

**In the Supreme Court of the State of California**

In re

**JOHNNY LIRA (C-33767),**

**On Habeas Corpus.**

Case No. S204582

**SUPREME COURT  
FILED**

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Sixth Appellate District, Case No. H036162  
Santa Clara County Superior Court, Case No. 76836  
The Honorable Rise Jones Pichon, Judge

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**OPENING BRIEF ON THE MERITS**

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## ISSUE PRESENTED

When a reviewing court overturns a Governor's decision to reverse the parole board's grant of parole to a life inmate, does the inmate's continued incarceration from the date of the Governor's parole denial until the inmate's eventual release become "unlawful" retroactively such that the inmate becomes entitled to credit for that period against his parole term?

## STATEMENT OF THE CASE

In 1984, a jury found Lira guilty of second degree murder for the 1982 shooting death of his estranged wife. (CT, at pp. 632, 815-816.) He received an indeterminate term of 17 years to life in prison, and was subject to a parole term not exceeding five years upon his release. (*Id.* at p. 632; Pen. Code, §§ 3000, subd. (b), 3001, subd. (b) [1982].)

In 2008, after Lira successfully challenging a 2005 Board of Parole Hearing denial (*In re Lira* (July 30, 2008, H031227) 2008 WL 2917073 [nonpub. opn.]), the Board provided a court-ordered hearing and found Lira suitable for parole (CT, at pp. 639-759). Former Governor Schwarzenegger reversed Lira's 2008 parole grant in April 2009. (CT, at pp. 635-637.) Lira filed for habeas corpus relief, challenging the Governor's reversal. (*Id.* at pp. 1-46.) Less than a year later, at a regularly scheduled hearing, the Board again granted Lira parole. (*Id.* at pp. 1080-1097.) This time Governor Schwarzenegger took no action. (*Id.* at p. 1107.) Lira was released to a five-year parole term on April 8, 2010. (*Id.* at pp. 1102, 1109.)

After his release on parole, Lira filed a supplemental petition claiming that his challenge to former Governor Schwarzenegger's reversal had not been mooted by his release, and requesting that the superior court reduce his fixed parole term for the time he spent "unlawfully incarcerated" after the Board's 2005 deficient parole decision and the Governor's 2009

deficient parole decision. (*Id.* at pp. 1039-1072.) The superior court granted the petition, finding that Lira had been unlawfully denied parole by the Board and Governor. (*Id.* at pp. 1183-1184.) The superior court directed the Board to reduce Lira's parole term by almost four years, crediting him for the time he spent in prison between the Board's 2005 decision and his release in April 2010. (*Ibid.*) Respondent below appealed and received a temporary stay of the superior court's order while the case was pending.

In a published opinion, the Court of Appeal affirmed in part. After granting the parties' petitions for rehearing, the court held that a life prisoner subject to a non-lifetime parole term is entitled to credit against his parole term where the Governor's reversal is later found to be unsupported by some evidence of current dangerousness. The court ruled that a Governor's decision that is unsupported by some evidence converts an inmate's "technically lawful" incarceration into unlawful confinement because the "later determination that a [Governor's decision] was unlawful . . . retrospectively negates the legal justification for having held an inmate after he or she has been found suitable for parole" by the Board. (Slip opn., at p. 21.) While the court held that a Governor's decision that is rendered without some evidence retroactively creates a period of unlawful confinement, it concluded that a similarly deficient Board decision does not. (*Id.* at pp. 20-21.) It reasoned that when a court vacates a Governor reversal, the Board's suitability finding is reinstated, but when a Board denial is vacated, the proper remedy is a new hearing where the issue of the inmate's suitability remains "at large." (*Id.* at pp. 17-19.)

Because the Penal Code requires that all periods of incarceration be credited against an inmate's term of imprisonment, which includes a period of incarceration and parole, the Court of Appeal further held that any unlawful period of incarceration following a Governor's decision must be

credited against the life prisoner's parole period. (*Id.* at pp. 8-9, citing Pen. Code, §§ 2900, 2900.5.) The appellate court thus affirmed the portion of the superior court's order that had credited against Lira's parole term the time he spent in prison after the Governor's 2009 decision—shortening his parole term from five years to four years. (*Id.* at p. 47.)

