Filed 3/19/12 In re Roberts CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re KENNETH A. ROBERTS, on Habeas Corpus.	B226130 (Los Angeles County Super. Ct. No. BH006724)

ORIGINAL PROCEEDING, petition for writ of habeas corpus. Peter Paul Espinoza, Judge. Petition denied.

Kenneth A. Roberts, in pro. per; Daniel Broderick, Federal Defender, and David M. Porter, Assistant Federal Defender, for Petitioner.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Phillip Lindsay and Kathleen R Walton, Deputy Attorneys General, for Respondent.

Defendant Kenneth A. Roberts filed a petition for a writ of habeas corpus in this court contending that the 2009 decision of the Board of Parole Hearings (Board) finding him unsuitable for parole violated his due process rights because it was not supported by some evidence he currently presents an unreasonable risk of danger to society.[1] Roberts also contends that the decision was arbitrary and capricious because it stemmed from a gubernatorial policy against parole for murders and that the application of Marsy's Law (Pen. Code, §[2] 3041.5), deferring his next parole suitability hearing for three years, violated his constitutional rights. We deny the writ petition.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Commitment Offense

A. Official Version

According to the probation officer's report, approximately one week before the murder, Roberts purchased a rifle. On the evening before the murder, a neighbor heard Roberts and the victim, his live-in girlfriend and ex-wife, arguing, and heard Roberts tell the victim that he "was going to knock the hell out of [her] or kill her." The next day, August 3, 1984, at 6 p.m., Roberts and the victim drove to a desert area where Roberts shot the victim in the head approximately two inches behind her ear. Roberts then buried the victim in a shallow grave and returned home around 3 a.m.

In the days following the murder, Roberts discarded the victim's clothes and gave the victim's car to his brother. Roberts told his brother that he had killed the victim, buried her body where no one would find it, and pulled the victim's teeth to prevent her identification. After a co-worker reported to police that the victim was missing, Roberts

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[1] Roberts also challenges the superior court's denial of his petition for a writ of habeas corpus.

[2] All statutory references are to the Penal Code.

was interviewed by police, and he told police that the victim had moved out of their home following an argument on the way home from the desert.

In February 1986, over 20 months later, the victim's remains were discovered after a dog uncovered one of the victim's bones. After an extensive investigation, the police issued a teletype broadcast for Roberts's arrest to all states between California and Michigan. Roberts, in the company of his attorney, turned himself over to the authorities.

Pursuant to a guilty plea for second degree murder with use of a firearm, the superior court sentenced Roberts to an indeterminate term of 17 years to life.

B. Roberts's Version (based on the 2009 Board report)[3]

Roberts stated he and the victim went to the desert to look at the stars and to get away because the victim had been arguing with Roberts's son. Roberts brought his new rifle along to practice shooting targets. At the desert, he and the victim argued about his son. While arguing with the victim and getting ready to leave the desert, Roberts went back to his truck to put his rifle away. Roberts claimed the victim pushed him in the back, and he got annoyed and turned around to push the victim away when the gun accidentally discharged, striking the victim behind her ear. When Roberts saw the victim was dead, he buried her in the desert. Roberts claimed he had no idea the victim's body had been recovered or that the police were investigating his role in the victim's death at the time he turned himself over to the authorities.

II. The Board Hearing

When asked what personal coping skills were absent that resulted in his shooting and burying his ex-wife Annie, Roberts replied:

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3 Roberts did not testify about the events at the 2009 parole hearing.

> I felt that I had to be responsible for everything. Annie was in my life. We got a divorce. She quit her job. She was out of work. She had to move back in after we got divorce[d] because she had no place to go and little money. She went to her home in Fresno and was there for several months. And then she contacted me and said her car was broken down and asked for help. And I felt because I had intervened in her life and caused her to give up and lose what she had that I was responsible. And that just became a complex situation that became unmanageable after a while. I can see now a simpler, easier life is the way to go without all the stress and strains.

