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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RUFUS THOMPKINS on Habeas Corpus.	D060171 (San Diego County Super. Ct. Nos. CR76417 and HC17675)

Petition for writ of habeas corpus. Petition denied.

Appellate Defenders, Inc. and Rich Pfeiffer, under appointment of the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Jennifer Neill, Acting Senior Assistant Attorney General, Phillip Lindsay and Kathleen R. Walton, Deputy Attorneys General, for Respondent.

In 2009, the Board of Parole Hearings (BPH) found petitioner Rufus Thompkins unsuitable for parole and scheduled his next parole hearing, pursuant to the minimum

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III, IV, and the concurring and dissenting opinion.

deferral term permitted under the amendments to Penal Code[1] section 3041.5 (adopted by the passage of Proposition 9, the Victim's Bill of Rights Act of 2008: Marsy's Law (hereafter Marsy's Law)), to be in 2012. Thompkins later applied for an "advanced" hearing date, which the BPH ultimately denied. In Thompkins's petition for writ of habeas corpus, he argues the mode by which the BPH disposed of his petition for an "advanced" hearing date denied him procedural due process, and that denial of the advanced hearing was an abuse of discretion. In Thompkins's supplemental petition, he argues application of Marsy's Law to him violates ex post facto principles.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

In 1986, petitioner Rufus Thompkins shot and killed his wife and wounded her boyfriend with a firearm. In 1988, a jury convicted Thompkins of the first degree murder of his wife, assault with a deadly weapon on her boyfriend, and burglary. Thompkins was sentenced to 27 years to life, and has been imprisoned for more than 25 years. (*In re Thompkins* (May 27, 2008, D050679) [nonpub. opn.].) During his imprisonment, he has largely avoided serious disciplinary actions, but the BPH found him unsuitable for parole at several hearings, including the most recent hearing in August 2009.

1 Statutory references are to the Penal Code unless otherwise specified.

B. The Challenged BPH Action

At the 2009 hearing, after finding Thompkins unsuitable for parole, the BPH set his next parole hearing for the minimum deferral term permitted under the amendments to section 3041.5 and ordered he not be considered for parole for another three years. However, one year later, Thompkins applied under section 3041.5, subdivision (d), to advance his parole hearing, asserting there were changed circumstances (in the form of an August 16, 2010 report by Dr. A. L. Matthews describing Thompkins's psychological progress) that required the BPH to advance his parole hearing date. Thompkins was notified he was scheduled for a November 2, 2010 "Petition to Advance Hearing," and that the BPH ordered a "full review" of his request for an advanced parole hearing.

However, the BPH (apparently after conducting a full review of Thompkins's application) ultimately denied his application to advance his parole hearing. In the order denying Thompkins's application to advance his parole hearing, the BPH found he had not established a reasonable likelihood that considerations of public safety and the victim's interests did not require the additional three years of incarceration. The order denying the advanced parole hearing stated the newly submitted information (the new psychological evaluation) did not address the concerns stated by the BPH in its 2009 denial of parole about his history of domestic violence. Neither Thompkins nor his attorney were permitted to attend the hearing at which his application to advance his parole hearing was considered.

C. The Writ Proceedings

Thompkins petitioned the trial court for a writ of habeas corpus asserting the order denying the advanced parole hearing should be vacated on two separate grounds. Thompkins argued he was denied procedural due process because he was entitled to be personally present and to have an attorney present when the application to advance his parole hearing date was considered, but was denied those rights. He also apparently contended, on the merits, that it was an abuse of discretion for the BPH to conclude the newly submitted information had not established a reasonable likelihood that considerations of public safety and the victim's interests did not require the additional three years of incarceration. The trial court denied Thompkins's petition, and he then filed a petition for writ of habeas corpus in this court asserting the order denying the advanced parole hearing should be vacated on the same two grounds.

This court issued an order to show cause, appointed counsel for Thompkins, and authorized Thompkins to file a supplemental petition for writ of habeas corpus. His supplemental petition reasserted the original arguments seeking relief and raised, for the first time, the argument that Thompkins should have been given a parole hearing on the one-year anniversary date of the 2009 denial because application of Marsy's Law's three-year deferral provisions violates ex post facto protections on their face and as applied by the BPH.

The People dispute that Thompkins was entitled to participate in the BPH's process of considering his application for an advanced parole hearing date, and dispute that the decision denying an advanced parole hearing was an abuse of the broad

discretion granted by the statutory scheme to the BPH under the advanced parole hearing provisions of section 3041.5. The People argue Thompkins may not interpose any ex post facto contest to Marsy's Law because it is not properly before this court, it is untimely, it is "successive," and because principles of comity should be applied to defer to a pending federal class action raising the same issue. The People also argue, on the merits, that application of Marsy's Law's three-year deferral provisions does not violate ex post facto protections either facially or as applied by the BPH.

In the published portion of this opinion, we conclude Thompkins was not entitled to a separate hearing on his request for advancement. We also conclude the BPH did not abuse its discretion in denying Thompkins's request for advancement of his next parole hearing.

