet the Court relied on the fact that the Board—the same Board involved in this case—had a practice of reviewing inmates' requests for earlier parole hearings. . . . Further, Plaintiffs have adduced no evidence that the Board has denied or failed to respond to requests for advance hearings." (*Id.* at p. 1110.)

The three-year waiting period for *additional* requests merely discourages frivolous or repetitive petitions for advancement where the Board has determined that an inmate needs additional incarceration time to become suitable for parole. Consequently, the Board's interpretation and its practical implementation of the advancement provision only serves to refute any notion that Marsy's Law creates a significant risk of increased punishment. (See *Garner*, *supra*, 529 U.S. at pp. 256–257.)

C. Marsy's Law Creates No Significant Risk of Increasing Vicks's Own Punishment.

"When the rule does not by its own terms show a significant risk," the inmate "must show that as applied to his own sentence the law created a significant risk of increasing his punishment." (*Garner*, *supra*, 529 U.S. at pp. 255.) Because the Marsy's Law amendment here does not on its face show a significant risk of increasing punishment, Vicks bears the burden of showing that the change in the law has created a significant risk of increasing his punishment in his individual case.

But an examination of Vicks's case only reinforces the conclusion that Vicks's rights have not been violated and that the amendment here properly worked as "designed for the better exercise of the discretion [the Board] had from the outset." (*Garner*, *supra*, 529 U.S. at p. 255.) It is true that Vicks could have received only a one- or two-year deferral under the previous statute. But, given the gravity of Vicks's multiple-victim violent crime spree, and his consequent lengthy sentence, it is highly unlikely that the Board increased the risk of Vicks serving a longer time when it deferred Vicks's next parole review for five years rather than two. (*Id.* at pp. 254-255.)

In addition, the new hearing-advancement provision eliminates any ex-post-facto-clause concern here. Vicks could have requested an earlier hearing immediately following his 2009 parole denial, and then again three

years later; that would have presented two opportunities for the Board consider whether changed circumstances merited an earlier parole consideration hearing before his five-year deferral period expired. That is, Vicks could have secured opportunities for more frequent hearings than if he had received repeated two-year denials under the previous statutory scheme.

Of course, Vicks has presented no evidence that he ever even requested an advanced hearing. If Vicks himself declines to claim that his circumstances have changed sufficiently to merit reconsideration, it cannot reasonably be said that the Board's failure to hold an earlier hearing has effected any increased punishment in violation of Vicks's ex-post-facto rights.

In short, Vicks's claim that the Marsy's Law amendments significantly risk an increase in his punishment is simply speculation. The United States Supreme Court has repeatedly emphasized that speculation is insufficient to invalidate a statute on ex-post-facto grounds. (*Garner, supra*, 529 U.S. at p. 256 ["The record before the Court of Appeals contained little information bearing on the level of risk created by the change in law. Without knowledge of whether retroactive application of the amendment . . . increases, to a significant degree, the likelihood or probability of prolonging respondent's incarceration, his claim rests upon speculation."]; *Morales, supra*, 514 U.S. at pp. 508–509 ["These and countless other changes might create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for ex post facto purposes."]; *Dobbert v. Florida* (1977) 432 U.S. 282, 294 [petitioner's speculation that jury would have recommended less onerous sentence under prior procedure insufficient to show ex post facto violation].)

CONCLUSION

Because the changes to the parole scheme effected by Marsy's Law do not present a sufficient risk of increased incarceration, either on the face of the law or as applied to Vicks, there has occurred no ex-post-facto violation. The Court of Appeal's decision should be reversed.

Dated: September 2, 2011

Respectfully submitted,

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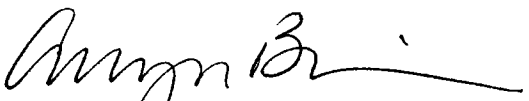

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,712 words.

Dated: September 2, 2011

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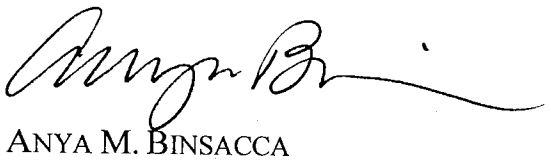

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DECLARATION OF SERVICE

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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. 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 with postage thereon fully prepaid that same day in the ordinary course of business.

On **September 2, 2011**, I served the attached

OPENING BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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On **September 2, 2011**, I caused an original and thirteen (13) copies of the **Opening Brief on the Merits** 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 **September 2, 2011,** at San Francisco, California.

M. Luna
Declarant

M. Luna
Signature