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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re LINDA ELIZABETH RICCHIO

on

Habeas Corpus.

D063229

(San Diego County
Super. Ct. No. CRN13312)

Petition for Writ of Habeas Corpus. Writ Denied.

Charles H. Khoury, under appointment by the Court of Appeal, for Petitioner.

California Board of Parole Hearings, Howard E. Moseley, Tiffany S. Shultz and
Verónica Mendoza for Respondent.

Petitioner Linda Ricchio seeks a writ of habeas corpus requiring the Board of Parole Hearings (BPH) to grant her application to advance her next parole suitability hearing. She argues denial of her application to advance her next scheduled parole hearing was a manifest abuse of discretion because there is no evidence she is presently dangerous if released on parole.

PROCEDURAL BACKGROUND

In 1996, a jury convicted Ricchio of first degree murder and found true she personally used a firearm in committing the offense. She was sentenced to a prison term of 27 years to life. At her 2011 parole suitability hearing, the BPH found Ricchio unsuitable for parole and deferred her next suitability hearing for seven years, pursuant to the amendments to Penal Code¹ section 3041.5, subdivision (b), adopted after the voters approved Proposition 9, otherwise known as the "Victims' Bill of Rights Act of 2008: Marsy's Law" (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 128 (Marsy's Law)). The BPH cited numerous factors in its decision, including the gravity of the commitment offense; Ricchio's lack of insight into the causative factors that led to the murder; her minimization of her responsibility for the murder; her lack of credibility in trying to portray her understanding of what led her to commit the crime and in accepting complete responsibility for the murder; a psychological evaluation that assessed her risk of reoffending to be in the low to moderate range, which the BPH interpreted to mean she had additional room for improvement; and certain behaviors² during her incarceration.

¹ Statutory references are to the Penal Code unless otherwise specified.

² We do not delve into the precise nature of those alleged behaviors because the parties to Ricchio's federal court action, pursuant to a settlement resolving her federal claims, agreed to redact references to these matters from her prison files and to seal those matters. To adhere to the sealing order, we have elected to employ the oblique nomenclature of "certain behaviors" when it is necessary to refer to that information.

In 2012, Ricchio challenged the 2011 finding of unsuitability in writ proceedings before this court. (*In re Ricchio*, D061312.) This court rejected her claims, concluding there was some evidence to support the BPH's determination that she was then unsuitable for parole. (*Id.* at p. 2.) This court also rejected her claim that ex post facto principles precluded the application of Marsy's Law to defer her next suitability hearing for seven years because any risk of prolonged incarceration was ameliorated by her ability to seek an advanced hearing date under section 3041.5, subdivisions (b)(4) and (d)(1). (*Ibid.*)

In separate legal proceedings in federal court, Ricchio pursued lawsuits under 42 U.S.C. section 1983 alleging she had been falsely accused of certain behaviors while incarcerated. In a March 2012 settlement of that action, the parties agreed certain documents from Ricchio's prison files be expunged or redacted. Pursuant to a subsequent April 1, 2013, order by a federal magistrate to enforce the settlement agreement, documents in her prison files referring to the alleged certain behaviors were ordered redacted or expunged.

Contemporaneously with the 2012 settlement of her federal court action, Ricchio petitioned the BPH, pursuant to section 3041.5, subdivision (d)(1), for an order to advance her next parole suitability hearing to an earlier date. Her petition claimed there were changed circumstances or new information establishing a reasonable likelihood that consideration of the public safety did not require the additional period of incarceration. (§ 3041.5, subd. (d)(1).) She specified, as the changed circumstances or new information, that the BPH's 2011 order denying her parole was invalid because it relied on improper and/or false information. The BPH summarily denied the petition, as

permitted by section 3041.5, subdivision (d)(2), on the grounds there were no changed circumstances or new information warranting further review. Ricchio petitioned the superior court for a writ of habeas corpus challenging the denial of her petition to advance the hearing date. The superior court denied the writ. Ricchio then filed the instant petition.