In the unpublished portion of this opinion, we will reject Thompkins's claim that application of Marsy's Law to him violates his ex post facto protections.

II

THOMPKINS'S CHALLENGE TO ORDER DENYING ADVANCEMENT

When the BPH denied parole to Thompkins in 2009, it ordered a three-year deferral under section 3041.5, subdivision (b)(3)(C), before Thompkins would again be considered for parole at his next parole hearing. Thompkins, contending new information or changed circumstances justified an earlier parole hearing, applied one year later to advance the date for his new parole hearing. The manner in which the BPH considered his application, as well as the decision on that application, was challenged in Thompkins's original writ petition.

A. The Former Law

The commitment offenses occurred in 1986. 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 parole hearing. However, that law gave discretion to the BPH to defer the subsequent parole hearing for two years (for all life sentence prisoners) or three years (for life sentence prisoners who had committed multiple murders) if the BPH found it was not reasonable to expect that parole would be granted sooner than two or three years, respectively.[2] (See Stats. 1982, ch. 1435, § 1.)

B. The Current Law

Changes in the Length of the Deferral Term (*Subdivisions* (*b*)(*3*)(*A*)-(*C*))

The enactment of Marsy's Law in 2008 amended section 3041.5 to provide longer deferral periods between parole hearings, and modified the standards and considerations for determining which of the longer deferral periods would be selected by the BPH panel. The most significant change is that, when the BPH denies parole, the amendments mandate longer deferrals for the subsequent parole hearing than were permitted under the prior statutory scheme. Under current law, the subsequent parole 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

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2 Section 3041.5 was later amended to permit a five-year deferral of subsequent parole hearings for life sentence prisoners who had committed multiple 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.)

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 are necessary to protect the safety of the public or the victims, the BPH must select a seven-year deferral for the subsequent parole 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 an additional 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).)

Advancing a Hearing (*Subdivisions* (*b*)(*4*) *&* (*d*)(*1*)-(*3*))

A second aspect of the changes adopted under Marsy's Law is that an inmate may request the BPH to order, or the BPH may on its own motion order, the subsequent parole hearing date be advanced to an earlier date based on changed circumstances or new information. (§ 3041.5, subds. (b)(4) & (d)(1).) Subdivision (b)(4) provides:

> "The [BPH] may in its discretion, after considering the views and interests of the victim, advance a hearing set pursuant to paragraph (3) to an earlier date, when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the prisoner provided in paragraph (3)."

Subdivision (d), which specifies the procedures and showing for inmate-initiated requests to advance a hearing date, provides:

> "(1) 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.
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> "(2) The board shall have sole jurisdiction, after considering the views and interests of the victim to determine whether to grant or deny a written request made pursuant to paragraph (1), and its decision shall be subject to review by a court or magistrate only for a manifest abuse of discretion by the board. The board shall have the power to summarily deny a request that does not comply with the provisions of this subdivision or that does not set forth a change in circumstances or new information as required in paragraph (1) that in the judgment of the board is sufficient to justify the action described in paragraph (4) of subdivision (b).
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> "(3) An inmate may make only one written request as provided in paragraph (1) during each three-year period. Following either a summary denial of a request made pursuant to paragraph (1), or the decision of the board after a hearing described in subdivision (a) to not set a parole date, the inmate shall not be entitled to submit another request for a hearing pursuant to subdivision (a) until a three-year period of time has elapsed from the summary denial or decision of the board."

The inmate's ability to initiate the procedures seeking review pursuant to this avenue appears constrained to cases in which he or she can make a prima facie showing *both* that there are changed circumstances or new information *and* that such changed circumstances or new information establishes a "reasonable likelihood" that consideration of the public safety does not require the additional period of incarceration of the inmate. (§ 3041.5, subd. (d)(3).) Additionally, if the inmate applies to advance the subsequent parole hearing date and the request is denied (as here), or obtains an advanced hearing but is denied parole at the advanced hearing, the inmate may not petition again to advance the subsequent parole hearing date to an earlier date until three more years have elapsed from

either the summary denial or the denial after a full review. (§ 3041.5, subds. (d)(1) & (d)(3).)

C. The BPH May Deny an Inmate's Application to Advance a Parole Hearing Without a Full Hearing on the Application

Thompkins argues he was denied procedural due process because the BPH reviewed and ruled on his application without affording him a hearing on his application at which he or his attorney could have attended to argue in favor of the application.

First, there is nothing in section 3041.5, subdivision (d), that supports Thompkins's claim that an inmate's application to advance a parole hearing date may only be denied after an adversarial hearing on the application. Subdivision (d)(2), which specifies the BPH has "sole jurisdiction . . . to determine whether to grant or deny a written request" and that such decision is subject to review "only for a manifest abuse of discretion," specifies the BPH "shall have the power *to summarily deny a request*" if it concludes either that the application "does not comply with the provisions of [subdivision (d)]" *or* that the application "does not set forth a change in circumstances or new information . . . *that in the judgment of the board is sufficient* to justify [advancing the suitability hearing]." (*Ibid*., italics added.) As we read the statute, section 3041.5, subdivision (d), gives the BPH two options when an inmate applies for an advanced parole hearing date: it may *grant* the application by "exercis[ing] its discretion to advance a hearing set . . . to an earlier date" (*id*., subds. (d)(1) & (b)(4), italics added), or it may "*summarily* deny a request" (*id*., subd. (d)(2), italics added). Neither option contemplates a hearing on the action the BPH decides to take in response to the application, and the plain language of

section 3041.5, subdivision (d), authorizing a "summary denial" appears inconsistent with Thompkins's argument that the decision must be preceded by some form of adversarial hearing on the application.

