IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

STEVE M. DEFILIPPIS
SBN 117292
PICONE & DEFILIPPIS, A P.L.C.
625 N. First Street
San Jose CA 95112
(408) 292-0441

Attorneys for Respondent,
MICHAEL VICKS
By Appointment of the Court of
Appeal under the Appellate
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STEVE M. DEFILIPPIS
SBN 117292
PICONE & DEFILIPPIS, A P.L.C.
625 N. First Street
San Jose CA 95112
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STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

On November 4, 2008, Marsy's Law was passed by the California electorate in which certain provisions radically altered the length of time between subsequent parole consideration hearings and the standard the Board applies in setting the deferral period. The new law drastically increases the default deferral period between parole hearings from one (1) year to fifteen (15) years and raises the minimum possible deferral period between parole hearings from one (1) year to three (3) years, thus eliminating all Board discretion to set the deferral period at one or two years. It also changes the standard for and alters the Board's ability to set the deferral period, and it radically alters the burden of proof, shifting it to the inmate, subjecting him or her to having to prove by clear and

convincing evidence that public safety does not require a longer period of incarceration to avoid a fifteen (15) year denial. Under the prior law, Mr. Vicks was subject to no more than a two (2) year denial. Now, the new law ***requires a fifteen (15) year deferral*** unless the Board finds by clear and convincing evidence that a shorter deferral period would ensure the public's and victim's safety, thereby eliminating the previous burden on the Board to establish that a deferral period longer than one year is necessary, and shifting that burden (at a higher standard) to the inmate. Finally, it limits a prisoner's ability to request and obtain a more speedy subsequent hearing. When applied retroactively, as is the case here, the new law creates a significant risk of increasing the measure of punishment attached to the original crime, and thereby violates the *Ex Post Facto* Clause of the United States Constitution.

California Penal Code §3041.5[1] came into existence with the Determinate Sentencing Law in California, which passed in 1976 and became operative on July 1, 1977. From 1977 through 1981, §3041(b)(2) mandated that the parole board review each case once before the expiration of the prisoner's minimum term "and annually thereafter." In 1982, an exception to annual parole hearings was made, allowing for deferring consideration for up to three (3) years, but only in a case where the prisoner has been convicted of more than one offense involving the taking of a life and the Board finds "that it is not reasonable to expect that parole would be granted at a hearing" sooner. From 1983-1990, the exception created in 1982 continued, but there was also a second exception, allowing the Board to defer consideration up to two (2) years in *any* case if the Board found it not to be reasonable to expect that parole would be granted sooner.

[1] Unless otherwise noted, all statutory references are to the *California Penal Code.*

The exceptions to annual parole hearings continued to expand. From 1991 through 1993, there was a third exception, allowing the Board to defer consideration up to five (5) years if the prisoner had been convicted of more than one murder and the Board found it was not reasonable to expect that parole would be granted sooner. If the deferral was for five years, a file review was required at three (3) years to determine if circumstances had changed such that parole consideration should take place at four (4) years. Importantly, like the prior changes, the default deferral period remained at one (1) year, with the multi-year deferrals being added as exceptions to the rule, based on the unique circumstances of the particular case before the Board.

In 1994, the exceptions to annual review were reduced to two (2) years but made broader. Thus, the first exception allowed a deferral of two (2) years in *any* case if the Board found that it was not reasonable to expect that parole would be granted sooner, thus making it applicable to both murder and non-murder parole eligible terms. The second exception allowed for a deferral for up to five (5) years in *any murder* case, but again, only if the Board made particularized findings that it was not reasonable to expect that parole would be granted sooner. ***However, in cases other than murders, like Mr. Vicks, the deferral period was capped at two (2) years,*** and in all cases, like the earlier modifications of the deferral periods, the default denial term remained at one (1) year. If a five (5) year deferral was imposed, a file review by a Board Commissioner at three (3) years was mandatory for consideration of whether there were changed circumstances such that a new hearing should be held in four (4) years. The 1994 change required that the Board adopt procedures and criteria for determining whether it was reasonable to expect parole to be granted sooner. The regulations adopted by the Board provided that the same factors considered in determining whether a prisoner was suitable for parole would be used to

determine the length of deferral before the prisoner would next be considered for parole. (*Cal. Code Regs.*, tit. 15, §2268, 2270(d).) This has remained the law until Marsy's Law passed in November 2008.

Marsy's Law amended both Article I, §28 of the California Constitution and *Penal Code* §3041.5. As relevant to the parole process for life prisoners, Marsy's Law's provisions ***default*** at a 15 year denial, and set the "clear and convincing" burden of proof as an obstacle to limit the Board's discretion to set a lower deferral period of ten (10) years. The provision again requires a separate determination that there is "clear and convincing" evidence before the Board can set a lower deferral period of seven (7) years. This same "clear and convincing" burden must again be met before the Board can set the next lower deferral period of five (5) years. The absolute minimum denial period is three (3) years, thus taking away all discretion from the Board to issue a deferral of one or two years.[2]

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2 *Penal Code* § 3041.5 (b)(3): (A) Fifteen years after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the setting of parole release dates enumerated in subdivision (a) of Section 3041 are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the prisoner than 10 additional years.

(B) Ten years after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the setting of parole release dates enumerated in subdivision (a) of Section 3041 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.

(C) Three years, five years, or seven years after any hearing at which parole is denied, because the criteria relevant to the setting of parole release dates enumerated in subdivision (a) of Section 3041 are such that consideration of the public and victim's safety requires a more lengthy period of incarceration for the prisoner, but does not require a more lengthy period of incarceration for the prisoner than seven additional years.

(4) The board 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

With the next level being five (5) years, the statute also eliminates the discretion to impose a four year denial, or the ability of the Board to advance a five (5) year denial to four (4) years as allowed under the 1994 version of the statute.

Under the amended provisions, the setting of any of these periods must include consideration of the "interests and views of the victim," but does not define how those views relate to the issue of suitability for parole. (*Penal Code* §3041.5 (b)(3).) The heightened burden of proof at each deferral level substantially limits the Board's discretion in a manner that did not exist under prior law which only permitted the Board panel to exercise its discretion under the weighing and balancing of evidence when determining whether to impose a ***longer*** deferral period, not a ***shorter*** one. Furthermore, the amendment completely reverses the prior requirement that the Board justify ***longer*** denial periods by only requiring that the Board make findings, supported by clear and convincing evidence, when giving a ***shorter*** denial term. This Initiative measure is a glaring example of a codified return to "mob rule" where the victims of crime get to decide the fate of a prisoner rather than his fate being decided according to law.

Until this Initiative measure was passed and codified, public outcry could be considered, but could not be relied upon to determine suitability for parole or any other aspect of parole. (*In re Fain* (1983) 139 Cal.App.3d 295.) In fact, the opinions of victims and next of kin are not considered evidence of unsuitability. (See *In re Dannenberg* (2009) 173 Cal.App.4th 237, at 256, fn. 5., ordered published by this Court at S170468; see also *In re Weider* (2006) 145 Cal.App.4th 570, at 590.) Of course, such a rule is eminently proper, as the victim or public's desire for further punishment

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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).

does not address the question of whether the inmate is currently dangerous. Likewise, forgiveness from the victim or next of kin has never been a prerequisite to parole or a factor of suitability. (See generally *Cal. Code of Regs.,* tit. 15, §§ 2281(c) & 2402(c).) Nothing in the prior statutory or regulatory scheme suggests that public outcry, per se, may be considered as a basis for denial of parole or the length of a parole deferral period. The Legislature meant to distinguish between emotion and information, between a mere show of hands in opposition to a prisoner's release anywhere, anytime, and specific information brought forward by the public relevant to the Board's determination. As noted in *Fain,* "[t]he former . . . is not constitutionally cognizable" and "[t]he latter, of course, can and should play a role in the board's decision, and the Legislature has so provided. In this light, ...the Legislature has seen fit to ensure that the public may provide the Board with food for thought, without devouring the inmate's constitutional rights." (*Id.*, 139 Cal.App.3d at 305.) Instead, Marsy's Law devours the inmates' constitutional rights.