Roberts admitted he felt overburden by the responsibilities he took on for his ex-wife. When asked what coping skills he now had to prevent such a thing from happening in the future, he responded:

> Through these self-help programs, I've come to grips with what happened, why it happened, and my involvement in it, and that patience and being able to say no and not feel bad for saying no, and being able to just move on with things and keeping things nice and simple without too much strains or hassles.

Roberts stated he cared for Annie, she was a good friend and he felt bad about leaving her in the desert, but he had a minor son and was trying to make arrangements for his son, which took longer than he thought, and he turned himself in to the police after he made the arrangements. Roberts "expressed [his] very deep sincere sorrow" that he caused the death of his ex-wife and stated he was at fault.

The deputy district attorney observed that Roberts's version of the shooting was "preposterous," Roberts did not call for medical assistance, but quickly determined the victim was dead, he did not call the police because he was really busy with other family matters, but he managed to squeeze in the time to rapidly dispose of the victim's personal belongings and her car. The deputy opined that despite Roberts's professed remorse and concern, when contacted by the police, he made up a story about how they argued, she got out of the car, and he had not seen her since. The deputy concluded that Roberts had

not come to an understanding of his criminal behavior, noting the victim was not a stranger and the shooting was not the result of gang retaliation, a drive by, road rage or a drunken brawl.

At the time of the parole hearing, Roberts was almost 68 years old. The psychological reports had consistently rated Roberts a low risk for future dangerousness, he had almost no disciplinary record (no 115's in 24 years and only one 128A for being out of bounds), no prior crimes of violence (the Board called his criminal history "very, very minimal"), no history of domestic violence, and no history of drug or alcohol abuse.

Roberts had realistic parole plans, including employment skills and opportunities, a place to live upon being released, and support from friends. While in prison, Roberts had obtained numerous vocational and educational skills, participated in long term self-help programming, including anger management classes, and assisted and tutored other inmates.

The Board stated its finding of unsuitability was based on weighing the considerations set forth in the Code of Regulations and found Roberts was not suitable for parole because he posed a present risk of danger. As to the circumstances of the commitment offense, the Board found the crime was "especially heinous and cruel." The Board also found that because Roberts's version of the crime and its aftermath was not credible, it could not trust (or called into question) his statements about his remorse and insight and that he had learned.

III. Superior Court Ruling

The superior court found there was some evidence in the record to support the Board's decision. The court opined that Roberts's claim the shooting was an accident was not believable. Referring to the Board's finding the murder was "'especially heinous and cruel'" and the fact that the motive was very trivial, the court concluded the gravity of the commitment offense and Roberts's refusal to accept responsibility constituted "some evidence" he was currently dangerous.

DISCUSSION

I. Any Evidence

A. Standard of Review

"[T]he governing statute [§ 3041, subd. (b)] provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654.) The Board found Roberts's commitment offense was "especially heinous and cruel."

This court will affirm the Board's "interpretation of the evidence so long as that interpretation is reasonable and reflects consideration of all relevant statutory factors." (See *In re Shaputis* (2008) 44 Cal.4th 1241, 1258 (*Shaputis I*).) "'[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion'" of the Board. (*Id*. at p. 1260.)

"[T]he court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based on the factors specified by statute and regulation." (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 658.) "It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Id*. at p. 677.)

"It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public. [¶] Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry 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." (Italics deleted.) *(In re Lawrence* (2008) 44 Cal.4th 1181, 1212.)

Recently, in *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*) the Supreme Court reaffirmed the limited scope of judicial review and the deferential nature of the "some evidence" standard for reviewing parole suitability determinations. The court explained, "While the evidence supporting a parole unsuitability finding must be probative of the inmate's current dangerousness, it is not for the reviewing court to decide *which* evidence in the record is convincing. Only when the evidence reflecting the present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process." (Citations omitted; original italics.) (*Id.* at p. 211.)

