No. S173260

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

MIGUEL MOLINA

on Habeas Corpus.

No. B208705

ANSWER BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
San Luis Obispo County, State of California
No. CR13298 (HC-2)

HONORABLE MICHAEL L. DUFFY, JUDGE

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Supreme Court

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MIGUEL MOLINA on Habeas Corpus.	No. B208705

ANSWER BRIEF ON THE MERITS

ISSSUE FOR REVIEW

Where a habeas court finds that a petitioner is entitled to a parole grant as a matter of law because no evidence supported the refusal by the Board of Parole Hearings to grant him a parole date, and by that time the petitioner had been imprisoned a year beyond the time he would have been duly released but for the Board's arbitrary refusal to grant him parole, may the court conclude that "any further delay [of parole] is unwarranted" and order his custodian to release him accordingly?

STATEMENT OF THE CASE

Miguel Molina, behind bars now for almost a quarter-century on an indeterminate life sentence following his plea to second degree murder, has been presumed entitled to a parole date since July 31,

1993, one year prior to his minimum eligible parole date of July 31, 1994. (1 CT 25, 2 CT 217-228; see Pen. Code, § 3041.) "[P]arole applicants ... have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, ... that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654) A determination of unsuitability requires a finding that a prisoner currently is too dangerous for release; that is, he would pose an unreasonable risk of danger if paroled at that time. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191.)

"[T]he statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder" makes parole the rule and denial of parole the exception. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1211; see also *In re Dannenberg* (2005) 34 Cal.4th 1061, 1087 [While the Legislature provided "that uniform release dates would be a typical or common result for indetermine life inmates ..., the Legislature provided an express 'public safety' exception."]; see generally *In re Smith* (2003) 114 Cal.App.4th 343, 366 ["parole is the rule, rather than the exception"]; *In re Roderick* (2007) 154 Cal.App.4th 242, 262 (quoting this language in *Smith*); *In re Scott* (2004) 119 Cal.App.4th 871, 891 ("*Scott I*") [also quoting *Smith* on this point]); *In re Rico* (2009) 171 Cal.App.4th 659, 670 [also quoting *Smith* on this point].)

Despite the fact that Molina had no prior criminal history and had been a model prisoner during his imprisonment (as further explained, *post*), the Board repeatedly invoked the "'public safety'

exception" to deny Molina a parole date until September 2002.[1] (Typ. opn. 2.) In that year the Board for the first time found Molina suitable for parole. (Typ. opn. 12.) It accordingly set a prison term for him of 148 months, or 12 years and 4 months. (2 CT 140). That term was set in accordance with the statutory requirement of uniform and proportionate punishment (Pen. Code, § 3041) and the Board's implementing regulations (Cal. Code Regs., tit. 15, § 2403 et seq.). Molina's prison term began on January 3, 1986 (2 CT 244), more than sixteen years earlier, so that by the time of his 2002 grant he had already served a number of years beyond the time the Board calculated he should serve as punishment, entitling him to release when that parole grant became effective following Board and Governor review. (See Pen. Code, § 3041 ["any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing"] and Cal. Const., article V, § 8 (b) [parole decision for murderer not effective "for a period of 30 days, during which the Governor may review the decision"].)

In fact, because Molina was entitled to reduction of his calculated prison term by approximately one year due to pre-prison

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[1] The Board in practice has turned denial of parole into the rule, with a parole grant the exception reserved for those few prisoners — like Molina — who make the most compelling showings of parole suitability. (See, e.g., *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 685 [Board granted parole to murderers 1% of time in its last 4800 hearings]; see also *In re Andrade* (2006) 141 Cal.App.4th 807, 823 (conc. & dis. opn. of Pollak, J.) ["This record, like that in numerous recent cases, strongly suggests that California parole authorities are losing sight of the fact that 'release on parole is the rule, rather than the exception.'"] (quoting *In re Smith, supra,* 114 Cal.App.4th at p. 351).)

credits of 332 days for his pre-conviction confinement (see 2 CT 217) plus the two weeks between his sentencing date and reception into prison (see Cal. Code Regs., tit. 15, § 2341), the Board's calculation of his prison term provided for a release date some time in 1977, approximately 6 years before the February 2003 effective date of release on parole pursuant to his 2002 grant, had the Governor let his parole grant stand.[2] By decision filed February 21, 2003, however, Governor Davis reversed that parole grant, concluding that "Molina needs to be consistently found to pose a low risk for a longer period of time before he is suitable for release." (1 CT 144-147, 2 CT 314; see also typ. opn. 2.)[3]

On September 17, 2003, the trial court granted Molina's habeas challenge to the Governor's reversal, finding that the Governor had arbitrarily deprived Molina of parole because there was "no evidence" showing his release would pose an unreasonable danger to public safety; the court accordingly ordered Molina released pursuant to his parole grant. (2 CT 314, 3 CT 529.) The Court of Appeal, however, stayed the judgment and, on July 22, 2004, reversed it on appeal,

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[2] Molina will be released on parole only figuratively: He is a Mexican citizen with an immigration hold, and will be released to federal custody for prompt deportation. (2 CT 319.)

[3] Governor Davis was notorious for reversing almost every parole date the Board granted a murderer. (See, e.g., *In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 685-686 [acknowledging "that the Governor has reversed most of the Board's decisions granting parole"].) Governor Davis's successors have continued the practice of reversing the great majority of the few grants of parole the Board makes, so that there remains a "statistically small number of life-term inmates actually released." (*In re Roderick* (2007) 154 Cal.App.4th 242, 272, fn. 27.)

upholding the Governor's deprivation of parole for Molina. (Typ. opn. 2-3; see also 2 CT 312-320.) Through the wisdom of hindsight and the clarifying lens of subsequent case law, most centrally this Court's decision in *In re Lawrence*, *supra*, 44 Cal.4th 1181, it appears that the appellate court erred when it reversed that trial court judgment. (See also *In re Dannenberg* (2009) 173 Cal.App.4th 237; *In re Rico* (2009) 171 Cal.App.4th 659; *In re Vasquez* (2009) 170 Cal.App.4th 370; *In re Burdan* (2008) 169 Cal.App.4th 18; *In re Aguilar* (2008) 168 Cal.App.4th 1479; *In re Singler* (2008) 169 Cal.App.4th 1227; *In re Gray* (2007) 151 Cal.App.4th 379; *In re Barker* (2007) 151 Cal.App.4th 346; *In re Elkins* (2006) 144 Cal.App.4th 475; *In re Lee* (2006) 143 Cal.App.4th 1400; *In re Scott* (2005) 133 Cal.App.4th 573, 578 (*Scott II*).)

During these administrative and judicial proceedings, Molina continued to be a productive and conforming prisoner, all the while deepening his reform and rehabilitation. As the Court of Appeal observed: "Molina claims that the Board's own findings showed that he was a model prisoner who had rehabilitated himself. We agree." (Typ. opn. 11.) In addition, "All the medical evidence and psychological evaluations before the Board uniformly concluded that Molina did not pose a current danger to society." (Typ. opn. 7.) The trial court had agreed as well, finding:

> [A]ll the relevant factors are in Mr. Molina's favor. He has positive psych evaluations, no juvenile record, no adult record, stable social/family history, no prison disciplinary convictions, not even a counseling chrono since 1990, sound parole plans for either Mexico or California, has taken

> advantage of all available education and self-help courses offered by the Department of Corrections and Rehabilitation, he has laudatory work evaluations. In short he has been a model inmate.

(3 CT 530.)

Yet, the Board reverted to denial of parole after the Governor's reversal, and continued thereafter to deny him parole, including when it considered him for parole on December 20, 2006. (Typ. opn. 3.) The Board allowed that decision to become final on April 19, 2007. (2 CT 309; see also Pen. Code, § 3041 ["any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing"].) The Governor allowed that decision to then become effective on May 19, 2007, endorsing the Board's arbitrary conduct for which his office served as a model in 2002. (See Cal. Const., article V, § 8 (b) [final parole decision for murderer not effective "for a period of 30 days, during which the Governor may review the decision"].)