It is clear that Marsy's Law, as codified, has allowed victim interests and objections to parole generally to far overshadow the administration of the deferral period after denial of parole, defaulting at a 15-year denial period, and requiring "clear and convincing evidence" that a lengthier period of incarceration is not required, essentially directing reviewing courts to stay out of their business absent a showing of "manifest abuse of discretion." (See §3041.5 (d)(2).) Although subd. (d)(1) allows an inmate to request an earlier hearing than that set at the time of the denial decision, this appears to be a toothless provision insofar as there is a three (3) year blackout period between hearings, and the Board is mandated to rely upon input from the crime victim to determine whether an earlier hearing should ever be granted. Also, as will be discussed, there is no mechanism for the Board to review on its own whether an earlier hearing is necessary, as was

required under prior law when a five (5) year denial term was selected. Thus, the claimed protective mechanism is nothing more than an illusion.

B. THE LOWER COURT'S FINDING OF AN EX POST FACTO VIOLATION

As the Court of Appeal in this case explained,

> "Vicks's commitment offenses occurred in 1983. At time, [Cal. Penal Code] section 3041.5 provided that when an inmate was denied parole, he or she was entitled to have the matter reviewed annually at a subsequent suitability hearing. However, ***that law gave discretion to the BPH*** to defer the subsequent suitability hearing for two years (for all life sentence prisoners) or three years (for life sentence inmates convicted of murder) ***if the BPH found it was not reasonable to expect that parole would be granted sooner than two or three years, respectively.***[9] (See Stats. 1982, ch. 1435, § 1, p. 5474.)" (*In re Vicks* (2011) *formerly published at* 195 Cal. App. 4th 475, 492; internal fn. 9 omitted; emphasis added.)

The lower court went through the history of California's parole suitability laws. Additionally, the lower court provided an in depth analysis of the two main cases relied upon by Petitioner, *California Dept. of Corrections v. Morales (Morales)* (1995) 514 U.S. 499 and *Garner v. Jones (Garner)* (2000) 529 U.S. 244. Ultimately, the lower court distinguished this case from both *Morales* and *Garner* because the changes to California's parole suitability implemented by Marsy's Law are radically different from the changes noted in *Morales* and *Garner,* and here, the changes made by Marsy's Law do rise to the level of violating the *Ex Post Facto* Clause.

Like the concurring and dissenting opinion issued in the lower court, Petitioner also "interprets *Morales* as supporting its conclusion that application of Marsy's Law to Vicks and others similarly situated does not offend ex post facto provisions," by arguing that the same considerations

present in *Morales* are also present in Marsy's Law. (*In re Vicks* (2011) *formerly published at* 195 Cal. App. 4th 475, fn.15.) However, as the majority opinion explained, this analysis is fatally flawed for several reasons. Indeed, Marsy's Law is unlike *Morales* because the Board does not retain the discretion to tailor the frequency of suitability hearings as they did in *Morales*, rather "Marsy's Law *eliminates* that discretion ... Marsy's Law *mandates* a longer deferral; and the new law in *Morales* gave the prisoner the ability to in effect reinstate his previous right to a hearing at one-year intervals (by showing changed circumstances), but Marsy's Law imposes three-year blackout periods. Moreover, *Morales* was careful to note that the new law applied only to those prisoners already particularly unlikely to be found suitable for parole (i.e., *multiple* murders), but Marsy's Law applies to even those prisoners (including Vicks) whose life offenses do not include murder." (*Id.;* emphasis in original)

Additionally, the lower court found that *Garner* was also unlike the case presented here because in *Garner* "Georgia's parole board had *discretion* in setting the length of the deferral period ... while Marsy's Law *eliminates* that discretion." (*Id.,* 195 Cal. App. 4th at fn.16; emphasis in original.) Furthermore, the lower court explained that, in *Garner,* Georgia's new law contained explicit provisions to expedite parole reviews "in the event of a change of circumstances or new information, by which a prisoner could reinstate his previous right to a hearing at the prior intervals...; in contrast, Marsy's Law sets three-year blackout periods that preclude the prisoner from initiating proceedings to reinstate his previous right to hearings at the prior one-year intervals." (*Id.*) Accordingly, the lower court held that "the salient factors relied on by *Garner* to conclude there was no ex post facto violation are not present in Marsy's Law." (*Id.*)

Next, the lower court reviewed the subsequent decisions that applied *Garner.* One of such cases was *Brown v. Palmateer* (9th Cir. 2004) 379

F.3d 1089, which dealt with a change in law regarding the postponement of release in cases of mentally ill inmates. Under the former law, in order to postpone a scheduled release a medical diagnosis was required to be made by a medical doctor, and under the changed law, the Board was able to make a finding that an inmate was mentally ill and thereby postpone the inmates release under the auspices that the inmate was a danger to society. (*Id.,* 195 Cal. App. 4th at 499-500, fn. 18, citing to *Brown v. Palmateer, supra,* 379 F.3d at 1091.) In *Brown v. Palmateer,* the court recognized that the controlling inquiry "'looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual'" and ultimately found that "[b]ecause 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 requisite risk of longer confinement was present for purposes of ex post facto protections." (*Id.,* 195 Cal. App. 4th at 499-500, fn. 18, citing to *Brown v. Palmateer, supra,* 379 F.3d at 1091, 1095, quoting *Weaver v. Graham* (1981) 450 U.S. 24, 33.)

Additionally, the lower court also reviewed *Himes v. Thompson* (9th Cir. 2003) 336 F.3d 848, since it followed *Morales* and *Garner. Himes* involved changes to the rules regulating a prisoner's eligibility for re-release after a grant of parole had been revoked. As the lower court here explained, "[u]nder 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. ... 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." *Id.,* 195 Cal. App. 4th at 500, citing to *Himes v. Thompson,*

supra, 336 F.3d at 859; internal citation omitted.) Accordingly, the Ninth Circuit held that this possibility of a lengthier period of incarceration created by the new changes amounted to a violation of the *Ex Post Facto* Clause. (*Id.*)

Using these principles to properly guide their decision, the lower court here held that Marsy's Law violates the *Ex Post Facto* Clause because it increases the presumptive deferral period from one (1) year to fifteen (15) years, and increased the minimum deferral periods from one (1) year to three (3) years; it increases the maximum deferral period from five (5) years for multiple murderers, and from two (2) years for inmate's like Mr. Vicks that have not committed murder, to fifteen (15) years; it divests the Board of discretion in setting a hearing any sooner than once every three (3) years; there is no mechanism for the Board to sua sponte learn of changed circumstances or new information (as was the case under the former law wherein a review by a commissioner was required at three (3) years whenever a five (5) year deferral was given in order to ascertain whether the inmate's hearing should be advanced by a year); and it shifts and elevates the burden of proof from the Board to the inmate to prove by clear and convincing evidence that he is not a current danger in order to receive a deferral period shorter than the mandated fifteen (15) years, in contrast to the former law which only required the Board to find by a preponderance of evidence that the inmate is unsuitable for parole, and to justify any deferral longer than one year.