We are also unpersuaded by Thompkins's argument that, because the decision on his application deprives him of some federally protected liberty interest, the due process clause superimposes on this decision the right to some form of adversarial hearing (under the rationale of *People v. Coleman* (1975) 13 Cal.3d 867 (*Coleman*)) before the BPH can rule on the application.[3] However, *Coleman* involved a parole *revocation* hearing and concluded, considering the analysis of *Morrissey v Brewer* (1972) 408 U.S. 471 (which had determined that a parole revocation proceeding required some level of procedural due process protections, *id*. at pp. 482-489), that some level of procedural due process protection is available in a probation revocation proceeding. (*Coleman*, at pp. 873-878.)

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[3] We are also unpersuaded by Thompkins's implicit argument that an administrative process having been made available, some form of procedural due process protections must attend the application process. In *Olim v. Wakinekona* (1983) 461 U.S. 238, the court noted that a state can "create[] a protected liberty interest by placing substantive limitations on official discretion [but the] inmate must show 'that particularized standards or criteria guide the State's decisionmakers.' [Citation.] If the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' [citation] the State has not created a constitutionally protected liberty interest. [Citations.] [¶] Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the [d]ue [p]rocess [c]lause." (*Id*. at p. 249.) Here, the statute expressly grants the BPH the "sole jurisdiction" to make the decision, and states the decision is both permissive and discretionary. (§ 3041.5, subd. (b)(4) [the BPH "*may* in its *discretion*" order an advanced hearing date].) Because there is no objective and defined criteria for ordering an advanced parole hearing, Thompkins has no liberty interest in obtaining that order for purposes of procedural due process protections.

Coleman is inapposite because the United States Supreme Court has expressly determined an inmate does not have a constitutionally protected liberty interest in being released on parole (*Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* (1979) 442 U.S. 1, 7 ["[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"]), and thus the protections accorded in parole revocation proceedings are inapplicable to proceedings to determine whether to grant or deny parole ab initio. (*Id.* at p. 9 [rejecting argument that *Morrissey* supported imposing procedural due process protections at hearing to determine whether to parole inmate because the "fallacy in respondents' position is that parole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires"].)

We conclude that neither the statute nor constitutional requirements require that, before the BPH rules on an inmate's application to advance a parole hearing date, the BPH must afford the inmate a hearing on that application.[4]

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4 In many ways, the inmate's application for an advanced parole hearing date resembles a petition for writ of habeas corpus. In both types of proceedings, the applicant must set forth facts establishing a prima facie case for relief, or the application may be summarily denied. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475 [petition for habeas corpus]; § 3041.5, subd. (d)(1) [application to advance hearing].) In neither proceeding, however, is the decisional body obligated automatically to order a full hearing on the merits of the application merely because the applicant's allegations are facially satisfactory; instead, the decisional body may conduct additional informal analysis of the applicant's allegations to assess whether a full adversarial hearing is warranted considering the full record before it. (See Cal. Rules of Court, rule 4.551, subd. (b) [before ordering a full adversarial hearing on merits, court may request informal

D. The BPH's Decision on Thompkins's Application Was Not a Manifest Abuse of Discretion

Thompkins also challenges the substantive ruling of the BPH as a manifest abuse of its discretion. The statutorily mandated standard for our review of the BPH's decision to deny Thompkins an advanced parole hearing is whether the denial constituted a "manifest abuse of discretion." (§ 3041.5, subd. (d)(2).) This highly deferential standard requires that we affirm the BPH's decision unless it " 'falls outside the bounds of reason' under the applicable law and the relevant facts." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

Under the applicable law, the BPH has discretion to order an advanced parole 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 of the prisoner." Thus, if there are no changed circumstances or new information, the BPH may deny an advanced parole hearing.

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response]; § 3041.5, subds. (b)(4) & (d)(2) [before BPH exercises discretion to advance a parole hearing, it must determine whether the proffered change in circumstances or new information establishes a reasonable likelihood that inmate does not require the additional period of incarceration].) The court explained in *Durdines v. Superior Court* (1999) 76 Cal.App.4th 247 that, in the context of a petition for writ of habeas corpus, a court need not issue an order to show cause merely because an "artful petitioner" has stated a prima facie claim for relief (*id*. at p. 252), but may instead request an informal response that might convince the court a full hearing is unnecessary, and permit the court to "speedily terminate proceedings, after the minimum expenditure of time and expense." (*Id*. at p. 253.) There is no suggestion that a *habeas* petitioner's procedural due process rights encompass the right to an adversarial hearing before the court (after considering the informal response) may decline to issue an order to show cause, and we are similarly convinced an *inmate's* procedural due process rights do not encompass the right to an adversarial hearing before the BPH (after considering the entire record before it) may decline to issue an order under section 3041.5, subdivision (b)(4) setting a full hearing on suitability for parole.

