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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

It is undisputed that the "Victim's Bill of Rights Act of 2008: Marsy's Law," increases both the default and the minimum periods for deferring future parole consideration hearings, and requires consideration of the victim's views. Despite hyperbole in Vicks's brief, Marsy's Law hardly presents a return to "mob rule." Rather, the Penal Code amendments strike a balance between the interest of families whose grief is compounded by multiple parole hearings and the question whether parole might realistically be granted. Also contrary to Vicks's argument, legislative intent neither begins nor ends the Ex Post Facto Clause inquiry in the parole context; nor does the change to the clear-and-convincing standard in determining deferral lengths place an unlawful burden on inmates. Although the changes enacted to section 3041.5 may appear of a different degree than other previous amendments, the Board's discretion and standards remain intact.

Underpinning Vicks's "ex post facto" claim is his argument that increases in deferral periods result in increased punishment. But his argument is not supported by evidence or logic; and, in pressing this argument, Vicks misreads the statute in a way that contradicts the Board's interpretation and practice. Like the Court of Appeal, Vicks disregards the Marsy's Law savings provisions that grant the Board discretion—and, in reading a three-year "blackout" period for hearing advancements into the statute, discounts the relevance of the Supreme Court's holdings in *California Department of Corrections v. Morales* and *Garner v. Jones.* No such blackout period exists for the Board to advance parole hearings, either in the statute's text or as implemented. Indeed, Marsy's Law does not implicate ex post facto concerns because, like the parole schemes upheld in *Morales* and *Garner*, it continues to allow the Board of Parole Hearings to

tailor the timing of the next hearing to the inmate's individual circumstances, and preserves the Board's discretion to advance hearings.

Vicks speculates that applying Marsy's Law to him increases his punishment because, he asserts, he would have received a shorter parole-hearing deferral period under the law as it stood before Marsy's Law. As opposed to mere speculation, however, what has actually happened in Vicks's case undermines his "as-applied" ex post facto challenge. His longer deferral period cannot be equated with increased punishment because parole consideration is no guarantee of parole suitability, particularly for Vicks, whose unsuitability factors supported the Board's decision to impose a five-year—rather than three-year—deferral. Instead, in allowing for the better exercise of the Board's preexisting discretion, the Board's application of Marsy's Law to defer parole consideration for five years did not violate Vicks's ex post facto rights.

ARGUMENT

I. MARSY'S LAW DOES NOT VIOLATE VICKS'S EX POST FACTO CLAUSE RIGHTS AND WAS NOT INTENDED AS VINDICTIVE LEGISLATION.

Vicks complains that Marsy's Law is "vindictive" legislation intended to "lengthen the duration of imprisonment for parole eligible life term inmates." (Answering Brief (AB) at p. 18.) However, Marsy's Law is not "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.).) Instead, as a valid legislative policy judgment, it weighs the costs associated with annual and biannual parole hearings, measured in millions of taxpayer dollars and the grief experienced by families of victims, against the likelihood that the offender will be found suitable for parole. (Text of Proposed Laws, PROPOSITION 9,

http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9, at p. 129 [stating the purpose, in part, is to spare the families of homicide victims from "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."].) For example, the initiative cited the example of the "Helter Skelter" followers of Charles Manson, who were particularly unlikely to be paroled yet together received 38 parole hearings in 30 years. (PROPOSITION 9, http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9, at pp. 128-129, Findings and Declarations ¶¶ 5-6.) Thus, Marsy's Law addresses the cost to the State and the stress to victims arising from repeated annual parole hearings by authorizing the Board to defer parole consideration for longer periods.