Molina challenged this latest refusal by the parole authority[4] to parole him as lacking evidence and otherwise arbitrary and capricious, and the trial court so found in granting relief on his petition on May

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[4] Reference in this brief to the "parole authority" comprehends both the Board and the Governor. "The governing statutes provide that the Board is the administrative agency within the executive branch that generally is authorized to grant parole and fix releases ...." (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 653.) Article V, section 8 (b) of the California Constitution gave the Governor power to review the Board's decisions for murderers and re-determine them. (*Id.* at pp. 663-664.) Thus, the Board and Governor act together in a complementary way as a single executive authority in parole determinations, and Molina so refers to them collectively as the parole authority.

30, 2008. (3 CT 526.) "In granting the writ, the superior court found, among other things, that the Board made findings about the commitment offense that were not supported by any evidence and that there was no evidence that Molina was a current threat to public safety." (Typ. opn. 3.) The Court of Appeal concurred, finding on appeal that "[t]he Board had no evidence of current dangerousness before it and made no findings on specific facts that show that Molina would pose a risk to the public." (Typ. opn. 7.) Noting that the record showed that "Molina is a more suitable candidate for parole" even than "the petitioner in *Lawrence*," where this Court affirmed a lower court order finding the deprivation of parole arbitrary and capricious and ordering the prisoner's release, the Court of Appeal held that "[t]he Board's decision to deny parole cannot be sustained." (Typ. opn. 12.)

Had the Board granted Molina parole on December 20, 2006, as the courts below found it was legally obligated to do, he would have been released upon the effective date of its decision. Not only had he served a decade of imprisonment beyond the 1997 date calculated for his release in 2002, but by that time he was additionally entitled to further advancement of his parole date because of his years of good conduct and rehabilitative programming since 2002. (See, e.g., Cal. Code Regs., tit. 15, § 2410 [presumption of four months reduction from term set for prisoner for each year of disciplinary-free behavior and programming].) In sum, there is no question (assuming parole authority adherence to the law) that had the Board acted lawfully at

Molina's parole consideration hearing on December 20, 2006, he would have been duly released on May 19, 2007, 150 days later.

In his petition, Molina noted he had "been incarcerated for over 22 years," and sought an order that freed him from that incarceration. (1 CT 3, 17.) In its order of May 30, 2008, more than one year after Molina would have been released had the parole authority acted lawfully, the trial court granted relief, ordering the Board to "immediately vacate its decision finding Mr. Molina unsuitable and enter a new decision finding him suitable and ordering him released to parole" accordingly. (3 CT 526.)

The Court of Appeal issued a writ of supersedeas staying the judgment pending appeal, but vacated the supersedeas stay order in its decision affirming the judgment. (Typ. opn. 13.) The Court of Appeal affirmed the trial court remedy of release, stating:

> The Warden claims that the trial court erred by ordering Molina to be released from prison. He contends it should have remanded the matter to the Board for another hearing. We disagree.
>
> The superior court properly granted the writ because there is no evidence that Molina is currently dangerous. [Citation.] The Board initially granted parole in 2002. Any further delay is unwarranted.

(Typ. opn. 12.) The Court of Appeal thus affirmed the judgment and remanded the matter to the superior court with directions to "in turn remand to the Board with instructions to release Molina on parole in accordance with conditions set by the Board." (Typ. opn. 13.)

The State does not challenge in this Court the correctness of the lower courts' findings that the parole authority had denied Molina due process by depriving him of a grant of parole without any evidence that such parole would unreasonably threaten public safety, and that it was legally obligated to grant him parole. Conceding that the denial of parole was arbitrary and capricious, the State here pursues only its contention that the trial court erred in fashioning its remedy providing for Molina's release on parole. According to the State, the court abused its habeas powers in relieving Molina from his imprisonment, and submits the following: "Where the Board's decision is not supported by some evidence, the court should vacate the Board's decision and order the Board to proceed in accordance with due process by providing the inmate a new hearing to determine his suitability for parole under all relevant statutory and regulatory factors, considering all relevant and reliable evidence." (Merits Opening Brief at 3.)

SUMMARY OF MOLINA'S ARGUMENT

The overriding duty of a habeas court upon finding that a petitioner is entitled to relief is to dispose of that party as justice requires. The judicial findings here that no evidence supported the parole authority's conclusion that Molina was too dangerous to be granted parole were tantamount to findings that he was entitled as a matter of law to a grant of parole. Thus, there was no reason to remand the matter to the Board to conduct another hearing, for there was no procedural irregularity with the hearing conducted. Rather,

the unconstitutionality was found in the substance or merits of the decision. Nor was there a need for remand to permit the Board to formally change its decision from a parole denial to a parole grant, for the court could simply deem the Board as having done so.

Where a court finds that a prisoner is entitled as a matter of law to a parole grant, a remand may be required in some cases to permit the Board, after changing its decision from one of parole unsuitability (parole denial) to parole suitability (parole grant) in accordance with the court's holding, to perform its statutory duty of setting the parole date. Such a remand allows the Board to comply with the statute and its implementing regulations that require it to set a term that provides for uniform and proportionate punishment. Here, however, the courts properly determined that there was no need for even that limited remand, for the Board had already once performed its duty to set a parole date for Molina in the manner provided by law. That parole date had long ago passed. Thus, the record showed more than Molina's simple entitlement to the setting of a parole date: It showed his entitlement to his release on parole.

Specifically, the record showed that Molina had been imprisoned for many years longer than the prison term the Board had already calculated for him in 2002 to achieve uniform and proportionate punishment. Thus, had the authority acted lawfully and granted him a parole date at its December 2006 hearing, Molina would have been released on parole when that decision became effective in May 2007. By the time the superior court acted to redress the wrong done Molina, May 2008, Molina had already suffered

overlong imprisonment for a year solely due to the authority's unconstitutional denial of parole.

Under these circumstances, the court concluded that no legitimate purpose would be served by the remand the State urges as the appropriate relief for Molina. Rather, such remand would only delay justice for Molina, and cause him to continue to suffer the wrongful imprisonment that resulted from the Board's 2006 refusal to grant him parole. Because there was no basis to deprive Molina of a parole grant, under the remand sought by the State the Board would be obligated to grant Molina parole, and the Governor would be obligated to let that grant stand. Yet, many months would go by before that administrative process would lead to the legally foreordained conclusion of Molina's release on parole, causing his wrongful imprisonment to remain unremedied throughout that time. Given that consideration, it was well within the discretion of the habeas court to cut through the bureaucratic tissue and chains of Molina's confinement to the chase of its fundamental unfairness, and relieve him of it by ordering the warden to release him on parole.

In contrast, invocation of the State's choice of remedy would necessitate only long and unnecessary delay to no purpose. Such a delay would run counter to the writ's function to provide speedy relief from wrongful imprisonment and render the writ ineffective in freeing Molina from the excessive imprisonment that plainly flowed from the Board's unconstitutional denial of parole. The heart and soul of habeas corpus is its use as an effective instrument of freedom from

wrongful imprisonment, which makes speed of the essence in the administration of the writ and provision of relief.

Arbitrary imprisonment is a mark of tyranny and incompatible with a free society, so that it is subject to termination forthwith whenever the writ of habeas corpus discovers it. The record established that Molina was suffering such excessive and arbitrary imprisonment. Thus, the Court of Appeal acted well within its discretion when it concluded that "[a]ny further delay is unwarranted" in curing the authority's unconstitutional deprivation of Molina's liberty on parole, affirmed the trial court exercise of its own broad discretion to craft a fair and just remedy, and ordered Molina's custodian to release him subject to the Board's parole supervision.

That order did not deprive the parole authority of its power and duty to determine Molina's readiness for parole. The State concedes that Molina was ready for parole at the time at issue, as reflected by abandonment of its argument that some evidence supported denial of parole for Molina in December 2006. It submits entitlement to a remand to determine his *current* suitability for parole, though it proffers no basis to suspect that he no longer remains suitable for parole that might justify the delay that would attend such a remand.

Even if there was information developed since December 2006 to cause the authority to suspect that Molina's release would jeopardize public safety — and again, it has never suggested such —, the authority does not need the matter remanded to it to determine such in accordance with due process. Statutory and regulatory law already provide that the authority can suspend a parole grant and

rescind a release date at any time before the prisoner's release if new information establishes cause to find that, notwithstanding the prisoner's earlier showing of suitability for parole, the inmate's release would pose an unreasonable risk of danger to the public. Thus, the habeas corpus relief in this case that provided for Molina's release on parole pursuant to a finding that the record provided no evidence of parole unsuitability in 2006 did not and does not restrain the authority from initiating rescission proceedings if it obtains information post-record that parole would unreasonably threaten public safety. Such action by the authority would relieve the custodian of his legal obligation otherwise to release the prisoner, just as any initiation of rescission relieves a warden of his duty to release a prisoner pursuant to an earlier parole grant.

