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THE STRANGE VICISSITUDES OF LIFER PAROLE VICTORIES AND DEFEATS

FRAN TERNUS
Staff Attorney
First District Appellate Project
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The Strange Vicissitudes of Lifer Parole Victories and Defeats

SIGNIFICANT CASES

A. California Supreme Court

In re Shaputis (*Shaputis* II) (December 29, 2011) _____ Cal.4th_____, S188655; Court of App. No. D056825; 2011 WL 6821364 (Cal.), 12 Cal. Daily Op. Serv. 137
An inmate's degree of insight is a proper consideration in determining whether an inmate poses a current threat to public safety.

In re Prather (2010) 50 Cal.4th 238
The remedy for a violation of due process at a Board of Prison Terms parole-suitability hearing is a new hearing comporting with due process.

In re Lawrence (2008) 44 Cal.4th 1181
The Board's conclusion that a life prisoner is currently dangerous and therefore should be denied parole "must be supported by some evidence, not merely by a hunch or intuition." (*Id.* at p. 1213.)

In re Shaputis (*Shaputis* I) (2008) 44 Cal.4th 1241
Once the appellate court identifies some modicum of evidence to support the Board's or the Governor's determination of current dangerousness, the appellant court can go no further. (*Id.* at pp. 1260–1261.)

In re Rosenkrantz (2002) 29 Cal.4th 616
The judicial branch is authorized to review the factual basis of a decision of the Board denying parole ... to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based on the factors specified by statute and regulation. "Some evidence" means "a modicum of evidence." (*Id.* at pp. 664–665.)

B California Courts of Appeal

1) Reversals of decisions of the governor and the board where they failed to articulate a nexus between the factors used to deny parole and the inmate's current dangerousness.

In re Singler (2008) 169 Cal.App.4th 1227;
In re Burdan (2008) 169 Cal.App.4th 18;
In re Aguilar (2008) 168 Cal.App.4th 1479;
In re Vasquez (2009) 170 Cal.App.4th 370;
In re Gaul (2009) 170 Cal.App.4th 20;
In re Palermo (2009) 171 Cal.App.4th 1096;
In re Rico (2009) 171 Cal.App.4th 659;
In re Ross (2009) 170 Cal.App.4th 1490;
In re Lazor (2009) 172 Cal.App.4th 1185;
In re Dannenberg (2009) 173 Cal.App.4th 237;
In re Moses (2010)182 Cal.App.4th 1279;
In re Juarez (2010) 182 Cal.App.4th 1316;
In re Loresch (2010) 183 Cal.App.4th 150;
In re Powell (2010) 188 Cal.App.4th 1530.

2) Cases which discuss "lack of insight", acceptance or minimization of responsibility, and credits

In re Wen Lee (2006) 143 Cal.App.4th 1400

The governor reversed the board's grant of parole, claiming that the commitment offense was particularly heinous and that inmate's acceptance of responsibility was "too recent". Court reversed and held that the recent nature of the inmate's acceptance of responsibility is irrelevant to a determination of parole suitability as long as the acceptance is sincere.

In re Barker (2007) 151 Cal.App.4th 346

Board denied parole because inmate's extensive rehabilitative gains were "too recent." Court reversed, holding that none of the suitability factors require that an inmate's gains be maintained over an extended period of time.

In re Reed (2009) 171 Cal.App.4th 1071

The court held that board's denial of parole for continual disciplinary write-ups was based on "some evidence" that the inmate was currently dangerous, even though the recent ones were minor.

In re Twinn (2010) 190 Cal.App.4th 447

Governor reversed board grant of parole because inmate "lacked insight" and minimized his responsibility. The court reversed, holding that the governor failed to establish a rational nexus between inmate's alleged lack of insight and his current dangerousness; the fact the inmate did not have insight into the causative factors of the commitment offense in the past was not some evidence that he was presently dangerous.

