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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MELVIN R. REED, JR. on Habeas Corpus.	D058592 (San Diego County Super. Ct. No. SCD114255)

Petition for Writ of Habeas Corpus, Howard H. Shore, Judge. Relief granted in part.

In 1996, Melvin Reed was convicted of assault on a child resulting in death and was sentenced to a prison term of 15 years to life. Reed, now 34 years old, has been incarcerated for more than 15 years.

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

suitable for parole. The BPH further concluded a 10-year denial of parole was appropriate under the circumstances.

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

Reed asserts the BPH's decision to deny parole violated due process because its conclusion that he posed an unreasonable risk of danger to society if released on parole was contrary to the evidence that he was not currently dangerous. He also asserts the amendments to Penal Code section 3041.5, subdivision (b),[1] adopted after the voters approved Proposition 9, otherwise known as the "Victims' 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), when applied to him violates ex post facto principles.

We conclude the BPH's decision to deny parole was supported by some evidence, pursuant to the guidance provided by *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241. However, we conclude application of the amendments to section 3041.5, subdivision (b), to inmates whose commitment offense was committed prior to the effective date of Marsy's Law violates ex post facto principles.

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

I

FACTS

A. The Commitment Offense

In 1996, Reed was convicted of physically assaulting a child resulting in the child's death. Reed was under the influence of drugs when the child, his girlfriend's 17-month old son, woke Reed with his crying. Reed struck the child in the abdomen with such force that his liver was forced against his spine, lacerating the liver and causing death. Because the facts of the crime support the BPH's determination that the commitment offense was particularly heinous, atrocious, or cruel (Cal. Code Regs., tit. 15, § 2402, subd. (b)),[2] and Reed does not dispute that this aspect of the BPH's determination is supported by the requisite level of evidence, we do not further detail the commitment offense.

B. Reed's Criminal Background

Reed had a prior juvenile criminal history of both violent and nonviolent offenses.

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

C. Reed's Disciplinary Record in Prison

During his time in prison, Reed received numerous "CDC 115's,"[3] the latest of which was in 2004,) and many of those violations involved violence. During his time in prison, he has also received several "CDC 128's."

D. Reed's Psychological Evaluation

A psychologist evaluated Reed and his report was received by the BPH without objection. The psychologist interviewed Reed and, based on the interview, concluded Reed did not have insight into the factors that led to his conduct, was unable to express genuine remorse for his conduct, and had not availed himself of the opportunities in prison to acquire insight or develop the empathy for others necessary to function appropriately in society.

The psychologist also evaluated Reed's potential for violence under two separate empirically-based assessment guides,[4] and evaluated Reed's general risk of recidivism under another empirically based-assessment guide.[5] Reed's PCL-R score placed him the "moderately high range" for future violence, and the tests suggested tendencies toward "Glibness, Superficial Charm, . . . Pathological Lying . . . , Conning, Manipulative, Lack

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

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

5 The guide used to assess Reed's general risk of recidivism was the Level of Service/Case Management Inventory (LS/CMI).

of Remorse or Guilt, Shallow Affect, Callous/Lack of Empathy, Parasitic Lifestyle, Poor Behavioral Controls, . . . Impulsivity, Irresponsibility, [and] Failure to Accept Responsibility for Own Actions . . . ." Reed's score on the HCR-20 placed him the "moderately high" risk category for violent recidivism. The LS/CMI placed him the "high" category for risk of recidivism. The psychologist concluded, based on his clinical assessment and the empirical guides, that Reed presented a "relatively [h]igh risk for violence in the free community."

E. Reed's Rehabilitative Efforts

Reed's participation in institutional programming and self-help groups was sporadic, and his educational and vocational training was sparse.

F. Parole Plans

The evidence supports the BPH's conclusion that Reed's parole plans were "non-existent": he had not identified a facility willing to accept him on release, had no job arranged, and had no letters offering financial or other support on his release from prison.

II

HISTORY OF PROCEEDINGS

A. The BPH Proceedings

Reed's minimum eligible parole date was in 2010. At his 2009 parole hearing, the BPH considered Reed's testimony, as well as the written reports, and concluded he was unsuitable for parole because he posed an unreasonable risk of danger to society if released. The BPH relied on the facts of the crime, his prior criminal record, his current

level of insight into or acceptance of responsibility for the crime, his disciplinary record while in prison, his psychological evaluation, his limited programming while incarcerated, and his lack of parole plans to conclude he was not currently suitable for parole. The BPH scheduled Reed's next parole eligibility hearing 10 years from his 2009 hearing pursuant to section 3041.5, subdivision (b)(3)(C).