This Court should accordingly affirm the lower courts' remedy that righted the wrong of the authority's abuse of power by requiring Molina's release from prison, for the record compelled such release. That remedy did not intrude on the authority's executive power to determine and redetermine Molina's current suitability for parole in accordance with due process as events unfold, for it remained empowered to invoke its rescission authority to do so.

* * * * * *

ARGUMENT

I.

THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE LOWER COURTS PROVIDING FOR MOLINA'S RELEASE ON PAROLE, GIVEN THE SHOWING THAT THE AUTHORITY'S ARBITRARY DENIAL OF PAROLE MADE HIS CONTINUED IMPRISONMENT EXCESSIVE AND UNLAWFUL.

A. A Habeas Court Has Broad Powers to Ferret Out Wrongful Imprisonment and to Free an Individual From Such.

This Court has acknowledged the storied power and pedigree that the writ of habeas corpus enjoys in our State:

> [T]he importance of the "Great Writ," [is] ... reflected in its constitutional status, and in our past decisions. Indeed, the writ has been aptly termed "the safe-guard and the palladium of our liberties" [citation] and is "regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release ...." [citation]. The writ has been available to secure release from unlawful restraint since the founding of the state. [Citations].

(*In re Clark* (1993) 5 Cal.4th 750, 763-764.)

Implementing "the high purpose of the writ of habeas corpus" as "an efficacious means of vindicating an individual's fundamental rights" (*In re Crow* (1971) 4 Cal.3d 613, 623) is Penal Code section 1484. That section vests a habeas court with broad power to fashion an effective remedy that frees the prisoner from the unlawful restraint he is suffering should it find entitlement to habeas relief. It authorizes

the court "to dispose of such party as the justice of the case may require ...." "The Penal Code thus contemplates that a court, faced with a meritorious petition for a writ of habeas corpus, should consider factors of justice and equity when crafting an appropriate remedy." (*In re Harris* (1993) 5 Cal.4th 813, 850; see also *In re Crow*, *supra*, 4 Cal.3d at pp. 619-20 ["Inherent in the power to issue the writ of habeas corpus is the power to fashion a remedy for the deprivation of any fundamental right which is cognizable in habeas corpus."].)

As the United States Supreme Court has stated about the federal counterpart of our writ:

> [C]ommon-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. See 3 Blackstone [Commentaries] *131 (describing habeas as "the great and efficacious writ, in all manner of illegal confinement"); see also *Schlup v. Delo*, 513 U.S. 298, 319, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (Habeas "is, at its core, an equitable remedy"); *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963) (Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose").

(*Boumediene v. Bush* (2008) 128 S.Ct. 2229, 2267.) In sum, "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*." (*Harris v. Nelson* (1969) 394 U.S. 286, 290-291 (italics added).)

In this regard, the power of a habeas court to redress wrongful restraint is at its greatest when it is confronted with arbitrary imprisonment, for "the practice of arbitrary imprisonments have been, in all ages, the favorite and most formidable instruments of tyranny." (Alexander Hamilton, The Federalist No. 84 (C. Rossiter ed., p. 512) (1961) (quoting 1 Blackstone at 136) (quoted in *Boumediene v. Bush*, *supra*, 128 S.Ct. at p. 2247).) Indeed, speedy relief from the grave and irreparable injury of wrongful imprisonment is the animating force of the writ of habeas corpus:

> [The] Great Writ['s] ... function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

(*Fay v. Noia* (1963) 372 U.S. 391, 401-402 [83 S.Ct. 822]; see also *Hamdi v. Rumsfield* (2004) 542 U.S. 507, 529 (plurality opinion) ["most elemental" of liberties protected by the Due Process Clause is "the interest in being free from physical detention by one's own government"]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 80 ["Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"].)

The equitable power of a habeas court to dispose of the petitioner as justice requires when it is confronted with wrongful imprisonment is the opposite of the straitjacket that the State proposes

courts be placed in when remedying an unconstitutional denial of parole. According to the State's theory that "one size fits all" constitutional violations of parole denial, all that a court can do in any case of wrongful denial of parole is order "remand for rehearing in accordance with due process." (See, e.g., Merits Opening Brief at 3 ["Where the Board's decision is not supported by some evidence, the court should vacate the Board's decision and order the Board to proceed in accordance with due process by providing the inmate a new hearing to determine his suitability for parole"].) But this Court has emphasized that a habeas court has the power and discretion to craft an equitable remedy that achieves justice based on the facts of the individual case. Molina explains below how the particular facts of his case rendered the judgment providing for his release an appropriate exercise of a habeas court's power to redress the fundamental wrong done him and to free him from the unlawful imprisonment that he was suffering as a consequence of that wrong.

B. The Order Providing for Molina's Release on Parole Was an Appropriate Exercise of the Court's Equitable Power in the Interests of Justice Under the Particular Facts of His Case.

The extraordinary facts of Molina's case illustrate the importance of according a habeas court wide berth in tailoring the remedy for unconstitutional conduct to the particular circumstances of the individual case in order to achieve a just result. The provision and tailoring of equitable relief to do justice, particularly in the habeas corpus context of righting a constitutional wrong and remedying the harm done thereby where wrongful imprisonment is at stake,

quintessentially rests in the discretion of the court. A reviewing court thus should give great deference to the exact form of relief provided by a habeas court faced with the complexities of doing justice in the individual case.

The circumstances under which the courts below determined that any further delay in Molina's release on parole was unwarranted included unusual facts that were central to their determination that an order providing for Molina's immediate release on parole was the appropriate relief here. The first such fact was that the Board had already set a parole date for Molina that met the statute's requirement for uniformity and proportionality of punishment.

In the typical case where the Board has denied parole without any evidence that merits invocation of the public safety exception to a parole grant, it will be necessary to remand the case to the Board for it to set a release date. This is because after finding a prisoner suitable for parole, the Board is obliged to set a release date "in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public ...." (Pen. Code, § 3041, subd. (a).) Thus, a prisoner may be entitled to the setting of a parole date by the Board, but because of the need for that prisoner to serve a term purely for punishment purposes, the Board's grant of parole may not entitle the prisoner to immediate release.

"Under subdivision (a), firm parole release dates, fixed in advance under principles of uniform incarceration for similar offenses, ... define the actual terms of imprisonment for eligible life prisoners. [Citation.]" (*In re Dannenberg, supra*, 34 Cal.4th at p.

1090.) This model replaced "an 'indeterminate' sentencing system" where historically "parole dates were not set, and prisoners had no idea when their confinement would end, until the moment the parole authority decided they were ready for release. [Citations.]" (*Id.* at p. 1078.) Thus, unlike the way the old parole system operated — at least until the advent of administrative reforms that foreshadowed the adoption of Penal Code section 3041[5] —, a finding of parole suitability does not necessarily entitle a prisoner to immediate release on parole. Rather, as Judge Reinhardt has explained California's current statutory and regulatory framework for parole of life prisoners:

> It is worth noting at the outset that the issue before us is whether [the petitioner] is suitable for parole, not when he should be released. Under the California parole system, the Board's initial task with respect to an inmate serving an indeterminate sentence is to determine whether he is suitable for parole -- that is, whether he "poses an

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[5] As this Court has recounted:

> Contemporaneous court decisions and administrative developments, addressing problems in the indeterminate sentencing law, further influenced the final shape of Senate Bill No. 42. First, the Adult Authority (as the parole authority was then known) acted on its own to meet some of the reformers' criticisms. "In April 1975, Chairman's Directive 75/20 was issued creating a structure for setting parole dates based on listed ranges and factors. Following this directive, numerous hearings were conducted to abolish the practice of deferring a decision on parole and to establish fixed parole dates for almost all inmates." [Citation].)

(*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1089 (brackets in quote deleted).)

> unreasonable risk of danger to society if released from prison." [Citation.] Only after the Board deems an inmate suitable is a release date set. [Citations.] The actual parole release date may well be a number of years in the future.