In issuing its holding the lower court found that, contrary to Petitioner's arguments, although "the possibility of advanced hearings serving as a safety valve was one of 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].)" (*Id.,* 195 Cal. App. 4th at 502.) Hence, the lower court found that "the possibility of an advanced hearing is an inadequate substitute for a scheduled hearing when the [Board] reasonably expects that an inmate will become suitable for parole in less than two years, or when the circumstances unexpectedly change or new facts unexpectedly develop during the additional two-year period that would demonstrate suitability. Accordingly, ***the change in the minimum deferral period itself creates a significant risk of prolonged incarcerated*** for inmates who would have received shorter deferral periods under the former statute." (*Id.,* 195 Cal. App. 4th at 503, emphasis added; see also *Himes v. Thompson, supra,* 336 F.3d at 864.)

Lastly, in relation to the burden shifting and elevation of that burden created by Marsy's Law, the lower court notes, "[i]f 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 [the inmate's burden of proving by clear and convincing evidence that future suitability will be attained in less than fifteen (15) years] is not met effectively removes the prior presumption of periodic scheduled hearings and restricts the [Board's] ability to respond timely to change." (*Id.,* 195 Cal. App. 4th at 506.) Accordingly, the lower court explained that "*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, supra,* at pp. 250-251)." (*Id.,* 195 Cal. App. 4th at 506.) Thus, the lower court concluded 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." (*Id.*)

SUMMARY OF ARGUMENT

Under Marsy's Law, the one (1) year presumptive denial is replaced with a fifteen (15) year deferral, and the Board loses its discretion to ever shorten the deferral period to less than three (3) years, thus eliminating the prisoners' opportunity to reduce their time in custody by one (1) or two (2) years no matter how much their conduct in prison has improved. Such an impairment of the Board's discretion not only operates to the detriment of the inmate, but also is detrimental to society as a whole, who must pay the cost of incarceration for an inmate who would be suitable earlier, but is given a lengthier denial solely because no other choice exists under the law. Here, the three (3) to fifteen (15) year mandatory deferrals are particularly disturbing, as the prior law only allowed one (1) or two (2) year denials for non-murder cases such as this one.

A conclusion that the change in law was intended to increase punishment satisfies an *ex post facto* challenge without further inquiry into the law's effect. (*Smith v. Doe* (2003) 538 U.S. 84, 92-93.) Here, the purpose of the amendments wrought by Marsy's Law was intended to be punitive, and was expressly made to prevent life prisoners, especially those convicted of murder, from being released, and specifically to prevent inmates from being considered for parole more frequently than once every three (3) years.[3] Nevertheless, inquiry into the effect of Marsy's Law independently establishes an *ex post facto* violation.

[3] See § ***I(B)*** ["*The Intent of Marsy's Law Is To Increase Punishment*"], pp. 17-19, *infra*.

LEGAL ARGUMENT

I. *ON ITS FACE, MARSY'S LAW IS A VIOLATION OF THE EX POST FACTO CLAUSE.*

A. ***Background***

The presumption against the retroactive application of new laws "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older that our Republic." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265.) In both the civil and criminal context, the Constitution "places limits on the Sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." (*Lynce v. Mathis* (1997) 519 U.S. 433, 440.) Article One, § 10 of the Constitution provides: "No state shall...pass any...ex post facto Law." This clause prohibits any law that "makes more burdensome the punishment of a crime after its commission." (*Beazell v. Ohio* (1925) 269 U.S. 167, 169-170.) The reasons behind the *Ex Post Facto* Clause are to provide fair notice and to assure that legislatures do not enact "arbitrary and vindictive legislation." (*Miller v. Florida* (1987) 482 U.S. 423, 429.) To fall within the *ex post facto* prohibition, the law "must be retrospective – that is, 'it must apply to events occurring before its enactment' – and it 'must disadvantage the offender affected by it,' ... by altering the definition of criminal conduct or increasing the punishment of the crime." (*Lynce*, *supra*, 519 U.S. at 441; internal citation omitted.)

A law is retrospective if it increases the punishment for a criminal act after it has occurred. (*California Dept. of Corrections v. Morales (Morales)* (1995) 514 U.S. 499, 504-505.) Changes in parole standards, practices or policies that apply to cases in which the commitment offense occurred before the changes were passed are considered retrospective. (*Id.*; *Garner v. Jones (Garner)* (2000) 529 U.S. 244, 250.) There is no question that the amendments to §3041.5 made by Marsy's Law are intended to

apply to every parole consideration hearing that occurs after the passage of the amendments without regard to when the life prisoner committed his offense. The express language in Marsy's Law states that "the provisions of this Act shall apply in all matters which arise and to all proceedings held after the effective date [December 16, 2008] of this Act." Given Mr. Vicks' deferral of five (5) years, it is clear that the Board has fully implemented the use of Marsy's Law on all parole eligible life term inmates, including non-murders, such as Mr. Vicks. Thus, the only issue to determine in establishing an *ex post facto* violation is whether Marsy's Law has created a sufficient risk of increasing the measure of punishment for California inmates serving parole eligible life terms.

An *ex post facto* violation does not require a definite showing that the prisoner would have done less time in custody under the old law than he will do under the new law. (*Miller, supra*, 482 U.S. at 432; *Lindsey v. State of Washington* (1937) 301 U.S. 397, 401-402.) ***A lost opportunity to serve less time satisfies the second prong of an ex post facto violation.*** (*Weaver v. Graham* (1981) 450 U.S. 24, 33-34 [finding an *ex post facto* violation in change in credit-earning scheme because it reduced prisoner's opportunity to shorten their incarceration].) Thus, a change in the parole process, even a highly discretionary one, can violate the *Ex Post Facto* Clause. (*Garner, supra,* 529 U.S. at 253.) Although not every change will raise *ex post facto* concerns, a change that creates "a sufficient risk of increasing the measure of punishment" will be held to violate the *Ex Post Facto* Clause. (*Morales, supra,* 514 U.S. at 509.) Whether or not a challenged provision creates a sufficient risk, rather than an attenuated risk of increased punishment is "a matter of degree." (*Id.*) Moreover, changes can violate the *Ex Post Facto* Clause when the new rules sufficiently circumscribe official discretion even if they do not automatically lead to a more onerous result than under the prior law. (See *Miller, supra,* 482 U.S. at 432-433 [finding *ex post facto*

violation in change of presumptive sentence although no change in minimum or maximum sentence]; *Himes, supra*, 336 F.3d at 856 [finding *ex post facto* violation in change in parole regulations that resulted in parole board having only two (2) choices, either 90 days or full term, when it previously had wide discretion, 90 days to full term or any period in between]; *Weaver, supra*, 450 U.S. at 33-34 [finding *ex post facto* violation in change in credit scheme because it reduced the prisoners' opportunity to shorten their time in custody through good conduct.].)

