SUPREME COURT COPY

In the Supreme Court of the State of California

In re MIGUEL MOLINA, On Habeas Corpus.	Case No. S173260

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Second Appellate District Division Six, Case No. B208705
San Luis Obispo County Superior Court, Case No. CR13298 (HC-2)
The Honorable Michael L. Duffy, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The judicial remedy for a denial of parole that is found to be unsupported by sufficient evidence must take account of the penological and public safety interests inherent in a parole decision and also must take account of restrictions on judicial power under the separation-of-powers doctrine and the limited scope of due process. The lower courts here, in ordering Molina's release from prison, did not adequately consider these interrelated factors.

Although Molina contends that his individual circumstances warrant the exceptional relief the Court of Appeal granted, nothing about his case justifies disregarding the relevant legal considerations; nor does a case-by-case analysis provide a workable standard for future habeas corpus matters.

Further, although Molina argues that his release order does not violate separation-of-powers principles, the release order materially impairs, if not totally defeats, the authority of the Board of Parole Hearings and the Governor to assess Molina's suitability for release to parole.

Finally, in contending that immediate release from prison provides him with the process he is due, Molina overlooks the fact that, as a life prisoner serving an indeterminate term, he has no reasonable expectation of his release on parole until he is found suitable for parole by the executive branch. Thus, the due process to which he is entitled is fair consideration of his suitability for parole by the executive branch. That means: consideration of all relevant information pertaining to his suitability; and, if denied, a decision that is supported by some evidence. Only remand to the executive branch can provide Molina with that process.

Because the remedy ordered by the appellate court adversely impacts public safety, disregards separation-of-powers principles, and exceeds any due-process demands, it should be modified by this Court to allow the executive branch to exercise its statutory parole authority.

ARGUMENT

I. THE EQUITABLE POWERS OF THE COURT DO NOT JUSTIFY THE RELEASE OF INMATES CHALLENGING THEIR PAROLE DECISIONS.

Before addressing the separation-of-powers and due-process issues raised by respondent,[1] Molina argues that the appellate court's release order should be affirmed based solely on the traditionally broad equitable powers of a court to remedy the unlawful restraint of a prisoner as dictated by the individual circumstances at hand. (See Answer Brief, at pp. 14-17.) This argument fails for several reasons.

First, because an inmate's challenge to a parole decision is not a challenge to his underlying conviction or prison sentence, the "unlawful restraint" sought to be remedied is not the prisoner's ongoing incarceration per se. As this Court explained in *In re Dannenberg* (2005) 34 Cal.4th 1061, 1097, "[O]ne who is legally convicted has no vested right to the determination of his sentence at less than maximum. Moreover, a defendant under an indeterminate sentence has no 'vested right' to have his sentence fixed at the term first prescribed by the [parole authority] or any other period less than the maximum sentence provided by statute." See *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex* (1979) 442 U.S. 1, 7 ["There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."]; *In re Schoengarth* (1967) 66 Cal.2d 295, 302 ["One who is legally convicted has no vested right to the determination of his sentence at

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[1] As indicated in the Opening Brief, the Warden, who is the current custodian of Molina and thus the proper respondent in the matter below, shall be referred to in this matter by his original designation, "respondent," as identified in the superior court habeas corpus matter, to maintain clarity and consistency in this action.

less than maximum."].) Instead, the "unlawful restraint" is a function of the deficient parole decision that may impact the inmate's on-going incarceration. Thus, within the context of a challenge to a parole decision, an order requiring an inmate's outright release does not equitably remedy a deficient parole decision. Instead, it provides the inmate with a windfall that is contrary to both law and equity.

Similarly, Molina is not now, and has never been "wrongfully imprisoned." As an indeterminately sentenced inmate, Molina remains lawfully incarcerated until: (1) he is found suitable for release on parole; and (2) his prison term is calculated. (*In re Dannenberg, supra,* 34 Cal.4th at pp. 1079-1080, citing Pen. Code, § 3041 and Cal. Code Regs, tit. 15, § 2402, subd. (a).) Since Molina is currently serving a life-maximum sentence for murder and has yet to be found suitable for parole by both the Board and the Governor, his incarceration cannot be considered unlawful.[2] (See *In re Bush* (2008)161 Cal.App.4th 133, 142 [inmate serving indeterminate sentence is lawfully incarcerated for period before he is found suitable for parole even if that period of time exceeds the prison term subsequently calculated by the Board after he is found suitable].)