(*Sass v. Cal. Bd. of Prison Terms* (9th Cir. 2006) 461 F.3d 1123, 1132 (dis. opn. of Reinhardt, J.) (brackets in quote deleted).)

The law charges the Board, an administrative agency, with setting a term for punishment purposes only after it has established his suitability for parole. (See, e.g., *In re Dannenberg*, *supra*, 34 Cal.4th at p. 1081 [endorsing the Board's practice "in which the suitability determination precedes any effort to calculate a parole release date"].) Thus, after a court has performed its judicial function of determining that the Board was bound by law to find the prisoner suitable for parole, entitling him to a parole grant as a matter of law, the typical provision of relief would include directions to the parole board to carry out the second half of its executive function in parole determinations, namely, setting the prisoner's term and consequent parole date. (See, e.g., *In re Dannenberg*, supra, 34 Cal.4th at p. 1090 [describing how section 3041 had "partially combined the term-setting and parole functions [that had been] separate under prior law"].)

Here, however, the Board had already once found Molina suitable for parole and set a parole date for him that complied with the statutory requirement for uniform and proportionate punishment. Thus, there was no need for remand to the Board to set a parole date for him. Nor was there any need to remand the matter to the parole board to consider advancement of the parole date the Board had

calculated for Molina in light of his continued progress,[6] since the prison term set for punishment had already expired. Indeed, the parole date the Board set for him in light of that term was in the distant past. (See, e.g., *Martin v. Marshall* (N.D. Cal. 2006) 448 F.Supp.2d 1143 [court ordered release on parole where it found a Governor reversal unsupported by the evidence and the Board in the meantime had denied parole at subsequent hearing]; *Rosenkrantz v. Marshall* (C.D. Cal. 2006) 444 F.Supp.2d 1063, 1086 ["Because petitioner's parole date has twice been determined under California law, and because both of those dates ... have passed, respondent should be directed to release petitioner on parole" based on court finding that no evidence supported Board's later finding of parole unsuitability].)

The fact that Molina had already served a ludicrously overlong term of confinement when measured against the statutory and regulatory law providing for uniform and proportionate punishment was a second important consideration in fashioning relief here. Since a public safety concern was absent and Molina had by then more than served a term that unquestionably satisfied the law's need for uniform and proportionate punishment, there was no justification for his continued imprisonment. The fact that Molina's parole date had passed many years earlier made the need for his release to cure the wrong done him all the more compelling.

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[6] If the Board sets a parole date for a prisoner that results in a prospective release date, it periodically conducts so-called "Progress Hearings" to consider advancement of that parole date for continued post-conviction progress. (See Cal. Code Regs., tit. 15, § 2269.)

Finally, it was already 17 months after the fact of the Board's arbitrary denial of parole that the superior court discovered that unconstitutional conduct. Given the fact that the Board's unconstitutional conduct had by then caused Molina to serve a year more in prison than he would have served had the Board granted him parole as it was obliged to do on the record before it (since a parole grant at that time would have entitled him to release upon its effective date five months later), the court tailored its remedy to right the wrong of Molina's excessive imprisonment caused by that lawlessness by providing for his prompt release on parole.

The excessiveness and disproportionality of Molina's imprisonment under all the circumstances of his case further supported the trial court's choice of remedy. Not only had Molina served an extra year of imprisonment due to the Board's unconstitutional denial of parole, but more than a decade had passed since the 1997 parole date it had originally set for him in 2002. That date was taken from him by the Governor, the lawfulness of whose action was questionable even at that time and which subsequent caselaw has made even more questionable.

Putting aside the questionable lawfulness of the years that Molina has been imprisoned beyond the 1997 parole date the Board established for him to provide for appropriate punishment for his offense and beyond the 2002 parole grant that set that date, Molina's incarceration for a full year beyond the time he would have been released absent the Board's 2006 arbitrary deprivation of parole was unquestionably unlawful. Indeed, the State's accedence to the

holdings of the lower court that the Board deprived him of a parole grant in 2006 without any justification for finding him unsuitable for parole effectively concedes the unlawfulness of his incarceration as of May 19, 2007 — a full year earlier than the grant of habeas relief.

The State submits that "[r]emand to the Board for a new review of parole suitability remedies the due process violation by placing the parties in the same position in which they would have been as if the challenged decision had never taken place." (Merits Opening Brief at 10.) Restoration of the *status quo ante* the violation, however, does not place the parties in the position in which they would have been had the Board's arbitrary denial of parole never taken place. Under that hypothetical, the Board indisputably would have found Molina suitable for parole and set a parole date for him that would have caused his release upon its effective date of May 19, 2007. Restoring the parties to the *status quo ante* the Board's unconstitutional deprivation of a parole grant severely disadvantages Molina, for it sets his parole release back by many months. While the court's order for prompt release did not serve to restore the freedom Molina had lost in prison to that point, it at least achieved the justice of putting the parties in the same position they would have been in *at the time of its order* had the Board acted lawfully. The lower courts were thus fully justified in concluding that justice favored an order providing for Molina's release.

Because Molina's continued incarceration after May 2007 was purely a product of unconstitutional executive action, the State's claim that the grant of habeas relief relieving him from his unlawful

imprisonment violated the separation of powers by infringing on the executive power to determine when Molina should parole fails. It was precisely the executive's abuse of that power that justified the habeas relief, where the lower courts did no more than perform their traditional judicial function of ensuring proper application of executive prerogatives. (See. e.g., *In re Sturm* (1974) 11 Cal.3d 258, 269, citing *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 161-163 [2 L.Ed. 60] ["Under time-honored principles of the common law, these incidents of the parole applicant's right to 'due consideration' cannot exist in any practical sense unless there also exists a remedy against their abrogation."] (Ellipsis in quote deleted.).)

The State's claim that the judicial remedy here violated the doctrine of separation of powers is ironic at best, for the remedy cured the executive's abuse of its power in administration of the parole law designed by the Legislature. The authority's refusal to parole Molina invaded the power of the Legislature to design the framework for parole that required the authority in this case to release Molina on parole. Article III, section 3 of the California Constitution states: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." "[T]he separation of powers doctrine is violated ... when the actions of a branch of government defeat or materially impair the inherent functions of another branch. [Citation.]" (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 662 [quoting earlier opinion].)

An outgrowth of the separation of powers doctrine is the "cardinal principle ... that an administrative agency has no discretion to exceed the authority conferred upon it by statute." (*In re Stanley* (1976) 54 Cal.App.3d 1030, 1036.)

> Administrative agencies have only the powers conferred on them, either expressly or impliedly, by the Constitution or by statute, and administrative actions exceeding those powers are void. To be valid, administrative action must be within the scope of authority conferred by the enabling statutes. ... [F]inal responsibility for interpretation of the law rests with courts. If the court determines that a challenged administrative action was not authorized by or is inconsistent with acts of the Legislature, that action is void." [Citation.]

(*In re J.G.* (2008) 159 Cal.App.4th 1056, 1066-1067.)

Penal Code "[s]ection 3041 addresses how the Board is to make parole decisions for indeterminate life inmates." (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1078.) As the lower courts found and as the State does not here dispute, that section obligated it to set a parole date for Molina in 2006. But the Board did not do so, which itself trespassed on the legislative power:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to

> observe the limitations which it imposes upon the exercise of the authority which it gives.

(*United States v. Lee* (1882) 106 U.S. 196, 220.)

The courts below had ample basis to conclude that the benefit of mitigating the irreparable injury of prolonged confinement that Molina was suffering outweighed whatever benefit there was to remanding Molina to prison to permit the executive to release him in due course. Likewise, it had ample basis to conclude that the harm of allowing his continued confinement for the many months it would take the executive to release him pursuant to its administrative process outweighed whatever harm there was to the dignity of the executive by not awaiting its process to release him.

By the time of the superior court's grant of relief, Molina had already served approximately *twice* the term that the Board fixed for him as uniform and proportionate punishment — even without the additional post-conviction credits he had earned since the 2002 grant that fixed his term. Molina was in prison only because of the Board's arbitrary refusal to set a release date for him in 2006. As conceded now by the State, that refusal was the epitome of arbitrariness — without "a factual basis"; rather, "based on 'whim, caprice, or rumor.' [Citation.]" (*In re Powell* (1988) 45 Cal.3d 894, 902.) As the courts have found, when there is no basis to deprive a prisoner of a parole date, the only legal action the parole authority may take is to grant him parole and release him in accordance with the terms of that grant. In sum, under the circumstances of this case, the only legal action the authority could take was to find Molina suitable for parole, fix a

parole date for him that was already well past, and release him accordingly.