The court reiterated that in reviewing the Board's decision, "[A] court must consider the whole record in the light most favorable to the determination before it, to determine whether it discloses some evidence—a modicum of evidence—supporting the determination that the inmate would pose a danger to the public if released on parole. . . . Any relevant evidence that supports the parole authority's determination is sufficient to satisfy the 'some evidence' standard." (Citations omitted.) (*Shaputis II, supra,* 53 Cal.4th at p. 214.) "The 'some evidence' standard is intended to guard against arbitrary parole decisions, without encroaching on the broad authority granted to the Board and the Governor. When, as in this case, the parole authority declines to give credence to certain evidence, a reviewing court may not interfere unless that determination lacks any rational basis and is merely arbitrary." (Citations omitted.) (*Id.* at p. 215.)

Roberts posits the Board denied parole on the basis of his lack of credibility as it related to the facts of the commitment offense, his version (i.e., that he shot the victim during an argument) has been consistent and the record shows he has accepted responsibility for his crime. Roberts also states there was nothing for the Board to balance – all the factors (age, education, lack of criminal history or prison discipline, etc.) pointed to his suitability for parole.

B. Commitment Offense

In *Lawrence,* the Supreme Court noted that "the Legislature explicitly recognized that the inmate's threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law." (*In re Lawrence, supra,* 44 Cal.4th at p. 1219.) The court concluded that "although the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (Italics deleted.) (*Id.* at p. 1214; see also *Shaputis I, supra,* 44 Cal.4th at pp. 1254-1255 ["[T]he relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude."].)

The standard is "unquestionably deferential," and "'[i]t is well established that a policy of rejecting parole solely upon the basis of the type of offense, without individualized treatment, deprives an inmate of due process of law.'" *(In re Lawrence, supra,* 44 Cal.4th at p. 1210.) However, the standard "certainly is 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 dangerousness." (*Ibid.*)

Roberts asserts the Board failed to articulate how his commitment offense was any more heinous than any other second degree murder and did not provide the requisite nexus as to how the facts of the commitment offense establish he is currently dangerous.

Roberts argues there is no evidence he committed the crime in an especially heinous and cruel manner as he shot the victim during an argument. Roberts's argument is based on his version of the crime, not the official version. Roberts also claims the Board failed to articulate how the offense was any more heinous than other second degree murder. Somewhat inconsistently, Roberts asserts the Board did not find his crime was atrocious, even though he also notes that the presiding commissioner stated Roberts had killed his ex-wife in "an especially heinous and cruel manner" by shooting her behind the ear after purchasing a gun six days before the incident and arguing with her over his son. However, the commissioner went into far more detail than Roberts indicated:

> [I]t appears that this whole thing was set up to where [the victim] was murdered in a very deliberate calculated manner. She was then buried in the desert in a remote place in a grave that Mr. Roberts dug, which was about five feet, ten inches long and three feet deep. And she was not found for 20 months when a hunting dog located some bones, and we know that when one is out in the desert, animals tend to distribute these bones around and this is very unpleasant and unsavory and is very -- certainly demonstrates a callous disregard for human suffering for this sort of thing to happen. The motive for the crime, apparently anger, and Mr. Roberts apparently had found a new friend, and apparently she moved in very shortly thereafter. . . . But Mr. Roberts' conduct before the crime certainly was suspect in that he did purchase a gun only six days at the Kmart before the crime and took her out to the desert, and he states that they went out there after arguing and their house was chaotic and there was a lot of disruption and to watch the stars and whatnot [sic] and he had this gun. There was a round in the chamber, as [the deputy district attorney] noted, and Mr. Roberts says it was an accident where she knocked the rifle and the bullets and what have you off the truck. And she swung at him, and he had the gun in his hand, the rifle and it accidentally went off and on and on. None of this is really credible. First of all, you have to plan to have the bullet in the chamber and safety off and your finger on the trigger, and you have to apply some pounds of pressure to make the trigger go off. And particularly the place on her body, two inches behind her ear, certainly lends credence to the fact that he -- this wasn't an accidentally shooting her in the shoulder or something, so we're concerned about his credibility. And

