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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

JOHNNY LIRA,

Respondent,

On Habeas Corpus.

Case No. S204582

(Commitment Offense: Santa Clara Co. Sup. Ct. Case #76836B)

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

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STATEMENT OF THE CASE

A. BACKGROUND

Respondent, Johnny Lira, was sentenced to an indeterminate term of seventeen (17) years to life in 1982 for the second degree murder of his wife. (Clerk's Transcript ["CT"], at pp. 632-633.) His minimum eligible parole date was April 7, 1992. (CT, at p. 174.)

In July 2006, Mr. Lira filed a petition for writ of habeas corpus in the superior court challenging the constitutionality of the Board's denial of parole suitability at his ninth parole hearing in December of 2005. On January 2, 2007 the superior court issued an order granting Mr. Lira's petition. (CT, at pp. 582-589) Petitioner filed a Request to Finalize the Order on January 25, 2007 and on January 30, 2007, the superior court ordered the Board to provide Mr. Lira with a new hearing "at which the

Board proceeds in accordance with due process." (CT, p. 580.) The order was appealed, and the Sixth District modified and affirmed the court's order holding that, "we find no evidence to support the finding of unsuitability, based on the factors enumerated by the Board." (CT, at pp. 598-599; *In re Lira* (July 30, 2008, H031227) 2008 Cal. App. Unpub. LEXIS 6222 [nonpub.opn.].) The Sixth District thus, remanded the case to the trial court to

> "modify its order granting Lira's petition for habeas and remand the matter to the Board to reconsider its decision and to conduct a new hearing to reconsider Lira's suitability for parole, using, without restriction, the factors deemed appropriate by the relevant statutes and regulations and in accordance with the requirements of due process. As so modified, the order is affirmed." (CT, at pp. 600.)

The Superior Court modified its order accordingly on October 3, 2008. (CT, at p. 603.)

Following the trial court's order, as affirmed by the Sixth District, a court ordered suitability hearing was held on November 13, 2008. (CT, at pp. 49-170.) At that hearing the Board found Mr. Lira suitable for parole and found that he would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison. (CT, pp. 157.) Although the facts of Mr. Lira's case were spelled out by the trial court and the Sixth District, and the controlling case law was even clearer than it was when the court issued its order, the Governor erroneously reversed the Board's grant of parole, effectively stripping Mr. Lira of his properly earned parole date. (CT, at pp. 635-637.) The Governor's decision was simply ***not*** supported by any evidence in the record that Mr. Lira presented a current danger to society. As such, Mr. Lira filed a writ of habeas corpus in the superior court addressing the Governor's improper reversal of the Board's grant of parole. (CT, at pp. 1-46.)

While that petition was pending in the lower court, Mr. Lira attended his regularly scheduled November 3, 2009 suitability hearing wherein the Board once again found him suitable for parole. (CT, at pp. 1080-1098.) This time, the Governor declined to review the Board's decision. (CT, at. p. 1100.) Although, Mr. Lira was released from physical custody on or about April 8, 2010, he was immediately placed in the state's constructive custody on five (5) years of "high control" parole. (CT, at p. 1102, 1109.) Upon releasing Mr. Lira, the Board did not credit Mr. Lira for the time he spent incarcerated from the time Board found him suitable for parole on November 13, 2008 and when he was ultimately released in 2010. The superior court, and ultimately the Sixth District, found that this period of time constituted unlawful custody, as the Governor's reversal was not supported by any evidence and thus, Mr. Lira should have been released following the Board's grant of parole. (CT, at pp. 1183-1184; *In re Lira* (June 29, 2012, H036162) *formerly published at* 207 Cal.App.4th 531, 546-547 [2012 Cal. App. LEXIS 768], review granted October 17, 2012, S204582.) Since he was not, the lower courts concluded that period of time had to be credited to his term of parole.

Here, the actions of the Executive Branch obviously supported the lower courts' intervention. Mr. Lira had already served over twenty-nine (29) years of actual incarceration prior to his release on or about April 8, 2010. (CT, at p. 174.) Thus, after his release on parole, Mr. Lira filed a supplemental petition for writ of habeas corpus, seeking to have his parole reduced for the time he spent unlawfully incarcerated from 2005 until his release in 2010. (CT, at pp. 1039-1072.) In a published decision, the Court of Appeal found that the Governor's 2009 reversal of the Board's 2008 grant of parole was not supported by any evidence, and the time Mr. Lira spent incarcerated from the time the Board's decision would have become final to when he eventually was released was therefore unlawful. (Slip

Opn., at pp. 41-42.) Thus, the court determined that Mr. Lira's five-year parole term should be reduced by the time he spent unlawfully incarcerated. (Slip Opn., at p. 41.)

B. THE LOWER COURTS' FINDING THAT A PAROLEE IS ENTITLED TO CREDIT FOR THE PERIOD OF CONTINUED INCARCERATION CAUSED BY AN EVIDENTIALLY UNSUPPORTED GOVERNOR'S VETO.

The superior court granted Mr. Lira's supplemental habeas corpus petition finding that he was entitled to nearly four (4) years of credit against his five-year parole term. (CT, at p. 1184.) The superior court determined that Mr. Lira was entitled to credit for two time frames. (CT, at pp. 1122-1127, 1183-1184.) The first was the time he had spent in prison in 2005 after the Board erroneously found him unsuitable for parole to the time that the Board found him suitable in 2008. The court determined that this period of continued imprisonment was unlawful and not part of Mr. Lira's "term of imprisonment." (*California Penal Code* §2900 [an inmate is entitled to have all time served in prison credited against his of her "term of imprisonment"]; *Penal Code* §2900.5(c) [a "term of imprisonment" includes "any period of imprisonment and parole"]; *In re Bush* (2008) 161 Cal.App.4th 133 [any period of imprisonment lawfully served].) The second, was the time he spent incarcerated after the Board found him suitable for parole but the Governor erroneously vetoed that grant based upon the same reasoning.

The Court of Appeal ultimately found that Mr. Lira's release from prison in 2010 did not render his habeas petition moot because the relief requested in the supplemental petition, credit against his parole term, was based upon the claim that he was unlawfully incarcerated from 2005 to 2010. (Slip Opn., at p. 4.) As such, Mr. Lira remains under the constructive custody of parole and the claim for credits hinges on the

lawfulness of his incarceration spent beyond the time of the Board's unsupported parole denial in 2005 and the propriety of the Governor's reversal of the parole grant in 2009.