Less than a month after the Sixth Appellate District decision in *Lira*, the Fourth Appellate District, Division One, issued a published decision explicitly rejecting the holding and rationale of *Lira*. (*In re Batie* (July 20, 2012, D059794) 207 Cal.App.4th 1166, 144 Cal.Rptr.3d 248 [2012 WL 2947642], review granted October 17, 2012, S205057.) Squarely addressing the issue presented in *Lira*, the Fourth Appellate District concluded that the relief imposed in *Lira* exceeded the established scope of judicial due process review of parole decisions, that it violated the separation-of-powers doctrine, and that it contravened Penal Code sections 3000 and 3001. (*Id.* at pp. 251, 263-266.)

The Governor in this matter and the petitioner in *Batie* petitioned this Court for review. On October 17, 2012, the Court granted review in *Lira* and *Batie*.

### SUMMARY OF ARGUMENT

Inmates serving life sentences with the possibility of parole are entitled to certain procedural protections under the due process clause to safeguard their liberty interest in a fair and meaningful parole consideration process. A parole denial that lacks evidentiary support is a procedural violation. And the remedy for a procedural error is a procedural correction. As such, when a Governor's parole denial lacks evidentiary support, the established remedy in the courts below is to reinstate the Board's parole grant. This remedy corrects the procedural error thereby sufficiently protecting the liberty interest at stake, and allows the executive branch to exercise its parole process following reinstatement of the Board's parole



grant. And it does so without unnecessarily interfering with the executive branch's discretion over parole matters.

The Court of Appeal's remedy below is contrary to the established role of the courts in correcting procedural due process violations. For almost 25 years, since 1988, the California Constitution has empowered the Governor to reverse the Board's parole grants for convicted murderers. Yet never before had a panel of the Court of Appeal declared that an inmate was entitled to a remedy completely unrelated to ensuring fairness in the parole process going forward. Rather, in the parole context, this Court and the appellate courts (with the sole exception of the panel below) have consistently rejected imposing a remedy broader than necessary to cure the procedural due process violation. Lira's release from prison rendered reinstatement of the Board's parole grant moot, but the appellate court attempted to vindicate Lira's procedural due process right with a remedy unrelated to the procedural violation—a shortened parole period. In doing so, the appellate court imposed an improper remedy.

In addition, the appellate court's novel remedy interferes with the executive branch's parole authority and therefore violates the separation-of-powers doctrine. The decision of when and how to release convicted murderers into the public rests in the executive's domain. The executive branch therefore maintains the authority and responsibility for determining a lifer prisoner's appropriate parole conditions, which includes the length of the prisoner's parole periods up to the statutory maximum. When the executive branch determined that Lira no longer posed an unreasonable risk to the public if released on parole, it did so with the understanding that his reintegration into society would include a five-year parole period with both general and specifically tailored parole conditions. But by undermining the executive branch in its individualized assessment of how best to reintegrate Lira into society, the appellate court intruded into executive decision

making, infused uncertainty into the parole-consideration process, and usurped the executive branch's statutory authority to determine the length of Lira's parole period.

Last, the appellate court erroneously concluded that the Penal Code entitled Lira to statutorily mandated parole credits. In reaching this conclusion, the court incorrectly characterized Lira's continued confinement after the Governor's decision as "unlawful." Lira, however, remained lawfully confined in prison until his release. The appellate court's view of the Penal Code conflicts with the plain language of the governing parole statutes, which dictate that a life prisoner's parole period must begin upon his physical release from prison, not some retrospective date based on a theoretical release.

The appellate court's judgment must therefore be reversed.

## **ARGUMENT**

### **I. THE REMEDY FOR A DUE PROCESS VIOLATION IS TO PROVIDE THE PROCESS DUE.**

Upon finding that the Governor's decision denying Lira parole was unsupported by some evidence, the Court of Appeal ordered Lira's parole period shortened by one year—the time he remained in prison after the Governor's decision. By imposing this remedy, however, the appellate court inflated the scope of the judiciary's role in its review of parole decisions beyond ensuring that life prisoners receive procedural due process protections throughout the parole-suitability process. Instead, the judicial remedy for a due process violation is limited to providing relief no greater than necessary to cure the violation.