In re McDonald (2010) 189 Cal.App.4th 1008

Governor reversed board grant of parole because inmate's "limited claim of responsibility" indicated he "lacked insight".The court reversed the governor's decision and held that an inmate's claim that he is innocent is not probative of a lack of insight as long as it is plausible in light of the evidence.

In re Jackson (2011) 193 Cal.App.4th 1376

Board denied parole because inmate's refusal to admit guilt evidenced "a lack of insight". Court reversed, holding that the board's denial was invalid because Title 15 expressly forbids the board to condition parole suitability on an admission of guilt.

In re Rodriguez (2011) 193 Cal.App.4th 85

Governor reversed board's grant of parole because inmate "lacked insight", largely relying on the psychological report's conclusion that inmate lacked insight into his crime. Court reversed, holding that the governor had failed to show that inmate's "lack of insight" was related to a determination of current dangerousness, given his remorse.

In re Lira (2011) 201 Cal.App.4th 677

Inmate was entitled to credit against his parole time for the period of continued incarceration caused by the governor's veto of the board's decision to grant parole.

Stanford Law School
Stanford Criminal Justice Center

LIFE IN LIMBO:

An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California

Robert Weisberg, Debbie A. Mukamal and Jordan D. Segall
September 2011

Stanford Criminal Justice Center

Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
www.law.stanford.edu/program/centers/scjc

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The Stanford Criminal Justice Center (SCJC) serves as Stanford Law School's vehicle for promoting and coordinating the study of criminal law and the criminal justice system, including legal and interdisciplinary research, policy analysis, curriculum development, and preparation of law students for careers in criminal law. The center is headed by faculty co-directors Robert Weisberg and Joan Petersilia and executive director Debbie Mukamal.

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INTRODUCTION

In recent years, California's prison system has been under federal judicial control because of severe overcrowding, which partly results from the recycling of revoked inmates under parole supervision. The federal litigation has cast a sharp focus on the mandatory parole system created by the 1976 Determinate Sentencing Law and viewed as the legal mechanism by which this recycling has developed. But far too little attention has been given to the prison population serving life sentences with the possibility of parole under older *indeterminate sentencing* principles, a population that as of 2010 represents **a fifth of California state prisoners. More than 32,000 inmates comprise the "lifer" category,** i.e., inmates who are eligible to be considered for release from prison after screening by the parole board to determine when and under what condition.[1] (This group of prisoners is distinct from the much smaller population of 4,000 individuals serving life sentences without the possibility of parole (LWOP)).

The goal of this project is to examine in empirical detail (a) the lifer population, covering key details of its demographics, and (b) the processes by which lifers are considered for release, including an examination of historical trends in grant and denial rates, the recidivism record of released inmates, and legal and policy analysis of the specific mechanisms of the parolee hearing process. Despite the importance of the lifer population in terms of its size and the major legal and policy changes that have occurred to the parole process for lifers in the last several years, little research has yet been devoted to this topic.

We foresee the result to be a body of research that will generate both better public understanding and further academic examination of the lifer population and processes. In addition, we hope our study generates suggestions for legal and policy reform, including better ways of assessing the recidivism risks of lifers, the fairness of the hearing process, and possible budgetary savings from changes in the state's legal rules governing lifers.

This is the first in a series of reports the Stanford Criminal Justice Center (SCJC) will be issuing on this topic. It describes the scope of the population of prisoners serving life sentences with the possibility of parole, as well as the process by which they are considered for release. It also includes initial analysis from our research examining Board of Parole Hearings transcripts the factors that might correlate with grant and denial decisions. Finally, this report identifies important research questions we are now pursuing.

