In the Supreme Court of the State of California

In re **JOHNNY LIRA (C-33767),** **On Habeas Corpus.**	Case No. S204582

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Lira's request for a court-decreed reduction in his parole period presupposes that a gubernatorial decision lacking some evidence retroactively creates a period of unlawful confinement. This is incorrect. Lira's indeterminate life prison sentence did not bestow a constitutional or statutory right entitling Lira to be released from prison on a particular date. Even when the executive branch denies a life prisoner parole without evidentiary support, the judicial remedy acts to correct the flawed parole-consideration process—it does not invent a retrospective right to release commencing at the time of the challenged parole decision. Therefore, this Court should reject Lira's claim for relief and reverse the judgment below.

ARGUMENT

I. JUDICIAL REVIEW OF PAROLE DECISIONS DOES NOT INVOKE SUBSTANTIVE DUE PROCESS CONCERNS.

Lira erroneously argues that judicial review is a matter of *substantive* due process, and as such, he is entitled to a "substantive" remedy—incarceration time credited against his parole term. (Answering Brief, at pp. 11, 16.) However, his claim finds no support in the substantive due-process jurisprudence of this Court or the federal courts. In fact, "[t]he mere novelty of [Lira's argument] is reason enough to doubt that substantive due process sustains it . . . ." (*Reno v. Flores* (1993) 507 U.S. 292, 303.)

Under the United States Constitution, the substantive component of the due process clause prohibits government from infringing on "certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Reno*, *supra,* 507 U.S. at pp. 301-302.) "[G]iven the nebulous contours of substantive due process, courts have begun to restrict its reach

to certain 'core' values." (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1183.) Thus, "for the most part," the protections of substantive due process have applied "to matters relating to marriage, family, procreation, and the right to bodily integrity." (*Albright v. Oliver* (1994) 510 U.S. 266, 271-272.)

In the context of indeterminate sentencing, the United States Supreme Court has specifically held that "there is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence." (*Swarthout v. Cooke* (2011) 562 U.S.__, 131 S.Ct. 859, 861 (*per curiam*), citing *Greenholtz v. Inmates of Neb. Penal and Correctional Complex* (1979) 442 U.S. 1, 7.) The substantive due process clause of the Fourteenth Amendment thus places "no duty" on California "to offer parole" to its indeterminately sentenced prisoners serving a valid life sentence. (*Ibid.*)

Nor has this Court ever held that the California Constitution imposes a duty on the executive branch to parole life prisoners as matter of substantive due process. Rather, this Court has concluded that some-evidence review stems from the state's *procedural* due process clause. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654-655 ["procedural due process" places some limitations upon the broad discretionary authority of the Board].) Thus, the mere fact that the state has created "an expectation that parole will be granted" for indeterminate life prisoners does not implicate the substantive component of that clause. (See *id.* at p. 654.)

Lira is not entitled to some "substantive" due process remedy merely because the state courts are empowered to review the merits of executive parole decisions. In seeking credit against his parole term, Lira necessarily requests that this Court judicially decree that he was entitled to release in 2009. But this relief directly conflicts with this Court's holding in *In re Prather* (2010) 50 Cal.4th 238, 253, which explicitly rejected the remedy of

outright release. Indeed, because courts cannot order the outright release of an inmate whose denial of parole is unsupported by some evidence, it follows that the judiciary similarly cannot reach back in time and issue a nunc-pro-tunc release order. This Court's jurisprudence thus illustrates that life prisoners do not have a substantive right to release from prison under the state's due process clause.

II. THE STATE'S DUE PROCESS CLAUSE ONLY GUARANTEES AN ADEQUATE AND MEANINGFUL PAROLE-REVIEW PROCESS—IT DOES NOT CREATE A RIGHT FOR A LIFE PRISONER TO BE RELEASED FROM PRISON ON A PARTICULAR DATE.

The governing statutes and the state Constitution dictate that parole suitability "is a decision vested in the executive branch." (*In re Shaputis* (2011) 53 Cal.4th 192, 198-199 (*Shaputis II*).) The law does not entitle life prisoners "to have [their] term[s] fixed at less than maximum or to receive parole." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.) Nevertheless, each life prisoner "is entitled to have his application for these benefits 'duly considered' based upon individualized consideration." (*Ibid.*) Procedural due process thus empowers state courts to review the factual basis of executive parole decisions to ensure that the executive branch affords "due consideration" of a life prisoner's parole application. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1210.) But if a parole decision does not reflect due consideration of the specified factors, "it is improper for a reviewing court to direct the [parole authority] to reach a particular result." (*In re Prather*, *supra*, 50 Cal.4th at p. 253.) The proper remedy is only a procedural correction, such as an order directing the Board to conduct a new parole consideration hearing (*Prather*, *supra*, 50 Cal.4th at p. 257), or an order vacating the Governor's decision and reinstating the Board's parole grant (*In re Twin* (2010) 190 Cal.App.4th 447, 473-474). The constitutional error is the inadequate process—i.e., the failure to duly consider the evidence—not the executive branch's failure to release the inmate. (See *In re*

Dannenberg (2005) 34 Cal.4th 1061, 1078, 1097 [life prisoner has no vested right to the determination of his sentence at less than maximum—life].)