Justice Stevens, in his dissenting opinion joined by Justice Souter in *Morales*, provided a succinct summary of *ex post facto* principles, outlining that "[a]lthough the text of the *Ex Post Facto* Clause is not self-explanatory, its basic coverage has been well understood at least since 1798, when the Court in *Calder v. Bull,* 3 U.S. 386, ... identified four categories of *ex post facto* laws. [Here, t]he case before us today implicates the third *Calder* category, which consists of 'every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed.' *Ibid.* (emphasis in original)." (*Morales, supra,* 514 U.S. at pp.515-516.) Justice Stevens also explained that "an impermissible increase in the punishment for a crime may result not only from statutes that govern initial sentencing but also from statutes that govern parole or early release. ... [Accordingly,] 'a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.' *Id.,* at 32, citing *Wolff v. McDonnell* [(1974)] 418 U.S. 539, ...; *Warden v. Marrero* [(1974)] 417 U.S. 653..." (*Id.,* 514 U.S. 499, 517-519.) Thus, as Justice Stevens noted "an increase in punishment occurs when the State deprives a person of the opportunity to take advantage of provisions for early release." (*Id.,* 514 U.S. 499, 517-519,

citing to *Weaver v. Graham, supra,* 450 U.S. at 33-34; and *Lindsey v. State, supra,* 301 U.S. at 401-402.)

Furthermore, Justice Stevens, quoting Justice Harlan, stated "'[t]he policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons.' *James v. United States* [(1961)] 366 U.S. 213, 247, n. 3, ... (Harlan, J., concurring in part and dissenting in part). Our cases have thus consistently noted that the ***Ex Post Facto Clauses protect against the danger of such 'vindictive legislation.'*** *Miller v. Florida*, 482 U.S. at 429; *Weaver v. Graham*, 450 U.S. at 29; see also *Malloy v. South Carolina* [(1915)] 237 U.S. 180, 183, ..." (*Morales, supra,* 514 U.S. 499, 520; emphasis added.) As outlined in Argument § ***I, B,*** *"The Intent of Marsy's Law Is To Increase Punishment,"* a plain reading of Marsy's Law's purpose and intent statement demonstrates that Marsy's Law is the type of vindictive legislative that Justices Harlan and Stevens warned about.

Given that Marsy's Law radically alters the parole suitability process in California by creating a presumptive fifteen (15) year denial and divesting the Board of its discretion to shorten the deferral period to less than three (3) years, eliminating the prisoners' opportunity to reduce their time in custody by one (1) or two (2) years no matter how their conduct in prison has improved.[4] As the lower court found, this change alone renders

[4] This Court has repeatedly observed: "'[The parole] power enables the Authority to give recognition to a prisoner's good conduct in prison, his efforts toward rehabilitation, and his readiness to lead a crime-free life in society.' (*In re Rodriguez* (1975) 14 Cal.3d 639, 652, ...) Parole decisions, the court has stated, 'are based in large measure on occurrences subsequent

Marsy's Law in violation of the *Ex Post Facto* Clause. Furthermore, the three (3) to fifteen (15) year mandatory deferrals are particularly disturbing, as the prior law only allowed one (1) or two (2) year denials for non-murder cases such as this one. Hence, "[t]hese settled propositions make perfectly clear that the retroactive application of" Marsy's Law violates *ex post facto principles.* (*Morales, supra,* 514 U.S. 499, 517-519.)

B. *The Morales and Garner Decisions Do Not Foreclose This Action Because the Changes to the California Parole Process Provided by Marsy's Law are Much Greater and Far Reaching than the Changes the Morales and Garner Courts Were Faced With.*

The Intent of Marsy's Law Is To Increase Punishment

A conclusion that the change in law was intended to increase punishment satisfies an *ex post facto* challenge without further inquiry into the law's effect. (*Smith v. Doe* (2003) 538 U.S. 84, 92-93.) Here, the purpose of the amendments wrought by Marsy's Law was intended to be punitive, and was expressly made to prevent life prisoners, especially those convicted of murder, from being released. Section 2 of the Victims' Bill of Rights Act of 2008 sets forth "findings and declarations," which include the following:

> "Crime victims are entitled to...above all, the right to an expeditious and just punishment of the criminal wrongdoer." ¶1.
>
> "Each year hundreds of convicted murderers sentenced to serve life in prison seek release on parole from our state prisons. ***California's 'release from prison parole procedures' torture the families of murdered victims*** and waste millions of dollars each year. In California convicted murderers are appointed attorneys paid by the tax dollars of its citizens, and these

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to the commission of the offense.'" (*In re Fain, supra,* 139 Cal. App. 3d at 305.)

> convicted murderers are often given parole hearings every year. The families of murdered victims are never able to escape the seemingly unending torture and ***fear that the murderer of their loved one will once again be free to murder***." ¶5.
>
> "...Marsy's family has endured the trauma of frequent parole hearings and constant ***anxiety that Marsy's killer would be released***." ¶8
>
> "Thousands of other crime victims have shared the experiences of Marsy's family, caused by the ...***failure to impose actual and just punishment*** upon their wrongdoers..." ¶9 (Emphasis added.)

Section 3 of Marsy's Law is a "statement of purposes and intent." It provides:

> "It is the purpose of the People of the State of California in enacting this initiative measure to:
>
> "1. Provide the victims with rights to justice and due process.
>
> "2. Invoke the rights of families of homicide victims to be spared the ordeal of prolonged and unnecessary suffering, and to stop the waste of millions of taxpayer dollars, by eliminating parole hearings in which there is no likelihood a murderer will be paroled, and ***to provide that a convicted murderer can receive a parole hearing no more frequently than every three years, and can be denied a follow-up parole hearing for as long as fifteen years***." (Emphasis added.)

Accordingly, the plain language of Marsy's Law demonstrates that Marsy's Law is vindictive legislation. Marsy's Law was created to lengthen the duration of imprisonment for parole eligible life term inmates. The intent and effect of Marsy's Law is to create further hurdles and obstacles for parole eligible life term inmates. Marsy's Law does this by not only lengthening the default deferral period from one (1) year to fifteen

(15) years, but by also insuring that an inmate will not have the opportunity to come before the Board any sooner than once every three (3) years. Marsy's Law was passed by capitalizing on the public's fear of repeated murders to reach its objective to lengthen prison terms by "***impos[ing] actual and just punishment*** upon ... wrongdoers...[,]" implying that the current system does not actually or justly punish murderers. (Marsy's Law, Section 2, ¶9, emphasis added.) Of course, the scope of the law goes beyond murders, and clearly results in meeting its stated objectives by effectively lengthening the terms actually served. Clearly, Marsy's Law is intended to be punitive in nature.