The Court of Appeal additionally found that although *In re Prather* (2010) 50 Cal.4th 238 "restricts a court's remedial authority when an inmate seeks a new hearing based on a claim that the Board's denial of parole violated due process," it does "not involve a parolee's claim for credit against the term of," nor "discuss whether a court has authority to review such a claim and direct the Board to grant credit if the claim has merit," and certainly does not imply "that a court lacks authority to determine entitlement to credit and grant credit when appropriate." (Slip Opn. at p. 7.)

As such, upon examination of these issues, the Court of Appeal determined that the time Mr. Lira spent incarcerated beyond the 2005 Board's erroneous parole denial was lawful and part of his term of imprisonment under *Prather.* (*Id.* at pp. 17-18.) This Court directed in *Prather* that when a court reverses the Board's finding of unsuitability, the proper remedy is to remand the matter to the Board for a new determination that comports with due process, and not an order of immediate release on parole. (*Prather*, *supra*, 50 Cal.4th at 244.) The appellate court thus concluded that the superior court erred in finding that Mr. Lira was entitled to credit for this first period of confinement. (Slip Opn., at p. 18.)

The Court of Appeal, however, distinguished the period of continued incarceration from the time a Governor erroneously vetoes a Board's lawful grant of parole, concluding that this period is unlawful and is not considered a part of the inmate's term of imprisonment, since the remedy in such a situation is reinstatement of the parole grant and release if the set term is already expired. Although a gubernatorial veto of a grant of parole is ordinarily presumed valid, and thus technically lawful, when there is "a

later determination that a veto was unlawful and violated due process [that determination] retrospectively negates the legal justification for having held an inmate after he or she has been found suitable for parole." (Slip Opn., at p. at p. 21.) Thus, "the unlawfulness of a veto renders 'unlawful' the extension of incarceration it caused," and does not become part of the inmate's "term of imprisonment" described in *California Penal Code* §2900, entitling that inmate to credit against that term, which includes the parole term if the inmate has already been released. (*Id.*; See also *Penal Code* §2900.5(c).)

Accordingly, the appellate court analyzed the propriety of the Governor's veto of the Board's grant of parole to Mr. Lira. (Slip Opn., at pp. 22-41.) The court ultimately found that the Governor's veto was not based on any evidence supporting his conclusion that Mr. Lira remained a current and unreasonable risk of danger if paroled. (*Id.* at p. 41.) As such, the lower court concluded that Mr. Lira was entitled to credit for the time he remained unlawfully incarcerated after the Board's parole grant and the Governor's erroneous reversal of that decision. (*Id.* at pp. 41-42.) The court calculated this time to be from the time the Board's 2008 decision became final to his eventual release. (*Id.*) The Board found Mr. Lira suitable for parole on November 13, 2008 and that decision became final 150 days later on April 12, 2009. (*Id.*) He was released on April 8, 2010. (*Id.*) Therefore, the appellate court determined that Mr. Lira is entitled to credit against his parole term from April 12, 2009 to April 7, 2010. (*Id.*)

SUMMARY OF ARGUMENT

Contrary to Petitioner's argument that the judiciary is limited in fashioning remedies against unlawful parole denials to a remand to the Board or a dismissal of the case as moot when a prisoner is released (Pet. Opening Brief on the Merits [hereinafter "OBOM"], p. 7), unsupported Governor vetoes of parole grants violate due process and are remedied by reinstatement of the original grant and release if the term is already served. The statutory framework for sentencing specifically requires that a term of imprisonment includes a period of parole (*Penal Code* §2900.5(b)) and that "all time served in an institution...shall be credited as service of the term of imprisonment." (*Penal Code* §2900(c).) The law is clear that a prisoner who spends excessive time in prison is entitled to a reduction of his term of parole by that period of unlawful confinement. (See *In re Ballard* (1981 115 Cal.App.3d 647, 650; *In re Young* (2004) 32 Cal.4th 900; *In re Reina* (1985) 171 Cal.App.3d 638.) Thus, when a life prisoner is subject to a fixed term of parole, any time spent unlawfully incarcerated should be credited against that term of parole. (*Bush, supra*, 161 Cal.App.4th at 143, ftnt. 4.) Furthermore, the judiciary has the power to "craft an appropriate remedy 'as the justice of the case may require.'" (Slip Opn., at p. 7, quoting *Penal Code* § 1484; see *In re Crow* (1971) 4 Cal.3d 613, 619.) Indeed, given the additional fact that the court had already once before determined that the Board's denial of parole was unsupported by the evidence, the appellate court did not afford an inappropriate remedy to correct the due process violation by the Governor in ordering that the period of unlawful confinement be credited to and reduce Mr. Lira's parole term.

Secondly, the separation of powers doctrine is not violated as the powers of the executive branch have not been impaired by the actions of the appellate court. (*Prather, supra*, 50 Cal.4th at 254; *In re Lugo* (2008) 164 Cal.App.4th 1522, 1538; *In re Rosenkrantz*, (2002) 29 Cal.4th 616, 662; *Le*

Francois v. Goel (2005) 35 Cal.4th 1094, 1102.) Applying credit for time unlawfully incarcerated to reduce a parole term does not hinder the Board's discretion to determine the length of parole, as the Board must discharge parole after five (5) years and does not have the power or discretion to extend parole beyond that time. (*Penal Code* §3000.) Furthermore, as the appellate court recognized, it is imperative that "the exercise of that power must still comply with the law." (Slip Opn., at p. 8.) Thus, under *Penal Code* § 2900(c), and *Penal Code* § 2900.5(c), the law requires that Mr. Lira is "entitled to have all of the time that he or she has actually 'served'—i.e., custody time—credited against the period of imprisonment and parole." (Slip Opn., at p. 8.) An order requiring the Board to follow the law, therefore does not violate the separation of powers doctrine. Indeed, it is the abuse by the Executive Branch of its powers that allow the Judicial Branch to order a remedy to suit the grievance.