Likewise, Molina's repeated assertion that his imprisonment has become excessive does not justify his immediate release. (See Answering Brief, at pp. 21, 22, 26, 44, 49) His "excessive confinement" argument,

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[2] Despite the fact that the majority concluded that Molina "is a more suitable candidate for parole" than was the petitioner in *In re Lawrence* (2008) 44 Cal.4th 1181, and thus ordered his release (Slip opn., at pp. 12-13), the ultimate decision of whether an inmate is suitable for parole rests with the executive branch. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1201, citing Pen. Code, §§ 3040, 5075 et seq., 1212; *In re Morrall* (2002) 102 Cal.App.4th 280, 287.) Thus, the fact that the executive branch has yet to determine Molina's suitability for parole supports respondent's contention that the matter should be remanded to the Board to proceed in accordance with due process.

challenging the length of his sentence, is essentially an Eighth Amendment claim that his continued incarceration is disproportionate to his crime. Considering Molina's status as a convicted murderer, however, such a claim has no merit.[3] (See *Ewing v. California* (2003) 538 U.S. 11 [25-year-to-life sentence for felony grand theft under three strikes law did not violate the Eighth Amendment]; see also *Cocio v. Bramlett* (9th Cir. 1989) 872 F.2d 889, 897-898 [25-year-to-life sentence for manslaughter conviction not unconstitutional]; *Alford v. Rolfs* (9th Cir. 1989) 867 F.2d 1216, 1220-1223 [15-year-to-life sentence for a habitual offender convicted for possession of stolen property not unconstitutional].) Thus, Molina's belated Eighth Amendment claim does not entitle him to any relief in this matter, let alone justify the appellate court's immediate-release order.

Furthermore, because the Board has yet to find Molina suitable for parole, it has yet to definitively calculate his term of imprisonment. (Cal. Code Regs., tit. 15, § 2403 [Board is vested with sole discretion to set a base term of confinement once a prisoner is found suitable for parole].) Because the calculation of an inmate's prison term is the second part in a two-step parole determination process, and because the setting of the term of confinement determines whether the inmate must continue to serve additional time in prison after the determination that he is suitable for parole or whether he should be released, the Board must be afforded the opportunity to calculate the inmate's term of confinement. (See *In re Dannenberg, supra,* 34 Cal.4th at p. 1080 ["Both we and the Courts of Appeal have consistently described the parole process for indeterminate life prisoners as one in which suitability for parole is within the Board's informed discretion, and must be first found before a parole date can be

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[3] Molina did not allege an Eighth Amendment violation in any of the courts below.

set."], citing *In re Stanworth* (1982) 33 Cal.3d 176, 183 [under both pre-1976 and post-1976 rules, suitability determination precedes setting of parole date].) Here, the Board has been denied that authority.

Molina alleges that there is no need to remand the matter to the Board to calculate his term of imprisonment; he states the Board already did so when it tentatively found him suitable for parole in 2002. But the Board's decision, including its calculation of the incarceration term, was properly reversed by the Governor, and his decision was upheld by the courts. The Board is not bound by the findings and conclusions of prior hearing panels, particularly when the Governor has independently reviewed and reversed the prior panel's decision. Molina's proposed approach –like his proposed remedy here –ignores the dynamic and changing nature of parole decisions over time. Even the calculation of incarceration terms involves the exercise of discretion, and that discretion is vested in the executive branch. The Board has not had an opportunity to evaluate Molina's parole suitability or to establish Molina's release date since its decision was reversed by the Governor, and in light of the appellate court's order. Thus, ordering Molina's release under these circumstances is not legallay viable.

Molina incorrectly asserts that, because respondent has not challenged the merits of the appellate court's sufficiency-of-evidence ruling, respondent has "conceded" that the Board's decision in this case was arbitrary. Respondent has never conceded that the Board's decision was improper in any manner. To the contrary, respondent maintains that the Board's decision in this matter was supported by sufficient evidence and was otherwise proper despite the appellate court majority's ruling to the contrary. Indeed, as evidenced by the dissenting opinion in the Court of Appeal, reasonable minds may differ regarding the sufficiency of the evidence supporting the Board's decision. That an appellate court Justice believed the evidence supported the Board's decision demonstrates that the

Board's decision is not arbitrary. Certainly, as a policy matter, the Court should not treat a decision declining to seek Supreme Court review on such case- and fact-specific questions as a "concession" of arbitrariness. Not every legal error is properly cognizable on review to this Court. (Cal. Rules of Court, rule 8.500, subd. (b).) Molina's contention that the purportedly arbitrary nature of the Board's decision in this matter mandates the exercise of the judiciary's broad equitable powers to effect a remedy – especially one that would otherwise violate the law –is unfounded.