Removal of Discretion

In both *Morales* and *Garner*, the Board retained the discretion to set hearings prior to the maximum deferral period. *Morales* addressed the case of Inmate Morales, whom had been convicted of murder, released on parole, and then murdered his wife while on parole. Morales pled no contest to the second degree murder of his wife and received a parole eligible life sentence. "Under the law in place at the time respondent [Morales committed his second] murder..., respondent would have been entitled to subsequent suitability hearings on an annual basis. 1977 Cal. Stats., ch. 165, § 46. In 1981, however, the California Legislature had authorized the Board to defer subsequent suitability hearings for ***up to*** three years ***if the prisoner had been convicted of 'more than one offense which involves the taking of a life' and if 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 basis for the finding.***' *Cal. Penal Code Ann. § 3041.5(b)(2)* (West 1982)." (*Morales, supra* 514 U.S. at 503; emphasis added; internal fn. 1 omitted.) Thus, the court explained, "[t]he 1981 amendment made ***only one change***: It introduced the possibility that after the initial parole hearing, the Board would not have to hold another hearing

the very next year, or the year after that, if it found no reasonable probability that respondent would be deemed suitable for parole in the interim period. *§ 3041.5(b)(2).*" (*Id.,* 514 U.S. at 507; emphasis added.) The *Morales* court ultimately held that

> "The amendment creates only the most speculative and attenuated possibility of producing the prohibited effect if 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." (*Id.,* 514 U.S. at 509.)
>
> "First, the amendment applies only to a class of prisoners for whom the likelihood of release on parole is quite remote. The amendment enabled the Board to extend the time between suitability hearings only for those prisoners who have been convicted of 'more than one offense which involves the taking of a life.' *Cal. Penal Code Ann. § 3041.5(b)(2)* (West 1982)." (*Id.,* 514 U.S. at 510; internal fn. 7 omitted.)
>
> "Moreover, ***the Board retains the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner.***" (*Id.,* 514 U.S. at 511; emphasis added.)
>
> "[T]he 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. For these prisoners, the amendment simply allows the Board to avoid the futility of going through the motions of reannouncing its denial of parole suitability on a yearly basis." (*Id.,* 514 U.S. at 512.)

Thus, the *Morales* Court upheld the statute because it was narrowly tailored to target a specific class of prisoners whose own conduct essentially made it a foregone conclusion that they would not be found suitable in the ensuing extra years of the denial term, while preserving the Board's ability to tailor

the denial term to meet an individual prisoner's circumstances. Those protections simply do not exist here.

In *Garner*, "respondent Robert L. Jones began serving a life sentence after his conviction for murder in the State of Georgia. He escaped from prison some five years later and, after being a fugitive for over two years, committed another murder. He was apprehended, convicted, and in 1982 sentenced to a second life term." (*Garner, supra* 529 U.S. at 247.) The *Garner* court explained that "[u]nder Georgia law, ... the ... Board has been required to consider inmates serving life sentences for parole after seven years. ... The issue in this case concerns the interval between proceedings to reconsider those inmates for parole after its initial denial. At the time respondent committed his second offense, the Board's rules required reconsiderations to take place every three years. ... In 1985, after respondent had begun serving his second life sentence, the Parole Board, acting under its authority to 'set forth ... the times at which periodic reconsideration [for parole] shall take place,' *Ga. Code Ann. § 42-9-45(a)* (1982), amended its Rules to provide that 'reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years.' Ga. Rules & Regs., Rule 475-3-.05(2) (1985)." (*Id.*) In Inmate Jones' case "at [his] 1995 review [the Board] set the next consideration hearing for 2003. Had the Board wished to do so, it could have shortened the interval, but the 8-year period was selected based on respondent's 'multiple offenses' and the 'circumstances and nature of' his second offense." (*Id.,* 529 U.S. at 248.) Ultimately, the *Garner* court held, "[t]he law changing the frequency of reviews is qualified in two important respects. ***First, the law vests the Parole Board with discretion as to how often to set an inmate's date for reconsideration, with eight years for the maximum.*** ... Second, the Board's policies permit 'expedited parole reviews in the event of a change in their circumstance or where the Board

receives new information that would warrant a sooner review.' ... These qualifications permit a more careful and accurate exercise of discretion the Board had from the outset." (*Id.,* 529 U.S. at 254; emphasis added.)

Respondent's case is very much ***unlike*** the cases presented in *Morales* and *Garner* because here, the Board's discretion has been hijacked by Marsy's Law. In both *Morales* and *Garner* the saving grace was discretion. In other words, both courts relied heavily on the fact that the Board retained discretion in setting the time between hearings in finding that the retroactive laws in *Morales* and *Garner* did not violate the *Ex Post Facto* Clause.[5] Here however, contrary to Petitioner's argument that Marsy's Law does not create a mandatory three-year blackout period between parole suitability hearings, the stated of purpose of Marsy's Law itself declares that inmates *shall not* receive a parole suitability hearing "***more frequently than every three years,*** and can be denied a follow-up parole hearing for as long as 15 years." (*Statement of Purpose and Intent of Marsy's Law.)*[6]

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[5] Along these same lines, this Court in, *In re Dunham* (1976) 16 Cal.3d 63, 66, in the parole revocation context, reemphasized that, "'Any official or board vested with discretion is under an obligation to consider *all* relevant factors...'" (citing to *In re Minnis* (1972) 7 Cal.3d 639, 645; emphasis in original.)

[6] The full statement and intent of Marsy's Law found on Petitioner's counsel's own website, the Attorney General's website, clearly states:
"The expressed purpose of Marsy's Law is to:

1. Provide victims with rights to justice and due process.
2. Eliminate parole hearings in which there is no likelihood a murderer will be paroled, and to provide that ***a convicted murderer can receive a parole hearing no more frequently than every three years***, and can be denied a follow-up parole hearing for as long as 15 years."

(State of California Department of Justice,
http://ag.ca.gov./victimservices/content/statement.php (last visited

Accordingly, the Court of Appeal in this case was correct when it found that it makes no difference that inmates can request an expedited hearing because in no case can an inmate obtain a suitability hearing more frequently than once every three years. Moreover, it is clear by the Board's own practices that they believe that they lack discretion to set or advance a hearing any more frequently than once every three years. For instance, "[the] Transcript of Parole hearing for CDC #J-55438, Feb. 25, 2009 (on file with the California Department of Corrections and Rehabilitation). (not[es] that [the Board] would have set the next parole hearing date for one year if not for Marsy's Law requiring [the Board] to set a period of three years)." (Richardson, Laura Lienhart, *Impact of Marsy's Law on Parole in California: An Empirical Study* (May 16, 2011). Available at SSRN: http://ssrn.com/abstract=1878594; fn. 80.) Therefore, under Marsy's Law, the Board does not "retain... the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner[,]" as the Board did in both *Morales* and *Garner*. (*Morales*, *supra*, 514 U.S. at 511.)

The essence of Petitioner's argument is that the "qualifying provisions" in § 3041.5 eliminate the risk of increased punishment because they permit a prisoner to petition the Board for an earlier hearing upon alleging a "change in circumstances or new information." Petitioner is wrong for at least two reasons. First, the new rules require a "change in circumstances or new information" only after the prisoner has already been denied parole for at least three years. The Board has no discretion whatsoever to issue a one- or two-year denial in the first instance, even

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November 18, 2011); emphasis added; see also Richardson, Laura Lienhart, *Impact of Marsy's Law on Parole in California: An Empirical Study* (May 16, 2011). Available at SSRN:
http://ssrn.com/abstract=1878594; fn. 55.)

when that shorter period is obviously warranted. Second, and more importantly, even a hearing that is *advanced* upon a showing of new information or changed circumstances cannot occur ***"until a three-year period of time has elapsed"*** since the Board's last parole denial. (§ 3041.5, subd. (d)(3), emphasis added.)[7] In other words, Marsy's Law provides ***no opportunity*** for the Board to ever deny a prisoner parole for less than three years. The Board's claim that the earlier review is somehow the saving grace of this law is simply false.