Some highlights from our findings include:

- The size of the lifer population has increased as a percentage of the overall California prison population from eight percent in 1990 to 20 percent in 2010. Most individuals serving life sentences with the possibility of parole are serving time for first- or second-degree murder.
- In line with the increase in the size of the lifer population, the Board of Parole Hearings has steadily increased the number of lifer suitability hearings it has conducted in the last 30 years, representing a 745 percent increase from 1980 to 2010. The majority of the increase has occurred in the last decade.
- More than twice as many hearings were scheduled than conducted in 2010, reflecting a trend that has appeared and grown since 2000. While efforts by the Board to address the backlog of hearings has increased the flow of hearings, the passage of Marsy's Law and new regulations promulgated in 2008 have likely increased the number of hearings.
- A lifer now stands an 18 percent chance of being granted parole by the Board of Parole Hearings. The grant rate has fluctuated over the last 30 years—nearing zero percent at times and never arising above 20 percent. The change in the rate could be attributed to changes in characteristics of the inmates appearing in a particular year, changes in the composition of the board, and court clarification of standards the Board should use in determining suitability or other factors.
- In addition, while an inmate's chance of being granted parole has increased in the last two years, the length of time he or she must wait for a subsequent hearing when denied parole has also increased (though there is a legal mechanism by which an inmate can petition the Board to advance his/her hearing by a showing of, among other things, changed circumstances).
- The Governor's rate in reversing decisions made by the Board has fluctuated over the last two decades, reflecting the individual policy orientation of the particular Governor in office.
- As with the size of the lifer population and the number of hearings conducted by the Board, the number of parole decisions made by the Governor involving murder cases has increased by 1754 percent in the last 20 years, with the bulk of the increase occurring after 2000 (when the total number of suitability hearings conducted by the Board increased).
- The likelihood of a lifer convicted of murder being granted parole by the Board and not having the decision reversed by the Governor is—and always has been—slim. In 2010, the probability was approximately six percent.
- A major—perhaps *the* major—question in public debate about the current lifer population is their risk of recidivating. While data is limited, interim information suggests that the incidence of commission of serious crimes by recently released lifers has been minuscule, and as compared to the larger inmate population, recidivism risk—at least among those deemed suitable for release by both the Board and the Governor—is minimal.

In particular, initial results from our research analyzing nearly 450 Board of Parole Hearings lifer suitability hearing transcripts from the time period 2007 through 2010 reveal the following significant findings:

- Grant rates vary significantly year to year: the grant rate in 2010 was nearly triple what it was in 2007 and 2008.
- Though commissioners become more lenient in one dimension—by increasing the grant rate in 2009 and 2010—they become more stringent on another dimension in those years, by setting lengthier periods of time until the subsequent parole hearing when denying parole.
- When victims attend hearings, the grant rate is less than half the rate when victims do not attend.
- There is no statistically significant difference in the grant rates of various types of offenses. One factor strongly associated with release is whether the life crime involved sexual violence. Other factors that do not relate in any statistically significant way include the use of a firearm in the life crime or the number of people the inmate victimized in the commission of the life crime.
- Prior record does not appear to significantly affect release decisions, whether they are adult or juvenile records.
- Most inmates committed their life crime between the ages of 20 and 25. Inmates who committed their life crimes between 20 and 30 were somewhat more likely to be paroled than inmates whose life crimes were committed in their forties. The average age of inmates at the time of the parole hearing is 50.8. The average age of inmates granted parole is 49.9 years, and the average age of inmates denied parole is 51. Surprisingly, age does not appear to be a significant factor in release decisions.
- Other factors like immigration status, whether an inmate has children, and marital status are not significantly associated with a release or denial.
- More research is needed to determine grant rate variance across prison facility, and the reasons associated with it, including the security levels of and program availability at each facility.
- In-prison behavior can affect whether an inmate is granted or denied parole. CDC 115 infractions are strongly associated with the grant rate, though CDC 128 infractions are not significantly associated with the grant rate. Also, the seriousness of the disciplinary violation is dispositive: violent disciplinary infractions—regardless of when they occur—are significantly associated with parole denials.
- Scores of psychological examinations administered to predict recidivism risk and inmate psychological stability are significantly correlated with the grant rate. Inmates who receive an average score or higher on these exams virtually never receive parole release.
- History of drug or alcohol abuse is not correlated with the grant rate. However, whether an inmate is participating in a 12-step program and whether he or she can correctly answer questions about those steps does affect whether an inmate is granted or denied parole.

WHO ARE CALIFORNIA'S "LIFERS?"