Nor does "mob rule" result from the Board's consideration of the victim's views under Marsy's Law. (Pen. Code § 3041.5(b)(3); AB at pp. 5, 24-25, 28.) Vicks himself acknowledges that victim testimony at parole consideration hearings does not provide evidence bearing on an inmate's parole suitability. (AB at pp. 5, 24; *In re Weider* (2006) 145 Cal.App.4th 570, 590 [holding the views of the District Attorney and the victim's next of kin may influence the weight the Board assigns to evidence but are not themselves evidence].) Further, Marsy's Law grants victims and victims' next-of-kin no decision-making authority. (Pen. Code § 3041.5(b)(3), (d)(1).) Rather, under Marsy's Law, the Board's discretion and standards remain intact. (Pen. Code §§ 3041, 3041.5(b)(4), (d)(1).) Vicks fails to support his assertion that the initiative provides victims with improper influence over the Board. (*Gilman v. Schwarzenegger* (2011) 638 F.3d 1101, 1109 ["[A]bsent evidence to the contrary, this court must presume the Board will exercise its discretion in a manner consistent with the Ex

Post Facto Clause."], quoting and citing *Garner v. Jones* (2000) 529 U.S. 244, 256.)

Regardless, Vicks's focus on legislative intent is misplaced. Legislative intent does not control the "ex post facto" inquiry in the context of a criminal parole statute such as Penal Code section 3041.5. Contrary to Vicks's argument, *Smith v. Doe* does not apply here because it concerned whether a civil regulatory scheme imposed on sex offenders constituted a criminal proceeding and was therefore an ex post facto law. (*Smith v. Doe* (2003) 538 U.S. 84, 92-93.) *Smith*'s holding that legislative intent to punish could be decisive of the ex post facto inquiry applies to civil, not criminal, statutory schemes. (*Id.* at p. 93, quoting *Kansas v. Hendricks* (1997) 521 U.S. 346, 361-363 [holding the Kansas statute created to provide civil commitment for repeat violent sex offenders did not establish criminal proceedings because it was placed in the probate code, and it did not have criminal objectives].) Notably, *Garner*, which came after *Hendricks*, contains no reference to *Hendricks* or to legislative intent. (*Garner v. Jones*, *supra*, 529 U.S. at pp. 247-257.) Indeed, only the *Garner* dissent discusses legislative intent. (*Id.* at p. 263 (dis. opn. of Souter, J.).) Rather, the relevant inquiry 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; *Garner*, *supra*, 529 U.S. at p. 250, quoting and citing *Morales*.) As explained in Appellant's Opening Brief, Marsy's Law does not produce such a risk.

II. BECAUSE VICKS FAILS TO SUPPORT HIS CONCLUSIONS THAT MARSY'S LAW INCREASES PUNISHMENT, ELIMINATES THE BOARD'S DISCRETION, AND IMPOSES AN UNLAWFUL BURDEN ON INMATES, HIS FACIAL EX POST FACTO CHALLENGE FAILS.

Throughout Vicks's argument, his ex-post-facto-clause analysis rests on his fundamental misapprehension that increases in deferral lengths equate to increased punishment. (AB at pp. 30-34.) Vicks provides no

justification for his conclusion that longer periods between parole hearings result in increased total incarceration time. (*Id.* at pp. 30-34.) He relies primarily on an unverified law review study that contains no data on lengths of incarceration or discussion of potential increases in punishment. (*Id.* at pp. 30-33; Richardson, Laura Lenhart, *Impact of Marsy's Law on Parole in California: An Empirical Study* (May 16, 2011) http://ssrn.com/abstract=1878594, pp. 20-24 [inferring causes of increases in parole-deferral lengths using correlational measures].) By conflating increases in time between parole consideration hearings and increases in total lengths of incarceration, Vicks jumps to the conclusion that the same inmates would have been released sooner under the pre-Marsy's Law parole scheme than under Marsy's Law. (AB at pp. 33-34.) Vicks's argument also unjustifiably assumes that the Board has continued to grant parole at either the same rate, or less frequently, after Marsy's Law. Vicks provides no evidence of parole grant rates before and after Marsy's Law. Thus, neither evidence nor logic support Vicks's conclusion that Marsy's Law has the "real and proven effect" of increasing the measure of punishment for California inmates. (*Id.* at p. 34.)