B. The Habeas Proceedings

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

III

LEGAL STANDARDS

A. The Parole Decision

The decision whether to grant parole is a subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that should be guided by a number of factors, some objective, identified in section 3041 and the BPH's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) In making the suitability determination, the BPH must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b)), including the nature of the commitment offense; behavior before, during, and after the crime; the inmate's social history; mental state; criminal record; attitude towards the crime; and parole plans. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) The circumstances that tend to show *unsuitability* for parole include that the inmate: (1)

committed the offense in a particularly heinous, atrocious, or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (Cal. Code Regs., tit. 15, § 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use on release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

These criteria are general guidelines, illustrative rather than exclusive, and "the importance attached to [any] circumstance [or combination of circumstances in a particular case] is left to the judgment of the [BPH]." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 679; Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) The endeavor is to try "to predict

by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz,* at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the BPH may consider facts other than those found true by a jury or judge beyond a reasonable doubt. (*Id*. at p. 679.)

B. Standard for Judicial Review of Parole Decisions

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

In *Lawrence,* the Supreme Court noted that its decisions in *Rosenkrantz* and *In re Dannenberg* (2005) 34 Cal.4th 1061, and specifically *Rosenkrantz's* characterization of "some evidence" as "extremely deferential" and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra,* 29 Cal.4th at p. 667), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra*, 44 Cal.4th at p. 1206.) *Lawrence* explained some courts interpreted *Rosenkrantz* as limiting the judiciary to reviewing whether "some

evidence" exists to support an unsuitability factor cited by the BPH or Governor, and other courts interpreted *Rosenkrantz* as requiring the judiciary to instead review whether "some evidence" exists to support "the core determination required by the statute before parole can be denied—that an inmate's release will unreasonably endanger public safety." (*Lawrence*, at pp. 1207-1209.)

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

adopted in *Lawrence* to clarify and illuminate "the precise contours of the 'some evidence' standard." (*Id.* at p. 1206.)

After clarifying the applicable standard of review, *Lawrence* addressed how one "unsuitability" factor—whether the prisoner's commitment offense was done in a particularly heinous, atrocious, or cruel manner—can affect the parole suitability determination, and whether the existence of some evidence supporting the BPH's finding that the offense was particularly heinous, atrocious, or cruel is alone sufficient to deny parole. *Lawrence* concluded that when there has been a lengthy passage of time, the BPH may continue to rely on the nature of the commitment offense as a basis to deny parole only when there are *other* facts in the record, including the prisoner's history before and after the offense or the prisoner's current demeanor and mental state, that provide a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at pp. 1211, 1214, 1221.)

IV

ANALYSIS OF CHALLENGE TO UNSUITABILITY FINDING

Reed appears to assert there is no evidence of sufficient substantiality on which the BPH could properly rest its determination that he would pose an unreasonable risk of danger to the community if released, because there is no logical nexus between the facts relied on by the BPH and its conclusion that he is currently dangerous.

We conclude there is sufficient evidence from which the BPH could have concluded Reed was unsuitable for parole. There is no dispute the evidence permitted the BPH to conclude the crime was especially egregious. However, because there has been a lengthy passage of time since that crime was committed, *Lawrence* teaches that the BPH may continue to rely on the nature of the commitment offense as a basis to deny parole only when other facts in the record, including the inmate's history before and after the offense or the inmate's current demeanor and mental state, provide a rational nexus for concluding those offenses continue to be predictive of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at pp. 1211, 1214, 1221.) We conclude that, in this case, there is some evidence—including Reed's history before and after the offense as well as his current demeanor and mental state—from which the BPH could rationally conclude the commitment crime remain probative of Reed's dangerousness.

A. Reed's History Before and After the Offenses

Reed's criminal record before the commitment offense did involve violence, and his postincarceration conduct showed he continued to be violent and was unable to adhere to rules despite imprisonment. Although Reed's *recent* disciplinary record in prison has improved, he received numerous disciplinary citations while in the highly controlled setting of a prison, including violence and manufacturing intoxicants, which undermines the credibility of his assertions that his long history of substance abuse and violence was a distant memory. Because Reed had shown that, despite years of institutionalization, he could relapse into behavior patterns that may have contributed to

the crime for which he was committed, the BPH could conclude an additional period of discipline-free behavior was required to show that the influences and impulses leading to the crime had been eradicated to a sufficient degree that he would not pose an unreasonable risk of relapsing into prior behavioral patterns.