Respondent provided the Court of Appeal with a true and correct copy of the Board's 1045(A) form, "Petition to Advance Hearing Date." [8] As this form and the *Penal Code* note, inmates "can only submit one petition every three (3) years after either a denial of a prior request to advance the hearing, or a denial of parole given at a hearing." Additionally, BPH form 1045(A) reveals that a copy of the inmate's Petition will be given to the victim or victim's next of kin and the BPH will consider the inmate's petition and the comments received from the victim or victim's next of kin in deciding whether to grant or deny the petition for advancement. As previously discussed, one of the stated purposes of Marsy's Law is to permit victims and next of kin to have a say in how often parole hearings occur. However, the courts have always been clear that these opinions of victims and next of kin do not constitute evidence of unsuitability (*In re Weider, supra,* 145 Cal.App.4th at 590), and this Court even ordered published the second *Dannenberg* decision affirming this rule. (*In re Dannenberg* (2009) 173 Cal.App.4th 237, at 256, fn. 5, ordered published by this Court at S170468.)[9]

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[7] See also fn. 7, Statement of Purpose and Intent of Marsy's Law.

[8] This form was submitted to the Court of Appeal by Respondent as Exh. P.

[9] *In re McLain* (1960) 55 Cal.2d 78, teaches that the denial of liberty "may not be made to turn upon mere whim, caprice, or rumor." Nothing in these

Moreover, the BPH requires the Petitioner to provide copies of documentation to verify the basis for their petition. This is perplexing since this Court held that the passage of time is itself a change in circumstances that may affect a prisoner's suitability for parole. (See *In re Lawrence* (2008) 44 Cal. 4th 1181.) Obviously, this change would be present in every case, and cannot itself be documented. Unlike the former law, where the Board was required to affirmatively investigate ***every*** five (5) year denial to determine if the circumstances had changed after three (3) years, no such mechanism exists here. It is also of significance that this form does not in any way describe or explain what guidelines, if any, the Board will follow in making its decisions. In other words, the Board has no standards whatsoever that it must follow in assessing a 1045(A) Petition, and apparently can deny it solely because the victim or victim's next of kin objects, without regard for how the changed circumstances actually impact the sole relevant issue, whether the inmate remains dangerous.

Furthermore, an Administrative Directive prepared by BPH states, "Penal Code section 3041.5(d)(2) gives the Board ***sole*** jurisdiction, after considering the views and interest of the victim, to determine whether to grant or deny a prisoner's request. The Board ***shall*** have the power to summarily deny a request that does not comply with the provisions of the subdivision or does not set forth the change in circumstance that the inmate

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cases suggests that public outcry may be considered as grounds for denial of parole. On the contrary, reliance upon outcry is inconsistent with the emphasis in these cases upon consideration of in-prison conduct and potential for rehabilitation (*In re Stanley, supra*, 54 Cal.App.3d 1030, 1037), and exclusive reliance upon public outcry is also inconsistent with the mandate that all factors be considered. (*In re Dunham, supra*, 16 Cal.3d at 66.) Case law that evolved under the former Indeterminate Sentencing Law (ISL) retains its vitality under current indeterminate-sentencing provisions, i.e., *Penal Code* §1168(b). (See *In re Stanworth,* (1982) 33 Cal.3d 176; *In re Fain, supra,* 139 Cal.App.3d at 306, fn. 4.)

does not require the additional period of incarceration as determined at the last hearing denial."[10] This Administrative Directive does nothing to define how the law will be applied, what criterion will be used, and how such criterion is defined, except to make it clear that the Board intends to interpret their discretion to be extremely broad.

Shifting and Elevating of the Burden of Proof

Additionally, in neither *Morales* nor *Garner*, was the burden shifted onto inmates as it is in Marsy's Law. Indeed, "[Marsy's Law] altered the standard for deciding when to set the next hearing, ***shifting the burden from the*** state on justifying why the inmate continued to be a threat to public safety necessitating a longer time before the next hearing, ***to the inmate*** in showing the non-existence of reasons why he or she continues to be a threat to public safety." (Richardson, Laura Lienhart, *Impact of Marsy's Law on Parole in California: An Empirical Study* (May 16, 2011). Available at SSRN: http://ssrn.com/abstract=1878594; p.8 citing to *Penal Code* § 3041.5(b); internal footnotes omitted; emphasis added.) Of course, even more troubling is that the inmate is saddled with proving this negative by clear and convincing evidence, while the Board need only find his or her unsuitability by a preponderance of the evidence. Therefore, neither *Morales* nor *Garner* are applicable in this situation. Indeed, the *Morales* court specifically held that "we express no view as to the constitutionality of any of a number of other statutes that might alter the timing of parole hearings under circumstances different from those present here." (*Morales, supra,* 514 U.S. at fn.5.) That is exactly the case here, where this Court is presented with a statute that alters the timing of parole hearings under markedly different circumstances. Here, these different circumstances include an improper and unconstitutional shifting and raising of the burden.

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[10] This Administrative Directive was submitted to the Court of Appeal by Respondent as Exh. Q.

Under Marsy's Law, the presumptive denial period is fifteen (15) years. In order for a life prisoner to gain a deferral period of less than 15 years, the Board must find by "clear and convincing evidence" that the public and the victim's safety does not require a more lengthy period of incarceration than ten additional years. But the standard for granting parole when a prisoner is considered for parole is that it "shall" be granted "unless" the Board finds by a preponderance of the evidence that the prisoner is a current risk to public safety. (§3041; *In re Lawrence, supra,* 44 Cal. 4th 1181.) Thus, it is possible for the Board to be certain that the prisoner would be found suitable for and granted parole in one or two years because a preponderance of the evidence would show he was no longer a risk to public safety and yet have to defer reconsideration of parole for fifteen years because it could not find by clear and convincing evidence that public safety would not require a more lengthy period of incarceration than ten additional years. While that is not a change in the actual standard for finding a prisoner suitable for parole, *when he finally is considered for parole*, it is a substantive change in the burden that will result in prisoners being given lengthy deferral period despite the preponderance of the evidence showing they are no longer any risk to public safety. Thus, due to the lengthy denial period that the new law requires the panel to impose, the inmate must spend a significant additional term in prison, at a high cost to the public, despite potentially being suitable for release much earlier.

Additionally, the application of Marsy's Law to a parole consideration hearing affects a critical stage of the criminal process, the sentencing phase of a criminal case. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) The case of *In re Roberts* (2005) 36 Cal. 4th 575, at 589-590, ruled that parole is an integral part of the overall process of sentencing. (See also *In re Sena* (2002) 94 Cal.App.4th 836, at 839.) As noted in *Roberts*, under California law, the sentencing process is not complete until

the term is set and the inmate released. (*Roberts, supra,* 36 Cal. 4th at 589-590; *Sena, supra,* 94 Cal.App.4th at 839.) In *Santosky v. Kramer* (1982) 455 U.S. 745; 102 S.Ct. 1388; 71 L.Ed.2d 599, the court held: "When the State brings a criminal action to deny a defendant liberty or life, however, the interests of the defendant are of such magnitude that historically, and without any explicit constitutional requirement, they have been protected by standards of proof designed to exclude, as nearly as possible, the likelihood of an erroneous judgment." Thus, the Supreme Court went on to describe the standard that applies to the state, stating: "This Court has mandated an intermediate standard of proof--"clear and convincing evidence" -- when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" (*Id.* at 755-756.) No case has ever authorized putting the burden on the defense. Thus, by altering the burden, and requiring a fifteen (15) year denial absent the defendant meeting that burden, even where the preponderance of the evidence shows the inmate would be suitable in a much shorter period of time, the new law imposes an unlawful shifting of the burden of proof to the defense at a critical stage of the criminal proceedings.