This court issued an order to show cause and directed newly appointed counsel for Ricchio to file a supplemental habeas corpus petition addressing whether application of "Marsy's Law" to Ricchio violated ex post facto principles. Subsequent to our order to show cause, the Supreme Court filed its decision in *In re Vicks* (2013) 56 Cal.4th 274 (*Vicks*) upholding Marsy's Law against a facial ex post facto challenge. It appears *Vicks* forecloses inmates from interposing a facial ex post facto challenge to deferrals of parole hearings authorized by Marsy's Law.³

However, in Ricchio's supplemental petition, she maintains her claim that she adequately demonstrated new information or changed circumstances and, therefore, the

³ *Vicks* appears to have limited its holding to whether Marsy's Law on its face violated ex post facto principles, and to have declined to evaluate the merits of an "as applied" challenge to Marsy's Law. (*Vicks, supra*, 56 Cal.4th at pp. 299-315.) On February 28, 2014, the federal district court filed its order in *Gilman v. Brown* (E.D. Cal. 2014) Case No. S:05-cv00830-LKK-CKD, of which we take judicial notice. (See *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 502, fn. 3.) *Gilman* declared Marsy's Law as implemented violated the class members' protections under the ex post facto clause of the federal Constitution, and required the BPH to apply section 3041.5 as it existed prior to the adoption of Marsy's Law to members of the plaintiff class. Although we interpret *Vicks* as compelling the conclusion that we must reject Ricchio's current claim that the BPH's denial of an advanced hearing was an abuse of its discretion, nothing in our opinion here should be construed to foreclose Ricchio from seeking the relief, if any, to which she may be entitled under *Gilman*.

BPH's summary denial of her petition to advance her next parole suitability hearing to an earlier date was a manifest abuse of discretion.⁴ (§ 3041.5, subd. (d)(1) [BPH decision on request made pursuant to subdivision (d)(2) "shall be subject to review by a court or magistrate only for a manifest abuse of discretion by the board"].) She argues the BPH's 2011 denial of parole necessarily turned on the certain behaviors she allegedly engaged in while incarcerated because there was no *other* evidentiary basis from which the BPH could rationally conclude she posed an unreasonable risk to the community if released on parole. From that predicate, Ricchio argues the new information or changed circumstances--the redaction or expunging of those matters from her record--left the record devoid of any evidentiary basis for concluding she posed the requisite unreasonable risk of danger to the community, and therefore the BPH manifestly abused its discretion within the meaning of section 3041.5, subdivision (d)(1), when it summarily denied her application to advance the date for her next suitability hearing. Ricchio's

⁴ Ricchio's supplemental petition also appears to assert she should be granted a new hearing because, at the 2011 BPH hearing, her counsel was denied access to her confidential prison files, which rendered the 2011 hearing a nullity because this error denied Ricchio her rights to confrontation and assistance of counsel. However, "[i]t has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. [Citations.] The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment." (*In re Clark* (1993) 5 Cal.4th 750, 767-768.) This argument was apparently available to Ricchio when she filed her prior writ petition attacking the BPH's 2011 decision decided adversely to her in *In re Ricchio*, D061312. Because she cites neither a change in law nor new facts that might exempt this claim from the ordinary rule barring repeated applications for habeas corpus reasserting claims previously rejected, we do not further examine this claim.

supplemental petition asserts this court should issue an order requiring the BPH to grant her petition for an advanced hearing date.

II

LEGAL FRAMEWORK

A. The Power to Grant or Deny Parole

The power over parole decisions lies with the BPH. (*Vicks, supra*, 56 Cal.4th at p. 294.) When a life prisoner becomes eligible for parole, it is for the BPH to determine whether the life prisoner is "suitable" for parole. (§ 3041, subd. (b).) Suitability is determined at a hearing before the BPH, and the BPH is required to find a prisoner "suitable" for parole unless it finds the prisoner is a current danger to the community, in which case it must find he or she is "unsuitable" for parole. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204 [under governing statute, BPH " 'must grant parole *unless* it determines that *public safety* requires a lengthier period of incarceration,' " italics added by *Lawrence*, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 654 (*Rosenkrantz*)].)