Given that the only action the parole authority could take in accordance with due process in 2006 based on the record before the courts was to grant parole and release Molina accordingly, remand was unnecessary. The courts could simply order his custodian to release him without the delay that would otherwise attend the formal administrative process if the courts had remanded the matter back to the authority for that purpose.

The courts' remedy did not invade the authority's "discretion to determine the inmate's current suitability for parole in light of the entire record," as the State asserts. (Merits Opening Brief at 8.) Rather, the parole authority under the order at issue here remains free "to proceed in accordance with due process." For example, if it had developed any information since it last considered Molina for parole to cause it to conclude that his presence in the community would present an unreasonable risk to public safety — and it has never suggested it has — it could, consistent with applicable statutory and regulatory law, and thus consistent with due process, suspend his release and conduct proceedings to rescind the parole grant. Besides its authorization to grant parole and fix release dates, the Board "is also empowered to rescind a parole date for cause." (*In re Powell, supra,* 45 Cal.3d at p. 902, citing case law, Pen. Code, §§ 3041.5, 3041.7, and Cal. Code Regs., tit. 15, § 2450.) "Cause for rescission may exist if the [authority] reasonably determines, in its discretion, that parole was 'improvidently granted' under the circumstances that

appeared at the time of the grant, or that may have appeared since. [Citation.]" (*In re Powell, supra*, 45 Cal.3d at p. 902.) California Code of Regulations, title 15, section 2451 sets forth "Reportable Information" that allows the authority to immediately suspend a parole grant and that can ultimately lead to parole rescission, which includes "[*a*]*ny* new information which indicates that parole should not occur." (Italics added.) "The ... parole date of a life ... prisoner may be postponed or rescinded for good cause at a rescission hearing" if the authority sustains that information. (Cal. Code Regs., tit. 15, § 2450; see also *In re Caswell* (2001) 92 Cal.App.4th 1017, 1026 ["Even after parole is granted, the Board is authorized to rescind the grant of parole, if unexecuted, for good cause after a rescission hearing."].)

Indeed, the Board remains free to rescind the parole grant notwithstanding the court order based on post-record information just as it remains free even *after* a court-ordered release to revoke parole based on post-release information it receives that the individual's presence in the community presents an unreasonable risk. (See Pen. Code, § 3063.) Thus, a habeas order directing the custodian to release the prisoner on the basis that the authority was obligated to parole him when it last considered him for parole leaves unimpaired the authority's power to rescind parole on the basis of new information. The release order here at issue accordingly did not invade the authority's executive power, for it is harmonious with the Board's "parole function[, which] retains its pristine elasticity, permitting release, retention, reconsideration, rescission and resetting as dictated

by post-conviction developments" (*In re Stanley, supra,* 54 Cal.App.3d at p. 1042.)

Liberty is precious, and its loss can never be restored. The lower courts properly recognized that there was no basis to permit the State to conduct the elaborate administrative process it here insists must be conducted before Molina is released. Enough unlawful imprisonment was enough, and fully justified the Court of Appeal's conclusion that further delay in freeing Molina from his wrongful imprisonment was unwarranted.

II.

THE ARGUMENTS MADE BY THE STATE FAIL TO SHOW THAT THE LOWER COURTS ABUSED THEIR DISCRETION IN CONCLUDING THAT THE APPROPRIATE RELIEF IN THIS CASE WAS AN ORDER THAT PROVIDED FOR MOLINA'S PROMPT RELEASE ON PAROLE.

A. The Separation-of-Powers Doctrine Did Not Preclude the Court From Ordering Molina's Release on Parole.

The State first argues that the court's remedy ordering Molina released on parole "violates the separation-of-powers doctrine ... by taking the parole suitability determination out of the Board's control ...." (Merits Opening Brief at 3.) In so arguing, the State relies on this Court's observation in *In re Lawrence*, *supra*, 44 Cal.4th at p. 1212 that "the ultimate discretionary decision of parole suitability remains with the executive branch." (Merits Opening Brief at 4.)

Lawrence, however, teaches that if the only way under the evidence the executive could lawfully exercise its discretion was to find suitability and release the prisoner on parole, and the executive instead abuses its discretion and deprives the prisoner of his entitlement to a parole grant and release in accordance with it, a habeas court is well within its power to order the release of the prisoner without the delay of remand to authorities to do so.

Lawrence illustrates the rule that where the record demonstrates the parole authority could exercise its discretion only in one way to conform with the law — namely, to grant parole and release the prisoner accordingly — a court may order release on parole where the executive has abused its discretion by depriving the inmate of parole. There, this Court affirmed a judgment of the lower court providing for a life prisoner's release on parole after agreeing with that court that no evidence supported the Governor's deprivation of parole. This Court found no call to remand the matter to the Governor for further action, and no constitutional objection to the judicial remedy of prompt relief crafted in that case.

Lawrence held that the remedy of release on parole that it there affirmed, where the authority had deprived the prisoner of parole without any supporting evidence supporting its finding of parole unsuitability, "does *not* impermissibly shift the ultimate discretionary decision of parole suitability from the executive branch to the judicial branch." (*Id.* at p. 1212 (italics added).) The Court so found with respect to a decision of the Governor, in whom the California Constitution both places the "supreme executive power" and vests

with the final executive authority over the parole of murderers. (See Cal. Const., art. V, §§ 1, 8, subd. (a); Cal. Const., art. V, § 8, subd. (b); see also *In re Burdan*, *supra*, 169 Cal.App.4th at p. 39 ["to 'proceed in accordance with due process of law' does not mean the Board, or the Governor, is to be given an opportunity to reconsider the parole decision ... where ... it is determined there is not 'some evidence' in the record to support the ... decision"].)

As this Court has more than once emphasized, "under the some evidence standard, a reviewing court reviews the *merits* of the Board's or the Governor's decision ...." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1210 (italics in *Lawrence*); see also *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 657 [rejecting the Governor's contention that the judicial branch may not "consider the *merits* of a parole decision" (italics in *Rosenkrantz*)].) This Court further noted in *Lawrence* that "judicial review must be sufficiently robust to reveal *and remedy* any evident deprivation of constitutional rights." (*Id.* at p. 1211 (italics added).) If it did not violate the doctrine of separation of powers for this Court to affirm the lower court order requiring the release of the prisoner in *Lawrence* after holding that no evidence supported the authority's finding that she was too dangerous to be released, it does not violate the doctrine of separation of powers for this Court to affirm the lower court order requiring the release of Molina after holding that no evidence supported the authority's conclusion that he was too dangerous for release, for the Board's executive power of parole is

subordinate to the Governor's.[7] The release remedy fashioned by the lower courts in this case no more "allows the court to substitute its judgment for the Board" (Merits Opening Brief at 7) than the release remedy fashioned by the lower court in *Lawrence* allowed the courts to substitute their judgment for the Governor. In each case, there was only one way in which the parole authority lawfully could have exercised its discretion, and that was to parole the prisoner.

There is no separation of powers violation when a habeas court orders release after finding no evidence to support the sole justification for continued custody any more than there is a separation of powers violation when a court finds insufficient evidence to support an agency's discretionary decision and then orders the agency to take the action it had refused to take. (*See, e.g., Tripp v. Sweep, Director of Department of Social Welfare* (1976) 17 Cal.3d 671, 676-778[8] [where determination of eligibility for benefits lies with the Department of Social Welfare and court finds a lack of evidence to support the agency's determination of ineligibility, court may issue a writ that orders the agency to set aside that decision and enter a new decision that finds the individual eligible and pays her benefits accordingly because there "was no issue remaining on which the trial court could invade the director's discretion"]; *SN Sands Corporation v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 195

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[7] The State acknowledges that the Board's executive power is subordinate to the Governor, who is "the final arbiter" of executive suitability determinations. (AOB 7.)

[8] Overturned on other grounds (standard of review) in *Frink v. Prod* (1982) 31 Cal.3d 166.