> then for 20 months he went back and forth between Michigan and here and there and Las Vegas, and saying all the while that he was providing a place for -- trying to get his son, [G.], squared away who was about ten or eleven. But in the meantime, he immediately gave the victim's car to his [brother] and then he gave other things. Well, most of it he threw in the dumpster and there was apparently garbage bags lined up, and he got rid of her things right away. He never reported her missing. Her coworker did. And of course, he gave varying stories about what had happened to her, and it was not until the animals dug up her bones, and that he apparently learned about this and turned himself in right away to the police just days before or about the time they were going to contact him again after his return from some out of state location. Mr. Roberts went to great lengths to hide her body and cover up his crime, and he's given different versions. His version does not really match logical thinking or the evidence, and is a concern of the Panel.

Thus, the Board did find, and explicitly explained why, Roberts's killing of his ex-wife was heinous and cruel. The 2009 Board report (i.e., the 2007 evaluation) and the probation report and supplemental report, which the Board incorporated by reference, provided the evidentiary support for the Board's finding described above. Even though Roberts claims the commitment offense was an isolated incident committed while he was under stress, that position is based on his version of the crime. The official version shows a more calculated crime committed the day after, rather than during, an argument. Afterwards, Roberts buried the victim in the desert, quickly disposed of her belongings and lied to the police about what had happened to her. Moreover, there was no finding by the Board that the commitment offense was committed under an ameliorating circumstance such as stress. (Compare *In re Lawrence, supra,* 44 Cal.4th at p. 1225.)

The issue before us is whether some fact, in addition to the nature of the commitment offense, supports a finding Roberts is currently dangerous to public safety.

C. Lack of Insight

Even though the specific term "insight" is not used in the statutes or regulations that form a basis for granting or denying parole, the concept of self-knowledge is clearly rooted in consideration of an inmate's attitude about the commission of the crime. "An inmate's lack of insight into, or minimizing of responsibility for, previous criminality,

despite professing some responsibility, is a relevant consideration." (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) "'As explained in detail in [*Shaputis I*], where the record also contains evidence demonstrating that the inmate lacks insight into his or her commitment offense or previous acts of violence, even after rehabilitative programming tailored to addressing the issues that led to commission of the offense, the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration.'" (*In re Smith* (2009) 171 Cal.App.4th 1631, 1639.)

In *Shaputis II*, the Court summarized its position about lack of insight. "In *Lawrence*, we observed that 'changes in a prisoner's maturity, understanding, and mental state' are 'highly probative . . . of current dangerousness.' In *Shaputis I*, we held that this petitioner's failure to 'gain insight or understanding into either his violent conduct or his commission of the commitment offense' supported a denial of parole. Thus, we have expressly recognized that the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (Citations omitted.) (*Shaputis II, supra*, 53 Cal.4th at p. 218.) "Past criminal conduct and current attitudes toward that conduct may both be significant predictors of an inmate's future behavior should parole be granted." (*Id*. at p. 219.)

Roberts notes that his most recent evaluation (from 2007) stated: "There continues to be a discrepancy between the file account and the inmate's account, which most likely will never be resolved. Despite this discrepancy, the inmate would still score in the low range in his propensity for future violence." The evaluation concluded Roberts's risk was in the low range for both future violence and general recidivism. The evaluation stated Roberts scored "in the low range on every factor" and "due to the inmate's advanced age and the fact that the controlling case was most likely a result of domestic dispute, such crimes tend not to recur. These two factors lower the inmate's chances of recidivism event further."