Alternatively, even if there *are* changed circumstances or new information, the BPH may deny an advanced parole hearing if it concludes the changed circumstances or new information do not establish "a reasonable likelihood" that parole would be granted at an advanced parole hearing. We must therefore examine whether there is "some evidence" (*In re Powell* (1988) 45 Cal.3d 894, 904) either (1) there were no changed circumstances or (2) such changed circumstances did not establish a reasonable likelihood that parole would be granted at an advanced parole hearing.

We conclude that, even assuming Thompkins had shown changed circumstances or new information,[5] there was some evidence to support the conclusion the asserted changed circumstances did not establish a reasonable likelihood parole would be granted at an advanced parole hearing. When the BPH concluded Thompkins was unsuitable for parole one year earlier, it cited (among other things) that Thompkins posed an unreasonable risk to the community because his mental attitude toward the crime reflected a continued effort to minimize his culpability for the murder of his wife.[6]

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5 The asserted new information cited by Thompkins was a new statement from a psychologist opining favorably on his ability to succeed on parole. While this was *chronologically* new (insofar as it was generated after his 2009 parole suitability hearing), the psychological evaluation considered by the BPH when it denied Thompkins's parole in 2009 *also* gave a favorable opinion on his ability to function on parole. Thus, we question whether the 2010 report was a "changed circumstance" from those previously considered and rejected by the BPH.

6 The 2009 panel noted that Thompkins currently claimed he had not been involved in any domestic violence toward his wife, and that he was armed with the gun on the night of the murder because he was sleeping in his car and carried it to protect himself, when there was contradictory evidence that (1) he *had* engaged in prior domestic violence toward his wife, (2) he carried the gun into his confrontation with his wife

When the BPH denied Thompkins's current application to advance a parole hearing date, it found the asserted changed circumstances did not establish a reasonable likelihood that parole would be granted at an advanced parole hearing, and specifically noted the " 'new information' " did *not* "address concern expressed by the hearing panel" concerning Thompkins's past history of domestic violence. Since there was some evidence that his cited "changed circumstances" did not establish a *reasonable likelihood* that parole would be granted at an advanced parole hearing, because the new information did not obviate a major concern expressed by the BPH one year earlier when it denied parole for Thompkins, we cannot conclude that denying his application for an advanced parole hearing was a manifest abuse of discretion within the standards prescribed by section 3041.5, subdivision (d)(2).

III

THOMPKINS MAY RAISE THE EX POST FACTO CHALLENGE

The People raise several preliminary arguments for why Thompkins may not raise, or alternatively why this court should decline to reach, any ex post facto challenge to the three-year deferral of the next parole hearing. We are unpersuaded by the People's arguments.

The People first argue Thompkins may not interpose any ex post facto challenge because it is not properly before this court. Relying on *Board of Prison Terms v. Superior Court* (*Ngo*) (2005) 130 Cal.App.4th 1212, the People assert a court in a habeas

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because he thought she was armed, and (3) he had expressed a willingness to kill his wife and her boyfriend if his wife refused Thompkins's entreaty to stop seeing her boyfriend.

proceeding should not "consider new claims not expressly or implicitly raised in the original habeas corpus petition" (*id*. at p. 1238), and Thompkins waived the ex post facto challenge because his original habeas petition did not raise it. However, *Ngo* went on to state a court should decline to consider those new claims "unless those claims have been asserted in a supplemental habeas corpus petition filed with permission of the court." (*Id*. at p. 1239.) Thompkins's ex post facto challenge *is* raised in his supplemental petition, filed in response to our order to show cause that authorized Thompkins's newly appointed attorney to file a supplemental petition. We therefore conclude the ex post facto challenge is properly before this court.

The People next argue Thompkins may not interpose any ex post facto challenge because it is "untimely." Thompkins was aware of the facts underlying his claim since August 2009 (when the BPH ordered a three-year deferral) but waited until October 2011 to raise the issue. Certainly, the courts have required prompt presentation of claims (or justification for the delay) when the petition seeks relief based on disputed factual assertions, because unreasonable delays can result in relevant evidence disappearing and witnesses becoming unavailable. (*In re Clark* (1993) 5 Cal.4th 750, 765 (*Clark*).) However, *Clark* then immediately cautioned that:

> "Challenges to the validity of the statute under which the petitioner was convicted do not present this problem and may be raised at any time. We recognized in *In re Bell* [(1942)] 19 Cal.2d 488, 493 that in some cases habeas corpus is the only remedy available by which this claim may be raised, and that 'the importance of securing a correct determination on the question of constitutionality' of a statute warrants departure from the usual procedural limits on habeas corpus. For that reason these claims have not been subject to either

> the rules requiring justification for delay or exhaustion of appellate remedies." (*Clark, supra*, 5 Cal.4th at p. 765, fn. 4.)