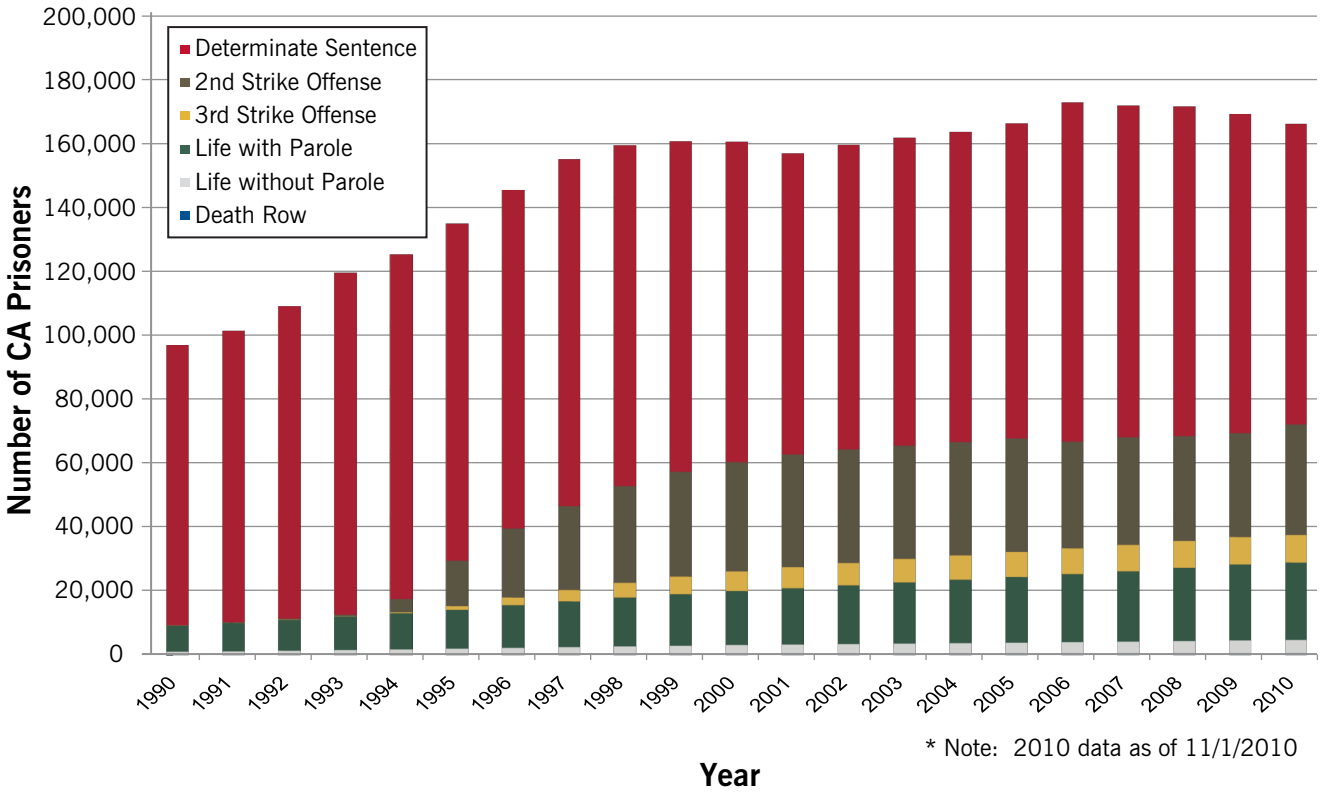
As of 2010, 20 percent of the California prison population is serving a term-to-life prison sentence, more than twice the percentage 20 years ago, and the highest such percentage of any system in the country.[2] Of the roughly 32,000 inmates serving life with the possibility of parole sentences, about 75 percent are serving so-called "term-to-life" sentences and 25 percent are serving three-strikes sentences. Chart 1 contextualizes the growth of these populations within the larger prison population.