Since changes can violate the *Ex Post Facto* Clause when the new rules sufficiently circumscribe official discretion, even if they do not automatically lead to a more onerous result than under the prior law, and because Marsy's Law does indeed lead to more onerous results than under the prior law, it logically follows that Marsy's Law violates the *Ex Post Facto* Clause. (See *Miller, supra*, 482 U.S. at 432-433 [finding ex post facto violation in change of presumptive sentence although no change in minimum or maximum sentence]; *Himes v. Thompson* (2003) 336 F.3d 848, 856 [finding ex post facto violation in change in parole regulations that resulted in parole board having only two (2) choices, either 90 days or

full term, when it previously had wide discretion, 90 days to full term or any period in between]; *Weaver, supra,* 450 U.S. at 33-34 [finding ex post facto violation in change in credit scheme because it reduced the prisoners' opportunity to shorten their time in custody through good conduct.]

C. *Marsy's Law Violates Ex Post Facto Principles Because it Creates a "Sufficient" Risk of Increasing the Measure of Punishment for California Inmates Serving Parole Eligible Life Sentences.*

As the *Garner* court explained,

> "[t]he States are prohibited from enacting *an ex post facto* law. *U.S. Const., Art. I, § 10, cl. 1.* One function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission. *Collins v. Youngblood* [(1990)] 497 U.S. 37, 42, ... (citing *Beazell v. Ohio* [(1925)] 269 U.S. 167, 169-170...). Retroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept. See *Lynce v. Mathis* [(1997)] 519 U.S. 433, 445-446, ... (citing *Weaver v. Graham* [(1981)] 450 U.S. 24, 32, ...); *Morales*, 514 U.S. at 508-509."(*Garner, supra,* 529 U.S. at 249-250.)

Both the *Morales* and *Garner* courts determined, "we have long held that the question of what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' *must* be a matter of 'degree.' *Beazell, 269 U.S. at 171.*" (*Morales, supra,* 514 U.S. at 509; emphasis original; See also *Garner v. Jones* 529 U.S. 244, 250.) Moreover the *Morales* court specifically held that "we express no view as to the constitutionality of any of a number of other statutes that might alter the timing of parole hearings under circumstances different from those present here." (*Morales, supra,* 514 U.S. at fn.5.) That is exactly the case here

where this Court is presented with a statute that alters the timing of parole hearings under dramatically different circumstances, changing the presumptive denial period from one (1) to fifteen (15) years, and shifting the burden of proof from the Board to the inmate and elevating only the inmate's standard of proof to clear and convincing evidence.

In *Morales,* the Court held, "[w]e have previously declined to articulate a single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition, ... ***and we have no occasion to do so here***." (*Morales, supra,* 514 U.S. at 509; emphasis added.) But, the *Morales* and *Garner* Courts each were clear that in determining whether a law violated the *Ex Post Facto* Clause "[t]he controlling inquiry, ... [is] whether the retroactive application of the change in California law created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.' [*Morales*] 514 U.S. at 509." (*Garner, supra,* 529 U.S. at 250.) Here, Marsy's Law does indeed create a "sufficient" risk of increasing the measure of punishment, a risk that has been evaluated and described in California.[11]

Indeed, a recent study, *Impact of Marsy's Law on Parole in California: An Empirical Study* conducted "[a]n empirical analysis of 211 parole hearings from [November] 2007 to [December] 2010 [that] reveal[ed that] the average amount of time set between parole hearings has almost doubled since the passage of Marsy's Law." (Richardson, Laura Lienhart,

[11] In California, non-LWOP (life without possibility of parole) sentences reflect a "top" or maximum term set by the judge, and the setting of the inmate's actual term is deferred and assigned to the Board. The Board then completes the sentencing process when it assigns the inmate a term of years and allows him or her to be released to parole. (*Roberts, supra,* 36 Cal.4th at 589-590.) By allowing u to fifteen (15) year denial terms, the setting of a term is dramatically delayed, thus increasing significantly the risk of serving additional time.

Impact of Marsy's Law on Parole in California: An Empirical Study (May 16, 2011). Available at SSRN: http://ssrn.com/abstract=1878594, p.2; see also fn. 56.) This study specifically found that "[o]ut of... 211 parole hearing[s] ..., the Parole Board panel denied parole 117 times, granted parole 12 times, and postponed, waived, stipulated, or continued the parole hearing 82 times. Out of the 12 grants of parole only one was given at an initial parole hearing. Marsy's Law was applied in nearly half of the hearings, 109." (*Id.* at p.18.) Furthermore, this study found that

> "***In complete parole hearings where Marsy's Law was applied the time set between parole hearings was nearly double to the time set between parole hearings before the passage of Marsy's Law. In 50% of the post Marsy's Law parole hearings the time set between the parole hearings was at least five years. Prior to... Marsy's Law, 50% of parole hearings resulted in a time set between parole hearings of two years or less. ... Prior to... Marsy's Law the Parole Board set the time between parole hearings at three years or less over half of the time (70%) despite being able to set the amount of time until the next parole hearing for five years. After... Marsy's Law, despite still being able to set parole hearings for three years, the Parole Board has set the amount of time until the next hearing at more than three years over half the time (75%).***" (*Id.* at p.18; emphasis added.)

This means that "the application of Marsy's Law resulted in an increase of nearly 2.5 years." (*Id. at* p.19.) Of significant importance, in order to report accurate results this study controlled for factors such as inmate activities, the inmate's education level, the amount of Counseling 128A Chronos (*Cal. Code of Regs., tit.* 15, § 3312(a)(2) that the inmate received, the amount of CDC 115 Disciplinaries (*Cal. Code of Regs., tit.* 15, § 3312(a)(3)) that the inmate received, the inmate's psychological evaluation, the inmate's gender, the inmate's gang affiliation, the type of crime that was committed, the use of a weapon, sentencing, whether the

hearing was an initial or subsequent hearing, the parole procedure, whether the inmate had an attorney present, whether an objection was made as to the use of Marsy's Law, the primary victim's gender, and the primary victim's age. (*Id. at* pp.19-20; see also Table 6 in Appendix.) Yet still, the study found that

> " ***No other variable showed an equal positive increase in the amount of time set between parole hearings by the Parole Board. Marsy's Law had a more significant impact on the time set until the next parole hearing by the Parole Board than any of the factors that the board must utilize in making their parole decisions or the inmate's activity*** (Table 6)." (*Id. at* pp.19-20; see also Table 6 in Appendix; emphasis added.)

This finding is quite contrary to the Board's past practices given that "prior to Marsy's Law the board had the discretion to set the next parole hearing at the statutory maximum of five years ***yet only did so in about 18 percent of full parole hearings. After the passage of Marsy's Law approximately 32 percent of full parole hearings are set at five years and 57 percent of parole hearings are set at five years or more.***" (*Id. at* p.22; emphasis added.) Hence, it is no surprise that this study ultimately found that

> "***The passage of Marsy's Law has nearly doubled the amount of time between parole hearings (from about 2.5 year[s] to about 5 years), and is a highly significant determinate of the length set between parole hearings***." (*Id. at* p.23; emphasis added.)