Here, Lira's release from prison in 2010 rendered the matter moot, requiring dismissal of the case. Indeed, "although a case may originally present an existing controversy, if before decision it has, through the act of the parties or other cause . . . lost that essential character, it becomes a moot case or question which will not be considered by the court." (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) Contrary to Lira's argument, applying the mootness doctrine to this case does not convert the judiciary into a "potted plant." (Answering Brief, at p. 14.) Lira's suggestion that some remedy must be imposed regardless of the posture of the case would appear to give the courts license to review parole decisions, or any controversy for that matter, regardless of the subsequent actions of the parties. Such a disposition is inconsistent with the judiciary's authority to hear only live controversies.

Lira's unsupported allegation that the Governor has conceded that the 2009 gubernatorial decision violated Lira's due-process rights does not revive his moot habeas petition, and misconstrues the legal question before this Court. (Answering Brief, at pp. 13-14.) First, in the courts below, the Governor maintained that some evidence supported the 2009 decision to deny parole. (Slip opn., at pp. 32-41.) Second, the issue before this Court is not whether the appellate court correctly applied the some-evidence standard—the issue is whether the appellate court should have applied it at all. Because prison officials released Lira from prison while his habeas petition was pending before the superior court below (CT, at pp. 1107-1109), Lira's due process claim regarding the Governor's parole denial became moot, and the courts below should have dismissed the petition without engaging in a some-evidence review of the Governor's decision.

Further, relying on *Prather*, Lira erroneously suggests that the facts of his particular case make him uniquely entitled to a reduction in his parole period. He argues that unlike the petitioner in *Batie*, the executive branch in this case "ignored" a prior court order by repeating the "same" decision on the same record. Lira's argument is once again factually inaccurate. (Answering Brief, at pp. 13, 15, 21, 31.) The Governor's 2009 decision did not deny parole based on the same factors as the Board's 2005 decision. (Compare CT, at pp. 634-637 [Governor's 2009 decision], with *In re Lira* (2008) 2008 WL 2917073 [unpub. op.] [noting reasons for the Board's 2005 denial].) In fact, the lower courts never found that the Governor violated a prior court order, nor was the appellate court's opinion—ordering a reduction in Lira's parole period—based on a finding that the executive branch had disregarded a prior judicial decree. (Slip opn., at p. 19; CT, at pp. 1183-1184.) Moreover, Lira's reliance on *Prather* is misplaced. As Justice Moreno noted in his concurrence, "[t]he extent to which courts' prior rulings [in Board cases] would limit the Governor's authority [was] beyond the scope of the [*Prather*] opinion." (*In re Prather*, *supra*, 50 Cal.4th at p. 262 (conc. opn. of Moreno, J.).) Therefore, Lira's factually and legally flawed contention should be rejected.

A court-decreed reduction in a life prisoner's parole period necessarily invents a retrospective right to release going back to the challenged parole decision. Lira thus asks this Court for a judicial decree that he should have been released from prison when the Governor considered his parole in 2009. But such a novel remedy exceeds the scope of due-process review, and violates the separation-of-powers doctrine because the judiciary does not make suitability findings (*In re Prather*, *supra*, 50 Cal.4th at p. 251), nor does it "fix the term or duration of the period of imprisonment" (Pen. Code, § 1168, subd. (b). Therefore, this

Court should reject Lira's request for a judicial decree that he became suitable for parole in 2009.

III. LIRA WAS NEVER UNLAWFULLY INCARCERATED AND PRISON OFFICIALS PROPERLY ALLOCATED LIRA'S PRE-SUITABILITY PRISON TIME TOWARD HIS LIFE-MAXIMUM TERM.

In asserting a statutory basis for relief, Lira erroneously contends that he never received credit for the time he spent in prison between the 2009 denial and his 2010 release. (Answering Brief, at p. 20.) But "all time [Lira] served" in prison, including the period between the 2009 denial and his 2010 release, was "credited as service of the term of imprisonment." (Pen. Code, § 2900, subd. (c).) When the Board granted Lira parole at his 2010 parole hearing, the Board credited Lira's custody following the Governor's 2009 parole reversal toward Lira's total period of confinement. (CT, at pp. 1080-1097; Cal. Code Regs., tit. 15, §§ 2401-2411.) Prison officials thus properly "credited" Lira for all the time he spent in custody. (Pen. Code, § 2900, subd. (c).) The mere fact that Lira's aggregate time in prison exceeded his calculated base term and period of confinement does not entitle him to a reduced parole period under Penal Code section 2900—he was not entitled to release until the executive branch determined him suitable. (*In re Bush* (2008) 161 Cal.App.4th 133, 143.)

Lira argues that courts have uniformly granted parole credits to offset "unwarranted" prison time. (Answering Brief, at p. 23.) But the cases Lira cites do not concern a life prisoner's denial of parole, nor do they address due process violations involving discretionary decisions made by the executive branch. Thus, the relief provided in these cases does not implicate separation-of-powers principles.

