



1 violation of the Ex Post Facto Law both the BPH's March 29, 2010  
2 decision finding him not suitable for parole, and the BPH's related  
3 deferral of his next parole hearing for a five year period.

4           Specifically, Petitioner argues that Marsy's Law (also  
5 known as Proposition 9), which was enacted on December 15, 2008, was  
6 applied during his 2010 parole hearing which violated the Ex Post  
7 Facto Clause by shifting the "burden of proof and quantum of proof"  
8 required to demonstrate parole eligibility. Doc. #1 at 5.  
9 Petitioner argues that, prior to the passage of Marsy's Law, there  
10 was a presumption that a prisoner was suitable for parole upon  
11 reaching his minimum eligible parole date (id. at 10-11) and the  
12 burden of proof lay with the Board of Parole Hearings to demonstrate  
13 by a preponderance of the evidence that the prisoner was unsuitable  
14 for parole (id. at 11, 14). According to Petitioner, Marsy's Law  
15 eliminated the presumption of parole suitability and shifted the  
16 burden of proof to the prisoner, who is now required to prove his  
17 parole suitability by clear and convincing evidence. Id. at 10-11,  
18 14.

19           Petitioner also appears to challenge the five-year  
20 deferral of his next parole hearing as a violation of the Ex Post  
21 Facto Law. Doc. #1 at 15. According to Petitioner, prior to the  
22 passage of Marsy's Law, the BPH had to justify a multiple year  
23 deferral of the next parole hearing. Under Marsy's Law, the BPH is  
24 required to defer the subsequent parole hearings for fifteen years  
25 unless it can justify a shorter deferral period. Id.

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II

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2 A "federal court may issue a writ of habeas corpus to a  
3 state prisoner 'only on the ground that he is in custody in  
4 violation of the Constitution or laws or treaties of the United  
5 States.'" Swarthout v. Cooke, 131 S. Ct. 859, 861 (2011) (per  
6 curiam) (citations omitted).

7 The United States Constitution prohibits the federal  
8 government and the states from passing any "ex post facto Law."  
9 U.S. Const., Art. I, § 9, cl. 3 (federal government); Art. I, § 10,  
10 cl. 1 (states). These clauses prohibit the government from enacting  
11 laws with certain retroactive effects: any law that (1) makes an  
12 act done before the passing of the law, which was innocent when  
13 done, criminal; (2) aggravates a crime or makes it greater than it  
14 was when it was committed; (3) changes the punishment and inflicts a  
15 greater punishment for the crime than the punishment authorized by  
16 law when the crime was committed; or (4) alters the legal rules of  
17 evidence and requires less or different testimony to convict the  
18 defendant than was required at the time the crime was committed.  
19 See Stogner v. California, 539 U.S. 607, 611-12 (2003) (citing  
20 Calder v. Bull, 3 U.S. 386 (1798)). Petitioner argues that Marsy's  
21 Law alters the burden of proof and quantum of proof required to  
22 demonstrate parole eligibility in violation of the fourth category  
23 of law prohibited by the Ex Post Facto Clause. However, the fourth  
24 category focuses on the legal rules of evidence required to *convict*  
25 the defendant. It does not address the requirements for parole  
26 eligibility.

27 However, the Supreme Court in Garner v. Jones, 529 U.S.  
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1 this Order and the Petition, and all attachments thereto (i.e., Doc.  
2 #1), on Respondent and Respondent's attorney, the Attorney General  
3 of the State of California. The Clerk also shall serve a copy of  
4 this Order on Petitioner.

5           2. Respondent shall file with the Court and serve on  
6 Petitioner, within sixty (60) days of the issuance of this Order, an  
7 Answer conforming in all respects to Rule 5 of the Rules Governing  
8 Section 2254 Cases, showing cause why a writ of habeas corpus should  
9 not be granted. Respondent shall file with the Answer and serve on  
10 Petitioner a copy of all portions of the state trial record that  
11 have been transcribed previously and that are relevant to a  
12 determination of the issues presented by the Petition.

13           If Petitioner wishes to respond to the Answer, he shall do  
14 so by filing a Traverse with the Court and serving it on Respondent  
15 within thirty (30) days of his receipt of the Answer.

16           3. In lieu of an Answer, Respondent may file a Motion to  
17 Dismiss on procedural grounds, as set forth in the Advisory  
18 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases.  
19 If Respondent files such a motion, Petitioner shall file with the  
20 Court and serve on Respondent an Opposition or Statement of  
21 Non-Opposition within thirty (30) days of receipt of the motion, and  
22 Respondent shall file with the Court and serve on Petitioner a Reply  
23 within fifteen (15) days of receipt of any Opposition.

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4. Petitioner is reminded that all communications with the Court must be served on Respondent by mailing a true copy of the document to Respondent's counsel. Petitioner also must keep the Court and all parties informed of any change of address.

IT IS SO ORDERED.

DATED 05/04/2012



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THELTON E. HENDERSON  
United States District Judge

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