Based on a contrived misreading of the statute and the Board's implementation of it, Vicks also erroneously discounts the discretion the Board retains under Marsy's Law. (AB at p. 22 [arguing Marsy's Law differs from the changes the Supreme Court upheld in *Morales* and *Garner* because Marsy's Law "hijacks" the Board's discretion].) Like the Court of Appeal, Vicks reads a three-year "blackout" period into the statute where none exists. (*Id.* at pp. 22-24.) He initially contends Marsy's Law creates a three-year blackout period because part of the initiative's stated purpose is to "provide that a convicted murderer can receive a parole hearing no more frequently than every three years, and can be denied a follow-up hearing for as long as 15 years." (*Id.* at p. 22; Text of Proposed Laws, PROPOSITION

9, Section 3, Statement of Purposes and Intent, http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9, at p. 129.) But, in focusing on the initiative's ballot language, Vicks ignores the controlling statutory text, which contains no black-out period. (AB at pp. 22-25; Pen. Code, § 3041.5, subd. (d)(1) [authorizing inmates to request, after a parole denial, that their next parole-consideration hearing be held sooner than the Board scheduled 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"].)

Turning to the statute, Vicks then argues that a parole hearing advancement can occur "only after the prisoner has been denied parole for at least three years," based on "'a change in circumstances or new information.'" (AB at p. 23, quoting and citing Pen. Code § 3041.5, subd. (d)(1).) But subdivision (d)(1), which permits the Board to advance parole hearings at an inmate's request, makes no mention of such a three-year delay:

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

(Pen. Code § 3041.5, subd. (d)(1).) Similarly, Vicks argues that a hearing "advanced upon a showing of new information or changed circumstances cannot occur 'until a three year period of time has elapsed' since the Board's last parole denial." (AB at p. 24, quoting and citing Pen. Code § 3041.5, subd. (d)(3), emphasis omitted).) Crucially, however, Vicks ignores the word "another": the statute reads, "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.) Thus, subdivision (d)(3) imposes a three-year black-out only for subsequent advancement requests. (*Id.*) The language "until a three-year period of time has elapsed from the summary denial or decision of the Board" refers to a Board decision at a hearing that is advanced under subdivision (d)(1), not to a regularly scheduled parole consideration hearing. (Pen. Code § 3041.5, subd. (d)(3).) As a result of this misinterpretation of the statutory language, Vicks, like the Court of Appeal, improperly discounts the Board's retained discretion under Marsy's Law.

Vicks also misunderstands the Board's implementation of the statute's hearing-advancement provisions. He mistakenly asserts that "in no case can an inmate obtain a suitability hearing more frequently than once every three years." (AB at pp. 23-24.) Again, Vicks's selective quotation of the Board's form ignores the crucial language: an initial advancement request can be made "*at any time*." (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, emphasis added.) Vicks has not provided any support for his assertion, in contradiction to this plain language, that three years must elapse before an advanced hearing may occur. (AB at p. 24.)

In yet another misguided attempt to discount the Board's retention of discretion under Marsy's Law, Vicks asserts that the Board "has no standards whatsoever" for determining whether to grant an advancement request. (AB at p. 25.) But the Board's denial of an inmate's hearing advancement request is subject to judicial review for abuse of discretion and thus protects against arbitrary decisions. (Pen. Code, § 3041.5, subd.