Lastly, the interim period between an unlawful veto and the court's reinstatement of the Board's grant cannot be characterized as "lawful" and does not become a part of the inmates "term of imprisonment." (Slip Opn., at p. 19; *Bush*, *supra*, 161 Cal.App.4th at 143; *Cal. Penal Code* §2900.) It is the "unlawfulness of a veto [that] renders 'unlawful' the extension of incarceration it caused." (Slip Opn., at p. 21.) Thus, under §2900, an inmate is entitled to credit for that unlawful period against that "term of imprisonment." When an inmate, like Mr. Lira has already been released on parole, and properly alleges that he has been unlawfully confined, requesting the remedy that his parole term be reduced, then under the definition of "term of imprisonment" (§ 2900.5(c)), the inmate is entitled to credit against his or her parole term." (*Id.* at 21.)

LEGAL ARGUMENT

I. THE REMEDY FOR CORRECTING AN ARBITRARY GUBERNATORIAL REVERSAL OF A PAROLE GRANT WHEN THE INMATE HAS ALREADY BEEN RELEASED ON PAROLE IS TO CREDIT THAT TIME SPENT UNLAWFULLY INCARCERATED AGAINST THAT INMATE'S FIXED PERIOD OF PAROLE.

A. THE STATUTORY FRAMEWORK REQUIRING A FIXED PERIOD OF PAROLE FOR LIFE INMATES SUPPORTS CREDITING AGAINST THAT PAROLE WHEN A GOVERNOR'S ARBITRARY ACTION CAUSED HIM ADDITIONAL IMPRISONMENT.

The statutory framework under which Mr. Lira was sentenced, supports crediting the time he spent unlawfully incarcerated due to arbitrary gubernatorial action, against his fixed period of parole.[1] It has long been established that a prisoner on parole remains in the constructive custody of the state until discharged from parole. (*People v. Borja* (1980) 110 Cal.App.3d 378, 382.) A sentence of imprisonment includes both a period of physical custody spent in prison, followed by a period of constructive custody spent on parole. (*In re Roberts* (2005) 36 Cal.4th 575, 589-590.) A " 'term of imprisonment' includes...any period of imprisonment and parole, prior to discharge, whether established or fixed by statute, by any court, or by any duly authorized administrative agency." (*Penal Code* §2900.5(b).) Life inmates eligible for parole could not be assigned a period of parole greater than five (5) years prior to 1983. (*Penal Code* §3000.) Although "[i]t is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees," parole is not mandatory,

[1] Mr. Lira was sentenced in 1982 and any citations to the Penal Code are as they existed at the time. When Mr. Lira was sentenced, life prisoners were subject to a maximum fixed parole term of five (5) years. Currently, a life prisoner is subject to lifetime parole.

and could be waived, discharging the inmate from custody of the department. (*Id.*)

Furthermore, *Penal Code* §3001 provided for presumptive discharge when upon review, the Board found no cause to continue parole once the life prisoner had "been on parole continuously for three years since release from confinement." (See Stats. 1978, ch. 582 at http://192.234.213.35/clerkarchive/ for the relevant text of former §§3000 and 3001 that control Mr. Lira's period of parole.) Additionally, §2900.5 expressly authorizes deductions from the parole term when an inmate's prison release date has been delayed by an administrative proceeding regarding whether credits should be denied, when those proceedings are resolved in the inmate's favor. (*Ballard*, *supra*, 115 Cal.App.3d at 650.) Thus, "the interests of public safety" are not only tempered by the strict limitations on setting parole length, but also by the statutory framework requiring a reduction of parole for excessive time spent incarcerated due to administrative proceedings found later to be resolved in the inmate's favor.

B. FUNDAMENTAL FAIRNESS REQUIRES A REDUCTION IN PAROLE WHEN THE GOVERNOR'S ARBITRARY ACTION DELAYS RELEASE FROM PRISON.

The "touchstone of due process is protection of the individual against arbitrary actions of government." (*Wolff v. McDonnell* (1974) 418 US 539, 558.) Contrary to Petitioner's belief that the Governor's arbitrary parole reversal was simply a "procedural error," in reality, it was an arbitrary deprivation of liberty. "Fundamental fairness requires that where misapplication of [the law] has contributed to delay in a prisoner's release date, those credits must be used to adjust the parole release date." (*Ballard*, *supra*, 115 Cal.App.3d at 650.) Had the Governor acted in accordance with the law, Mr. Lira would have been released in 2008. Principles of fundamental fairness and due process support returning Mr. Lira to the legal status he would have enjoyed had the Governor acted in accordance with due process of law. (See *Chioino v. Kernan* (9th Cir. 2009) 581 F.3d 1182, 1184 ["Habeas remedies should put the [petitioner] back in the position he would have been if the...violation never occurred."].) It is because the loss of liberty can never be restored, that it is necessary to at least partially right the wrong by reducing a life inmate's fixed term parole by the time he spent unlawfully incarcerated, thereby reducing time spent in constructive custody.

Contrary to Petitioner's attempt to isolate this matter as merely a procedural error requiring a procedural remedy (OBOM, p. 9), here, the factually unsupported reversal of a parole grant is a substantive due process violation. As previously recognized by this Court,

> "In expressly rejecting a purely procedural standard of review in *Rosenkrantz*, we recognized that in light of the constitutional liberty interest at stake, ***judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights***. If simply pointing to the

> existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by "some evidence," a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry. ***Such a standard, because it would leave potentially arbitrary decisions of the Board or the Governor intact, would be incompatible with our recognition that an inmate's right to due process "cannot exist in any practical sense without a remedy against its abrogation.*** " ([*In re Rosenkrantz* (2002) 29 Cal.4th 616, 664]; see *In re Scott* (2004) 119 Cal.App.4th 871, 898 [15 Cal. Rptr. 3d 32] [observing that the deferential standard of review set forth in *Rosenkrantz*, although requiring courts to be "exceedingly deferential" to the Board's findings, "does not convert a court reviewing the denial of parole into a potted plant"].)" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1211-1212, emphasis added.)

Thus, it is an established rule that in habeas corpus proceedings "courts are vested with the power to craft an appropriate remedy 'as the justice of the case may require.'" (Slip Opn., at p 7, quoting *Penal Code* § 1484; see *Crow*, *supra*, 4 Cal.3d at 619.) "'The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.'" (Slip Opn., at pp. 7-8, quoting *Harris v. Nelson* (1969) 394 U.S. 286, 291.) Indeed, without the flexibility to correct individual due process violations, the judiciary would be unable to utilize the great writ so as to serve its useful and necessary functions.