A life prisoner "has no vested right to the determination of his sentence at less than maximum." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1078, 1097 [convicted murderers serving indeterminate life sentences "may serve up to life in prison, but they become eligible for parole

consideration after serving minimum terms of confinement”], citing *People v. Wingo* (1975) 14 Cal.3d 169, 182.) Nevertheless, the law demands that the executive branch provide an adequate and meaningful parole-consideration process for each life prisoner. (*In re Prather* (2010) 50 Cal.4th 238, 251.) Thus, this Court has explained that the judiciary’s role in reviewing executive parole decisions is to ensure that life prisoners receive certain procedural protections, such as a parole-consideration hearing, an opportunity to be heard, a statement of the reasons for the parole decision, and a decision that is not arbitrary and capricious. (See *id.* at p. 251 [explaining that the courts ensure life prisoners receive procedural due process, even though “the decision to grant or deny parole is committed entirely to the judgment and discretion of the Board” and Governor].)

When the executive branch fails to deliver constitutionally required procedural protections, a reviewing court should order only the process due—not impose a substantive right for which the inmate may not be entitled. (See, e.g., *In re Prather, supra*, 50 Cal.4th at pp. 256-257 [proper remedy for Board decision that lacks evidentiary support is to order the Board to provide a new parole hearing in accordance with due process]; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 [proper remedy for Board decision unsupported by some evidence is to order Board “to proceed in accordance with due process of law.”]; *In re Minnis* (1972) 7 Cal.3d 639, 647, 653 [ordering process due, not release from prison]; *In re Carr* (1995) 38 Cal.App.4th 209, 218 [remedy for failure to hold annual parole hearing was to order the hearing to be held]; *In re Stone* (2011) 197 Cal.App.4th 746, 754 [the remedy for the Board’s failure to provide parolee with the decision to retain him on parole was to order Board to provide him a copy of the decision]; *In re Stanley* (1976) 54 Cal.App.3d 1030, 1041-1042; *In re Bowers* (1974) 40 Cal.App.3d 359, 362; *In re Love* (1974) 11 Cal.3d 179, 185; *Raditch v. United States* (9th Cir. 1991) 929 F.2d 478, 481 [“A

violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right to which the claimant may not be entitled on the merits.”].) For instance, the remedy for a Governor’s parole decision unsupported by some evidence is limited to the court vacating the gubernatorial decision and ordering the executive branch to reinstate the Board’s parole grant and proceed with the process due. (*In re Twin* (2010) 190 Cal.App.4th 447, 473-474 [court does not simply order the inmate’s immediate release from prison, but rather permits the executive branch to observe its typical processes with regard to life prisoners who have a parole grant]; see also Cal. Code Regs., tit. 15, §§ 2482, 2289 [Board sets prisoner’s base term and expected release date after suitability finding], § 2451 [Board may rescind a parole grant for cause].)

Observing this “established scope of due process review” in the parole context, *Batie* held that once a life prisoner has already been released on parole, the proper remedy “is to dismiss [the habeas matter], for lack of any pending controversy upon which relief may properly be granted with respect to any award of credits against the parole period.” (*In re Batie*, *supra*, 144 Cal.Rptr.3d at pp. 251, 266, review granted October 17, 2012, S205057.)<sup>1</sup> Just like in this case, the petitioner in *Batie* had been released from prison while his challenge to a gubernatorial parole decision was pending. He too sought credit toward his parole term and argued that the case was not moot. The *Batie* court rejected these arguments. (*Ibid.*)

*Batie* explained that the denial of parole without evidentiary support violates the life prisoner’s right to “a constitutionally adequate and

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<sup>1</sup>Petitioner is not citing *Batie* as authority and recognizes that the *Batie* opinion may not be relied upon by a court or a party as legal authority. (Cal. Rules of Court, rule 8.1115(a).) The reference to *Batie* merely acknowledges this Court’s grant of review in *Batie* on the same legal issue presented here.

meaningful review of [his] parole decision.” (*Id.* at p. 255, citing *In re Prather, supra*, 50 Cal.4th at p. 251; see also *Superintendent v. Hill* (1985) 472 U.S. 445, 454 [a decision supported by some evidence is a procedural due process right]; *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 655-658.) But, because the petitioner had already been released to parole, the established scope of due process review mandated that the court dismiss the action. Indeed, even if the Governor’s 2010 reversal of Batie’s parole grant was unsupported by the evidence, the petitioner had already received the process he was due. (*Id.* at p. 266, citing *In re Twin, supra*, 190 Cal.App.4th 447, 473-474 [when a court vacates a flawed Governor’s parole decision, the court does not simply order the inmate’s immediate release from prison] and *In re Miranda* (2011) 191 Cal.App.4th 757, 763 [denying prisoner’s claim for reduction in parole credits based on an invalid Board decision].)