(d)(2); cf. *Cal. Dept. of Corrections v. 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].) Additionally, the Board's 1045 Form, as well as an Administrative Directive, provide procedures for advancement requests and inform inmates of when and how advancements may be obtained. (Form BPH 1045; Administrative Directive No. 09/01, exh. P to Respondent Vicks's Informal Letter Brief; *Gilman v. Schwarzenegger*, *supra*, 638 F.3d at pp. 1109-1110 [rejecting plaintiffs' argument that there was no mechanism or procedure in place for the Board to consider or rule on an advancement, relying on *Morales* where "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."].) And Vicks has presented no evidence indicating that the Board has failed to respond to requests to advance hearings or has responded arbitrarily. (AB at p. 25; see *Gilman*, *supra*, 638 F.3d at pp. 1109-1110 ["Plaintiffs have adduced no evidence that the Board has denied or failed to respond to requests for advance hearings."].) Rather, under Marsy's Law the Board retains the discretion to determine whether inmates are suitable for parole or for hearing advancements. (Pen. Code §§ 3041, 3041.5(b)(4), (d)(1).)

Finally, Vicks focuses on unimportant differences between Marsy's Law and controlling cases in an effort to obscure the ex post facto inquiry. Specifically, he argues Marsy's Law unlawfully shifts the burden to inmates to prove they do not present a safety risk "by clear and convincing evidence," and it sets the default denial period at 15 years. (AB at pp. 26-30.) As a result, Vicks contends, "neither *Morales* nor *Garner* are applicable" because neither case contains burden shifting. (*Id.* at p. 26.) However, although the statute articulates a different standard from the

previous scheme for determining the appropriate hearing-deferral period, it does not actually place any burden on inmates to prove their parole eligibility. (Pen. Code § 3041.5, subd. (b)(3)(A)-(C).) Rather, the change is limited to deferral periods, and directs the Board to make its decision by clear and convincing evidence. (*Id.* at subd. (b)(3)(A)-(C); see *Garner v. Jones*, *supra*, 529 U.S. at p. 251 [finding differences between Georgia's parole scheme and the amendments at issue in *Morales* were "not dispositive"].)

Additionally, burden shifting is traditionally a concept relevant in assessing the validity of criminal sentencing and trials. Parole proceedings, in contrast, are not adversary proceedings that can be equated to a guilt determination. (*Greenholtz v. Inmates of Nev. Pen. and Correctional Complex* (1979) 442 U.S. 1, 15 [distinguishing parole proceedings from a criminal conviction].) Indeed, Vicks has cited no authority that proscribes burden shifting in the parole context. (AB at p. 28, citing *In re Roberts* (2005) 36 Cal.4th 575, 590 [holding a period of parole is related to a sentence to the extent that a sentence contemplates parole, and the objectives of sentencing and parole are related]; *Santosky v. Kramer* (1982) 455 U.S. 745, 769-770 [holding a state must support allegations of parental neglect with clear and convincing evidence to permanently sever the parents' rights].) The law review comment Vicks relies on likewise cites no authority on burden shifting. (AB at p. 26, quoting and citing Richardson, *supra*, *Impact of Marsy's Law on Parole in California: An Empirical Study*, http://ssrn.com/abstract=1878594, p. 6 [stating Marsy's Law shifted the burden from the state].)

In any event, Vicks has not demonstrated that the statute's alleged burden shifting has lead to any real differences in the Board's exercise of its discretion. No evidence supports Vicks's speculation that the amendments to the standards of proof described in section 3041.5 have resulted in a

spate of 15-year parole deferrals or have led to "onerous results." (AB at pp. 28, 30, fn. 11.) To the contrary, the law review comment Vicks relies on signals the Board's continuing exercise of its discretion under Marsy's Law. (Pen. Code, § 3041.5, subd. (b)(3).) Indeed, the study's review of 211 parole consideration decisions found "even the presence of a low suitability score, representing unsuitability, resulted in a time set between parole hearings of three years or less 50% of the time." (Richardson, *supra*, *Impact of Marsy's Law on Parole in California: An Empirical Study*, http://ssrn.com/abstract=1878594, p. 19 [finding factors related to an inmate's parole suitability had nearly as much impact on the length of the deferral set as Marsy's Law].) Regardless, the study is not evidence, reviewed only approximately 1% of the applicable parole decisions, and fails to take the Board's parole-grant rates into consideration. (AB at p. 26; Richardson, *supra*, p. 19.)