The decision whether to grant parole is an inherently subjective determination (*Rosenkrantz, supra*, 29 Cal.4th at p. 655) guided by a number of factors, some objective, identified in section 3041 and the BPH's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The BPH must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b)), including the nature of the commitment offense; behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude towards the crime; and parole plans. (*Ibid.*) A factor that alone might not

establish unsuitability for parole may still contribute to a finding of unsuitability.⁵ (Cal. Code Regs., tit. 15, § 2402, subd. (b).) These criteria are general guidelines, illustrative rather than exclusive, and "the importance attached to [any] circumstance [or combination of circumstances in a particular case] is left to the judgment of the [BPH]." (*Rosenkrantz, supra*, 29 Cal.4th at p. 679; Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) The endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz*, at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the BPH is free to consider facts apart from those found true by a jury or judge beyond a reasonable doubt. (*Id.* at p. 679.)

In *Rosenkrantz*, the California Supreme Court addressed the standard the courts must apply when reviewing parole decisions. The court first held that "the judicial branch is authorized to review the factual basis of a decision of the [BPH] denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based upon the factors

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

specified by statute and regulation." (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) The "some evidence" standard is "extremely deferential" and requires "[o]nly a modicum of evidence" (*id.* at p. 667), and the BPH's " "discretion in parole matters has been described as 'great' [citation] and 'almost unlimited' [citation]." [Citation.]' The Board's discretion is limited only by the requirements that it provide an individualized consideration of all relevant factors, provide a written statement that sets forth its reasons for denying a parole date, and not render an arbitrary decision." (*Vicks, supra*, 56 Cal.4th at p. 295, quoting *Rosenkrantz*, at p. 655.)

B. The Deferral Period and Advanced Hearings

If the BPH finds the prisoner "unsuitable" for parole, it also sets a deferral period before the prisoner will next be considered for parole. Under Marsy's Law the deferral periods were increased over those previously authorized "absent a finding by the [BPH] that an earlier hearing is appropriate." (*Vicks, supra*, 56 Cal.4th at p. 283.) Marsy's Law increased the default interval between hearings to 15 years, increased the minimum deferral period to three years from one year, and increased the maximum deferral period to 15 years from five years. (*Vicks*, at p. 284.)

However, Marsy's Law also expressly provided for an "advance hearing," pursuant to which a prisoner may seek, and the BPH may order, a parole hearing sooner than the deferral period originally set by the BPH. (*Vicks, supra*, 56 Cal.4th at pp. 284-286.) Under section 3041.5, subdivision (b)(4), the BPH "may in its discretion . . . advance a hearing . . . to an earlier date, when 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" required by the originally-set deferral period. The procedures and standards for an inmate-initiated petition to advance a hearing date, as specified in section 3041.5, subdivision (d), provide:

"(1) An inmate may request that the board exercise its discretion to advance a hearing . . . to an earlier date, by submitting a written request to the board, with notice, upon request, and a copy to the victim which shall set forth the change in circumstances or new information that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration of the inmate.

"(2) The board shall have sole jurisdiction, after considering the views and interests of the victim to determine whether to grant or deny a written request made pursuant to paragraph (1), and its decision shall be subject to review by a court or magistrate only for a manifest abuse of discretion by the board. The board shall have the power to summarily deny a request that does not comply with the provisions of this subdivision or that does not set forth a change in circumstances or new information as required in paragraph (1) that in the judgment of the board is sufficient to justify the action described in paragraph (4) of subdivision (b)."

Under the advanced hearing procedures, the inmate must show both the existence of new information or changed circumstances and that, considering such new information, there exists "*a reasonable likelihood* that consideration of the public safety does not require the additional period of incarceration." (§ 3041.5, subd. (d)(1), italics added.) We construe the language of section 3041.5, subdivision (d)(1), to mean the requisite showing must establish the nature of the new information or changed circumstances makes it reasonably likely the inmate would be found suitable for parole at an advanced hearing. Moreover, subdivision (d)(2) vests substantial discretion in the

BPH to decide whether the nature of the new information or changed circumstances makes it reasonably likely the inmate would be found suitable for parole at an advanced hearing. Under subdivision (d)(2), the BPH may deny the petition and decline to hold a new parole hearing if, in the judgment of the BPH, the cited new information is not sufficient to create a reasonable likelihood the inmate would be found suitable for parole at a new hearing, and that determination may only be reviewed for a "manifest abuse of discretion." As *Vicks* explained,