Finally, it would be illogical to adjust the proper remedy for a Board decision unsupported by evidence based on different circumstances that are personal to the prisoner. Inevitably, such an approach case would lead to inconsistent and unjust results for the Board and inmates alike.[4] Under Molina's proposed case-by-case approach, the ultimate relief ordered would vary depending on which court reviews the parole decision. As already evidenced by the differing remedies being ordered by courts now, under any given parole challenge, the Board may or may not be given an opportunity to execute its duties in accordance with due process and retain its authority to determine parole suitability. Similarly, one inmate seeking enforcement of his due process rights may receive further review of his suitability for parole, while a similarly-situated inmate may be released on parole without consideration of his current suitability for parole.

Indeed, the majority here determined that the circumstances of this case dictated that Molina should be immediately released (Slip opn. at pp. 12-13), whereas the dissent concluded that, in addition to disagreeing with the majority regarding the deference afforded to the Board's decision, at a

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[4] Indeed, the lack of uniform remedies and disparate treatment of inmate petitions is one of the reasons review was sought in this case.

minimum, he would have ordered the matter remanded to the Board for further proceedings. (Slip opn. dissent, at pp. 6-7.)

Because the issue in parole challenges is essentially the same – whether the decision is supported by some evidence –the remedy in all cases should also be the same –vacate the improper decision and order the Board to provide the inmate a new hearing that comports with due process. Recognizing one consistent remedy will avoid confusion, unnecessary litigation, and arbitrary results, which is a more equitable result for all.

II. THE PLAIN LANGUAGE OF THE COURT OF APPEAL'S ORDER REQUIRING MOLINA'S IMMEDIATE RELEASE WITHOUT ANY FURTHER CONSIDERATION BY THE EXECUTIVE BRANCH NECESSARILY VIOLATES PRINCIPLES OF SEPARATION-OF-POWERS

A. Parole Rescission Is Not Relevant to the Separation-of-Powers Analysis.

Molina argues that the appellate court's order did not violate separation-of-powers principles because the Board could still maintain its authority over Molina's release on parole by initiating rescission proceedings, if appropriate. (See Answering Brief, at pp. 27-30.) This contention fails for numerous reasons. First, it ignores the plain language of the court's order indicating that any further delay in the consideration of Molina's parole is unwarranted, and that Molina is to be released. (Slip opn. at pp. 12-13.) Because the court's order did not expressly contemplate any further action by the Board other than its release of Molina, the Board would run the risk of being in contempt of court if it did anything other than release Molina. (See *In re Fain* (1976) 65 Cal.App.3d 376, 389 [an administrative agency has the inherent power to reconsider its decision "unless reconsideration is precluded by law."].) Further, the law pertaining to parole rescission contemplates that the Board can reconsider and rescind its own prior grant of parole. (Cal. Code Regs, tit. 15, § 2450; see also Pen.

Code, §§ 3040, 3063). Here, the Board has not found Molina suitable for parole. Molina's assertion that the Board has a theoretical ability to initiate rescission proceedings does not avert the separation-of-powers conflict caused by the appellate court's release order.

Even if rescission proceedings were a legal option, a court order requiring the release of an inmate on parole still manifestly infringes upon the Board's inherent authority to determine that inmate's suitability for parole, a decision that necessarily precedes a decision to rescind a grant of parole. Moreover, Molina himself argues (see Answering Brief, at p. 41) that the Board's discretion to rescind an inmate's parole is adjudged by different standards than the Board's decision whether an inmate is suitable for parole. The Board is authorized to rescind an unexecuted grant of parole only upon a finding of good cause[5] (*In re Powell* (1988) 45 Cal.3d 894, 901; Cal. Code Regs., tit. 15, § 2450; see Pen. Code, §§ 3040, 3063), that must also be supported by an adequate factual underpinning. (*In re Johnson* (1995) 35 Cal.App.4th 160, 169.) Whereas the determination of an inmate's suitability for parole looks to the future, and whether the