*Batie*, therefore, observed the traditional function of the courts with regard to parole. For instance, when a Board decision is unsupported by some evidence, this Court has instructed that the proper remedy is remand to the Board for a new parole hearing in compliance with due process. (*In re Prather, supra*, 50 Cal.4th at p. 244.) In the same vein, a reviewing court cannot issue “a get-out-of-jail-free card” simply because it finds a parole decision to be unsupported by some evidence. (*In re Miranda* (2011) 191 Cal.App.4th 757, 763 [denying prisoner’s claim for reduction in parole credits based on an invalid Board decision].) Indeed, the court’s role is to provide relief tailored to correcting the due process violation. Thus, when fashioning a remedy to correct the due process violation, a court cannot “bypass the proper procedure[s,] conclude that [the inmate] was entitled to be released as of his [challenged] parole-suitability hearing . . . and “order a reduction of his parole period.” (*Ibid.*)

Ensuring that the executive branch “provide(s) procedural fairness” going forward appropriately addresses the constitutional violation. (See *In re Batie, supra*, 144 Cal.Rptr.3d at p. 256.) The constitutional error is the flawed process, not the executive branch’s failure to release the inmate. Thus, like the prisoner who receives a procedurally deficient Board denial, a prisoner who receives a procedurally deficient Governor’s denial has no substantive right to immediate release from prison. In both circumstances, the prisoner was denied procedural due process, not because he had a constitutional right to be released from prison but because he had a constitutional right to a fair and meaningful review process.

The Court of Appeal below erred by fashioning a remedy that went beyond ensuring Lira received a “constitutionally adequate and meaningful” parole decision. (See *In re Prather, supra*, 53 Cal.4th at p. 251 [judicial review is to ensure executive branch renders a decision supported by some evidence].) Like the prisoner in *Batie*, Lira already received fair parole procedures when the Board granted him parole in 2010 and the Governor did not reverse the decision, which resulted in his release from prison. Therefore, on its own accord, the executive branch procedurally corrected the Governor’s 2009 procedural error. In turn, rather than issuing habeas relief, the Court of Appeal below should have concluded that the proper disposition was “to dismiss the petition, for lack of any pending controversy upon which relief may properly be granted.” (*In re Batie, supra*, 144 Cal.Rptr.3d at p. 266.) Indeed, Lira already has received the process he was due.

In sum, the Court of Appeal exceeded the scope of the due process violation when it declared that Lira was entitled to release at the time of the Governor’s 2009 denial, and ordered the executive branch to shorten his parole period for the time he remained in prison thereafter.

## II. A JUDICIAL REMEDY THAT SHORTENS OR ELIMINATES A CONVICTED MURDERER'S PAROLE PERIOD VIOLATES THE SEPARATION-OF-POWERS DOCTRINE.

The judiciary violates the separation-of-powers doctrine when it imposes habeas relief that “defeat[s] or materially impair[s] the inherent functions” of the executive branch. (*Prather, supra*, 50 Cal.4th at p. 254, citing *In re Lugo* (2008) 164 Cal.App.4th 1522, 1538.) In the parole context, boundaries between these two branches of government exist to ensure that the some-evidence review does not “encroach[] on the broad authority granted to the Board and the Governor.” (*In re Shaputis* (2011) 53 Cal.4th 192, 215 (*Shaputis II*).

The decision of “[w]hether to grant parole . . . is [] vested in the executive branch.” (*Shaputis II, supra*, 53 Cal.4th 192 at pp. 198-199.) Once the Board grants parole and the Governor takes no action under his discretionary review authority (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 638 [explaining the levels of review within executive branch]), the “[B]oard has sole authority, within the confines set by the Legislature,” to oversee the length and conditions of that inmate’s parole (*Bergman v. Cate* (2010) 187 Cal.App.4th 885, 898, citing Pen. Code, §§ 3000, 3041). The judiciary’s function in parole for life prisoners is to guarantee procedural due process. (*In re Prather, supra*, 53 Cal.4th at p. 251; *Rosenkrantz, supra*, 29 Cal.4th at p. 658.)