C. PETITIONER HAS CONCEDED THE APPELLATE COURTS FINDING THAT THE GOVERNOR VIOLATED MR. LIRA'S DUE PROCESS RIGHTS.

In this case, Mr. Lira was denied parole in 2005 by the Board. The lower courts determined that the Board's decision was not supported by some evidence and a new hearing was ordered. At the court ordered hearing held three (3) years later, the Board followed the court order and conformed its decision with due process, finding Mr. Lira was suitable for parole, as there was no new evidence indicative of current dangerousness. Nevertheless, the Governor reversed the Board's lawful grant of parole citing nearly identical factors that the court had previously determined were not supported by the record. While Mr. Lira's habeas corpus petition was pending challenging that unlawful veto, another hearing was held and Mr. Lira was again found to be suitable for parole. This time, the Governor properly declined to review the decision. Thus, Mr. Lira was finally released from physical custody, however, he was immediately placed in the state's constructive custody on five (5) years of "high control" parole. (CT, at p. 1102, 1109.)

A supplemental petition was promptly filed requesting to have his parole reduced for the time he spent unlawfully incarcerated from 2005 until his release in 2010. (*Id.*, at pp. 1039-1072.) Although the superior court agreed (*id.*, at pp. 1183-1184), the appellate court determined that only the time from when the Board found him suitable for parole in 2008 through when he was ultimately released in 2010 constituted unlawful custody, and should be credited against his parole term. The court determined this period to be unlawful because the Governor's reversal was not supported by any evidence. (Slip Opn., p. 41.) Notably, Petitioner does not argue that the appellate court erred in finding that the Governor violated

Mr. Lira's due process rights, but only disagrees with the remedy imposed for the abrogation. As such, Petitioner concedes that the Governor's reversal of the Board's 2008 grant of parole was unsupported by the evidence.

In this specific case, Mr. Lira's due process rights were found to have been abrogated back in 2005, and again in 2009. The process due for the first violation was to order a remand to the Board and to hold a new hearing comporting with due process. Yet, Petitioner argues that the judiciary's only role is to ensure that an inmate "received a 'constitutionally adequate and meaningful' parole decision." (OBOM, p. 9, citing *Prather*, *supra*, 53 Cal.4th at 251.) Under Petitioner's opinion of the scope of power held by the judiciary, an inmate's only remedy against the Executive Branch's repeated due process violation is to continually remand the matter back to the Executive Branch which will eventually "on its own accord" correct their own procedural errors. (OBOM, p. 9.) Under this model, the judiciary is reduced to nothing more than what one court referred to as a "potted plant" (*In re Scott* [*Scott* I] (2004) 119 Cal.App.4th 871, 898 [arguing that the "exceedingly deferential nature of the 'some evidence' standard" used in parole determinations does not convert the court into a "potted plant"), forced to review repeated arbitrary decisions of the Executive Branch without ever being able to correct the violation. Of course, Petitioner's argument is fatally flawed, as this Court reaffirmed in *Prather*, stating "an inmate's due process right 'cannot exist in any practical sense without a remedy against it's abrogation.'" (50 Cal.4th at 251 quoting *Rosenkrantz*, *supra*, 29 Cal.4th at 664.)

Petitioner argues that the only process Mr. Lira was therefore due, was a new parole hearing, which he received, albeit not through court order, and therefore the petition should have been dismissed as moot. However, as noted by this Court,

> "The proper function of the courts in respect to parole and revocation of parole is simply to ensure that the prisoner is accorded due process. ... Thus, where the Department of Corrections has failed to accord a prisoner due process of law in revoking his parole, the relief to which the prisoner is entitled on habeas corpus is not an order forever barring the Department of Corrections from proceeding further, but, rather, ***an order directing the Department of Corrections to vacate its order of revocation and thereafter to proceed in accordance with due process of law.***" (*Prather, supra*, 50 Cal. 4th at 254, citing, *In re Bowers* (1974) 40 Cal. App. 3d 359, 362, citations omitted, emphasis added.)

Here, Mr. Lira was not afforded due process for the blatant disregard of the 2007 court order requiring the new hearing to be conducted in accordance with due process of law. Yet, Petitioner argues that "due process of law" only allows for the Court to repeatedly order new hearings with no consequence when the Executive Branch disregards these court orders. However, as this Court has noted, "an order generally directing the Board to proceed in accordance with due process of law does not entitle the Board to 'disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record.'" (*Prather, supra*, 50 Cal. 4th at 254 citing, *In re Masoner* (2009) 172 Cal.App.4th 1098, 1110.) When this is done, clearly due process of law requires a different remedy than has already been provided and ignored.

Ironically, this is what Petitioner inadvertently argues when they stated that "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 in his parole period.'" (OBOM, p. 8, quoting *In re Miranda* (2011) 191 Cal.App.4th 757, 763.) Petitioner

further argues that "[e]nsuring that the executive branch 'provide(s) procedural fairness' going forward appropriately addresses the constitutional violation." (OBOM, p. 9, quoting *In re Batie* (July 20, 2012) *formerly published at* 207 Cal.App.4th 1166 [2012 Cal. App. LEXIS 826], review granted October 17, 2012 at S205057.) Here, the "proper procedures" were not bypassed even when the 2005 Board denied parole. Instead, that Panel of the Board conducted a procedurally sound hearing, but substantively issued a decision that was unsupported by the evidence. Thus, the lower courts followed the "proper procedure" required at that point and ordered a new hearing comporting with due process. Again, in 2008, the Board conducted a procedurally sound hearing, but this time also issued a substantively sound decision, finding Mr. Lira suitable for parole. Then, the Governor conducted his review in accordance with sound procedures, but this time, he was the one to substantively issue a decision that was unsupported by the evidence. Had the Governor proceeded in accordance with due process, Mr. Lira would have been released when the Board's decision became final. Obviously, the only way to address this constitutional violation, and best return Mr. Lira to a position as close to where he would have been but for the constitutional error, was to afford him credit for the time spent unlawfully incarcerated against his constructive custody.