Here, there are no disputed facts, Thompkins's challenge is to the validity of the law, and we therefore conclude the challenge should not be rejected based on alleged untimeliness.[7]

The People also argue this court should decline to reach the ex post facto challenge because it is "successive." Citing the policy that courts are reluctant to consider a second or successive habeas corpus petition when a prior petition has been considered and rejected, the People argue Thompkins could have presented his ex post facto challenge in his prior habeas corpus petition filed in 2010, which this court denied without issuing an order to show cause (see *In re Thompkins* (Sept. 20, 2010, D057934) [nonpub. order]), and Thompkins must therefore justify piecemeal presentation of his claim by showing the factual basis for the claim was unknown, he had no reason to believe the claim might be have been made in the prior proceeding, and the claim is presented as promptly as reasonably possible. (*Clark*, *supra*, 5 Cal.4th at p. 775.) However, *Clark* also recognized that an unrepresented habeas petitioner "need not 'develop' the legal theory on which the claim is based," and that a possible justification for not presenting the claim in the earlier proceeding is that the petitioner did not have adequate legal representation in the earlier proceeding. (*Id.* at pp. 779-781.) Thompkins

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7 Indeed, Thompkins's claim may not have been ripe for review until after the BPH denied his application to advance his hearing (after which he did promptly pursue his claim), because he was arguably unharmed by the statute's application as to him until his effort to obtain a hearing at the one-year mark was unsuccessful.

apparently was not represented by counsel (and counsel was not appointed) in the earlier proceeding, and the law on which his ex post facto claim is based was not developed at the time of the earlier proceeding. We conclude this constitutes an adequate excuse for not raising the claim in the earlier proceeding.

The People finally argue this court should decline to reach the ex post facto challenge because principles of comity should be applied to defer to a pending federal class action raising the same issue, and that the rule of comity is particularly compelling here because the federal action is considering a claim rooted in the federal Constitution. The decision to stay proceedings under principles of comity is a discretionary decision (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574-575), and the fact that other courts are examining ex post facto claims does not convince us that this court should decline to reach Thompkins's claim that application of Marsy's Law to him (particularly insofar as his claim may have transmogrified into an "as applied" challenge) is a violation of the prohibition against ex post facto laws.

IV

THE APPLICATION OF MARSY'S LAW TO THOMPKINS DOES NOT VIOLATE EX POST FACTO PRINCIPLES

The Board concluded a three-year deferral before Thompkins would be again considered for parole, as permitted under section 3041.5, subdivision (b)(3), was appropriate. Thompkins asserts the amendments to section 3041.5, subdivision (b), which implement aspects of Marsy's Law to permit the three-year deferral, cannot be applied to him without violating ex post facto principles.

At the outset, we note this court is split on the issue, but our Supreme Court recently granted review of two cases to resolve the disagreement. (See *In re Vicks* (2011) 195 Cal.App.4th 475, review granted July 20, 2011, S194129 [finding ex post facto violation]; *In re Russo* (2011) 194 Cal.App.4th 144, review granted July 20, 2011, S193197 [finding no violation].) Without the benefit of the high court's guidance, we think the better reasoned result is Marsy's Law does not violate ex post facto principles as it applies to the Board setting Thompkins's next suitability hearing in three years. (See *In re Aragon* (2011) 196 Cal.App.4th 483, 500-504, review granted Sept. 14, 2011, S194673.)

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.) 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 *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 504 (*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*, *supra*, at p. 854.)

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 (*Garner*).)

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

> "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."

As we have previously noted, Marsy's Law 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 Marsy's Law 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. (Former § 3041.5, subd. (b)(2).) After Marsy's Law, 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, as we have previously discussed, Marsy's Law also authorizes 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).)

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 we noted above, section 3041.5, subdivision (b)(2), at that time provided for annual

subsequent parole reviews. 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. (*Morales, supra,* at pp. 501-503.) 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, supra,* 514 U.S. 499, 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, supra,* 514 U.S. 499), 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." (*Garner, supra*, 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. The court concluded that because 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. 7.)

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

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. 2011) 638 F.3d 1101 (*Gilman*).) 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, supra,* 514 U.S. 499 and *Garner, supra,* 529 U.S. 244:

> "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*, 638 F.3d at pp. 1107-1108.)

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*, 638 F.3d at p. 1109, 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 pp. 1110-1111.)

Moreover, *Garner*, *supra*, 529 U.S. 244, supports the conclusion that the Board's setting a parole date three years from the July 2009 hearing did not constitute an ex post

facto violation. At the time of Thompkins's commitment offense, California law provided inmates like Thompkins with an annual parole hearing, unless the Board found it not reasonable to expect that parole would be granted in the one-year period, in which case, the Board could order a two-year deferral period. (Former § 3041.5, subd. (b)(2)(A), Stats. 1990, ch. 1053, § 1.) In the wake of Marsy's Law, Thompkins was subjected to a three-year parole hearing deferral period, with the possibility that an earlier hearing could be held upon a change in circumstances or the discovery of new information establishing a reasonable likelihood that he would be found suitable for parole. (See § 3041.5, subds. (b)(4), (d)(3).) In *Garner*, the Supreme Court concluded that the application of an administrative regulation that increased an inmate's parole hearing deferral period from three years to eight years (a five-year increase in the deferral period) did not constitute an ex post facto violation. (*Garner*, *supra*, at pp. 246-249.) Thus, *Garner* strongly supports the conclusion that the Board's setting Thompkins's next parole hearing three years from the July 2009 hearing did not constitute an ex post facto violation.