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[5] "Cause" for rescission includes conduct enumerated in section 2451 of title 15 of the California Code of Regulations, which includes:
(a) Disciplinary Conduct.
(b) Psychiatric Deterioration. Any prisoner whose mental state deteriorates to the point that there is a substantial likelihood that the prisoner would pose a danger to himself or others when released, and who is within 90 days of release, shall be reported to the Board.
(c) Fundamental errors occurred, resulting in the improvident granting of a parole date.
(d) Other. Any new information which indicates that parole should not occur. Examples include: an inability to meet a special condition of parole, such as failure of another state to approve an interstate parole; or information significant to the original grant of parole was fraudulently withheld from the Board.

inmate will be a risk to public safety if released, the decision whether to rescind a parole grant looks to the prior suitability determination and whether there is cause to question that decision. (Compare *In re Lawrence, supra,* 44 Cal.4th 1181 with *Powell, supra,* 45 Cal.3d at pp. 901-902 and *In re Caswell* (2001) 92 Cal.App.4th 1017, 1026-1029.)

In addition, limiting the Board's future consideration of Molina's suitability for parole to the scope of rescission proceedings might prevent the Board from considering relevant information considered by the Board at a previous hearing.[6] Such a limitation, while proper for parole rescission hearings, would be incompatible with the Board's ability to assess an inmate's current parole suitability, for state law requires the Board to consider several enumerated suitability and unsuitability factors and any other relevant evidence. (Pen. Code, § 3041; Cal. Code Regs., tit. 15, § 2402.) It is also inconsistent with a long line of cases from this Court that require the Board to consider the interrelation of all factors when determining an inmate's parole suitability. (*In re Lawrence, supra,* 44 Cal.4th at pp. 1212, 1214, 1221; *In re Powell, supra,* 45 Cal.3d at p. 902; *In re Minnis* (1972) 7 Cal.3d 639, 644-645; *In re Schoengarth, supra,* 66 Cal.2d 295, 300.) Thus, the availability of rescission proceedings does not address, let alone remedy, the separation-of-powers violation inherent in a court ordering an inmate released on parole.

B. *In re Lawrence* Did Not Resolve The Issue of Remedy or Separation-of-Powers.

Molina contends that this Court already has determined that remedying a Board decision found unsupported by some evidence by

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[6] See footnote number 5 for the regulatory basis of cause for rescission.

releasing the inmate without first remanding the matter to the executive branch does not violate separation-of-powers principles, for this Court allowed the release of Sandra Lawrence. (See Answering Brief, at pp. 30-32, citing *Lawrence, supra,* 44 Cal.4th at pp. 1210-1212.) But the issue of remedy and more precisely, whether a particular remedy violates separation-of-powers principles, was not at issue in *Lawrence.*[7] Moreover, as Molina acknowledges, *Lawrence* involved the judicial review of a gubernatorial parole decision, and did not consider the issue of the proper remedy when a court finds that a Board decision is not supported by some evidence. *Lawrence* does not does not support Molina's contention that release orders do not violate separation-of-powers principles.

C. Remand of Parole Decisions Is Necessary Because the Outcome Is Not Mandated as a Matter of Law.

In an attempt to demonstrate why remand to the Board is not necessary, Molina cites to various examples of administrative decisions on review in mandate proceedings, where the reviewing court declined to remand the matter for further consideration. In the cited decisions, however, the outcome was required as a matter of law. (See, e.g., *Tripp v. Sweep, Director of Depart. of Social Welfare* (1976) 17 Cal.3d 671, 677 [disability applicant is entitled by statute to benefits as of a particular date once eligibility is established by demonstrating debilitating injury]; *SN Sands Corporation v. City & County of San Francisco* (2008) 167

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[7]Although remedy was not at issue in *Lawrence*, this Court did make a passing reference to the remedy issue by quoting *Rosenkrantz,* stating that "[i]f [a Board] decision's consideration of the specified factors is not supported by some evidence in the record and thus devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter proceed in accordance with due process of law." (*Lawrence, supra*, 44 Cal.4th at p. 1210, citing *Rosenkrantz, supra*, 29 Cal.4th at p. 658.)