B. Reed's Current Demeanor and Mental State

In addition to Reed's pre- and postincarceration behavior, the BPH considered and expressly relied on the facts and opinions contained in the psychological evaluation. The psychologist's observations, and particularly the psychologist's opinion that Reed's mental state (especially his tendency to discount his criminal history and to not understand the underlying sources of his antisocial/criminal behavior) would be expected to cause difficulties with Reed's ability to identify and change his poor decision-making and to avoid relapsing into antisocial conduct, provide some evidence under *Shaputis* to support the BPH's finding that he posed an unreasonable risk to the community if released on parole.

In this proceeding, Reed cites snippets of the report as supportive of his claim that he is not currently dangerous, but then ignores the context in which those statements were made and ignores the conclusions reached by that evaluator. We believe the psychologist's adverse report provided the requisite evidence to support the finding of unsuitability.

C. Additional Evidence of Unsuitability

The BPH properly relied on additional evidence to find Reed was unsuitable for parole. He minimized or rationalized his prison misconduct, claiming his disciplinary citations were just "little things [that] are going to happen" in prison, and that he manufactured alcohol because he needed the money to buy food and personal hygiene materials, which could support the conclusion that Reed would continue to act in antisocial ways when he believed his self-interest justified those actions. He eschewed significant efforts at participating in rehabilitative activities, and had no extant parole plans, both of which factors may properly be relied on to determine unsuitability. (See Cal. Code Regs., tit. 15, § 2402, subds. (d)(8) & (d)(9).)

D. Conclusion

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

V

ANALYSIS OF EX POST FACTO CHALLENGE

The BPH concluded a 10-year deferral before Reed would again be considered for parole, as permitted under section 3041.5, subdivision (b)(3), was appropriate. Reed argues the amendments to section 3041.5, subdivision (b), which implement aspects of Marsy's Law to permit the 10-year deferral, when applied to him violate ex post facto principles.

A. Background

Former Law

Reed's commitment offense occurred in 1996. At that time, section 3041.5 provided that when an inmate was denied parole, he or she was entitled to have the matter reviewed annually at a subsequent suitability hearing. However, that law gave discretion to the BPH to defer the subsequent suitability hearing for two years for life sentence prisoners or to select a three- or five-year deferral for life sentence inmates convicted of multiple murders if the BPH found it was not reasonable to expect that parole would be granted sooner than the two-, three- or five-year periods, respectively. (See Stats. 1990, ch. 1053, § 1, pp. 4380-4381.)

Current Law

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

The most significant change is that, when the BPH denies parole, the 2008 amendments mandate longer deferrals for the subsequent suitability hearing than those permitted under the prior statutory scheme. Under current law, the subsequent suitability hearing date must be set at either 15 years or 10 years unless the BPH finds by clear and convincing evidence that the factors relevant to deciding suitability for parole "are such

that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the prisoner" than either 15 or 10 years. (§ 3041.5, subds. (b)(3)(A) & (B).) Even if the BPH finds by clear and convincing evidence that neither the 10- nor 15-year deferral is necessary to protect the safety of the public or the victims, the BPH must select a seven-year deferral for the subsequent suitability hearing unless it concludes the suitability factors examined at the hearing "are such that consideration of the public and victim's safety . . . [do] not require a more lengthy period of incarceration for the prisoner than seven additional years," in which event the BPH may set the deferral at either five years or three years. (§ 3041.5, subd. (b)(3)(C).)

A second aspect of the changes adopted under Marsy's Law is that, although an inmate may request the BPH to advance the subsequent parole suitability hearing date to an earlier date because of changed circumstances or new information (§ 3041.5, subd. (d)(1)), the inmate may not obtain review pursuant to this provision earlier than three years after a decision denying parole has been made even if there are changed circumstances or new information.[6] (§ 3041.5, subd. (d)(3).) Additionally, if the inmate

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

petitions to advance the subsequent suitability hearing date and either his or her request is summarily denied or it is denied after a hearing on the merits, the inmate may not petition again to advance the subsequent suitability hearing date to an earlier date until three more years have elapsed from either the summary denial or the hearing on the merits.[7] (§ 3041.5, subds. (d)(1) &(d)(3).)