"The Board evaluates a petition to determine whether it 'set[s] forth [a] change in circumstances or new information that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration' (§ 3041.5, subd. (d)(1).) Whether there is a reasonable likelihood that the prisoner is suitable for parole is evaluated by considering the suitability criteria set forth in section 3041 and the Board's regulations. [Citation.] As explained above, the Board applies these criteria to 'attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts. [Citation.]' "The [Board's] exercise of its broad discretion 'involves the deliberate assessment of a wide variety of individualized factors on a case-by-case basis, and the striking of a balance between the interests of the inmate and of the public.' " [Quoting *Rosenkrantz, supra*, 29 Cal.4th at p. 655.] If the change in circumstances or new information establishes that there is no longer an evidentiary basis for concluding the prisoner is a current threat to public safety, the Board will abuse its discretion if it declines to advance the hearing date and find the prisoner suitable for parole. If, however, there is some evidence to support a conclusion that the prisoner continues to pose a threat to public safety, it is within the Board's broad discretion to decide whether the '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' " (*Vicks, supra*, 56 Cal.4th at p. 311.)

As construed by *Vicks*, when the BPH considers a petition for an advanced hearing, and there remains "some evidence" to support a conclusion that the prisoner

continues to pose a threat to public safety notwithstanding the changed circumstances or new information, the BPH has broad discretion to decide whether or not the changed circumstances or new information established a reasonable likelihood the prisoner would be found suitable for parole at an advanced hearing and therefore warranted granting the petition for an advanced hearing. If the changed circumstances or new information establishes there is "no longer an evidentiary basis for concluding the prisoner is a current threat to public safety," the BPH would abuse its discretion if it declined to advance the hearing date. The negative implication of this construction by *Vicks* is that, if the changed circumstances or new information do *not* establish the absence of any evidentiary basis for concluding the prisoner is a current threat to public safety, denial of the advanced hearing would fall within the BPH's broad discretion and would trigger the same appellate deference accorded other determinations by the BPH that there is likely to be some evidence for concluding the prisoner remains a current threat to public safety.

III

ANALYSIS

Ricchio asserts the denial of her petition to advance her next parole hearing was a manifest abuse of discretion because, apart from the certain behaviors she allegedly engaged in while incarcerated, there was no evidentiary basis from which the BPH could rationally conclude she posed an unreasonable risk to the community if released on parole. Ricchio asserts the redaction or expunging of those certain behaviors necessarily left the record devoid of *any* evidentiary basis from which the BPH could conclude she posed the requisite unreasonable risk to the community, and therefore she asserts the

BPH manifestly abused its discretion, within the meaning of section 3041.5, subdivision (d)(3), as construed by *Vicks*, when it denied her application to advance the date for her parole suitability hearing.

We are not persuaded by Ricchio's claims because of both procedural and substantive reasons. First, Ricchio's core claim is that no evidence (other than the expunged materials) supports a finding of current dangerousness. However, her claim that there was no evidence to support a finding of current dangerousness was also at the core of her previous writ petition challenging the 2011 denial of parole by the BPH, and this court found (citing her statements to a psychologist that suggested Ricchio lacked insight, remorse, had a " 'superficial acceptance of responsibility' " and employed defenses of " 'denial, minimization and rationalization' ") there *was* some evidence to support a finding of current dangerousness. (*In re Ricchio*, D061312, *supra*, at p. 2.)

It is the general policy in California that "piecemeal presentation of known claims and repetitious presentation of previously denied claims [will] not [be] condoned in this state." (*In re Clark*, *supra*, 5 Cal.4th at p. 777.) The *Clark* court explained that "[i]t has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. [Citations.] The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment." (*Id.* at pp. 767-768.) Although *Clark* recognized the rule against successive petitions is not inflexible, and a successive petition will be permitted when (1) the petition alleges facts demonstrating that a fundamental miscarriage of justice has

occurred, or (2) where the factual basis for a claim was unknown to the petitioner and he or she had no reason to believe that the claim might be made (or where the petitioner was unable to present that claim) and he or she promptly asserts the claim (*id.* at pp. 775-797), Ricchio's argument asks this court to reexamine whether there was some evidence to support a finding of current dangerousness without demonstrating that either of the *Clark* exceptions are applicable. Although this court's previous order denying a writ of habeas corpus has no res judicata effect, courts nonetheless ordinarily decline to reconsider the merits of issues raised and determined in prior habeas corpus proceedings absent a change in the facts or law substantially affecting the petitioner's rights. (*In re Walker* (2007) 147 Cal.App.4th 533, 548.)