Observing these boundaries between the judicial and executive branches, the appellate court’s analysis in the review-granted *Batie* case shows that *Lira*’s rationale is wrong. As *Batie* noted, judicially imposed reductions in a life prisoner’s parole period “disregards important separation of powers principles . . . .” (*In re Batie, supra*, 144 Cal.Rptr.3d at p. 263.) *Batie* recognized that “judicial remedies are impliedly restricted by separation of powers concerns, when the Board’s core functions are

concerned.” (*Id.* at p. 263, citing *In re Prather, supra*, 50 Cal.4th 238.) *Batie* further noted that, under former Penal Code section 3000, subdivision (b), the Legislature vested the Board with “the power and discretion to regulate the length of parole terms.” (*Id.* at p. 258.) *Batie* thus reasoned that, “the court [must] allow the executive branch to carry out its own functions, as defined by statute and the Constitution.” (*Id.* at p. 266, citing *In re Prather, supra*, 50 Cal.4th at p. 258.) And, “[e]ven if we assume that the 2010 Governor’s reversal was unsupported by the evidence, this court cannot replace the Board as the decision maker on how long *Batie*’s parole period should be, or when it should begin, or what conditions should be imposed in the interest of protecting public safety.” (*Id.* at p. 265.)

Ten years ago, this Court endorsed judicial review of parole decisions. (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) This Court, however, recently cautioned that a reviewing court’s authority to conduct a some-evidence review in this realm “is meant to serve the interests of due process by guarding against arbitrary or capricious parole decisions, *without* overriding or controlling the exercise of executive discretion.” (*In re Shaputis II, supra*, 53 Cal.4th at p. 199, emphasis added.) Thus, even though a court maintains broad authority to craft a remedy ““as the justice of the case may require”” (slip opn., at pp. 7-8, quoting *In re Crow* (1971) 4 Cal.3d 613, 619), habeas relief to correct a due process violation in the parole-consideration process cannot “improperly curtail[] the Board’s exercise of the authority it possesses under the governing statutes.” (*In re Prather, supra*, 50 Cal.4th at p. 522.)

Two years ago, this Court rejected two remedies that would have impermissibly interfered with the exercise of the executive’s parole authority. (*Prather, supra*, 50 Cal.4th at p. 522.) In *Prather*, two separate life prisoners received arbitrary Board parole denials that the appellate courts held lacked sufficient evidentiary support. In one case, the Court of



Appeal ordered the Board to find the inmate suitable for parole unless, during a new parole hearing, it found recent evidence of the inmate's dangerousness. In the other case, the Court of Appeal directed the Board to promptly release the inmate in accordance with his parole conditions. This Court, however, rejected both judicial remedies as violations of the separation-of-powers doctrine. (*Ibid.*)

This Court reasoned that the governing statutes vested the Board with the discretion to consider “*all* relevant factors” in assessing an inmate's dangerousness (*Prather, supra*, 50 Cal.4th at p. 255), and once the Board has done so, the Governor maintains “independent constitutional authority to review the Board's parole decision” (*id.* at p. 257). As a result, an order barring the Board from reconsidering the prisoner's suitability, or even restricting the type of evidence the Board can consider during remand, impermissibly impairs the executive branch's “statutory and constitutional authority over parole decisions.” (*Ibid.*)

Similarly here, by ordering the executive branch to reduce Lira's parole period, the Court of Appeal's remedy impairs the executive branch's statutory parole authority over indeterminate life prisoners. The Board maintains the authority and responsibility for determining a lifer prisoner's appropriate parole conditions, which includes the length of parole (up to three years for pre-1979 murderers, up to five years for pre-1983 murderers, and up to life for post-1982 murderers). (Former Pen. Code, § 3000, subd. (b) [1978][“the period of parole shall not exceed three years in the case of an inmate imprisoned under a life sentence”]; former Pen. Code, § 3000, subd. (b) [1982][“the period of parole shall not exceed five years in the case of an inmate sentenced under a life sentence”]; Pen. Code, § 3000.1 [“a person convicted of second degree murder that occurred after January 1, 1983, is subject to lifetime parole”]; see *In re Carabes* (1983) 144 Cal.App.3d 927, 930, fn. 1 [noting statutory change in parole duration is

not retroactive].) In fact, the Legislature recognized that “the period immediately following incarceration is critical to successful reintegration of the offender into society” and thus the sole discretion to waive the parole period rests with the Board. (Pen. Code, § 3000, subs. (b)(1)-(2), (7).) Murderers who have spent the last 30 years or more in prison, such as Lira, certainly require a parole period as much as, and likely more than, other felons. (Cf. *People v. Burgener* (1986) 41 Cal.3d 505, 532 [“That the parole [period] may come at the end of a term of imprisonment, rather than as part of that term, does not lessen the societal interest” in reintegrating the offender into society and preventing the commission of additional crimes], disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753; *Bergman v. Cate* (2010) 187 Cal.App.4th 885, 896, 898 [noting that parole “is a statutorily mandated consequence” of defendant’s conviction and not a permissible subject of plea negotiations], citing *In re Moser* (1993) 6 Cal.4th 342, 357, *People v. Avila* (1994) 24 Cal.App.4th 1455, 1461.) However, by shortening Lira’s parole period, the appellate court significantly weakened the Board’s ability to ensure Lira’s complete and successful reintegration into society.