Contrary to Petitioner's assertion that "the constitutional error is the flawed process, not the executive branch's failure to release the inmate," here the constitutional error was the Governor's failure to issue a decision complying with due process when he reversed the parole grant without any supporting evidence. By definition, this is an error of substantive due process, not procedural due process. Petitioner conflates procedural and substantive rights when arguing that the executive branch must "provide adequate and meaningful parole consideration process for each life

prisoner," requiring 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 or capricious." (OBOM, p. 6.) However, a finding that the Governor's veto was unsupported by the evidence is a substantive consideration, and requires the judiciary to look beyond the more limited "procedural protections," and examine the record to determine if the Board or Governor's decision is supported by some evidence that rationally indicates the inmate remains a current and unreasonable risk of danger if released on parole. Indeed, this Court has previously rejected this very claim that the "some evidence" standard constitutes "a purely procedural standard of review." (*Lawrence*, *supra*, 44 Cal.4th at 1211, citing *Rosenkrantz*, *supra*, 29 Cal.4th at 664.) Herein, the constitutional error lies not in the flawed process, but in the issuing of a decision that lacks any evidentiary support in the record.

Significantly, this also distinguishes Mr. Lira's case from that of *Batie*, which the Attorney General heavily relies upon.[2] In that case, Batie was never successful in challenging any of the Governor's reversals. While he was challenging the Governor's 2010 reversal of the Board's grant of parole, the Board again granted him parole in 2011 and the Governor took no action. Batie was released on parole October 7, 2011. Batie filed a supplemental petition arguing that he was entitled to credit during the time

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[2] Petitioner repeatedly cites to *Batie* in its Opening Brief on the Merits, appearing to do so in an improper attempt to refer to it as authority for the propositions being argued. (See Respondent's Brief on the Merits, pp. 3, 7-8, 9, 11, 16-17, and 19.) Respondent, on the other hand, is not citing *Batie* as authority and merely does so to point out the flawed reasoning in Petitioner's arguments and its effort to equate the facts in *Lira* with those in *Batie*. Despite Petitioner's improper attempts to do so, Respondent 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).)

he spent unlawfully incarcerated. Significantly, the *Batie* court acknowledged that

> "We agree with Batie that theoretically, if the Governor's 2010 reversal were wrongful, a viable issue in his petition would remain, whether he may be entitled to a judicially imposed credit against his parole term for the time he spent in prison after the effective date of the Board's 2010 parole grant, due to "unlawful" delay in release caused by that reversal. (Former § 3000, subd. (b).)" (*Batie, supra,* Cal.App.4th at 1178, review granted October 17, 2012, S205057.)

Since this Court's decision in *Prather*, courts that have faced the issue of what the correct remedy is when the Governor violates an inmate's due process rights by reversing a proper grant of parole have been consistent in concluding that the remedy must include setting aside the Governor's reversal, reinstating the previous grant of parole, and if the inmate's term is already served, ordering his or her immediate release from custody. (*In re McDonald* (2010) 189 Cal.App.4th 1008, at 1024; *In re Juarez* (2010) 182 Cal.App.4th 1316; *In re Loresch* (2010) 183 Cal.App.4th 150, at 163; *In re Moses* (2010) 182 Cal.App.4th 1279; *In re Nguyen* (2011) 195 Cal.App.4th 1020, 1036; *In re Copley* (2011) 196 Cal.App.4th 427, 435; see also *In re Singler* (2008) 169 Cal.App.4th 1227, 1245; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257; *In re Burdan* (2008) 169 Cal.App.4th 18, 3; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491; *Masoner, supra,* 179 Cal.App.4th at 1537-1538; *In re Vasquez* (2009) 170 Cal.App.4th 370, 386; see also *Prather,* 50 Cal.4th at 252.) Like the court noted in *McDonald*, where the Governor failed to reach the only result that is proper under the evidence, like the situation in this case, a remand to the Governor would be an idle act, as the Governor could not again reverse the decision on the same factually unsupported record. (*McDonald, supra*, 189

Cal.App.4th at 1024; see *Prather, supra*, 50 Cal.4th at 252; *Lawrence, supra*, 44 Cal.4th at 1201.)

The analysis by the *Loresch* court is instructive. There, the Governor failed to point to any new evidence or grounds that could justify a reversal and the *Loresch* court held no further review was required, stating,

> "The Governor contends that we should remand this matter to him for further review. He does not contend that there is any new evidence or any additional basis upon which his decision to reverse the Board's decision could be upheld. [¶] ... 'Because we have reviewed the materials that were before the Board and found no evidence to support a decision other than the one reached by the Board, a remand to the Governor would amount to an idle act." (*Loresch, supra*, 183 Cal.App.4th at 163, quoting *Dannenberg, supra*, 173 Cal.App.4th at 256.)

In this case, Petitioner concedes that the Governor improperly reversed the Board's decision granting parole, because there was no supporting evidence of unsuitability. Thus, it is beyond dispute that had the Governor not violated Mr. Lira's due process rights, he would have been entitled to release as soon as the Board decision granting parole became final. Instead, he was forced to endure a period of further illegal incarceration, as he had already far surpassed the term set for him by the Board. As such, since there was no doubt Mr. Lira would have been released upon the finality of the Board decision, the only remedy which provided even a modicum of correction of the constitutional error would be exactly what the lower courts fashioned, a credit against Mr. Lira's parole term.

II. THE SEPERATION OF POWERS DOCTRINE IS NOT VIOLATED BY THE JUDICIARY IMPOSING A REMEDY THAT PROPERLY CORRECTS THE HABEAS CORPUS VIOLATION.

As this Court has previously acknowledged, the separation of powers doctrine is not violated unless the actions of one branch of government materially impairs the performance of a core of function by another branch. (*Prather*, *supra*, 50 Cal.4th at 254; *Lugo*, *supra*, 164 Cal.App.4th at 1538; *Rosenkrantz*, *supra*, 29 Cal.4th at 662; *Le Francois, supra*, 35 Cal.4th at 1102.) Here, the Court of Appeal remedy does not materially impair the Board's authority to monitor Mr. Lira on parole. The only impairment is that the parole term is not as long as the government would prefer. Of course, that impairment is solely due to the constitutional infirmity of the government's own actions.

Although parole determinations generally fall within the exclusive power of the executive branch, "the exercise of that power must still comply with the law." (Slip Opn., at p. 8, emphasis added.) Thus, the law specifically states that "all time *served* in an institution designated by the Director of Corrections *shall* be credited as service of the term of imprisonment" (*Penal Code* § 2900(c), italics added); and "term of imprisonment" is defined to include "any period of imprisonment *and parole*." (*Penal Code* § 2900.5(c), italics added). Therefore, the law requires under *Penal Code* § 2900(c) that "an inmate is entitled to have all of the time that he or she has actually 'served'—i.e., custody time—credited against the period of imprisonment and parole." (Slip Opn., at p. 8.) As the Appellatr court recognized,

> "If under applicable statutes and judicial precedent, Lira was entitled to have a certain amount of the time that he 'served' in actual custody credited against his 'term of imprisonment,' then an order requiring that he receive such credit is simply an

> order directing the Board to comply with the law. Such orders are not novel, and courts have routinely granted habeas corpus relief and ordered that credit be given to inmates and parolees."