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for an inmate to petition for an advanced hearing when parole is denied following a regularly scheduled suitability hearing.

Certainly, section 3041.5, subdivision (b)(4), nominally appears to preserve the ability of the BPH on its own motion to advance a subsequent suitability hearing date to a date earlier than that set, as long as there are changed circumstances or new information that establish a reasonable likelihood the inmate will be found suitable for parole. However, neither the statute nor the administrative regulations explain the mechanism by which the BPH would (absent a request from the inmate under § 3041.5, subd. (d)(1)) become cognizant of the changed circumstances or new information that might trigger sua sponte action by the BPH to advance the hearing date. (See fn. 13, post.) Although *In re Aragon* (2011) 196 Cal.App.4th 483 [2011 WL 2239564] (*Aragon*) concluded this sua sponte power "ameliorat[es] ex post facto concerns that the increased deferral period raises" (*id*. at * 13) because courts may " 'presume [a parole board] follows its statutory commands and internal policies in fulfilling its obligations' " (*ibid*., quoting *Garner v. Jones* (2000) 529 U.S. 244, 256 (*Garner*)), we explain in more detail below why we are less sanguine that either the facts or the precedents support this aspect of *Aragon's* analysis.

[7] 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 Reed's commitment offense 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. 1990, ch. 1053, § 1, p. 4380.) No similar requirement of a statement of reasons is found in the current version of section 3041.5 (§ 3041.5,subd. (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).)

B. Ex Post Facto Principles

The core of ex post facto law is to bar application of laws that criminalize conduct not criminal when done, or increase punishment for a crime above the punishment the law specified at the time the crime was committed. In *Calder v. Bull* (1798) 3 U.S. (Dall.) 386, 1 L.Ed. 648, the court explained at page 390 that the ban against ex post facto laws under the federal Constitution[8] 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.[9]

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

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

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

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

Reed contends section 3041.5, as amended by Marsy's Law, if applied to him, violates ex post facto principles because it increased his sentence (i.e., punishment) beyond the term that applied when the crime was committed in 1996. He argues that, under the statutory scheme applicable in 1996, he would have been eligible for a new parole hearing not more than two years after the initial denial of parole, but must now wait at least three years (even if he could show changed circumstances or new information) or up to 10 years before his suitability for parole may be reexamined. Reed argues the longer period before he may obtain his subsequent suitability hearing creates the risk that he will remain incarcerated longer than if his subsequent suitability hearing

had been scheduled at the earlier date prescribed by the statutory scheme in effect at the time of his commitment offense.

The *John L.* court explained, however, that "not every amendment having 'any conceivable risk' of lengthening the expected term of confinement raises ex post facto concerns. [Citation.] In [*California Dept. of Corrections v. Morales* (1995) 514 U.S. 499]**,** a California law allowed the parole board, after holding an initial hearing, to defer subsequent parole suitability hearings up to three years for inmates convicted of multiple homicides, provided it found parole was not reasonably likely to occur sooner. (*Id*. at p. 503.) Finding no retroactive increase in punishment, the high court emphasized that there had been no change in the applicable indeterminate term, in the formula for earning sentence reduction credits, or in the standards for determining either the initial date of parole eligibility or the prisoner's suitability for parole. (*Id*. at p. 507.) . . . At bottom, no ex post facto violation occurred because the risk of longer confinement was 'speculative and attenuated' (*id.* at p. 509), and because the prisoner's release date was essentially 'unaffected' by the postcrime change. (*Id*. at p. 513; [citation].)" (*John L. v. Superior Court, supra,* 33 Cal.4th at pp. 181-182.)

In *California Dept. of Corrections v. Morales*, *supra*, 514 U.S. 499 (*Morales*) and again in *Garner, supra,* 529 U.S. 244, 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 principles. (*Morales,* at p. 509.) We examine the particular principles and rationales employed by *Garner* and *Morales* to guide our evaluation of whether Marsy's Law offends ex post facto principles by posing a sufficient risk, either by its own terms or by its practical implementation, of resulting in a longer period of incarceration than under the old rule. (*Garner, supra*.)