In summary, the Board's setting Thompkins's next suitable hearing date three years after the July 2009 hearing under Marsy's Law does not violate ex post facto principles.

DISPOSITION

The petition is denied.

HUFFMAN, Acting P. J.

I CONCUR:

HALLER, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McDONALD, J., concurring and dissenting.

I concur with the majority opinion's conclusion that, for those inmates to whom the amendments to Penal Code[1] section 3041.5, subdivision (b) (adopted after the voters approved Proposition 9, otherwise known as the "Victim's Bill of Rights Act of 2008: Marsy's Law" (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 128, hereafter Marsy's Law)) properly apply, the inmate is not entitled to an adversarial hearing on an application to advance a parole hearing date. I also concur with the majority opinion's conclusion that, assuming it was constitutionally permissible to apply Marsy's Law to Thompkins, the BPH's action denying Thompkins's application to advance his parole hearing date based on a change of circumstances was not an abuse of discretion on the facts presented. I also concur with the majority opinion's conclusion that Thompkins may raise an ex post facto challenge to the constitutionality of Marsy's Law in this petition for a writ of habeas corpus. However, I would grant relief in response to the petition for writ of habeas corpus and order the BPH to schedule a new parole hearing for Thompkins because I believe ex post facto principles bar the BPH from applying Marsy's Law to Thompkins. The BPH was therefore barred from using Penal Code section 3041.5, subdivision (b)(3)(C), to defer Thompkins's next parole hearing for three years.

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1 Statutory references are to the Penal Code.

I

ANALYSIS OF EX POST FACTO CHALLENGE

The BPH concluded, under section 3041.5, subdivision (b)(3)(C), a three-year deferral before Thompkins would again be considered for parole was appropriate. Thompkins argues the amendments to section 3041.5, subdivision (b), which implement aspects of Marsy's Law to permit the three-year deferral, cannot be applied to him without violating ex post facto principles.

A. Background

Former Law

Thompkins's commitment offenses occurred in 1986. 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 parole hearing. However, that law gave discretion to the BPH to defer the subsequent parole hearing for two years if the BPH found it was not reasonable to expect that parole would be granted sooner.[2] (See Stats. 1982, ch. 1435, § 1, p. 5474.)

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2 The People argue there was no ex post facto violation in this case because, prior to the enactment of Marsy's Law, Thompkins was already eligible for a three-year deferral, and therefore received no greater "punishment" than was already applicable to him. However, the only provision permitting *more* than a two-year deferral for other than multiple murderers (a subclass to which Thompkins does not belong) was under the *1994* amendments to section 3041.5. (See Stats. 1994, ch. 560, § 1, p. 2834.) Because those amendments post-dated Thompkins's crimes, the application of those provisions to Thompkins would equally be subject to the same ex post facto challenge. Accordingly, this aspect of the People's argument appears to be premised on a misreading of the statutory scheme applicable to Thompkins.

Current Law

The voters' enactment in 2008 of Marsy's Law amended section 3041.5 to provide longer deferral periods, and to modify the standards and considerations for determining which of the longer deferral periods would be selected by the BPH panel. It is the application of these changes to Thompkins that assertedly offends the ex post facto clause.

The most significant change is that, when the BPH denies parole, the amendments mandate longer deferrals for the subsequent parole hearing than those permitted under the prior statutory scheme. Under current law, the subsequent parole 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)(3)(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 select a seven-year deferral for the subsequent parole hearing unless it concludes the suitability factors examined at the hearing "are such that consideration of the public and victim's safety . . . does not require a more lengthy period of incarceration for the prisoner than seven additional years," 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, highly significant in any ex post facto analysis of Marsy's Law, are the advanced hearing provisions that are

the subject of Thompkins's present writ petition. Under the advanced hearing provisions of Marsy's Law, although an inmate may request the BPH to advance the subsequent parole hearing date to an earlier date because of changed circumstances or new information (§ 3041.5, subd. (d)(1)), that section bars the inmate from seeking 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. The three-year "blackout" period for an inmate to trigger the advanced hearings safeguard derives from that section's provision 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 the decision of the board*." (§ 3041.5, subd. (d)(3), italics added.) Because a regularly scheduled parole suitability hearing results (as it did here in Thompkins's 2009 parole suitability hearing) in a "decision of the board after a hearing described in [section 3041.5, subdivision (a)] to not set a parole date," the statute on its face 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.[3] (§ 3041.5, subd. (d)(3).)

