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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re TAI TRUONG

on

Habeas Corpus.

D063272

(San Diego County  
Super. Ct. No. SCD117464)

Petition for writ of habeas corpus. Petition dismissed.

Benjamin Ramos, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Jennifer A. Neill, Assistant Attorney

General, Jessica Blonien and Nikhil Cooper, Deputy Attorneys General, for Respondent.

Petitioner Tai Truong seeks a writ of habeas corpus requiring the Board of Parole Hearings (BPH) to grant his request to advance his next parole suitability hearing.

Although this court issued an order to show cause, subsequent developments have made the petition moot.

**BACKGROUND**

In 1996, Truong pleaded guilty to crimes, and admitted enhancing allegations, resulting in a sentence of 17 years to life. Truong first became eligible for parole in

2009; at his 2010 parole suitability hearing, the BPH found Truong unsuitable for parole. The Board relied principally on the commitment offense and Truong's disciplinary violations during incarceration, but also noted he had not begun self-help programming until 2004, and at least one psychological evaluator concluded two years earlier that he was in the high range for psychopathy and posed a high risk for future violence. Although the BPH also noted many positive factors militating in favor of finding suitability, it determined he was not then suitable for parole. The BPH set a deferral period of three years for Truong's next parole suitability hearing. Truong challenged the BPH's 2010 ruling denying him parole by petitions for habeas corpus, filed in the superior court and in this court, which alleged there was no evidence supporting the BPH's determination he was unsuitable for parole. The courts denied Truong's petitions.

The following year, Truong filed a request with the BPH, pursuant to Penal Code<sup>1</sup> section 3041.5, subdivision (d)(1), seeking an order from the BPH advancing his next parole suitability hearing to an earlier date, and alleging 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).) The BPH summarily denied the request, as permitted by section 3041.5, subdivision (d)(2),<sup>2</sup> and in 2012 Truong petitioned the superior court for a writ of habeas

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> That subdivision provides, in part, that the BPH "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

corpus challenging the denial of his request to advance the hearing date. The superior court denied the petition, and in 2013 Truong filed the instant petition. This court issued an order to show cause and specifically directed newly appointed counsel for Truong to address whether application of "Marsy's Law" to Truong violated ex post facto principles.

After we issued our order to show cause, the Supreme Court issued its decision in *In re Vicks* (2013) 56 Cal.4th 274 upholding Marsy's Law against ex post facto challenges. Accordingly, to the extent Truong's habeas corpus petition sought relief under ex post facto principles, that basis for relief is now foreclosed. However, Truong's habeas corpus petition appears to maintain his claim that he adequately demonstrated new information or changed circumstances, and therefore the BPH's summary denial of his request to advance his next parole suitability hearing to an earlier date was a manifest abuse of discretion (§ 3041.5, subd. (d)(2) [BPH decision on request made pursuant to subdivision (d)(1) "shall be subject to review by a court or magistrate only for a manifest abuse of discretion by the board"]), and he therefore continues to pursue an order requiring the BPH to set an advanced hearing date. Truong's petition also appears to contain a request that we determine there was no evidence of current dangerousness, and he argues at length that the 2010 BPH ruling was an abuse of discretion because it improperly assessed his youth and immaturity when weighing the circumstances of the original offense in evaluating his current dangerousness. However, Truong had the opportunity to raise those challenges in his earlier petitions for writ of habeas corpus, and

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paragraph (1) that in the judgment of the board is sufficient to justify the action described in paragraph (4) of subdivision (b)." (§ 3041.5, subd. (d)(2).)

under *In re Clark* (1993) 5 Cal.4th 750, 796-799, we decline to entertain successive petitions raising this claim.

## DISCUSSION

Ordinarily, we do not review questions that have become moot. (*National Assn. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746.) As one court instructed:

"It is settled that 'the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]' " (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.)

Numerous other decisions have likewise concluded mootness requires dismissal of an appellate challenge to an underlying ruling. (See *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 11 [dismissing as moot appeal from trial court's denial of injunction to stop election where election had subsequently taken place]; *National Assn. of Wine Bottlers v. Paul, supra*, 268 Cal.App.2d at p. 746 [dismissing as moot appeal where challenged order of Director of Agriculture had been terminated]; *Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 636 [dismissing as moot appeal where challenged legislation had been repealed and replaced with materially different law].)

The policy of dismissing moot appellate proceedings, which applies with equal force to writ proceedings (see *Fleming v. Bennett* (1941) 18 Cal.2d 888; *Lay v. Pacific*

*Perforating Co.* (1944) 63 Cal.App.2d 452), is based on the rationale that "an action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal would be without practical effect, and the appeal will therefore be dismissed." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 749, p. 814.) "[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (*Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863, quoting *Mills v. Green* (1895) 159 U.S. 651, 653.) "A case is moot when the decision of the reviewing court 'can have no practical impact or provide the parties effectual relief. [Citation.]'" (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.) "[W]hen, pending an appeal . . . , an event occurs which renders it impossible for this court, if it should decide the case in favor of [appellant], to grant him [or her] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]" (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541; accord, *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316.) The question of mootness must be decided on a case-by-case basis. (*In re Kristin B.* (1986) 187 Cal.App.3d 596, 605.)

Here, the only relief we could grant under Truong's petition would be to order the BPH to conduct a suitability hearing on a date earlier than the "due course" suitability hearing set by the BPH in its 2010 order. However, we are informed by the parties that

the "due course" suitability hearing set by the BPH in its 2010 order will occur earlier (September 24, 2013) than if this court ordered an earlier hearing. Accordingly, even were we to rule that Truong's 2011 request for an advanced hearing date should have been granted by the BPH, that ruling would have no impact because the relief he sought--an immediate suitability hearing for a date earlier than the due course suitability hearing--is no longer available. We therefore dismiss the petition as moot.

#### DISPOSITION

The petition is dismissed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.