[no separation of powers violation in court issuing writ that ordered the agency to award contract to plaintiff after finding agency used incorrect standard in refusing the award; though under these circumstances to permit the agency to exercise its discretion under the correct standard "remand is customary, such prolongation of the process is not necessary 'in the rare case where as a matter of law no evidence could support the agency's decision"]; *Ross General Hospital, Inc. v. Director of the Department of Health* (1978) 83 Cal.App.3d 346, 354 [holding that court was not required to remand to the Department of Health and could instead order a specific action, explaining that "[w]here the record of the administrative proceedings requires as a matter of law that a particular determination be made, the court may order that the agency carry out its legal obligation"]; cf. *In re Perkins* (1958) 165 Cal.App.2d 73, 81 [petitioner committed to custody as insane entitled to a writ providing for his release where the evidence established his restoration of sanity as a matter of law, so that "[t]he court had a manifest duty to act in only one way, namely, by adjudicating that Perkins had been restored to sanity" and abused its discretion in finding otherwise]; *In re Lee* (2006) 143 Cal.App.4th 1400, 1414 ["As the record allows only one conclusion about Lee's lack of dangerousness to the public, it serves no purpose to remand this matter to the Governor to permit him to reconsider his decision. [Citations.]"].)

The State asserts that the release remedy fashioned here "strips the Governor of his right to be the final arbiter of Molina's parole suitability." (AOB 7.) While the Governor is the final executive

arbiter of Molina's parole suitability, he declined to exercise his power of final administrative decision-making and effectively endorsed the Board's denial of parole. As indicated, however, the Board's denial of parole was arbitrary and capricious. Under these circumstances, no useful purpose would be served by remanding the matter to the authority, for Molina's entitlement to parole release has been established as a matter of law. The cases, both before and after *Lawrence*, are legion that such an idle gesture is not required for form's sake in the face of the constitutional imperative to relieve the individual from the irreparable harm of wrongful imprisonment. (See, e.g., *In re Smith* (2003) 109 Cal.App.4th 489, 507 ["Since 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 in this case would amount to an idle act"]; *In re Gaul* (2009) 170 Cal.App.4th 20, 39-40 [same].)

The Governor had the power and opportunity to review the Board's unlawful denial of parole in 2006 and rectify the Board's constitutional violation, and exercised that power by allowing an unlawful parole denial to stand. Thus, the court's remedy ordering Molina's release will not deprive the Governor of his discretionary power to review the Board's parole action in this case. The Governor declined to exercise that power, and there is no discretionary power he lawfully could take in any event but to permit Molina's release. Again, *In re Lawrence, supra,* 44 Cal.4th at p. 1229, supports this point. There, the Court affirmed the appellate court order for Lawrence's release, and did not require a remand to the Governor to

proceed in accordance with due process despite his asserted "right to be the final arbiter of ... parole suitability."

B. While a General Remand for the Board to Provide the Process Due May Be An Appropriate Remedy for a Purely Procedural Violation Attending a Parole Consideration Hearing, Such an Order Does Not Adequately Remedy a Refusal to Set a Parole Date that Lacks Supporting Evidence.

The State submits that "the traditional remedy when a due process violation is found" in connection with parole consideration is an order "to provide the process due ...." (Merits Opening Brief at 8.) The State proceeds to cite a number of cases where the courts remedied due process violations occasioned by procedural irregularities by ordering the Board to correct its procedure. (Merits Opening Brief at 8-9.) The remedy for purely procedural violations that do not necessarily implicate the substance of the administrative decision, however, is very different from the remedy for a decision that has no evidentiary support and thus necessarily affects the substance of the decision. Thus, the State's reliance on cases concerning failure to provide a requisite procedural protection that attends the parole consideration process, where the remedy typically is the provision of the requisite procedure at a new hearing, are inapposite. (See Merits Opening Brief at pp. 8-9.) Indeed, the State concedes that "[a]t first blush these procedural issues might not appear analogous to a decision found to be unsupported by some evidence ...." (Merits Opening brief at 9.) At second blush the analogy remains inapt, for the need for some supporting evidence places a

substantive limit on an agency's discretion as well as providing a procedural protection.

The "some evidence" standard is a rule for judicial review, not a rule for administrative decisionmaking. (See, e.g., *Hamdi v. Rumsfeld, supra,* 542 U.S. 537 ["we have utilized the 'some evidence' standard ... as a standard of review, not as a standard of proof"].) "The 'some evidence' requirement is a standard of review, not a requirement that particular procedures be employed by the original decisionmaker." (Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence"* (1988) 25 San Diego L.Rev. 631, 663 (italics and capitalization deleted).) "Standards of review are not procedures employed by the original decisionmaker in order to increase the accuracy or fairness of the decisions it actually reaches." (*Ibid.*)

Rather, standards of review requiring a certain amount of evidence to support an administrative decision are utilized by courts to establish a floor for assessment of the substance of the decision. Because an action taken without any evidence supporting it is substantively unfair, "[s]ome justices have interpreted the 'some evidence' requirement as a guarantee of nonarbitrary government action in the substantive rather than the procedural sense." (*Id.* at p. 665.) After all, "The touchstone of due process is freedom from arbitrary governmental action." (*Ponte v. Real* (1985) 471 U.S. 491, 495.) Thus, while the "some evidence" standard has some characteristics of a procedural protection, it protects most fundamentally against actions that are substantively arbitrary. Again, "under the some evidence standard, a reviewing court reviews the

merits of the Board's or the Governor's decision ...." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1210 (italics in *Lawrence*);

Notwithstanding *Lawrence*, the State clings to language in *In re Rosenkrantz* to support its assertion that "when a parole decision does not satisfy due process, the reviewing court should order the Board to 'vacate its decision denying parole and thereafter to proceed in accordance with due process of law.' (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 658, citing *In re Ramirez* (2001) 94 Cal.App.4th 549, 572 ..., and *In re Bowers* (1974) 40 Cal.App.3d 359, 362.)" (Merits Opening Brief at 4-5.) Thus, according to the State, Molina is entitled to nothing more than "a new hearing to determine his suitability for parole." (See Merits Opening Brief at p. 3 & 9-10.) Not so.

Rosenkrantz concerned review of a judgment of the Court of Appeal affirming a trial court judgment finding no evidence supported a gubernatorial reversal of a parole grant. (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 625.) Finding that there was some evidence, the Court reversed the judgment. Accordingly, the Court's passing observation at p. 628 of the proper remedy where a court finds a due process violation in the deprivation of parole was dictum, for cases are not authority for propositions that are extraneous to its holdings. (See, e.g., *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [axiomatic that cases are not authority for propositions neither essential to its decision nor raised by the parties].)

The State finds "[t]his Court's references to *Ramirez* and *Bowers*" in *Rosenkrantz* supports its submission that the separation of powers precludes the court from ordering release "when fashioning a

remedy once a due process violation has been determined." (Merits Opening Brief at 5.) They do not. *Bowers*, again, was a matter of pure procedure, as conceded by the State, which explained that there the issue was "the Board's failure to provide the mandatory pre-revocation hearing ...." (Merits Opening Brief at 5.) In *Ramirez*, the reviewing court rejected the trial court finding that no evidence supported the denial of parole, so that the lack of supportive evidence was not the due process violation at issue at that point. In *Ramirez*, the appellate court concluded the Board had erred by failing to consider the proportionality of an inmate's sentence in relation to the determinate term prescribed for his crimes, and to assess the gravity of the petitioner's offenses by comparing them with other similar offenses. (*In re Ramirez*, *supra*, 94 Cal.App.4th at pp. 570, 572.) *Ramirez* further concluded the trial court had erred by "making its own evaluations of the evidence before the Board ...." (*Id.* at p. 572.) In holding only that some of the Board's findings were unsupported by the evidence, the Court of Appeal decision necessitated further consideration by the Board of the prisoner's suitability for parole.

Just as another appellate court reasoned:

> Here, unlike in *Ramirez*, we have not found the BPH applied a flawed methodology in its decisionmaking process, necessitating reweighing of the evidence on remand. Instead, we have concluded there is an absence of evidence to support the BPH's unsuitability finding. Under these circumstances, "to 'proceed in accordance with due process of law' does not mean the Board, or the Governor, is to be given an opportunity to reconsider the parole decision" where there is not

> "some evidence" in the record to support the unsuitability finding. [Citation.] As *In re Gaul* explained, "Having concluded that no such evidence exists in 'the full record before the Board' [citation], vacating the denial of parole and directing the Board to conduct a new hearing on the same record would be a meaningless exercise." [Citation.].