Morales

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

Morales held that the risk of prolonged confinement posed by this amendment's terms was not sufficient to violate the ex post facto clause. (*Morales, supra,* 514 U.S. at p. 512.) The court provided three reasons for this conclusion. Most importantly, the court concluded the *only* group of inmates impacted by the increased deferral periods under the amendments (e.g. multiple murderers) would be unlikely to have been found suitable at an earlier date because, in general, inmates convicted of multiple murders were particularly unlikely to be found suitable for parole.[10] (*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 increased only where the BPH had made specific findings that an individual inmate was unlikely to be found suitable for parole in the deferral period, and the length of the increased deferral would be specifically tailored to the BPH's findings. (*Ibid*.) Finally, even assuming there were inmates (within the larger group the BPH had found were unlikely to be found suitable for parole if a subsequent suitability hearing were held within one year) who could show there *was* a change in circumstances sufficient to call into question the BPH's projection that suitability would be found at a one-year hearing, those inmates could seek to advance the hearing date. (*Id*. at p. 512; *In re Jackson* (1985) 39 Cal.3d 464, 475.)

Because the terms of the 1981 amendment increased deferral of subsequent suitability hearings only in cases in which the BPH projected it would be unlikely there would be an earlier finding of suitability, and because advanced hearings were available

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

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

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 court illustrated the effect of these qualifications with the particular circumstances of the inmate in that case. (*Garner, supra*, 529 U.S. at p. 255.) The parole board had deferred the inmate's next parole suitability hearing for the maximum period of eight years. The inmate's history—including a prior escape from prison and a subsequent act of murder—made it unlikely that, even if the parole board were to conduct a suitability hearing in the intervening time, the inmate would be found suitable for parole. However, if a change in circumstances or new information arose that would call the parole board's assessment into question, the inmate could seek earlier review. (*Ibid*.) Based on these provisions, the court concluded application of the changed regulation did not facially violate ex post facto principles. (*Id.* at p. 256.)[11]

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11 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, after expressly stating that *"*[*a*]*bsent a demonstration to the contrary*, we presume the Board follows its statutory commands and internal policies in fulfilling its obligations" (*id*. at p. 256, italics added), found no evidence to undermine the presumption in the record before it. Reed has requested that we take judicial notice of various documents he appears to assert constituted evidence that, *in practice*, the BPH (1) has routinely issued summary denials of *all* inmate petitions seeking a section 3041.5, subdivision (d)(1), expedited review (except for two cases in which parole had been denied because the prisoner had not submitted paperwork documenting his parole plans, and (2) has not ordered a single sua sponte advancement of a parole hearing. Whether we may take judicial notice of the documents submitted by Reed is problematic, but because we

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 principles. Recognizing that the significant inquiry "looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual" (*Weaver v. Graham* (1981) 450 U.S. 24, 33), the Ninth Circuit in *Brown v. Palmateer* (9th Cir. 2004) 379 F.3d 1089 applied *Garner* and *Morales* to conclude the changed standards challenged in *Brown* created a sufficiently significant risk of longer incarceration to violate ex post facto principles.[12]

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conclude Marsy's Law on its face violates ex post facto protections, we need not examine whether Marsy's Law *as applied* also violates ex post facto principles, and we therefore deny Reed's request for judicial notice as moot.

[12] 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

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

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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 principles. (*Id*. at p. 1095.)

increase in the possibility of serving a more lengthy period of incarceration to preclude application of the new rules under ex post facto principles. (*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, Reed asserts the changes effectuated by Marsy's Law present a distinct set of changes outside the boundaries of the changes that *Garner* and *Morales* found not to violate ex post facto principles.

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

Increased Minimum Deferral Periods

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

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

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

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

which the new information or changed circumstances would be considered.[13] (§ 3041.5, subd. (d)(1).) Although the former statutory scheme would permit annual (or biennial) examinations of changed circumstances or new facts supporting a release on parole, inmates must now wait at least an additional year (or two years) before changed circumstances or new facts supporting a release on parole will be considered, resulting in a significant risk that an inmate will spend a longer period of incarceration under Marsy's Law than under the former system.[14]

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13 As previously noted (see fn. 6, *ante*), although Marcy's Law *nominally* appears to allow the BPH sua sponte to advance a subsequent suitability hearing date based on changed circumstances or new information, the absence of any statutory or regulatory requirements (as was present under a 1990 enactment requiring the parole authority to conduct a file review within three years and to act on that information to conduct an earlier parole hearing when appropriate, see Stats. 1990, ch. 1053, § 1) by which the BPH might obtain information for that action appears *de facto* to relegate advanced hearings to those triggered by the "inmate request" provisions. Because there is no mechanism by which the BPH might sua sponte *generate* new information, or any mechanism by which the BPH might sua sponte *learn* of either new information or changed circumstances on which it might act, an inmate who would have obtained a new hearing as early as one year after his or her last hearing must now wait a *minimum* of three years before obtaining a new hearing. Thus, although sua sponte advanced hearings are nominally available, it appears "the rule's practical implementation . . . will result in a longer period of incarceration than under the earlier rule" (*Garner, supra,* 529 U.S. at p. 255) because of the absence of any practical method for triggering this advanced hearing.