However, "A psychological evaluation of an inmate's risk of future violence is information that also 'bears on the prisoner's suitability for release' but such assessment does not necessarily dictate the Board's parole decision. It is the Board's job to assess current dangerousness and parole must be denied to a life prisoner 'if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.'" (Citations omitted.) (*In re Lazor, supra*, 172 Cal.App.4th at p. 1202; compare *In re Twinn* (2010) 190 Cal.App.4th 447, 471-472 [This court reversed the Governor's reversal of the Board's finding the inmate was suitable for parole, noting that even though there was a modicum of evidence the inmate lacked full insight, the Board had found the inmate was "credible, remorseful and that he had insight into his crime for which he accepted full responsibility."].)

Roberts asserts the superior court erroneously determined that the Board based its decision on the commitment offense and his lack of insight because the Board did not determine he lacked insight, but merely questioned the credibility of his remorse and insight. Roberts insists the issue is his dangerousness not his credibility. However, credibility is relevant to the question of insight. (*In re Lee* (2006) 143 Cal.App.4th 1400, 1413-1414 [It is the genuineness of the prisoner's acceptance of responsibility not its timing that is relevant.].)

In addition to the nature of Robert's commitment offense, although not expressly stated, the Board relied on Roberts's lack of insight. The Board stated its concern was that Roberts continued to maintain that his crime was an accident and that the firearm accidentally discharged, i.e., that he continued to minimize his culpability for the offense. The Board concluded, "it's just not a credible statement, so that brings then into question his claim of remorse and his attitude towards the crime." The Board then found Roberts refused to accept responsibility for the crime. The Board indicated Roberts needed to gain insight into the circumstances of the commitment offense and his role in it. By stating Roberts's statements of remorse and insight were not credible, the Board was essentially stating he lacked insight into the nature of his crime and was minimizing his

responsibility for it. (See *In re Lazor*, *supra*, 172 Cal.App.4th at p. 1202 ["An inmate's lack of insight into, or minimizing of responsibility for, previous criminality, despite professing some responsibility, is a relevant consideration."].)

Although generally the most recent evidence of the inmate's degree of insight will bear most closely on the parole determination, that is not necessarily so. (*Shaputis II*, *supra*, 53 Cal.4th at pp. 219-220.) It is apparent the Board was not convinced by the 2007 evaluation that Roberts was a low risk. The Board noted that Roberts had been diagnosed with a personality disorder with passive/aggressive traits and that at the last hearing, the commissioner had requested a new evaluation due to some anger that was expressed by Roberts during the hearing and observed that could not be done as the evaluations are done every five years. The commissioner stated he hoped an evaluation addressing those issues would be done in the future. The Board also noted Roberts needed to develop more concrete parole plans.

Recently, in *In re Taplett* (2010) 188 Cal.App.4th 440, the court discussed cases in which an inmate's lack of insight rendered the circumstances of the commitment offense relevant to the current level of dangerousness. In one case, the inmate had not accepted responsibility for her personal participation in the beating of the victim, and in another case, the inmate's racial hatred rendered the circumstances of the offense still probative to the inmate's current level of dangerousness. *(Id.* at pp. 449-450.) In her description of the factors underlying the commitment offense, Taplett, who was the driver in a drive-by shooting by her friend Cynthia Feagin, stated she did not think Feagin meant to kill the victim. (*Id*. at p. 448.) In Taplett's evaluation, her insight had been rated as adequate. (*Id*. at p. 444.)

In reviewing the Governor's reversal of the Board's decision to release Taplett on parole, the court reasoned that: "Despite having entered a plea to second degree murder, with the requisite element of intentional killing, Taplett continues to deny she also had any such intent. Her description of the circumstances leading to the murder also differ markedly from the facts of the offense as related by other witnesses. Taplett insists she

thought Feagin intended only to fight the victim, despite the fact Taplett intentionally pursued the victim even after Feagin took a shot at the victim's vehicle." (*In re Taplett, supra,* 188 Cal.App.4th at p. 450.) The appellate court concluded Taplett's failure to accept the full extent of her responsibility for the murder rendered the circumstances of the commitment offense relevant to her current level of dangerousness and supported the Governor's reversal of the Board's grant of parole. (*Id*. at p. 450.)