(*In re Rico*, *supra*, 171 Cal.App.4th at p. 688 (ellipsis in inside quote omitted).)

The lack of force of *Rosenkrantz's* passing observation when determining the appropriateness of the lower court's remedy of release in this case is illustrated by *In re Lawrence*, *supra*, 44 Cal.4th 1181, where the Court upheld a judgment of the Court of Appeal finding no evidence to support a gubernatorial reversal of a parole grant. There "the Court of Appeal issued a writ vacating the Governor's reversal of the Board's decision, and reinstated the Board's 2005 grant of parole to petitioner [and] ... petitioner was paroled" pursuant to that habeas relief order. (*Id.* at p. 1201.) This Court affirmed that order providing for the immediate release of the prisoner without need for remand to authorities for either a new hearing or a new decision. (*Id.* at pp. 1229 & 1231.)

Taking their cue from *Lawrence*, the Courts of Appeal since then have directed the Board to set a parole date in cases where it has refused to do so despite the lack of any evidence that the prisoner posed an unreasonable risk on parole, unless the Board after hearing cites evidence developed since the wrongful denial of parole that shows current dangerousness. (See, e.g., *In re Masoner* (2009) 172

Cal.App.4th 1098, 1107-1111; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112-1113; *In re Rico, supra,* 171 Cal.App.4th at p. 688; *In re Gaul, supra,* 170 Cal.App.4th 20; *In re Singler, supra,* 169 Cal.App.4th at p. 1245.)

Again, because the Board already had set Molina's term of confinement, there was no need for a remedy that included remand to the Board for a finding of suitability and consequent setting of a parole date. Nor was there any need to remand to account for "the theoretical possibility — however unlikely it may be — that Gaul has engaged in conduct since the [last] parole hearing that would suggest he is no longer suitable for parole," as the *Gaul* court determined, "rather than simply order Gaul released forthwith." (*In re Gaul, supra*, 170 Cal.App.4th at p. 41.) Again, the lower court here was justified in finding that the delay involved in such a remand was outweighed by any need to account for the remote possibility that Molina had become unsuitable for parole since the 2006 hearing, not only because there was no suggestion of such, but also because the rescission power that the Board retained could account for that eventuality in accordance with due process.

The court's remedy here of release, which left the Board with the power of rescission in accordance with law, made Molina more whole than he would have been by an order remanding the matter to the Board for a determination of parole suitability *ab initio* that includes consideration of post-record information. A parole grant is a valuable commodity. (See *In re Rosenkrantz, supra,* 29 Cal.4th at pp. 656-657 incl. fn. 13; see also *In re Powell, supra,* 45 Cal.3d at p. 908

(Broussard, J., dissenting).) Molina was entitled to such in 2006, and he is entitled to it now absent cause to take it from him.

The Board's discretion in rescission proceedings is circumscribed by the need for cause to rescind an existing parole grant, in contrast to the Board's broader discretion to determine whether or not to grant parole to begin with. (See, e.g., *In re Caswell, supra,* 92 Cal.App.4th 1017.) Thus, while the decision whether a prisoner is suitable for parole is analogous to a decision whether there is cause to rescind a parole grant, whether new information developed since a grant of parole shows that the original grant was improvident and thus provides cause for rescission of it constrains the discretion of the Board in a way its original determination of parole suitability does not. (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 657.) This is why "[a]n incarcerated individual for whom a parole date has not been set possesses less of an expectation of liberty than one for whom a released date previously has been established by the Board." (*Ibid.*; see also *In re Powell, supra,* 45 Cal.3d at p. 908 (Broussard, J., dissenting) ["in contrast to its broad discretion to grant or deny parole, the BPT's discretion under the ISL in redetermining sentence and in rescinding parole has been limited"].)

To allow the Board to consider subsequent evidence in parole consideration proceedings, rather than to order the Board to set a parole date and allow the Board to initiate rescission proceedings if warranted, deprives a life prisoner of the value of the parole date to which he was entitled and thus fails to adequately cure the arbitrary deprivation of his liberty interest in parole. *Lawrence*, which post-

dated *Rosenkrantz* and affirmed the lower court order granting release as an appropriate remedy following a finding that there was no evidence that justified the deprivation of parole, illustrates this point. It affirmed an order granting release to the petitioner without any remand to the authority to determine "current" suitability.

The remedy of release after the parole authority acted arbitrarily to deny Molina parole is in accordance with the letter and spirit of the Great Writ. As stated in *In re Rosenkrantz* (2000) 80 Cal.App.4th 409, 428:

> At some point, a failure to follow the law, or the continued application of an arbitrary and irrational standard, will rise to the level of a substantive due process violation. [Citation.].... [W]e flatly reject the Board's contention that (a) Rosenkrantz's only remedy is the continuing charade of meaningless hearings, and (b) that the superior court lacks the power to compel the Board to follow the law.

Six years later, a federal court finally granted Rosenkrantz relief from the authority's "meaningless charade" of parole consideration, reasoning thusly:

> For the foregoing reasons, the petition should be granted. Because petitioner's parole date has twice been determined under California law, and because both of those dates (March 30, 2000 and March 30, 2001) have long since passed, respondent should be directed to release petitioner on parole within thirty (30) days of the date of entry of judgment. *McQuillion v. Duncan*, 342 F.3d 1012, 1015-1016 (9th Cir. 2003) (affirming grant of relief on appeal after remand, and explaining that proper relief is immediate release rather than remand for further parole proceedings where no evidence in the

> record supported the BPT's determination that the petitioner was not suitable for parole); *Saif'Ullah*, 2005 U.S. Dist. LEXIS 43319, 2005 WL 1555389 at *16[9] ("In the absence of any evidence in the record supporting the Board's decision, remanding the case for a new hearing is futile, and the appropriate remedy is to grant the release of the petitioner.").

(*Rosenkrantz v. Marshall, supra,* 444 F.Supp.2d at p. 1086.) Molina is entitled to similar habeas relief.

The lessons of the delay that attended the release of George Scott on parole after the Court of Appeal found that there was no basis to deprive him of parole also may not have been lost on the courts here. On June 22, 2004, the Court of Appeal issued its decision in *Scott I, supra,* 119 Cal.App.4th at p. 891, finding that no evidence supported the Board's 2001 denial of parole and remanding the matter to the Board "to conduct a new parole suitability hearing for Scott no later than the currently scheduled hearing date, July 20, 2004." (*Id.* at p. 899.) The Board duly found Scott suitable for parole at that hearing, and "set a parole release date" that was past, entitling him to release upon its effectiveness. (*Scott II, supra*, 133 Cal.App.4th at p. 578.) The Governor reversed that parole grant, despite the fact that again (and as here as well), "[t]he record before the Board in 2004 provide[d] no evidence upon which to find Scott unsuitable for release on parole on the grounds relied upon by the Governor or on any other ground identified by applicable law and regulations." (*Id.* at p. 603.)

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[9] *Saif'Ullah v. Carey* (E.D. Cal. June 28, 2005) 2005 U.S. Dist. LEXIS 43319 (recommendation rejected on grounds unrelated to remedy in *Saif'Ullah v. Carey* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 74390).

"Considering that the release date set by the Board was October 4, 2001, more than four years ago, and in the interests of justice," the Court of Appeal ordered its opinion providing for Scott's release to "be final as to this court immediately" in order to meet the imperative of freeing him from his excessive imprisonment. (*Id.* at p. 604.) That decision was not issued until October 18, 2005.

The circumstances of Molina's overlong confinement and arbitrary parole decision-making make the lower courts' provision for his prompt release even more appropriate. Imprisonment, without any evidence of dangerousness, for twice as long as the Legislature contemplated when it enacted the statutes and regulations that control here is enough; it is more than enough. Every day that Molina remains unlawfully confined he pays for the State's lawlessness "in a coin that the state cannot refund." (*Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1161.)

This Court has admonished that "it must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired ...." (*In re Bell* (1942) 19 Cal.2d 488, 493, quoting *Bowen v. Johnston* (1939) 306 U.S. 19, 26-27.) That calls in this case for the Court to put an immediate stop to Molina's unconstitutionally excessive confinement by affirming the lower court's order providing for his release. Nothing in that order purports to deprive the Board of its power to rescind that release action for good cause in accordance with due process if any new information has developed since 2006 that demonstrates Molina no longer is suitable for parole. (See, e.g., Cal.