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3 I recognize that other courts have disagreed with this construction, and have viewed the "blackout" period as applying *only* after the inmate's *first* unsuccessful application for an advanced hearing. Even assuming that construction to be accurate, Marsy's Law *as applied to Thompkins* now subjects him to the three-year blackout period because of his unsuccessful application. Thus, Thompkins is *now* barred from initiating

Moreover, when (as here) the inmate petitions to advance the subsequent parole hearing date and either the request is summarily denied or denied after a hearing on the merits, the inmate may not petition again to advance the subsequent parole hearing to an earlier date until three more years have elapsed from either the summary denial or the hearing on the merits.[4] (§ 3041.5, subds. (d)(1) & (d)(3).)

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proceedings that would garner him a review under the timetables applicable under the version of section 3041.5 in effect at the time of his commitment offense.

I also recognize that section 3041.5, subdivision (b)(4), nominally appears to preserve the ability of the BPH on its own motion to advance a subsequent parole hearing 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 not the administrative regulations explain the mechanism by which the BPH would (absent a request from the inmate under § 3041.5, subd. (d)(1)) become cognizant of the changed circumstances or new information that might trigger sua sponte action by the BPH to advance the hearing date. Perhaps the absence of any such mechanism explains the recent observation, made by the district court in *Gilman v. Brown* (9th Cir. Jul. 25, 2011, No. CIV. S-05-830 LKK/GGH) 2011 WL 3163260, that the inmates challenging Marsy's Law "have also presented evidence on how the advanced hearing process has been utilized in practice. . . . [T]he . . . data for the time period of January 2009, shortly after Proposition 9 was implemented, through December 2010 [showed]: . . . *The Board* [*has*] *never initiated the process to advance a hearing for a prisoner*." (*Id*. at *4, italics added.)

4 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 Thompkins'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 former § 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).)

The net impact of these changes is that, although Thompkins was previously entitled (at a minimum) to biennial reviews at which his suitability for parole could be considered, he is now subject to a three-year waiting period before his suitability may again be considered, *even if* new circumstances or evidence demonstrate his suitability for parole.

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, the court explained at page 390 that the ban against ex post facto laws under the federal Constitution[5] prohibits four general categories of laws: (1) a law 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.[6]

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5 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.) Accordingly, I refer to federal law to evaluate Thompkins's ex post facto arguments.

6 The language in *Collins v. Youngblood* (1990) 497 U.S. 37 created doubt whether the fourth category remained viable for ex post facto purposes. Indeed, many subsequent California decisions interpreted *Collins*'s exclusive reference to the first three categories,

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.] . . .
>
> "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 overcrowding credits requires reimprisonment of an inmate who has been freed." (*John L. v. Superior Court, supra,* 33 Cal.4th at p. 181.)

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

Thompkins contends section 3041.5, as amended by Marsy's Law, if applied to him violates ex post facto protections because it in effect increased his sentence beyond the term that applied when the crime was committed in 1986. He argues that, under the statutory scheme applicable in 1986, he would have been eligible for a new parole hearing not more than two years after he was denied parole, but he instead must now wait

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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.)

at least three years (even if he could show changed circumstances or new information) before his suitability for parole may be reexamined. Thompkins argues the longer wait before he may obtain his subsequent suitability hearing poses a 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 (*Morales*)],** 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 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.) The principles and rationales employed by *Garner* and *Morales* guide my 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 § 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 that 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.[7] (*Morales, supra,* 514 U.S. at pp. 511-512.) Second, even among this subset of inmates, the additional deferral period was not mandatory but instead would be utilized only where the BPH had made particular findings that the inmate was unlikely to be found suitable for parole in the deferral period, and 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 parole 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 parole hearing, those inmates could seek to advance the hearing date. (*Id*. at p. 512; *In re Jackson* (1985) 39 Cal.3d 464, 475.)

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

Because the terms of the 1981 amendment increased deferral of subsequent parole 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 *Morales* 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].)

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 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*.)

The *Garner* 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 parole hearing in the intervening time, the inmate would be found suitable for parole. However, if a change in circumstance or new information arose that would call the parole board's assessment into question, the inmate could seek earlier review. (*Ibid*.) Based on these provisions, the *Garner* court concluded application of the changed regulation did not facially violate ex post facto protections. (*Id.* at p. 256.)[8]

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8 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. Thompkins has requested that we take judicial notice of various documents which he asserts provide evidence that, *in practice*, the BPH routinely issues summary denials of *all* inmate petitions seeking a section 3041.5, subdivision (d)(1), expedited review unless the prior denial of parole was due to some procedural default or error. I have substantial doubt we are authorized to take judicial notice of the documents submitted by Thompkins, and I would therefore deny the

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,

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request for judicial notice. However, I do note that the district court in *Gilman v. Brown*, *supra*, 2011 WL 3163260 recently observed that the statistical data for the time period of January 2009 (shortly after Marsy's Law was implemented) through December 2010 showed that 119 inmate-initiated applications for advanced hearings were filed, and all but five were denied. Moreover, even as to the five applications that *were* granted (and it is unclear whether these petitions were granted under the standards embodied in § 3041.5, subd. (d)(1) rather than because of some procedural default or error in the original parole hearing), *none* of those hearings had *actually* been held as of April 2011, and "[t]he average length of time between the prisoner's most recent hearing and the scheduled advanced hearing was 22 months" (*id*. at *4), nearly one year longer than the one-year deferrals the prisoners had previously waited between parole hearings. These observations by the *Gilman* court raise significant concerns under *Garner* whether the BPH's exercise of the discretion provided by the statute has *in practice* presented a significant risk of increased incarceration under *Garner*, *supra*, 529 U.S. at pp. 256-257.

