

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re NORMAN G. MORRALL
on Habeas Corpus.

3 Civ. C040322

ORDER MODIFYING
OPINION AND DENYING
REHEARING; NO CHANGE
IN JUDGMENT

THE COURT:

It is ordered that the opinion filed in this case on September 23, 2002, be modified in the following particulars:

1. On page 36, first paragraph under part V, substitute the word "violates" for "violate" so the sentence reads:

Lastly, we address Morrall's contention that the Governor's parole suitability decision violates principles of due process and the prohibition against the ex post facto application of penal laws.

2. At the end of part V, after the first full paragraph on page 37, which ends in the words "ex post facto law," add the following new paragraphs:

In claiming that the prohibition against ex post facto laws precludes the Governor from reviewing and reversing the Board's determination that he is suitable for parole, Morrall does not cite to the United States Supreme Court's decision in *Garner v. Jones, supra*, 529 U.S. 244 [146 L.Ed.2d 236].

It is understandable why Morrall did not rely on that case and why we initially did not address it. In denying Morrall's petition for rehearing, we take the opportunity to explain why that decision is of no assistance to Morrall.

Garner v. Jones addressed a matter not at issue in this case. The change of Georgia law considered there was a parole board rule extending, from three to eight years, the period between automatic parole hearings for some prisoners. (*Garner v. Jones, supra*, 529 U.S. at pp. 246-247 [146 L.Ed.2d at p. 242].) Like in the earlier case of *Cal. Dept. of Corrections v. Morales* (1995) 514 U.S. 499 [131 L.Ed.2d 588], the rule change in *Garner v. Jones* did not alter the standards for exercising discretion in the determination of an inmate's suitability for parole. (*Garner v. Jones, supra*, 529 U.S. at pp. 250, 252-253, 254 [146 L.Ed.2d at pp. 244, 245-246, 246].) Rather, the "essence" of the inmate's case was "not that discretion has been changed in its exercise but that, in the period between parole reviews, it will not be exercised at all." (*Id.* at p. 254 [146 L.Ed.2d at p. 246].) Thus, the question was whether the

retroactive change in the *frequency* of parole hearings created a sufficient risk of a longer period of incarceration than under the earlier rule for an inmate convicted prior to the rule change. (*Id.* at p. 252, 255 [146 L.Ed.2d at pp. 245, 247].) The Supreme Court found no ex post facto violation on the record in that case because (1) the rule change vested the parole board with discretion as to how often to set a parole hearing, with eight years as the maximum period between hearings, and permitted "expedited parole reviews in the event of a change in their circumstance or where the [parole board] receives new information that would warrant a sooner review'" (*id.* at pp. 254, 256-257 [146 L.Ed.2d at pp. 246-247, 248]); (2) this change did not by its own terms demonstrate a significant risk of increased punishment (*id.* at p. 255 [146 L.Ed.2d at p. 247]); and (3) the inmate failed to demonstrate, by evidence drawn from the parole board's actual implementation of the rule change, that it will result in a longer period of incarceration than under the earlier rule (*id.* at pp. 255, 256-257 [146 L.Ed.2d at p. 247, 248]).

The change in law at issue in this case does not alter the *frequency* of parole hearings and does not alter the *standards* the executive branch must use in the exercise of its discretion when determining whether an inmate is suitable for parole. It simply provides that the executive decision whether an inmate is suitable for parole does not stop at the Board but is subject to review by the chief of the executive branch--the Governor--who stands in the shoes of the Board and whose determination must be based upon

the same record that was before the Board and upon the same factors that the Board was required to consider.

Although *Garner v. Jones* did not address this situation, the United States Supreme Court recognized the very idea of discretion contemplates that it is subject to changes in the manner in which it is informed and then exercised. (*Garner v. Jones, supra*, 529 U.S. at p. 253 [146 L.Ed.2d at p. 246].) In other words, the court implied that a change in the exercise of discretion, rather than in the factors to be considered, does not violate the ex post facto clause, even if a longer period of incarceration might result.

That implication is consistent with the decision of *In re Arafiles, supra*, 6 Cal.App.4th 1467, in which this court drew a parallel to a United States Supreme Court opinion holding that a state law permitting the People to appeal an intermediate court reversal of a criminal conviction did not violate the ex post facto clause. (*Id.* at pp. 1485-1486.) "If allowing for higher court review of intermediate court decisions does not violate ex post facto proscriptions, we fail to see how allowing for executive review of parole decisions can be otherwise." (*Id.* at p. 1486.)

Simply stated, a change in the person or persons within the executive branch who has or have final say in the suitability for parole determination does not violate the ex post facto clause. Because Morrall did not rely on *Garner v. Jones, supra*, 529 U.S. 244 [146 L.Ed.2d 236], and since that decision is not on point with respect to the aforesaid issue, a simple reference to *In re*

Arafiles, supra, 6 Cal.App.4th at pages 1481-1488, which correctly resolved the question, is sufficient.

These modifications do not change the judgment.

The petition for rehearing is denied.

FOR THE COURT:

_____ SCOTLAND _____, P.J.

_____ BLEASE _____, J.

_____ HULL _____, J.