Similarly, Roberts's insistence that the killing was an accident rather than intentional was relevant to whether he was currently dangerous. Roberts told the Board that he had "come to grips with what happened, why it happened, and [his] involvement in it." How can Roberts understand the crime and why it happened or accept responsibility for it if he does not acknowledge the nature of the killing? Hence, Roberts's version of the shooting strained credulity "such that his denial of an intentional killing was delusional, dishonest, or irrational." (*In re Palmero* (2009) 171 Cal.App.4th 1096, 1112.)

Thus, the record supports the conclusion that Roberts "'has failed to gain insight or understanding into either [his] violent conduct or [his] commission of the commitment offense.'" (*In re Smith, supra,* 171 Cal.App.4th at p. 1638.) The lack of insight together with the nature of the commitment offense constituted some evidence Roberts was currently dangerous.

II. Gubernatorial Policy

Roberts asserts the denial of his parole stemmed from a gubernatorial policy against parole for murderers. This argument is without merit. First, Roberts is not challenging a decision by the governor. Second, he adduced no evidence of a gubernatorial policy opposing parole for murders at the time of the 2009 Board decision. In *Rosenkrantz,* the Supreme Court rejected a similar argument because the evidence did not support a finding the Governor had adopted or followed a blanket policy. (*In re Rosenkrantz, supra*, 29 Cal.4th at pp. 683-684.)

III. Marsy's Law

Roberts contends the application of Marsy's Law violated the ex post facto clause of the United States and California Constitutions because it made the punishment for a crime more burdensome after its commission. (*In re Rosencrantz*, *supra*, 29 Cal.4th at p. 639.) The parties cite two recent cases (*In re Russo* (2011) 194 Cal.App.4th 144 and *In re Vicks* (2011) 195 Cal.App.4th 475) discussing whether Marsy's Law violated the ex post facto clause (one concluding it did and the other it did not). Review has been granted in those cases and the issue is pending in the California Supreme Court.[4]

Marsy's Law amended the Penal Code to give the Board discretion to schedule a parole hearing three, five, seven, ten or fifteen years after any hearing at which parole was denied. (§ 3041.5, subd. (b)(3).) The Board may hold an earlier hearing at its own discretion or upon request of a prisoner, if a "change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the prisoner [or inmate]." (§ 3041.5, subds. (b)(4) & (d)(1).)

Roberts posits that Marsy's Law violated the ex post facto clause because, among other changes, previously inmates found unsuitable for parole were presumptively given a one year deferral to the next parole hearing.

Ex post facto laws are those that "retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; accord *People v. Alford* (2007) 42 Cal.4th 749, 755.) "A change in the law that merely operates to the disadvantage of the defendant or constitutes a burden is not necessarily ex post facto. It must be 'a more burdensome punishment.'" (Citations & italics omitted.) (*People v Bailey* (2002) 101 Cal.App.4th 238, 243.) Both California and the United States constitutions prohibit ex post facto laws. (Cal. Const., art. I, § 9; U.S.

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4 The Supreme Court has continued to grant review of this issue in other cases.

Const., art. I, § 10, cl. 1.) The two provisions are analyzed identically. (*Alford*, at p. 755.)

A change in the parole process might constitute a violation of the ex post facto clause if it creates "a sufficient risk of increasing the measure of punishment." (*California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 509.) In *Morales*, the Court found no ex post facto violation where the California Legislature amended section 3041.5 to decrease the frequency of parole suitability hearings for up to three years for inmates who had committed multiple murders if the Board found it was not reasonable to expect parole to be granted before that time because it created "only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." (*Id*. at p. 514.)