Judicially imposed reductions in a prisoner’s parole period are uniquely intrusive on the executive’s authority over indeterminate life prisoners. Indeed, the governing statutes vest the Board with the authority to determine the safest way to reintegrate convicted murderers back into society. (*In re Bush* (2008) 161 Cal.App.4th 133, 145, [when conducting suitability reviews, “the Board must consider all relevant information, ‘including any conditions of treatment . . . [or] the use of special conditions under which the prisoner may be safely released to the community . . . .’”] quoting Cal. Code Regs., tit. 15, § 2281, subd. (b).)

Thus, in 2008, when the Board initially found Lira suitable for parole during a parole consideration hearing, it mandated that he serve a five-year

parole period and be prohibited from using drugs and alcohol, associating with gang members, and contacting the victim's family. (CT, at p. 754.) Similarly, when the Board found Lira suitable in 2010, it again imposed these same parole restrictions. (*Id.* at p. 1102 [reflecting special parole conditions Board imposed].) The Board imposed these "special conditions" specifically because these particular issues plagued Lira in the past. (*Id.* at pp. 649, 703, 737-739, 816, 821-822, 828-829, 836-894, 940, 944.) The Board therefore determined that the executive branch needed to closely regulate these aspects of Lira's activities following his release from prison, and that Lira should be supervised for a five-year period. (*Id.* at pp. 737-759; see also *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 655 [noting that the Board's task "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 the public."].)

The Board's objective here necessarily depends on its continued ability to supervise the terms of Lira's parole, up to the maximum duration prescribed by statute. (Cf. *Sampson v. California* (2006) 547 U.S. 843, 850 [the state "extend[s] parole only because it is able to condition it upon compliance with certain requirements"], citation omitted.) Therefore, the Court of Appeal's decree shortening Lira's parole period not only undermines public safety, it also improperly curtails the Board's exercise of its "broad discretion" in determining how best to reintegrate a convicted murderer into society.

Moreover, the ruling in the opinion below improperly intrudes upon executive decision making during the Governor's review process. Parole suitability determinations are difficult decisions. When weighing the numerous considerations involved in a parole decision, the Governor should not have to be concerned that his decision may jeopardize public

safety if a reviewing court later vacates his decision and shortens or eliminates the inmate's parole period.

The Court of Appeal's opinion here infuses significant uncertainty into the parole process and impacts public safety. Because habeas litigation, appeals, and delays in the filing of claims can take years, murderers may have little to no parole terms by the time the litigation is resolved. This uncertainty undermines the entire parole-consideration process and interferes with the executive's exercise of its discretion.

**III. A CONVICTED MURDERER WHO COMMITTED HIS LIFE CRIME BEFORE 1983 DOES NOT HAVE A STATUTORY RIGHT TO HAVE HIS PAROLE TERM SHORTENED BASED ON A VACATED GOVERNOR'S DECISION.**

The Court of Appeal below determined that Lira maintains a statutory right to have his parole period reduced for the time he spent in prison after the Governor's decision. The court reasoned that this portion of Lira's confinement was "unlawful" and that he therefore was entitled to credit against his parole term under Penal Code section 2900. The court's holding, however, is flawed. Prison authorities never unlawfully incarcerated Lira, and the reduction of Lira's parole period is inconsistent with the statutes governing parole for indeterminate prisoners.