(Slip Opn., at p. 9; *Ballard, supra*, 115 Cal.App.3d at 650 [directing Board to grant conduct credit against parole term]; *In re Anderson (*1982) 136 Cal.App.3d 472, 476 [same]; *In re Randolph* (1989) 215 Cal.App.3d 790, 795 [same]; see *In re Carter (*1988) 199 Cal.App.3d 271, 273.) Although the Attorney General attempts to argue that the Legislative intent was thwarted by the appellate court's decision (OBOM, pp. 11-13), nothing in *Lira* disregards the Legislature's intent that convicted murderers serve a parole term at the Board's discretion. In fact, *Lira* upheld the Board's imposition of a five-year parole term.

Furthermore, without offering any proof in the courts below, including relevant statistics, Petitioner states that the "Court of Appeal's opinion here infuses significant uncertainty into the parole process and impacts public safety." (OBOM, p. 15.) Of course, no authority is cited for this claim. The very process of parole for life inmates requires that a finding of an absence of current dangerousness be made, and it is only after years of incarceration, multiple positive psychological examinations, positive institutional behavior, extensive self help programming, and in many instances, multiple findings of parole suitability, that the inmate is considered suitable for release.

In order to even reach a point where a court can consider reducing parole by the time spent unlawfully incarcerated, a court must first follow impose traditional remedies, which include a remand to the Board to conduct a hearing in accordance with due process of law, where the Board and ultimately, the Governor, are given the opportunity to correct what has already been found to be a violation of the inmate's due process rights.

Here, the lower courts determined that the Board's finding of parole unsuitability was unsupported since 2005. Using this as a base, Mr. Lira has already been deemed not a current or unreasonable risk of danger to public safety for, at the very least, over seven (7) years, two (2) years longer than his imposed parole-term. Yet, under the appellate court's finding, he will remain on parole until 2014, an additional two (2) years. More importantly, as *Thomas v. Yates* (E.D.Cal. 2009) 637 F. Supp.2d 837, 842-843 specifically held,

> "***The Court may not ignore alleged violations of Petitioner's constitutional rights simply because parole supervision is helpful to many parolees.*** See *Jones* [*v. Cunningham* (1963) 371 U.S. 236, at 243] "***It is not relevant that [parole] conditions and restrictions ... may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do.***"" (Emphasis added.)

This is exactly the case here. Mr. Lira cannot continue to be under the unlawful restraint of parole based on public policy considerations that do not apply to him and that must be secondary to Petitioner's overriding rights to due process and constitutional protections.

A. THE SEPARATION OF POWERS DOCTRINE HAS NOT BEEN VIOLATED WHEN PAROLE IS SHORTENED OR DISCHARGED IN OTHER CONTEXTS.

Petitioner argues that the remedy imposed by the appellate court somehow limits the executive branch's authority over parole. (OBOM, pp. 11-13.) Petitioner also argues that "[m]urderers 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." (*Id.* at p. 13.) Yet, by Petitioner's own account of the legislative changes to *Penal Code* §3000 limiting parole at three-years for pre-1979 murders, up to five-years for pre-1983 murders, and requiring up to lifetime parole for post 1982 murders, these changes were never meant to be applied retroactively. (*Id.* at p. 12.) Thus, while Mr. Lira can only be placed upon parole for a maximum of five-years, other similarly situated inmates are subjected to a life-time parole or at the very least, three-years maximum depending solely on when their life crime was committed, a factor having nothing to do with the egregiousness of that crime, how much time they have already spent incarcerated, or their perceived need for supervision. Furthermore, as the case law dating back at least thirty (30) years indicates, the judicial branch has uniformly recognized that that unwarranted prison time should always be credited against an inmate's period of parole. Clearly, Petitioner's arguments fails.

Contrary to Petitioner's assertion, *Lira* is not the first case to have endorsed granting the time a life prisoner spends unlawfully incarcerated due to a Governor's arbitrary parole reversal to reduce the fixed period of parole. (OBOM, p. 4.) Like Mr. Lira, and Mr. Batie in the companion case, the petitioner in *Bush* was also subject to a life sentence, but had a fixed period of parole, and was challenging the Governor's unsupported

efforts to reverse the Board's grant of parole. (161 Cal.App.4th at 139.) In *Bush*, the Governor sought an *en banc* review of the 2004 Board's decision to grant parole. Bush filed a writ of habeas corpus in the superior court challenging the timeliness of the Governor's request. (*Id.*) The superior court found the Governor's request was untimely and ordered Bush released from prison. (*Id.*) Bush was released four months after the Board's decision became final. (*Id.*) The superior court ordered that Bush receive credits against his parole period for the time he spent unlawfully in prison. (*Bush*, *supra*, 161 Cal.App.4th at 143, ftnt. 4.) The Attorney General did not challenge this decision. In fact, it was Bush who filed a petition in the Court of Appeal seeking the further relief of applying the credit for the time he spent in prison beyond the term set by the Board (credits exceeding approximately twenty years) to when the Board's decision finding him suitable became final. The *Bush* court denied the petition based upon a finding that Mr. Bush's time spent incarcerated beyond his minimum term was lawful as he was subject to a life-time sentence. (*Id.* at p. 143.) The court distinguished this from the time Mr. Bush spent unlawfully incarcerated due to the Governor's action in excess of his jurisdiction. (*Id.*) Likewise, Mr. Lira is only seeking his entitlement to the time he spent unlawfully incarcerated following the Governor's arbitrary and unlawful parole reversal. As discussed *infra*, a Governor's reversal that is not based upon any supporting evidence is a violation of due process and therefore the ensuing time in custody is unlawful.

The idea of excess credits earned or accumulated while incarcerated being applied to reduce or discharge parole is also not a new concept. In *Ballard*, the parole authority initially refused to award the petitioner conduct credits he received during pre-sentence confinement. (115 Cal.App.3d at 648.) The *Ballard* court found that "because the duration of [a] parole term is to be determined under strict statutory guidelines, [the

prisoner's] prison release date … has a direct effect upon the date on which he will be released from parole." (*Id.* at 649.) *Ballard* further noted an inmate is prejudiced when "his actual prison release date will be later than the prison release date to which the credit, timely applied, would have entitled him. In such situations unless some adjustment is made, the delay in releasing the person from prison will delay his release from parole." (*Ibid.*) It is for this reasoning that the court upheld the deduction of the excess credits from the parole term.