The controlling inquiry was whether retroactive application of the amendment created "a sufficient risk of increasing the measure of punishment attached to the covered crimes." (*California Dept. of Corrections v. Morales*, *supra*, 514 U.S.at p. 509.) The Court reasoned there was no ex post facto violation because the amendment did not increase the statutory punishment for the crime; it did not disturb the indeterminate sentence, the substantive formula for securing any reductions to the sentence, the process for setting the minimum eligible parole date or the standards for determining parole suitability. (*Id*. at p 507, 511-513.) In addition, the Board "retain[ed] the authority to tailor the frequency of subsequent suitability hearing to the particular circumstances of the individual prisoner" and inmates given two- or three- year denials, rather than the normative one-year denial, were not precluded from asking, based on changed circumstances, for an earlier hearing. (*Id*. at pp. 511, 513-514.) The Court concluded that the amendment was not unconstitutional when applied to an inmate whose crime had been committed before the effective date of the amendment. (*Id*. at p. 509.)

In *Garner v. Jones* (2000) 529 U.S. 244, 246-247, the Supreme Court concluded that an administrative regulation that increased an inmate's parole hearing deferral period from three years to eight years did not constitute an ex post facto violation. Although the

new rules allowed the parole board to extend parole reconsideration by significantly more than the two additional years at issue in *Morales*, applied to all prisoners serving life sentences, not just those who had committed multiple murders, and afforded fewer procedural safeguard than the amendments at issue in *Morales*, the Court concluded those differences were "not dispositive." (*Garner*, at p. 251.)

The Court reasoned that although the presence of discretion does not displace the ex post facto analysis, "to the extent there inheres in ex post facto doctrine some idea of actual or constructive notice to the criminal before the commission of the offense of the penalty for the transgression, we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in the manner which it is informed and then exercised. The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors, will inform parole decisions. The essence of respondent's case, as we see it, is not that discretion has been changed in its exercise but that, in the period between parole reviews, it will not be exercised at all. The statutory structure, its implementing regulations, and the Parole Board's unrefuted representations regarding its operations do not lead to this conclusion." (Citations & italics omitted.) (*Garner v. Jones*, *supra*, 529 U.S. at pp. 253-254.) The Court emphasized that the new regulations vested the parole board with discretion as to how often to set an inmate's date for reconsideration and the board's policies permitted expedited review in the event of a change in circumstances or the receipt of new information. (*Id*. at p. 254.) Thus, the Court concluded the change in the law did not lengthen the inmate's time of actual imprisonment because it did not deprive the parole board of discretion during the time between hearings. (*Id*. at p. 256.)

The California Supreme Court also found no ex post facto violation where the Legislature had changed the Penal Code to allow for two-year, rather than one-year, parole denials, reasoning the change was a procedural one because it only changed the

frequency of hearings and did not alter criteria for determining suitability or entirely deprive inmates of the right to a hearing. (*In re Jackson* (1985) 39 Cal.3d 464, 472-473.)

As Marsy's Law did not alter the statutory punishment for the crime, the substantive formula for securing credits, calculation of the minimum eligible parole date or the standards for determining parole suitability, it merely changed the "administrative method by which a parole release date is set." (Italics deleted.) (See *In re Brown* (2002) 97 Cal.App.4th 156, 160.) Even though the subject amendment in *Morales* did not involve a change to the minimum deferral period as the amendments effected by Marsy's law have done, section 3041.5, subdivisions (b)(4) and (d)(1) allow the Board to advance a hearing on its initiative or in response to an inmate's request. Similar to the provisions in *Garner*, those provisions ensure the Board retains discretion between scheduled hearings to order an inmate's release and thus eliminate any risk of unduly prolonging a prisoner's incarceration. In sum, the Marsy's Law extension of the minimum deferral period following the denial of parole and its mandated decrease in the frequency with which parole suitability hearings will be held do not violate the prohibition against ex post facto laws.

DISPOSITION

The petition for a writ of habeas corpus is denied.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**