**A. Lira's Confinement Was Never Unlawful.**

Penal Code section 2900 states that "all time served in an institution . . . shall be credited as service of the term of imprisonment," which includes "any period of imprisonment and parole." (Pen. Code, §§ 2900, subd. (c), 2900.5.) Relying on dicta from *In re Bush, supra*, 161 Cal.App.4th at pp. 144-145, the Court of Appeal below deduced that any unlawful period of confinement "is not part of the 'term of imprisonment,' and an inmate who has been released on parole is entitled to credit for such a period." (Slip

opn., at p. 17.) To try to justify the leap that Lira was entitled to parole credits, the Court of Appeal further declared that a deficient Governor's decision later overturned by a court converts a life prisoner's "technically lawful" incarceration into "unlawful" confinement. (*Id.* at p. 20.) Also, *Lira* suggested that a similarly deficient Board decision does not create "unlawful" confinement because "the inmate has not yet been found suitable for parole" when the Board improperly denies parole. (Slip opn., at pp. 20-21.)

Again, the analysis employed in *Batie* dictates rejection of the *Lira* court's notion that a life prisoner's confinement can become "unlawful" based upon "the process of the Governor's independent review pursuant to [Penal Code] section 3041.2 and the Constitution." (*In re Batie, supra*, 144 Cal.Rptr.3d at p. 263.) *Batie* recognized that, as a convicted murderer, the indeterminate prisoner remains "in lawful continuous custody on his life sentence" even after the Governor's allegedly deficient review process. (*Id.* at p. 265.) *Batie* further rejected the "theory" that, before the petitioner's physical release from prison, "the period of [the petitioner's] prison confinement can be segregated into portions attributable to the Board's grants, and/or Governor reversals, and individually evaluated to support the issuance of any judicially awarded credits." (*Id.* at p. 265; see also *id.* at p. 263 [finding the *Lira* court improperly conducted "free-form hindsight determinations of whether [Lira's] incarceration was technically lawful or not"].) *Batie* reasoned that, even though the Board initially granted *Batie* parole, that grant "had not yet become final" when the Governor exercised his constitutional authority to reverse it. (*Ibid.*) Therefore, the "inevitable delay among the various [parole consideration] proceedings did not convert [petitioner's] lawful life imprisonment sentence into unlawful custody," even if the Governor rendered a decision unsupported by some evidence. (*Ibid.*)

Similarly, here, Lira was never unlawfully confined and the *Lira* court's reasoning on this point "is not persuasive." (*In re Batie, supra*, 144 Cal.Rptr.3d at p. 265.) As an indeterminately sentenced inmate, Lira had "no 'vested right' to have his sentence fixed at the term first prescribed by the [Board] or any other period less than the maximum sentence"—life. (*In re Dannenberg, supra*, 34 Cal.4th at p. 1097, internal quotations and citation omitted.) In other words, Lira had no vested right to be released from prison. The Governor found Lira unsuitable for parole after exercising his constitutional authority to review Lira's parole suitability. But Lira's continued incarceration on his life sentence did not become retroactively "unlawful" merely because the Governor's decision was later found to lack evidentiary support. (*In re Batie, supra*, 144 Cal.Rptr.3d at pp. 265-266; see also *id.* at p. 263 ["Official duties are presumed to be correctly carried out unless otherwise demonstrated in an appropriate form of review, and the period of judicial review of a Governor's reversal does not automatically remove that presumption."], citing Evid. Code, § 664.) And, like the petitioner in *Batie*, Lira has not shown that his continued incarceration after the Governor's 2009 reversal until his release from prison "was attributable to any 'unlawfulness' in the proceedings," such as if the Governor had rendered an untimely parole denial resulting in the action becoming "void." (*Id.*, citing *In re Bush, supra*, 161 Cal.App.4th at pp. 143-145.)

In short, a judicial finding that a parole decision is unsupported by some evidence cannot be converted into a finding that government officials unlawfully incarcerated that prisoner. Rather, judicial review of executive parole decisions is limited to ensuring that a prisoner receives a constitutionally adequate process with regard to his consideration for parole. Lira, therefore, remained "in lawful continuous custody on his life

sentence” even after the Governor’s allegedly deficient review process. (*Id.* at p. 264.)