Even assuming the expungement of certain behaviors qualifies as a change in facts within the meaning of *Clark*, we conclude there was a modicum of non-expunged evidence from which the BPH could have concluded Ricchio remained unsuitable for parole, and therefore the BPH could have concluded the expungement (the changed circumstances) did not establish a reasonable likelihood she would be found suitable for parole at an advanced parole hearing. The BPH relied on numerous factors when it made its 2011 decision finding Ricchio unsuitable for parole, including her lack of insight into the causative factors that led to the murder, her minimization of her responsibility for the murder, her lack of credibility in trying to portray her understanding of what led her to commit the crime, and her lack of credibility in accepting complete responsibility for the murder. It noted, for example, that she "glossed over" the "tremendous amount" of planning she engaged in leading up to the murder, including acquiring the gun, engaging

in target practice, and moving into an apartment next door to the victim after their relationship ended. The BPH was also concerned that she testified to an incident in which the victim struck her with a towel without mentioning that "one of the things that prompted all of that . . . was [Ricchio's] constant harassment" of the victim, suggesting she might be trying to mitigate her actions. Her other testimony at the BPH hearing additionally suggested she still partially minimized her responsibility, because she claimed she shot the victim when "[h]e was coming at me, either with a grocery bag or a lunge," "[i]t startled me," and she responded by shooting him. She had elsewhere explained her basis for fearing the victim, noting he had "threatened to have me killed" and been "physically violent" toward her.

She also claimed at the hearing that, after firing numerous shots at him, she "knelt down and . . . touched him," and the BPH expressed doubt over the veracity of her claim that she "checked on him" because there was "no indication of that," which "gives us concern" about "how honest you're being with us [b]ecause this is very contradictory [of] what we see the facts to be." The BPH was also concerned that she had only a superficial understanding of how childhood abandonment issues contributed to her desire to hang onto the victim, since she claimed to understand how abandonment issues contributed to her crime, but characterized her upbringing as "pretty good" even though her parents in effect abandoned her when she was young. The BPH also questioned the degree to which she understood her codependency issues because Ricchio, rather than responding to the BPH's questions about codependency by "explain[ing] it right off the bat" and giving an "explanation of what codependency was," gave a "programmized" statement that she was

a codependent and only elaborated after the BPH asked her numerous questions trying to "draw that out of you." Finally, the BPH was concerned about statements suggesting she continued to attribute some blame to the victim, and stated Ricchio needed to "come to grips with you and what you did, and blaming or shifting focus to someone else . . . is again indicative of not having adequately come to grips with this, not certainly having adequate remorse or insight into it."

Her testimony at the hearing provided some evidence from which the BPH could conclude Ricchio had not yet accepted full responsibility for the crime, still lacked insight into her criminality, and was therefore unsuitable for parole.⁶ Although expungement of Ricchio's certain behaviors did represent a *change* in circumstances, elimination of that material did not establish there was no longer *any* evidentiary basis for concluding she remained a current threat to public safety. Instead, because there remained "some evidence to support a conclusion that the prisoner continues to pose a threat to public safety, it is within the Board's broad discretion to decide whether the '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. . . .'" (*Vicks, supra*, 56 Cal.4th at p. 311.)

⁶ An inmate's acceptance of responsibility and signs of remorse may be considered in determining the inmate's suitability for parole (Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); *In re Shaputis* (2008) 44 Cal.4th 1241, 1246), and to the extent there is some evidence the inmate lacks insight into and understanding of the behavior precipitating the commitment offense, there is some evidence from which the BPH could conclude the inmate is currently dangerous. (*Shaputis*, at p. 1260.)

We note that less than one year had passed between the time the BPH found Ricchio unsuitable for parole and the time it considered and rejected her petition for an advanced hearing. Because the BPH relied on numerous grounds for concluding (less than one year earlier) Ricchio was not yet suitable for parole, and only a portion of those grounds had changed because of the expungement, we conclude the BPH did not abuse its broad discretion by concluding it was not reasonably likely she would have been found suitable for parole at an advanced hearing at which everything except the expunged material would have been considered by the BPH.

DISPOSITION

The petition is denied.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.