Relying up *Ballard*, the court in *Reina* applied conduct credits earned while incarcerated to reduce the petitioners' parole period even though both petitioners had already been released on parole. (171 Cal.App.3d at 642.) In *In re Sosa* (1980) 102 Cal.App.3d 1002, 1005-1006, the court applied the excessive amount of presentence custody credit over the total state prison term to completely invalidate the one-year period of parole. These principles even apply to the excessive time that a prisoner spends lawfully confined. The court in *In re Kemper* (1980) 113 Cal.App.3d 434, 436 found that the petitioner was entitled to have his excess custody credits applied to his "uninterrupted" and continuous one-year parole term where he was sentenced to three-years in prison and the appellate court reduced his sentence to 16-months. In that case, Kemper had already served beyond the16-month term. The court determined that the " 'uninterrupted' year be computed from the date when he should have been released had he been sentenced initially in what --in view of the modification to 16 months of his original term-- was determined to be the correct manner." (*Id.* at p. 438.) This was so even though the court determined the excess time to be the result of an "accidental injustice," in the interest of fairness, that time should "count in his favor." (*Id.*; See also *In re Welch* (1987) 190 Cal.App.3d 407, 409.)

All of these cases involved the judiciary applying hindsight to the determinations of the inmate's legal status after clarifying the lawfulness of the actions by the Executive Branch. It makes no difference whether the Governor's actions were intentional or mistakenly made, delayed release from confinement is arbitrary from the moment it occurs. Since liberty cannot be given back to the inmate, the only just remedy is to credit that unlawful period of incarceration against the fixed parole term. As established by the cases discussed *supra*, public policy supports the application of credits accumulated from excess imprisonment to fixed parole terms. Furthermore, these cases specifically demonstrate that the Court of Appeal in this case acted in accordance with Legislative intent.

Clearly, Petitioner's argument that the separation of powers doctrine is violated by the remedy imposed by the appellate court fails. Ironically, it is precisely the executive's abuse of power that justified such habeas relief. As discussed *infra*, Mr. Lira's continued incarceration beyond the finality of the Board's grant of parole was solely due to the unconstitutional executive action of the Governor.

III. MR. LIRA REMAINED UNLAWFULLY IMPRISONED FROM THE TIME OF THE GOVERNOR'S VETO TO HIS EVENTUAL RELEASE.

Petitioner erroneously argues that the Mr. Lira may not receive credit against his parole term under *Penal Code* §2900 because the Governor's parole veto was not "unlawful." (OBOM, pp. 15-16.) To the contrary, it is well established that giving credit against a parole term, when credit is wrongfully denied in the first instance, is the preferred remedy. (*Ballard, supra*, 115 Cal.App.3d at 647-649-650.) The justification for the remedy is that the government illegally detained the prisoner in physical custody and it is therefore necessary to shorten the parole term to the length that it would have been but for the illegal detention. (*Id.* at p. 649.) This principle is directly applicable here.

It is also well established that "[d]ue process of law requires that [a parole decision] be supported by some evidence in the record." (*Rosenkrantz, supra,* 29 Cal.4th at pp. 676-677.) When a "gubernatorial veto is not supported by some evidence, it is unlawful." (Slip Opn., at p. 20; *In re Dannenberg (*2005) 34 Cal.4th 1061, 1094 [recognizing protected expectation]. As recognized by this Court, "[o]nly when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process." (*In re Shaputis* (2011) 53 Cal.4th 192, 211.) It is also true that "erroneous denial of conduct credit implicates the right to due process because it affects vested liberty interest." (*Id.*; *In re Johnson* (2009) 176 Cal.App.4th 290.) Thus, as the Appellate court reasoned, "when a court vacates an unlawful veto and reinstates the Board's suitability finding, the interim period of incarceration—between the Board's finding of suitability and its reinstatement by the court—cannot be

characterized as time "lawfully" spent awaiting a determination of suitability." (Slip Opn., at p. 20; *Bush, supra,* 161 Cal.App.4th at p. 143.)

Although the Appellate court acknowledged that this interim period is initially presumed lawful, when the Governor's veto is later found to be in violation of due process, the presumed lawfulness of that period no longer exists. (Slip Opn., at pp. 20-21.) As such, the Appellate court reasoned that

> "a later determination that a veto was unlawful and violated due process ***retrospectively negates the legal justification for having held an inmate after he or she had been found suitable for parole.*** For this reason, we believe the later determination of unlawfulness and not the interim technical legality of incarceration pending that determination should control the characterization of a period of incarceration extended by an unlawful veto. Stated more simply, ***the unlawfulness of a veto renders "unlawful" the extension of incarceration it caused.*** As such, that period of incarceration does not become part of the inmate's "term of imprisonment," and, under *section 2900*, an inmate is entitled to credit for that period against that "term of imprisonment." If the inmate has already been released on parole, then under the definition of "term of imprisonment" (*§ 2900.5, subd. (c)*), the inmate is entitled to credit against his or her parole term." (*Id.* at 21.)

It is for these reasons that Mr. Lira is entitled to credit for the period between 2009, after the Governor's erroneous veto of the Board's suitability finding, and his eventual release in 2010.

The Attorney General further argues that shortening Mr. Lira's parole by the time he spent unlawfully incarcerated undermines the Legislative intent (OBOM, p. 19.) Petitioner reasons that, because Mr. Lira had no "vested right" to have his sentence fixed at less than his maximum sentence, when the Governor exercised his constitutional right to review Mr. Lira's suitability, and took his parole date, even without any supporting evidence, this somehow does not show that the resulting

continued incarceration was "unlawful." (OBOM, p. 17.) This argument necessarily fails, for the reasons discussed above, and for the further reason that here, the Governor exercised his veto power in violation of the lower court's order, which defined the scope of what factors simply could no longer justify continued refusals to parole Mr. Lira. As such, the continued incarceration was clearly unlawful.