In addition, the cases Lira cites award credit against a prisoner's parole period for time spent in prison *in excess of the prisoner's determinate sentence.* (Answering Brief, at p. 23.) The relief in these cases

functions to compel prison officials to execute their ministerial duties in accordance with the underlying criminal judgment. (See *In re Bush*, *supra*, 161 Cal.App.4th at p. 140 [prison officials must release determinate-sentenced prisoners as soon as they serve their determinate sentences].) Lira's reliance on these cases is misplaced.

Here, Lira's murder conviction imposed an indeterminate life sentence, and until the executive branch found him suitable for release, his "term of imprisonment" was an indeterminate life-maximum term. There existed no fixed or legally mandated release date, which is a prerequisite for extending parole credits under section 2900. (See *Bush*, *supra*, 161 Cal.App.4th at pp. 140-141 [recognizing that custody beyond the determinate prisoner's parole release date is unlawful, and the excess time is credited against the prisoner's parole period]; see also *In re Prather*, *supra*, 50 Cal.4th at p. 257, fn. 12 [the duty to observe "a parole decision begins only when the decision is effective"], citing *In re Tokhmanian* (2008) 168 Cal.App.4th 1270, 1276.) Thus, Penal Code section 2900 provides no benefit for Lira, who was promptly released from prison when he received a suitability finding that was finalized once the Governor's review process expired in April 2010. (Cal. Const. art. V, § 8, subd. (b) ["No decision of the parole authority . . . shall become effective for a period of 30 days"].)

Lira argues that *In re Bush* endorses the granting of credits under section 2900 when the Governor acts unlawfully. (Answering Brief, at pp. 23-24.) But in *Bush*, the Court of Appeal did not consider the Governor's actions. Rather, it considered and rejected the petitioner's claim for a reduction in his parole period for the time he spent in prison in excess of his calculated base term. (*Bush*, *supra*, 161 Cal.App.4th at p. 143, fn. 4.) The appellate court reasoned that prison officials had credited Bush for all the time he lawfully spent in prison because "the Board could not have legally

released Bush absent a determination that he was suitable for release." (*Id.* at pp. 143-144.) This was the sole issue before the Court of Appeal. And, contrary to Lira's suggestion, the appellate court never considered the issue of whether Penal Code section 2900 mandated a reduction in Bush's parole period for the four months he spent in prison due to the Governor's untimely request for an en banc review of the Board's suitability determination. Because cases are not authority for propositions not considered (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176), Lira's argument should be rejected.

Moreover, even if the appellate court had endorsed the superior court's order to reduce Bush's parole period for the four months he was in prison after the Governor's untimely action, the facts of *Bush* are inapposite. In *Bush*, the Board's suitability determination was finalized, and once it became effective, the law provided for Bush's prompt release from prison. (*In re Bush*, *supra*, 161 Cal.App.4th at p. 142, citing Cal. Code Regs., tit. 15, § 2289.) Bush nevertheless remained in prison for four additional months beyond this fixed or legally compelled release date.[1]

Conversely, here, the Board's 2009 determination that Lira was suitable for release never became effective because the Governor rendered a timely reversal. (Cal. Const. art. V, § 8, subd. (b) [Board decision does not "become effective" until after the Governor's review period]; *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 638 [noting that the Governor is another "level of review" within the executive branch for parole

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[1] Because this was not an issue on appeal, the facts are unclear as to whether there was a legal basis for the continual detainment of Bush after the parole grant became effective. Even if the Governor issues an untimely request for an en banc review of the Board's suitability determination, the Board, in some instances, can still initiate rescission proceedings and lawfully detain the life prisoner in order to conduct a rescission hearing. (*In re Johnson* (1992) 8 Cal.App.4th 618.)

decisions].) Lira, in turn, was never confined beyond an established or fixed release date. His prison confinement through April 2010 was therefore lawful, and Penal Code section 2900, subdivision (c), does not mandate a reduction in his parole period.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: February 19, 2013

Respectfully submitted,

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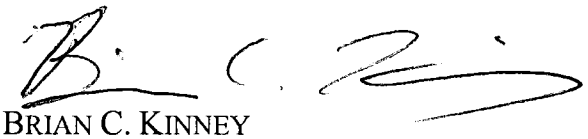

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CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief on the Merits uses a 13 point Times New Roman font and contains 2,493 words.

Dated: February 19, 2013

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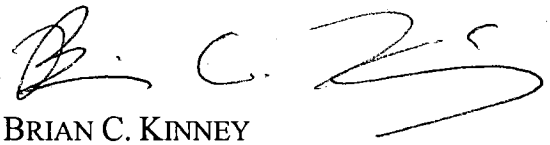

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DECLARATION OF SERVICE

Case Name: **In re Lira**

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 **February 19, 2013**, I served the attached **REPLY 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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On **February 19, 2013,** I caused **Thirteen (13) copies** of the **REPLY BRIEF ON THE MERITS** in this case to be delivered to the at 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 **February 19, 2013**, at San Francisco, California.

F. Triplitt
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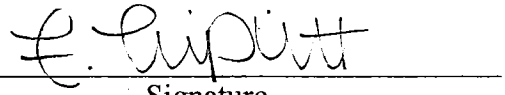

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