Cal.App.4th 185 [administrative board lacked authority to approve or reject contract because contract in question was less than the statutory minimum necessary before the board could legally exercise its discretion]; *Ross General Hospital, Inc. v. Director of the Depart. of Health* (1978) 83 Cal.App.3d 346, 353-354 [project commenced before enactment of relevant administrative regulation is not subject to requirements of the regulation, thus hospital board could not require compliance with regulation]; *In re Perkins* (1958) 165 Cal.App.2d 73 [court had manifest duty to adjudicate that petitioner had been restored to sanity when all evidence introduced showed he was sane and no evidence suggested he was not sane].)

Unlike in these decisions, where the outcome was dictated as a matter of law, the inherently subjective nature of a parole decision requires consideration of a multitude of factors before a prediction can be made regarding an inmate's chances of success in free society. (See *Greenholtz, supra,* 442 U.S. at p. 8 [parole decision involves a "synthesis of record facts and personal observation filtered through the experience of the decision maker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice."].) Because "there is no prescribed or defined combination of facts which, if shown, would mandate release on parole," (*id.* at p. 8), no inmate, including Molina, is entitled to be released on parole as a matter of law. (Pen. Code, § 3041, subd. (b); *In re Dannenberg, supra*, 34 Cal.4th at p. 1087 ["the statutory language belies the notion of a *mandatory duty* to set a release date for all indeterminate inmates, or for any particular such prisoner."].) Instead, subject to judicial review for the sufficiency of the evidence, the determination of whether an inmate is suitable for parole, and

thus entitled to release, is "committed entirely to the judgment and discretion of the board." (*Roberts v. Duffy* (1914) 167 Cal. 629, 641.) Thus, Molina's allegation that parole decisions are analogous to other administrative matters where the outcome is dictated as a matter of law is without merit.

D. The Appellate Court's Order Improperly Impairs the Governor's Authority to Consider Molina's Suitability for Parole.

By ordering Molina's release, the Court of Appeal prohibited the Governor from exercising his constitutional and statutory authority to review Molina's suitability for parole. (Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2; *In re Morrall, supra,* 102 Cal.App.4th at pp. 295-296 [court may not arrogate to itself the exercise of authority that the Constitution expressly vests in the Governor].) Despite this, Molina alleges that the appellate court's release order does "not deprive the Governor of his discretionary power to review the Board's parole action in this case." Molina asserts that the Governor had the opportunity to review the Board's decision when it was issued and that he exercised his authority by allowing the Board's parole denial to stand. (See Answering Brief, at p. 34.)

The Governor's decision to review a Board decision denying parole (i.e., finding an inmate *unsuitable* for release on parole) involves different considerations than, the Governor's assessment of the Board's decision not to grant parole (i.e., finding the inmate *suitable* for release). A finding of unsuitability results in the inmate's continued incarceration, and does not implicate public safety concerns. A finding of suitability, however, potentially results in a convicted murderer's release from prison. This decision has serious public safety implications, and the Governor is authorized to review it. Moreover, because public safety is the ultimate consideration when evaluating an inmate's suitability for parole, "the

Governor has the discretion to be 'more stringent or cautious'" than the Board "in determining whether a defendant poses an unreasonable risk to public safety." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258, quoting *In re Rosenkrantz, supra*, 29 Cal.4th at p. 686.) Thus, this Court has recognized that the Governor's interest in assessing an inmate's suitability for parole is heightened once the Board makes the tentative determination that the inmate is suitable for parole.[8] (*Rosenkrantz, supra*, 29 Cal.4th at p. 686.) If the Board does not make the preliminary decision that the inmate is suitable for parole, but instead the decision is made by a reviewing court, the Governor is never faced with the opportunity to assess whether the inmate's impending release will impact public safety. Thus, Molina's contention that the appellate court's release order does not materially impair the Governor's legal right to review his release on parole is without merit.

E. Remand to the Board Preserves the Separation of Powers and Scope of Judicial Review.

Molina claims that "no useful purpose would be served by remanding the matter to the [parole] authority, for Molina's entitlement to parole release has been established as a matter of law." (Answering Brief, at p. 34.) Some courts have drawn similar erroneous conclusions that remanding a parole matter to the Board is not necessary because it would be an idle act. But relief on such a basis (1) violates the separation of powers; and (2) necessarily exceeds the standard of judicial review in parole matters.

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[8]Molina's suggestion that the Governor's review serves no purpose is belied by the fact that the electorate specifically granted the Governor this review authority. Further, Molina's suggestion is irrelevant, because the Governor is constitutionally authorized to review the Board's parole decisions in cases like his.