Code Regs., tit. 15, § 2450 ["The ... parole date of a life ... prisoner may be postponed or rescinded for good cause at a rescission hearing."].) Thus, the State's concern about judicial invasion of the executive power here is unwarranted.

The public panic about crime and safety has caused the executive to disregard the legislative framework for parole and its design that uniform and predictable terms of imprisonment proportionate to the gravity of the crime be set early for most indeterminate life prisoners. That panic has created not only bad policy at odds with the legislative policy, but also has created many false prisoners like Molina.

The danger that the parole authority may sacrifice adherence to the law for expediency because of political and social pressures was earlier noted in *In re Dannenberg*, *supra*, 34 Cal.4th at pp. 1104-1105 (dis. opn. of Moreno, J.):

> The Board's reluctance to grant parole is understandable, but troubling. Denial of parole may incur the wrath of the prisoner and his immediate supporters. But granting parole to a prisoner who reoffends will incur the disapproval of society at large. [Citation.] The Board's commissioners therefore have little to gain and potentially much to lose by granting parole, and accordingly, the incentive to give only pro forma consideration to the parole decision is strong.

Justice Moreno in his dissent continued in this vein at a later point:

> Because of the nature of the parole process, there is more than a little risk that the Board's power to deny parole will at times be exercised in an

> arbitrary and capricious manner. Failure to grant parole where parole is due wastes human lives, not to mention considerable tax dollars, concerns that, along with public safety, unquestionably motivated the Legislature when it enacted section 3041.

(*Id.* at p. 1109.) The authority has capitulated to this political pressure by its overwhelming deprivation of parole as unreasonable risks to public safety, instead of recognizing the reality that parole candidates like Molina represent the cream of the crop of a pool of parole candidates who historically have overwhelmingly demonstrated the little risk to public safety that is implicated by their regular and routine release.

A study just this summer that reported directly on California's parole experience made findings that "illustrate the powerful way in which parole for persons serving a life sentence has become increasingly politicized." (Ashley Nellis and Ryan S. King (The Sentencing Project, July 2009) *NO EXIT: The Expanding Use of Life Sentences in America.*)[10] As it explained:

> There is a strong disincentive for a sitting governor to approve the release of life-sentenced individuals. Both governors and parole board members generally receive only negative feedback on releases (when someone reoffends), which reinforces a reticence to grant release. Victims' rights groups closely monitor the process, as do other "watchdog organizations" in some states, and politicians are vulnerable to being held accountable for any potential future transgressions of people released on parole.

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[10] This study can be found at http://www.sentencingproject.org/doc/plublications/inc_noexit.pdf.

> Parole for persons serving a life sentence has become a political liability, even if all reliable indicators suggest to an independent parole review board that the individual is suitable to be released. While the recommendation of a parole review board may be intended to serve as a buffer for a governor should a person released on parole reoffend, in practice this is not the case. This is perhaps no more clearly apparent than in the 1988 presidential campaign, in which it is widely held that the linking of Massachusetts Governor and Democratic candidate Michael Dukakis with Willie Horton, a man who was released and later convicted of kidnapping and rape while on furlough from a state prison, doomed the campaign. In the 2008 presidential campaign, former Arkansas Governor Mike Huckabee was criticized for the parole of a person who had been serving a life sentence and subsequently reoffended within a year of release.
>
> When the choice must be made between granting parole at the risk of political backlash or denying parole, many decisionmakers will opt for the less risky option. Such politically-driven decisions in the case of life imprisonment are frequently at cross-purposes with sound public policy.

(Report, pp. 26-27.)

The authority has capitulated despite the reality that the recidivism rates of life prisoners are extremely low, one to three percent for any type of return to custody, and rarely for violence. For example, of the prisoners released on parole from life sentences since Schwarzenegger became Governor, few have recidivated. As reported in October of 2006:

> California lifers are for the most part behaving after they get out. ... Five lifers paroled by Schwarzenegger have violated parole, four of those for drug relapses, well below the recidivism rate of 60 percent for the state's overall prison population ....
>
> .....
>
> Parole experts say lifer inmates who are released generally fare better than repeat offenders who cycle through the prison system, in part because they tend to have grown into middle age behind bars and have used their time for self-improvement.

(Howard Mintz, *Prison Break*, Mercury News Special Report (Oct. 29, 2006) <www.accessmylibrary.com/coms2/summary_0286-22962362_ITM>.) By the time of Mintz's article, Governor Schwarzenegger had allowed approximately 140 prisoners to parole. (See Crime Victims Action Alliance, California Parole Board Statistics <http://www.cvactionalliance.com/Statistics.html>.) Historically, most life prisoners convicted of murder have been released, and the recidivism rates for such prisoners are consistently low. (See *Ewing v. California* (2003) 538 U.S. 11 (dis. opn. of Breyer, J.), citing "Historical Data for Time Served by Male Felons Paroled From Institutions 1945-1981" dated October 5, 1982, and prepared by the Offender Information Services, Administrative Services Division, Department of Corrections [Board found vast majority of prisoners suitable for parole, including 90% of first-degree murderers]; see also *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 510-511 [historically ten percent of life prisoners in California were found suitable at their first parole

hearing, and fifteen percent received parole dates at their second and subsequent hearings]; see also, e.g., Research: Recidivism <http://newgon.com/wiki/Research:_Recidivism> [1.2% recidivism rate for those convicted of murder and paroled].)

The State seeks to maintain a kind of Limbo on the question of Molina's release, but its unending illegality has transformed the indeterminancy of his sentence into a Hell. The authority has turned him into the unwilling protagonist of a drama out of the French Theatre of the Absurd, somewhere between Beckett's Waiting for Godot and Sartre's No Exit. The executive discretion of the authority and judicial deference due it "does not convert a court reviewing the denial of parole into a potted plant." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212 (quoting *Scott I*, 119 Cal.App.4th at p. 898).) Rather, when it is given that the denial of parole has caused the petitioner to suffer excessive confinement, the courts have a legal and moral imperative to instruct the warden to release that individual forthwith.

Judicial toleration of a little wrongful imprisonment of a life prisoner is too much toleration. To restore Molina to the *status quo* ante the due process violation is to award him the parole grant that he was entitled to before the authority unconstitutionally denied him parole. Adequate account of the Board's executive power to redetermine parole as circumstances change is made by simple recognition of the Board's power to rescind the parole grant that it was required to make in 2006, in the event circumstances since then have proved him too dangerous for release. The lower courts were

well within their discretion to so conclude when they crafted their remedy of release in this case.

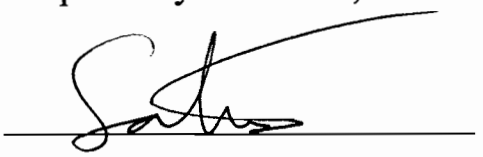
* * * * * *

CONCLUSION

For the foregoing reasons, the Court should affirm the lower court's judgment.

DATED: October 16, 2009

Respectfully submitted,



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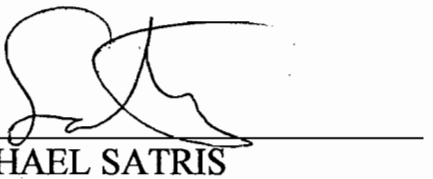
Court of Appeal, Second Appellate District, Div. Six, No. B208705
San Luis Obispo County Superior Court No. CR13298 (HC-2)
In re Miguel Molina

CERTIFICATE OF APPELLATE COUNSEL

I, Michael Satris, appointed counsel for Miguel Molina, hereby certify, pursuant to rule 8.520 (c)(1) of the California Rules of Court, that I prepared the foregoing Answer Brief on the Merits on behalf of my client, and that the word count for this answer, including footnotes, is **13191** words. This answer to petition for review therefore complies with the rule, which limits a petition for review or answer to petition for review to 14000 words. I certify that I prepared this document in Microsoft Word 2002, and that this is the word count Microsoft Word generated for this document.

Dated: October 16, 2009



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PROOF OF SERVICE

I am a citizen of the United States and a resident of Marin County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 337, Bolinas CA.

On October 19, 2009, I served the within **ANSWER BRIEF ON THE MERITS** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, on October 19, 2009.

Sabine Jordan