14 We are loathe to characterize the risk of increased incarceration as insubstantial because we apprehend that inmates who *do* obtain rehabilitation sufficient for parole presumably do so over a time continuum. That is, some inmates will achieve the requisite rehabilitation during the first year after denial, while a second group of inmates will achieve the requisite rehabilitation after the first year but during the second year after denial, while the third group requires three years. Under the old system, 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 until

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

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after an additional one or two years. Indeed, Reed's request for judicial notice contains statistical data verifying that a significant percentage of inmates would have suffered prolonged incarceration had Marsy's Law been applied to them.

We acknowledge there exists a 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 this fourth group of inmates would again be subjected to a mandatory three-year denial, the cyclical continuum would recommence and many of those inmates would eventually become members of the first, second, and third groups, two of which groups will be *certain* to suffer an additional incarceration under the minimum deferrals required by Marsy's Law.

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

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

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

Second, in addition to *raising* the minimum deferral period, Marcy's Law also increases the default deferral period to 15 years while simultaneously limiting the BPH's ability to reduce the maximum deferral period. Under the scheme applicable in 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. 1990, ch. 1053, § 1, p. 4380.) 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,"[15] that "consideration of the public and victim's safety does not require a more lengthy period of incarceration." (§ 3041.5, subd. (b)(3)(A).) Because this aspect of Marsy's Law imports (into the departure from the default 15-year deferral) "consideration of the public safety," which is also the determinant of parole suitability, Marsy's Law appears to allow a deferral for less than the maximum only when clear and convincing evidence indicates parole will *actually* be granted at the next hearing. Thus, the BPH no longer has the discretion (which it apparently had under the former scheme) to depart from the maximum deferral periods and schedule an earlier hearing when it does not expect parole to be granted at an earlier hearing.

Because Marsy's Law *constrains* the discretion to set earlier hearings (and entirely *eliminates* the discretion to set hearings earlier than three years), rather than *expands* the discretion to set *deferred* hearings, it bears scant resemblance to the schemes considered by *Garner* or *Morales*.[16] Those cases examined changes that, like California's prior

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15 Neither party has identified whether this aspect of Marsy's Law changes the quantum of proof previously governing BPH determinations, which precludes us from assessing whether this change might also raise ex post facto concerns under *Calder v. Bull's* fourth category (see fn. 8, *ante*).

16 We are unpersuaded by 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 again ignores that the "possibility of harm" remained extant during the three-year blackout period for prisoner-initiated

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 an inmate serving a more lengthy period of incarceration to offend ex post facto principles. (*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].)

We assess whether this second set of changes—imposing a longer default maximum deferral period while simultaneously limiting the BPH's discretion to depart from that maximum by requiring (as a condition to departing from the maximum) that there be clear and convincing evidence supporting a prediction that the inmate will achieve rehabilitation before that maximum deferral period term would expire—increases the probability that application of the new rules will cause inmates to serve more lengthy periods of incarceration than they would have served under the old rules. Because ex post facto principles may preclude application of new rules even when an inmate

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requests. Indeed, when the *Gilman* court rejected the plaintiffs' argument that there would " 'necessarily be a delay between any meritorious request for an advance hearing and the grant of such hearing' " (*Gilman,* at p. 1110) as unsupported by the evidence, *Gilman* did so because the plaintiffs "fail[ed] to explain how these statutory requirements make it 'virtually impossible' for a prisoner to receive an advance hearing within one year of the denial of parole—the previous default deferral period." (*Ibid*.) However, the *explanation* for why it is "virtually impossible" for a prisoner to successfully pursue an advance hearing within *one* year of the denial of parole is that the statute *bars* an inmate-initiated request for an advanced hearing for *three* years.

" 'cannot show definitively that he would have gotten a lesser sentence' " (*Miller v. Florida* (1987) 482 U.S. 423, 432), and instead "[t]he controlling inquiry . . . [is] whether retroactive application of the change . . . created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes' " (*Garner, supra*, 529 U.S. at p. 250), we assess whether these changes do create that risk.