Here, the Attorney General erroneously equates the Governor's authority over parole decisions with the Board's authority (OBOM, p. 18.) It is undisputed that the Board has great discretion in parole matters and weighing of the evidence, "the statutes and governing regulations establish that the decision to grant or deny parole is committed entirely to the judgment and discretion of the Board." However, this same power is not bestowed upon the Governor who is only given "a constitutionally based veto power over the Board's decision." (*Prather*, *supra*, 50 Cal.4th at 251.) The Attorney General erroneously argues that "the appellate court's finding [] fails to accord equal deference to the Governor's parole review authority under the constitution." (OBOM, p. 18.) However, the authority between the Board and the Governor are in fact not equal and should be distinguished. While the Board "has the obligation and ability to take evidence, consistent with due process protections," the Governor "cannot create an evidentiary record." (*McDonald, supra,* 189 Cal.App.4th at 1024; *In re Twinn* (2010) 190 Cal.App.4th 447, 473.) A remand to the Governor only results in the Governor considering the same record before him from his initial consideration, which *McDonald* pointed out is "the same record this court has reviewed." (*Id.*) Thus, "neither the Governor, nor the Board, has the authority to 'disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the record.'" (*Id.*, citing *Prather*, *supra*, 50 Cal.4th at 258, quoting *Masoner*, *supra*, 172 Cal.App.4th at 1110.) Under

California's Constitution, Article V, §8(b), the Governor is only provided with a "***single review***... of a determination by the Board and does not authorize repeated reviews of that single determination." (*McDonald, supra*, at 1024, emphasis added; See also *Cal. Code Regs.*, tit. 15, §3041.2(a) and (b).) Likewise, "even the Board, with the benefit to hold a hearing and gather evidence, is obligated to state all of the reasons for its actions rather than withholding some in the event of a reversal 'in light of the injunction in *In re Sturm* (1974) 11 Cal.3d 258, 272 [], that due process requires the Board to provide a "'definitive written statement of its reasons for denying parole.'" (*McDonald, supra,* 189 Cal.App.4th at 1024, quoting *Prather, supra,* 50 Cal.4th at 260, concur. opn.) In his concurring opinion in *Prather*, Justice Moreno went on to state,

> "This requirement followed from the principle that a prisoner has the right to be " 'duly considered' " for parole and not to be denied parole arbitrarily, and that such rights "cannot exist in any practical sense unless there also exists a remedy against their abrogation." ([*Sturm*, supra, at 268].) A definitive written statement of reasons was necessary to guarantee that such an effective remedy exists, because, inter alia, it will help to ensure "an adequate basis for judicial review." (*Id.* at p. 272, [].) It is important that *Sturm* be taken at its words, and that the Board be required to issue a *definitive* written statement of reasons. The ***Board cannot, after having its parole denial decision reversed, continue to deny parole based on matters that could have been but were not raised in the original hearing***. Such piecemeal litigation would undermine the prisoner's right to a fair hearing and the ability of courts to judicially review and grant effective remedies for the wrongful denial of parole." (*Prather, supra,* 50 Cal.4th at 260, concur. opn. at pp. 260-261.)

Given this limitation imposed on the Board's authority, the *McDonald* court concluded that this concept also applied to the Governor, holding that "the ***Governor should state all of the reasons for his determination in the first instance***, permitting prompt review, compliance

with Constitutional mandates, and a predictable process." (*McDonald*, *supra*, 189 Cal.App.4th at 1024, emphasis added.) Thus, "[r]emand to the Governor after his determination is found lacking in some evidence of current dangerousness is inconsistent with this requirement and is not required by *Prather*." (*Id.*) As such, the Governor's parole review is not equal to the Board's.

In this case, the lower courts had already issued an order finding that the Board's decision denying parole in 2005 was unsupported by the record. A new hearing was ordered wherein Mr. Lira was found suitable by the Board, yet the Governor ignored the court's previous order, reversing the Board's 2008 grant upon the same factors that the Board relied upon in 2005, thus violating the clear mandate of the lower court's order. Accordingly, Mr. Lira remained unlawfully incarcerated from the time the Board's decision became final and when he was ultimately released in 2010. As discussed *supra*, this also distinguishes Mr. Lira's case from that of *In re Batie.*

CONCLUSION

Based on the foregoing, the Court of Appeal was correct in finding that Mr. Lira was unlawfully incarcerated from the time of the Governor's erroneous veto to his eventual release and this time was properly credited towards his parole term.

Dated: January 30, 2013

Respectfully submitted,

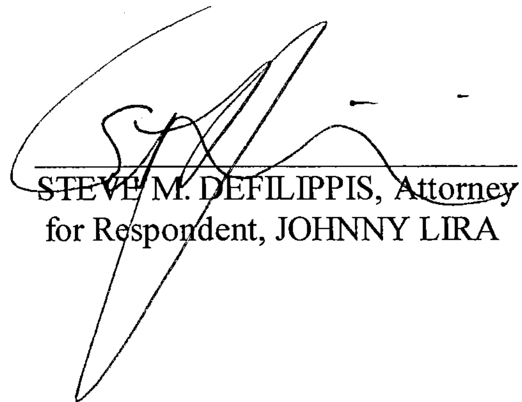
LAW OFFICES OF PICONE & DEFILIPPIS

By: ______________________
STEVE M. DEFILIPPIS
Attorneys for Respondent,
JOHNNY LIRA

CERTIFICATE OF WORD COUNT TO RESPONDENT'S ANSWERING BRIEF ON THE MERITS - Case No. S204582

Pursuant to California Rules of Court, Rule 8.520(c)(1), this will certify that this document contains 9, 243 words.

Dates: 1/30/13



STEVE M. DEFILIPPIS, Attorney
for Respondent, JOHNNY LIRA

PROOF OF SERVICE BY U.S. MAIL
(1013a) (2015.5 CCP)

In Re JOHNNY LIRA, Case No. S204582

I am now, and at all times herein mentioned have been, a citizen of the United States, over the age of eighteen years, a resident of Santa Clara County, California, and not a party to the within action or cause; that my business address is 625 North First Street, San Jose, California 95112; that I served copies of the:

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

By placing said copies in an envelope addressed to:

Attorney General's Office
Attn: Brian Kinney, DAG
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050-6520

Which envelope was then sealed and, with postage fully prepaid and registered thereon, was on January 30, 2013, deposited in the United States mail at San Jose, California; that there is delivery service by the United States mail at the place so addressed, or that there is regular communication by mail between that place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 30, 2013 at San Jose, California.

NAOMI CHAIREZ