Of significance, in *Morales* the Court highlighted that "[t]he California Supreme Court has noted that about 90% of *all* prisoners are found unsuitable for parole at the initial hearing, while 85% are found unsuitable at the second and subsequent hearings." (*Morales, supra,* 514 U.S. at 511; emphasis in original.) Since *Morales* was decided over fifteen

(15) years ago, the state has continued with its tough on crime stance and continues to incarcerate its population at an alarming rate. Accordingly, it was no surprise when the study *Impact of Marsy's Law on Parole in California: An Empirical Study* found that "[o]ut of… 211 parole hearing[s] …, the Parole Board panel denied parole 117 times, granted parole 12 times, and postponed, waived, stipulated, or continued the parole hearing 82 times. ***Out of the 12 grants of parole only one was given at an initial parole hearing.***" (Richardson, Laura Lienhart, *Impact of Marsy's Law on Parole in California: An Empirical Study, supra,* at p.18.) Hence, virtually no-one is granted parole at an initial hearing.

Therefore, the default deferral period of fifteen (15) years mandated by Marsy's Law creates a sufficient risk of increasing an inmate's period of incarceration. This is because inmates, such as Mr. Vicks, that receive a parole eligible life term for non-murder crimes, and inmates whose murder crimes predated 1978, receive a seven (7) year minimum – that is, their sentence is a minimum of seven (7) years up to life. In these cases, if the inmate receives the default fifteen (15) year deferral, this inmates minimum term has now been more than tripled. If the inmate is lucky enough to prove by clear and convincing evidence "***the non-existence of reasons why he or she continues to be a threat to public safety***[,]" he may receive a deferral of ten (10) years. (Richardson, Laura Lienhart, *Impact of Marsy's Law on Parole in California: An Empirical Study, supra,* at p.8 citing to *Penal Code* § 3041.5(b); internal footnotes omitted; emphasis added.) Even so, this would mean that the inmate would serve well over double his minimum term. Likewise, if the inmate were able to again prove by clear and convincing evidence enough to prove by clear and convincing evidence that he would be suitable for parole in a shorter period, he may receive a deferral of seven (7) years. In this case, the inmate will now be serving double his minimum term.

Accordingly, the "sufficient" risk of increasing the measure of punishment for California inmates serving parole eligible life sentences is neither speculative nor attenuated; rather it is a real and proven effect of Marsy's Law. Thus, Marsy's Law reaches the "degree" of violating the *Ex Post Facto* Clause that both the *Morales* and *Garner* courts warned about, and is therefore, unconstitutional. (*Morales, supra,* 514 U.S. at 509; *Garner, supra* 529 U.S. at 250.)

II. AS APPLIED TO RESPONDENT MICHAEL VICKS THE BOARD'S APPLICATION OF MARSY'S LAW VIOLATED THE EX POST FACTO CLAUSE.

Additionally, under *Garner, supra*, the Court also teaches that a neutral parole statute may be violative of the *Ex Post Facto* clause with respect to some prisoners but not to others. (*Id.*, 529 U.S. at 255 [conducting an as-applied analysis of petitioner's claim]; See also *Nulph v. Faatz* (9th Cir. 1994) (per curiam) 27 F.3d 451, 456 [recognizing that "even if the new law is not disadvantageous to defendants in general, an individual will satisfy the detriment requirement (of an *ex post facto* challenge) if he shows that it can 'be said with assurance' that he would have received less severe punishment under the prior scheme"].) Thus, even if the amended §3041.5(b), may be found not *ex post facto* to all prisoners – a notion Mr. Vicks expressly rejects – under the "as applied" challenge requirements, he could certainly demonstrate a clear and certain risk that the amendment increases the punishment for his crimes, as shown heretofore.

After *Garner, supra,* it is clear that a petitioner need not demonstrate that his punishment was increased "with certainty." (See e.g., *Brown, supra,* 379 F.3d at 1096 applying *Garner* standard). Under *Garner,* the Court held that a prisoner must show that, as applied to his own sentence, the law created a significant risk of increasing his punishment. (*Id.*, 529

U.S. at 255.) Although, Mr. Vicks need not show "with certainty" that under the previous parole statute he would have received less than the five (5) year parole deferral that he received, it is indeed with certainty that he would have as his case is a non-murder case and the prior maximum deferral period was two (2) years. In addition, he need not show "with certainty" that he would have been granted parole sooner under the previous statute. A lost opportunity to serve less time satisfies this inquiry. (*Weaver v. Graham* (1981) 450 U.S. 24, 33-34 [finding an *ex post facto* violation in change in credit-earning scheme because it reduced prisoner's opportunity to shorten their incarceration].) Mr. Vicks has been punished substantially by the amended provisions of §3041.5, subd.(b), by a five (5) year denial, two and one half times what he could have received under prior law.

Accordingly, under an "as applied" construct, the retroactive application of the amended §3041.5(b), is also *Ex Post Facto* when applied to Mr. Vicks.

CONCLUSION

Based on the foregoing, the Court of Appeal was correct in finding that Marsy's Law is unconstitutional because it violated the *Ex Post Facto* Clause.

Dated: November 28, 2011

Respectfully submitted,

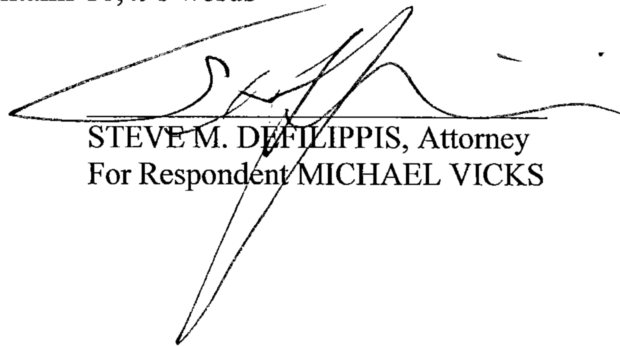
LAW OFFICES OF PICONE & DEFILIPPIS

By:______________________
STEVE M. DEFILIPPIS
Attorneys for Respondent,
MICHAEL VICKS

CERTIFICATE OF WORD COUNT TO RESPONDENT'S ANSWERING BRIEF ON THE MERITS – Case No. S194129

This will certify that this document contains 10,498 words

Dated: 11/28/11



STEVE M. DEFILIPPIS, Attorney
For Respondent MICHAEL VICKS

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STATE OF CALIFORNIA) In Re Michael Vicks, Case No. F060316

I am now, and at all times herein mentioned have been, a citizen of the United States, over the age of eighteen years, a resident of Santa Clara County, California, and not a party to the within action or cause; that my business address is 625 North First Street, San Jose, California 95112; that I served copies of the:

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

By placing said copies in an envelope addressed to:

Attorney General's Office
Attn: Anya M. Binsaca
455 Golden Gate Ave, Suite 11000
San Francisco CA 94102-7004

Court of Appeals-Fourth Appellate District
750 "B" Street, Suite 300
San Diego, CA 92101

San Diego County Superior Court
Attn: Clerk's Office
220 W. Broadway
San Diego, CA 92101

San Diego District Attorney's Office
330 West Broadway, Suite 1320
San Diego, CA 92101

Appellate Defenders, Inc.
Attn: Lynelle K. Hee
555 West Beech Street, Suite 300
San Diego, CA 92101-2939

(X) **BY MAIL:** I placed true and correct copies in a sealed envelope(s), with postage thereon fully prepaid, for collection and mailing at San Jose, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 28, 2011, at San Jose, California.

NAOMI CHAIREZ