We appreciate that it is hard to predict when many inmates will become suitable for parole and, in a significant number of cases, the evidence will not support a prediction (one way or the other) regarding future suitability for parole. Under the former rules, yearly (or biennial) hearings were held to reevaluate suitability and afforded the BPH the ability to respond flexibly to unforeseeable progress at these periodic hearings; the former rules also provided the BPH with discretion to schedule a one-year hearing even if it believed it was unlikely sufficient progress would be achieved but the BPH nevertheless wished to preserve its ability to respond to unexpected progress. Marsy's Law, however, eliminates this discretion and appears to place on the inmate the burden of proving, clearly and convincingly, that future suitability will be attained earlier than 15 years. If it is frequently impossible to make any confident prediction as to whether an inmate will (or will not) achieve the requisite progress, reallocating the burden of proof and simultaneously imposing a 15-year default deferral if that burden is not met effectively removes the prior presumption of periodic scheduled hearings and restricts the BPH's ability to respond timely to change.

In *Miller v. Florida*, *supra*, 482 U.S. 423, the court concluded application of a new set of rules could be barred by ex post facto principles even if the change did not automatically lead to a more onerous period of incarceration than under the prior rules. In *Miller*, the court considered a challenge to application of Florida's new sentencing guidelines. (*Id*. at p. 425.) The former guidelines provided a presumptive range of three and one-half to four and one-half years for the crime; a sentence within the presumptive range could be imposed with no statement of reasons and, although a judge could depart from the range to impose a higher or lower term, he or she could only do so by providing clear and convincing written reasons for the departure. The new guidelines imposed a higher presumptive range of five and one-half 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.

We recognize the court in *Aragon, supra*, 196 Cal.App.4th 483 [2011 WL 2239564] recently concluded Marsy's Law does not create a risk of prolonged incarceration and therefore application to inmates convicted before its enactment does not offend ex post facto protections. However, we disagree with *Aragon*, for numerous reasons. First, *Aragon* concluded section 3041.5, subdivision (d)(3), does not impose a three-year "black-out period" for an inmate to petition to advance a hearing. However, that subdivision reads "[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, (d)(3), italics added.) Because a regularly scheduled parole suitability hearing results (as it did here) in a "decision of the board after a hearing described in [section 3041.5, subdivision (a)] to not set a parole date," we interpret the statute according to its literal provisions, e.g., 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. *Aragon's* contrary conclusion rests on imbuing a single word in the subdivision—the word "another"—with the intention to alter the plain meaning of the language (e.g. "the decision of the board after a hearing described in [section 3041.5,

subdivision (a)] to not set a parole date") by excluding from its operation *most* "decision[s] of the board after a hearing described in [section 3041.5, subdivision (a)] to not set a parole date" (i.e. regularly scheduled suitability hearings). Because the overarching intent of this aspect of Marsy's Law appears to be that the time between parole suitability hearings be extended to a minimum of three years, we do not ascribe the same import to the word "another" as did *Aragon*.[17]

We also disagree with *Aragon's* rationale that the BPH's sua sponte power to advance a hearing "ameliorat[es] ex post facto concerns that the increased deferral period raises." (*Aragon, supra,* 196 Cal.App.4th 483 at *13.) Although this authority nominally exists, its practical value is dubious because (as we observed earlier, see fn. 13, *ante*) we are unaware of any administrative mechanism by which a change in circumstances or new information might sua sponte come to the attention of the BPH to trigger a BPH-initiated advanced hearing. Moreover, although *Aragon's* expression of confidence in the BPH's sua sponte power to ameliorate the ex post facto aspects of Marsy's Law relied heavily on *Garner's* statement that a court may " 'presume [a parole board] follows its statutory commands and internal policies in fulfilling its obligations' " (*Aragon*, at *13, quoting *Garner, supra*, 529 U.S. at p. 256), *Garner's* full statement was that "[*a*]*bsent a*

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17 Moreover, even assuming *Aragon* correctly concluded a prisoner is not *initially* subject to the three-year blackout period following a regularly scheduled suitability hearing, prisoners who *invoke* section 3041.5, subdivision (d)(3)'s provisions *do* become subject to rolling three-year blackout periods. For this reason, the same concerns we believe are raised by the three-year blackout periods (see fn. 14, *ante*) will apply *either* immediately (under our interpretation) *or* once the prisoner invokes the changed circumstances clause (under *Aragon's* interpretation).