Additionally, Vicks argues that, due to the default fifteen-year deferral period and the "clear and convincing" standard, the Board could be certain a prisoner would be found suitable for parole within two years yet be forced to deny parole for ten additional years. (AB at p. 27.) However, if the Board is indeed certain that an inmate will be found suitable for and granted parole within one to two years, the Board may assess a three-year deferral, and advance a hearing on its own accord or at the inmate's request, as appropriate. (Pen. Code § 3041.5, subds. (b)(3), (4), (d)(3).) Thus, the statute's alleged burden shifting does not support Vicks's ex post facto challenge or distinguish Marsy's Law from the *Morales* and *Garner* amendments.

Rather, because Marsy's Law 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." (*Cal. Dept. of Corrections v. Morales, supra,* at p. 514; see also *id.* at pp. 510–513; *Garner v. Jones*, *supra*, 529 U.S. at pp. 251-254.)

III. VICKS HAS NOT DEMONSTRATED THAT MARSY'S LAW INCREASED HIS PUNISHMENT.

Focusing on the three-year increase from the maximum two-year deferral period he could have received before Marsy's Law, Vicks asserts that he has been "punished substantially." (AB at p. 35.) However, because Vicks did not prove any significant risk of increased punishment in his facial challenge, he must show actual prolonged incarceration to make a successful as-applied challenge. (*Garner v. Jones*, *supra*, 529 U.S. at p. 255 ["When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule."].) Because Vicks conflates a delay in parole consideration with increased punishment, and relies strictly on speculation, his claim fails. (AB at pp. 34-35; *Garner*, *supra*, 529 U.S. at p. 256 [finding speculation insufficient to support the inmate's as-applied challenge].) Moreover, it is improbable that Vicks would be found suitable for parole two years following his initial parole suitability hearing, given the gravity of his multiple-victim violent crime spree, 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.

Thus, rather than increase Vicks's punishment, the amendment here properly worked as "designed for the better exercise of the discretion [the Board] had from the outset." (*Garner v. Jones*, *supra*, 529 U.S. at p. 255.) Nor has Vicks lost any opportunities to serve less time, because during his five-year deferral period he will have had two opportunities to ask the Board to consider advancing his next hearing. (Pen. Code, § 3041.5, subds. (b)(4), (d)(1); Form BPH 1045.)

In fact, under the Marsy's Law advancement provisions, Vicks could have secured opportunities for more frequent hearings than if he had received repeated two-year denials under the previous statutory scheme. Because Vicks failed to demonstrate that he has ever even requested a hearing advancement, his claim that the Marsy's Law amendments significantly risk an increase in his punishment rests on speculation and conjecture. (See, e.g., *Garner v. Jones*, *supra*, 529 U.S. at p. 256 [rejecting an ex post facto challenge lacking information bearing on the likelihood of prolonging the inmate's incarceration].) Consequently, Vicks has not met his burden of showing that the change in the law lengthened the time of his actual imprisonment. (*Id.* at p. 256.)

CONCLUSION

For the reasons stated here and in Appellant's Opening Brief, Marsy's Law survives Vicks's ex post facto challenge because it does not present a sufficient risk of increased incarceration, either on the face of the law or as applied to Vicks. The Court of Appeal's decision should therefore be reversed.

Dated: December 20, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 3,576 words.

Dated: December 20, 2011

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DECLARATION OF SERVICE

Case Name: **In re Vicks**

No.: **S194129**

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 **December 20, 2011,** I served the attached **REPLY 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 **December 20, 2011**, I caused one (1) original and thirteen (13) copies of the **REPLY 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 **December 20, 2011**, at San Francisco, California.

M. Luna
Declarant

M. Luna
Signature

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