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 sufficiently significant risk of longer incarceration to violate ex post facto protections.[9] (*Brown v. Palmateer, supra*, 379 F.3d at pp. 1094-1096.) Similarly, in *Himes v. Thompson* (9th Cir. 2003) 336 F.3d 848, an inmate argued application of the new rules was barred by ex post facto protections based on two changes in the rules governing an inmate'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 an inmate's eligibility for rerelease. (*Id*. at pp. 854-863.) The court concluded that, while 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

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9 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 providing evidence the inmate would pose 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.)

mandate outright denial of rerelease as the only available remedy following a finding of aggravation, but allowed a selection among a graduated series of terms of confinement. (*Ibid*.) This constriction of available release dates, concluded *Himes*, was a sufficiently significant increase in the possibility of serving a lengthier 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, Thompkins 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 protections.

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), I turn to 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 (in the exercise of its discretion and judgment as to the particular inmate before it) that it was unreasonable to expect parole would be granted to the inmate 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 triples 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 opaque, 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. As best I can discern, the People argue that in all the circumstances when 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 seeking to trigger the safety valve for a minimum of three years (or at a minimum is expressly barred from seeking to trigger the safety valve for a minimum of three years after his or her first application to advance a hearing is rejected, as in Thompkins's case here) *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.[10] (§ 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 another 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.[11]

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10 As previously noted (see fn. 3, *ante*), although Marcy's Law *nominally* appears to allow the BPH sua sponte to advance a subsequent parole 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 upon that information to conduct an earlier parole hearing when appropriate, see Stats. 1990, ch. 1053, § 1) by which the BPH might obtain information for such action appears *de facto* to relegate advanced hearings to those triggered by the "inmate request" provisions. That is, because there is no mechanism by which the BPH might sua sponte *generate* new information, nor any mechanism by which the BPH might sua sponte *learn* of either new information or changed circumstances upon 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. The empirical evidence cited by the *Garner* court (see fn. 8, *ante*) appears consistent with my belief that the *BPH*-initiated advancement provisions are a largely illusory protection. Thus, although sua sponte advanced hearings are nominally available, it appears that "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.

11 I am loathe to characterize the risk of increased incarceration as insubstantial because I believe inmates who *do* obtain rehabilitation sufficient for parole presumably are spread over a time continuum. That is, some inmates will achieve the requisite

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 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 parole hearing is an inadequate substitute for a scheduled parole 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

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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 an additional three years. Under the old system, while 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 being heard after one or two years. Of course, I 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.

develop during the two-year blackout period that would demonstrate suitability. Accordingly, the change in the minimum deferral period itself creates a significant risk of 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 1996, 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,"[12] 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 "consideration of the public safety" (also the determinant of parole suitability) into a reduction of the 15-year deferral, Marsy's Law appears to allows 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 even 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*.[13] Those cases examined changes that, like California's prior

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12 Neither party has identified whether this aspect of Marsy's Law changes the quantum of proof previously governing BPH determinations, which precludes me from assessing whether this change might also raise ex post facto concerns under *Calder v. Bull's* fourth category (see fn. 6, *ante*).

13 For this reason, I disagree with the recent decision in *Gilman v. Schwartzenegger* (9th Cir. 2011) 638 F.3d 1101. The *Gilman* court, although acknowledging that "the changes required by Proposition 9 appear to 'create[] a significant risk of prolonging [Plaintiffs'] incarceration' " (*id*. at p. 1108), concluded the availability of the advanced hearings " 'would *remove any possibility of harm*' to prisoners who experienced changes in circumstances between hearings." (*Id.* at p. 1109, quoting *Morales, supra*, 514 U.S. at p. 513, italics added by *Gilman*.) This conclusion ignores that the "possibility of harm" remained extant during the three-year blackout period for prisoner-initiated requests.

system, granted the BPH discretion to postpone subsequent parole hearings when it 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].)

I also 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 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

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Indeed, when the *Gilman* court rejected the 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. 1110) as unsupported by the evidence, *Gilman* did so because the prisoner "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, either initially or (at a minimum) after an unsuccessful application for an advanced hearing (see fn. 3, *ante*.)

" '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), I assess whether these changes do create such a risk.

I recognize 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, annual (or biennial) parole 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 parole 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 years 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 on 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 within the two-year blackout period newly imposed under Marsy's Law. 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.) I would hold that 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.

I would grant the relief requested in Thompkins's petition for a writ of habeas corpus in part, and order the BPH to vacate its order insofar as it results in the scheduling

of Thompkins's next parole hearing according to the standards and procedures of section 3041.5 as amended pursuant to Marsy's Law, and would direct the BPH to enter a new and different order scheduling Thompkins's subsequent parole suitability hearing according to the standards and procedures of section 3041.5 in effect in 1986.

McDONALD, J.