demonstration to the contrary, we presume the Board follows its statutory commands and internal policies in fulfilling its obligations." (*Garner,* at p. 256, italics added.) We do not know whether the record in *Aragon* reflected how often the BPH actually *uses* its sua sponte power (or how the BPH actually disposes of prisoner-initiated petitions), but Reed's counsel has made an offer of proof (a "demonstration to the contrary," *Garner, supra*) that the BPH (1) has never used its sua sponte power, and (2) almost invariably denies prisoner-initiated petitions. Accordingly, we are less confident than *Aragon* that the ex post facto concerns can be ameliorated by the presumption described in *Garner*.[18]

Aragon's final rationale for concluding Marsy's Law survived the ex post facto challenge was its observation that, under the regime applicable at the time the prisoner committed his offense, the prisoner was subject to a one-year deferral or (with appropriate findings) could have been subjected to a two-year deferral, and was only subjected (under the new regime adopted by Marsy's Law) to a three-year deferral. (*Aragon, supra*, 196 Cal.App.4th 483 at *13.) *Aragon* then observed that "[*Garner* held] the application of an administrative regulation that increased an inmate's parole hearing

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18 Indeed, the proffer by Reed's counsel (while mooted by our conclusion, see fn. 11, *ante*), raises an additional issue on which *Aragon* is silent: whether Marsy's Law violates ex post facto protections under an "as applied" analysis. As *Garner* explained, "[w]hen the rule does not by its own terms show a significant risk, the [prisoner] must demonstrate, *by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion*, that its retroactive application will result in a longer period of incarceration than under the earlier rule." (*Garner, supra,* 529 U.S. at p. 255, italics added.) As we understand this language in the context of a rule that would raise significant ex post facto concerns but for an ameliorating clause, evidence showing that the practical implementation of that clause renders the clause illusory provides a separate "as applied" challenge to the retroactive application of the rule. *Aragon's* analysis contains no discussion of this separate issue.

deferral period from three years to eight years (a *five-year* increase in the deferral period) did not constitute an ex post facto violation. [Citation.] Thus, *Garner* strongly supports the conclusion that the Board's setting [the prisoner's] next parole hearing three years from the October 2009 hearing did not constitute an ex post facto violation." (*Ibid*., fn. omitted.) To the extent this aspect of *Aragon's* rationale rests on an interpretation that, after *Garner*, any increase of deferral periods less than five *additional* years are insulated from ex post facto challenge, we have explained why we believe that reading of *Garner* to be erroneous. *Garner* relied heavily on its observation that a feature of the new regime was that the parole board had *discretion* in setting the length of the deferral period, with a policy to impose a lengthened period when it was " 'not reasonable to expect that parole would be granted during the intervening years' " (*Garner*, *supra*, 529 U.S. at p. 254), but absent such a finding the parole board apparently could and would set hearings at the times provided by the old rule. In contrast, Marsy's Law *mandates* a longer period of confinement than the old regime—even if the BPH believes one additional year would suffice—and hence is distinct in a critical aspect from the system evaluated and upheld by *Garner*. For all of these reasons, we respectfully disagree with the analysis and conclusions reached in *Aragon*, and decline to follow it.

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 but must now wait until the end of the three-year blackout period 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.) We conclude the risk of increased incarceration is real and significant, rather than speculative or attenuated, and therefore the changes to section 3041.5 enacted pursuant to Marsy's Law may not be applied to inmates whose crimes predated the effective date of Marsy's Law.

DISPOSITION

Relief requested in Reed's petition for a writ of habeas corpus is denied in part and granted in part. The BPH's 2009 order, insofar as it denied parole to Reed, is affirmed. However, the BPH shall vacate its 2009 order insofar as it scheduled Reed's next parole

hearing according to the standards and procedures of section 3041.5 as amended pursuant to Marsy's Law, and shall enter a new and different order scheduling Reed's subsequent parole suitability hearing according to the standards and procedures of section 3041.5 in effect in 1996.

McDONALD, Acting P. J.

I CONCUR:

McINTYRE, J.

Aaron, J.:

I concur with parts I, II, III, and IV of the majority opinion. However, for the reasons set forth in *In re Aragon* (2011) 196 Cal.App.4th 483, I dissent from part V of the majority opinion.

AARON, J.