First, as discussed in detail in Respondent's Opening Brief, the decision regarding an inmate's suitability for parole is vested exclusively in the executive branch, not the courts. (Cal. Const., art. V, § 8, subd. (b); Pen. Code, §§ 3041-3041.2, 5054, 5077; *In re Rosenkrantz, supra*, 29 Cal.4th at p. 659.) Thus, although the courts may determine whether a parole decision is supported by some evidence, only the Board or Governor may ultimately determine the inmate's suitability for release to parole. Because the authority to make a suitability decision is vestedc in the executive branch, remanding a parole matter to the Board to make that decision cannot be considered a meaningless act –especially since the determination of an inmate's suitability for parole involves an evaluation of his current dangerousness, which requires a current assessment of all relevant and reliable information. (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.)

Moreover, the analysis of whether remanding a matter to the Board would constitute an idle act necessarily exceeds the standard of judicial review in parole matters. A court's review of a parole decision is limited to the decision itself –whether it reflects due consideration of the specified factors as applied to the inmate in accordance with applicable legal standards and whether there is some evidence in the record that supports the decision. (*In re Lawrence, supra,* 44 Cal.4th at p. 1204, citing *In re Rosenkrantz, supra*, 29 Cal.4th at p. 677. "Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 665, quoting *Superintendent v. Hill* (1985) 472 U.S. 445, 455.) Accordingly, if a reviewing court, after determining that a parole decision is not supported by sufficient evidence, considers matters beyond the decision before it, that action exceeds the proper scope of judicial review. Moreover, although a

reviewing court considers the Board's decision and the exhibits presented with the parties' pleadings, it does not review the inmate's entire central file, as does the Board. (*Hill, supra,* 472 U.S. at p. 455 [some-evidence standard does not require court to review entire record].)

Respondent does not suggest that separation-of-powers principles would allow the Board to disregard a judicial determination regarding the sufficiency of the evidence and simply repeat the same decision on the same record. Indeed, any assumption that the Board would disregard a court ruling or order is unfounded, as there is a presumption that official government duties are regularly performed. (*In re McClendon* (2004) 113 Cal.App.4th 315, 323, citing Evid. Code, § 664.) Moreover, if the Board flouted the court's ruling, it might leave itself susceptible to contempt proceedings.

Because the Board is vested with the authority to determine an inmate's parole suitability, it cannot be said that allowing the Board to exercise its authority is an idle act.

III. THE RELEASE ORDER PROVIDES MOLINA WITH MORE PROCESS THAN HE IS DUE

As this Court has already stated, when a Board's decision violates due process, the proper remedy is for the agency to provide the process due. (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 658, citing *In re Ramirez* (2001) 94 Cal.App.4th 549, 572 ["In deference to the Board's broad discretion over parole suitability decisions, courts should refrain from reweighing the evidence, and should be reluctant to direct a particular result. *The Board must be given every opportunity to lawfully exercise its discretion* over Ramirez's parole application." (emphasis added)] (disapproved on other grounds in *In re Dannenberg, supra,* 34 Cal.4th 1061), and *In re Bowers* (1974) 40 Cal.App.3d 359, 362 ("where the Department of Corrections has failed to accord a prisoner due process of law in revoking parole, the relief

to which the prisoner is entitled on habeas corpus is not an order forever barring the Department of Corrections from proceeding further, but, rather, an order directing the Department of Corrections to vacate its order of revocation and thereafter proceed in accordance with due process of law.")[9]

Molina contends that remanding a parole matter to the Board is only appropriate to cure procedural deficiencies, but is inappropriate for matters involving what he calls substantive deficiencies such as lack of evidence.[10] (See Answering Brief, at pp. 35-39.) A number of courts have recently concluded that remand is not the appropriate remedy for similar reasons. (See, e.g., *In re Rico* (2009) 171 Cal.App.4th 659, 687-688 [discussing *Rosenkrantz* and *Ramirez* without addressing *Bowers*], *In re Gaul* (2009) 170 Cal.App.4th 20, 39-40, *In re Burdan* (2008) 169 Cal.App.4th 18, 39.)