Moreover, the *Lira* court’s attempt to differentiate the “unlawful” effect of the Governor’s deficient decision from the lawful effect of a similar deficient decision by the Board is unpersuasive. According to *Lira*, a Board decision unsupported by some evidence does not create “unlawful” confinement because “the inmate has not yet been found suitable for parole.” (Slip opn., at pp. 20-21.) But this is a distinction without a difference. As with a Board denial, a life prisoner has similarly “not yet been found suitable” when the Governor reverses a Board grant. Indeed, when a panel of the Board grants parole, that decision remains subject to disapproval during the Board’s decision review process (Pen. Code, § 3041, subd. (b) [describing mechanism for disapproving a finding of suitability]) and reversal during the Governor’s discretionary review period (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 638 [finding that the Governor is another “level of review” within the executive branch for parole decisions]; Cal. Const. art. V, § 8, subd. (b) [“No decision of the parole authority . . . shall become effective” until after the Governor’s review period]). In other words, until the Governor’s review period expires, the inmate maintains no heightened expectation of release based on a tentative grant of parole. Further, the Court of Appeal’s “unlawfulness” finding, and the distinction it draws between Board decisions and gubernatorial decisions, fails to accord equal deference to the Governor’s parole review authority under the Constitution. (See *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 638, 652 [describing the Governor’s constitutional authority to review parole decisions].)

**B. The Parole Statutes Dictate that a Life Prisoner's Parole Period Must Begin upon His Release from Prison.**

The Court of Appeal's order to afford parole credits also contravenes the Legislature's mandate that the parole term is "the transition between imprisonment and [parole] discharge." (Pen. Code, § 3000.) As recognized in *Batie*, the *Lira* court did "not closely read and interpret former [Penal Code] sections 3000 and 3001 in a proper manner . . . ." (*In re Batie, supra*, 144 Cal.Rptr.3d at p. 263.) Relying on "a key concept" announced in *In re Chaudhary* (2009) 172 Cal.App.4th 32, 37 (finding that the parole statute applicable to post-1982 murderers prohibits a court's reduction of a life prisoner's parole term), *Batie* properly discerned that "parole credits do not accrue until the inmate has actually been released on parole . . . ." (*In re Batie, supra*, 144 Cal.Rptr.3d at p. 263, citing former Pen. Code, § 3001, subd. (b).)

Indeed, the former parole statutes still applicable to pre-1983 murderers such as *Lira* "provide[] for discharge from parole after the parolee ha[s] served the required parole term 'since release from confinement . . . .'" (*In re Batie, supra*, 144 Cal.Rptr.3d at p. 264, citing Pen. Code, § 3001, subd. (b).) Thus, a life prisoner "cannot properly obtain a judicial order" that deems his parole period to have started earlier than his actual "release from confinement." (*Ibid.*)

Moreover, the court's decree to shorten *Lira*'s parole period disregards the Legislature's intent that convicted murderers serve a parole term at the Board's discretion. (*Id.* at p. 258, citing current and former Pen. Code, §§ 3000, 3001; see also *In re Chaudhary, supra*, 172 Cal.App.4th at p. 37 [finding that parole statute applicable to post-1982 murderer prohibited a court's reduction of the life prisoner's parole term]; *In re Gomez* (2010) 190 Cal.App.4th 1291, 1309-1310 [same].)



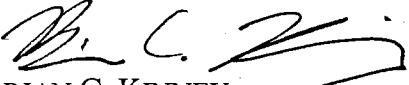
As a result, the Court of Appeal below erroneously held that Lira maintains a statutory right to have his parole period shortened under Penal Code section 2900. Instead, Lira remained lawfully incarcerated until his ultimate release from prison in 2010. And, nevertheless, the governing parole statutes prohibit court-ordered parole credits for life prisoners.

## CONCLUSION

The Court of Appeal exceeded the established scope of due process review of parole decisions, violated the separation-of-powers doctrine, and contravened the terms of Lira's life sentence and the parole statutes. Therefore, the judgment of the court below should be reversed.

Dated: November 17, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached OPENING BRIEF ON THE MERITS uses a  
13 point Times New Roman font and contains 5,906 words.

Dated: November 17, 2012

KAMALA D. HARRIS  
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**DECLARATION OF SERVICE**

Case Name: **In re Lira**

Case No.: **S204582**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **November 16, 2012**, I served the attached

**OPENING BRIEF ON THE MERITS**

by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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(2 Copies)

Santa Clara County Superior Court  
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Case No. 76836

Court of Appeal of the State of California  
Sixth Appellate District  
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333 West Santa Clara Street, Suite 1060  
San Jose, CA 95113

Santa Clara County  
District Attorney's Office  
The Honorable Jeffrey Rosen  
70 W. Hedding Street, West Wing  
San Jose, CA 95110

On November 16, 2012, I caused THIRTEEN (13) copies of the **OPENING BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797 by **Personal Delivery**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **November 16, 2012**, at San Francisco, California.

M. Xiang

Declarant



Signature