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[9]See also *Bd. of Parole Hearings v. Sup. Ct.* (2008) 170 Cal.App.4th 104, 111-112; *In re Bettencourt* (2007) 156 Cal.App.4th 780, 807, fn. 8; *In re DeLuna* (2005) 126 Cal.App.4th 585, 599-600 [matter remanded to Board "to reconsider its decision and to conduct a new hearing to reconsider defendant's suitability for parole using, without restriction, the factors deemed appropriate by the relevant statutes and regulations and in accordance with the requirements of due process."]; *In re Scott* (2004) 119 Cal.App.4th 871, 898-899 [finding no evidence of current dangerousness to support Board decision and ordering new suitability hearing]; *In re Weider* (2006) 145 Cal.App.4th 570, 590-591 [same]; *In re Barker* (2007) 151 Cal.App.4th 346, 377-378 [same]; *In re Roderick* (2007) 154 Cal.App.4th 242, 278 [ordering Board to vacate denial and conduct new suitability hearing not inconsistent with its opinion].)

[10]Molina's contention that the some evidence test "protects most fundamentally against actions that are substantively arbitrary" (see Answering Brief, at p. 36) misperceives the inherent nature of the standard of judicial review as a substantive due process protection instead of its actual purpose, as a procedural due process protection. (See *Hill, supra,* 472 U.S. at p. 453, ["due process requires procedural protections before a prison inmate can be deprived of a protected liberty interest in good time credits."], citing *Wolff v. McDonnell* (1974) 418 U.S. 539.)

Neither this Court nor the *Bowers* or *Ramirez* courts ever limited their rulings so as to suggest that remand was appropriate only to correct certain so-called procedural errors. Further, Molina's claim to that effect is inconsistent with *Rosenkrantz* and the supporting cases cited therein. Although *In re Bowers* required remand to cure procedural errors (*Bowers*, *supra,* 40 Cal.App.3d at pp. 360-362 [remand to Board provide pre-rescision hearing]), the *Ramirez* court ordered remand to address issues directly related to the underlying merits of the Board's decision (*Ramirez, supra,* 94 Cal.App.4th at p. 572 [remand to Board to reconsider weight of evidence]). This Court's citation to two precedents involving different due process violations indicates that the proper remedy when a Board's decision violates due process, regardless of the type of violation to be corrected, is to remand the matter to the Board to proceed in accordance with due process and to reconsider the inmate's suitability for parole without restrictions. (See *In re Rosenkrantz, supra,* 29 Cal.4th at p. 658.) This interpretation is also consistent with separation-of-powers principles, in that remand ensures that the executive branch makes the final decision regarding the inmate's suitability for parole release.

Also, as discussed above, releasing an inmate instead of remanding the matter to the executive branch provides the inmate with more process than he is due. Because "it is fundamental to [an] indeterminate sentence law that every such sentence is for the [statutory] maximum unless . . . the [parole] authority acts to fix a shorter term," (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1097, citing *People v. Wingo, supra,* 14 Cal.3d at pp. 182-183), and because there is no mandatory duty to release an inmate on parole before a determination by the executive branch that he is suitable for parole (*id.* at p. 1087), ordering an inmate's release without further consideration by the executive branch necessarily provides the inmate with a remedy greater than he is entitled to under the law. (See *Benny v. U.S. Parole*

Comm'n (9th Cir. 2002) 295 F.3d 977, 984-985 (a liberty interest in parole is limited by the Board's exercise of discretion so a due process error does not entitle an inmate to a favorable parole decision.) Remand to the Board for a new review of parole suitability remedies the due process violation by placing the parties in the same position they would have been if the challenged decision had never taken place. Thus, the only proper remedy is to 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. Any other remedy would divest the executive branch of its broad discretion to determine parole suitability, violate the separation of powers, and give the inmate a windfall by providing a remedy beyond the process due.

CONCLUSION

Respondent respectfully requests that the remedy ordered by the Court of Appeal be modified to allow the Board to proceed in accordance with due process on remand by providing Molina a new hearing to determine his suitability for parole under all relevant statutory and regulatory factors, and considering all relevant and reliable evidence.

Dated: November 23, 2009

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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 4,846 words.

Dated: November 23, 2009

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Miguel Molina**
Case No.: **S173260**

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 that same day in the ordinary course of business.

On November 23, 2009, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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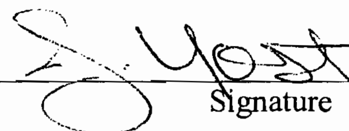
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 23, 2009, at San Diego, California.

J. Yost
Declarant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