This bulletin concentrates on those inmates serving "term-to-life" or life sentences with the possibility of parole sentences (generally referred to as "lifers" by the California Department of Corrections and Rehabilitation (CDCR)). Note, however, that because the three-strikes law is less than two decades old, the percentage of the overall lifer population contributed by three-strikes will surely grow, regardless of any changes in the term-to-life population. It is presently unknown whether and how current policies and laws governing parole release for the term-to-life population will also presumably apply to the three-strike population, the first of whom will come before the Board of Parole Hearings for parole release in 2019.[3]

Although numerous crimes can lead to life sentences under the California Penal Code, the great majority of current lifers were convicted of first- or second-degree murder[4] or attempted murder; the two other crimes with substantial numbers of lifers are rape and kidnapping. More details on the proportion of lifers representing the various crime categories, as well as the length of time typically served by category, appears in the "Detailed Demographics" section beginning on page 15.

CHART 1

Sentencing Categories Comprising the CA Prison Population, 1990 – 2010



* Note: 2010 data as of 11/1/2010

PAROLE PROCESS IN A NUTSHELL

The California Penal Code and Board of Parole Hearings regulations lay out the detailed rules that govern the parole decision-making process for individuals serving term-to-life sentences. The Board of Parole Hearings ("Board" or "BPH", formerly called the "Board of Prison Terms") is responsible for conducting suitability hearings to determine parole consideration for lifers. Its power vests from California Penal Code § 3040, et seq.: "The Board of Prison Terms shall have the power to allow prisoners imprisoned in the state prisons pursuant to subdivision (b) of Section 1168 to go upon parole outside the prison walls and enclosures." As early as 1914, the court held that whether an inmate should be released on parole should "be left to the judgment and discretion of the [B]oard to be exercised as it might be satisfied that justice in the case of any particular prisoner required."[5]

The Board is comprised of 12 full-time members, appointed by the Governor and confirmed by the Senate.[6] Terms of service are three years, although Commissioners are eligible for reappointment. Membership is supposed to "reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the population of the state."[7]

Some 70 Deputy Commissioners—civil servants—also participate in and make decisions at hearings to determine suitability for parole release, though they are not permitted to rule on objections at hearings.[8] Commissioners and Deputy Commissioners participating in parole suitability hearings are required to receive 40 hours of annual training, including training in domestic violence and intimate partner battering.[9] They are required to have a "broad background in criminal justice" and "…a varied interest in adult correction work, public safety, and shall have experience or education in the fields of corrections, sociology, law, law enforcement, medicine, mental health, or education."[10]

The Board meets with and schedules initial parole suitability hearings with individuals serving life terms one year before their minimum parole eligibility dates (MEPD). Typically, one commissioner and one deputy commissioner preside over a hearing. Hearings are held in person and at the institution in which the prisoner is currently housed. Before the hearing, the Board receives a case file consisting of the inmate's central file, forensic evaluations (including the results of risk assessment instruments), behavior in prison, vocational and education certificates, letters of support and opposition, and statements from victims.

MARSY'S LAW: AN EXPANSION OF VICTIMS' RIGHTS

In November 2008, California's voters passed Proposition 9—also known as "Marsy's Law"—a ballot initiative promoted as a "Victims' Bill of Rights." It was named for Marsy Nicholas, a 21-year-old college student who was murdered by her boyfriend in 1983 and whose perpetrator was released on bail without her family's knowledge. The law amended the California Constitution by expanding victims' rights in a number of important ways, including providing notice and granting participation in all proceedings. Specifically within the parole process for lifers, Marsy's Law grants the victim, next of kin, members of the victim's family, and two representatives designated by the victim the right to attend and make statements at suitability hearings which reasonably express their views concerning the prisoner, the effect of the crimes on the victim and the victim's family, and the prisoner's suitability for parole. It requires the Board to consider the entire and uninterrupted statements of victims, including victims of non-life crimes. It also forbids the prisoner or his/her attorney from asking the victim questions during the hearing. See: California Constitution Article I, Section 28 and California Penal Code §§ 3041.5 and 3043.

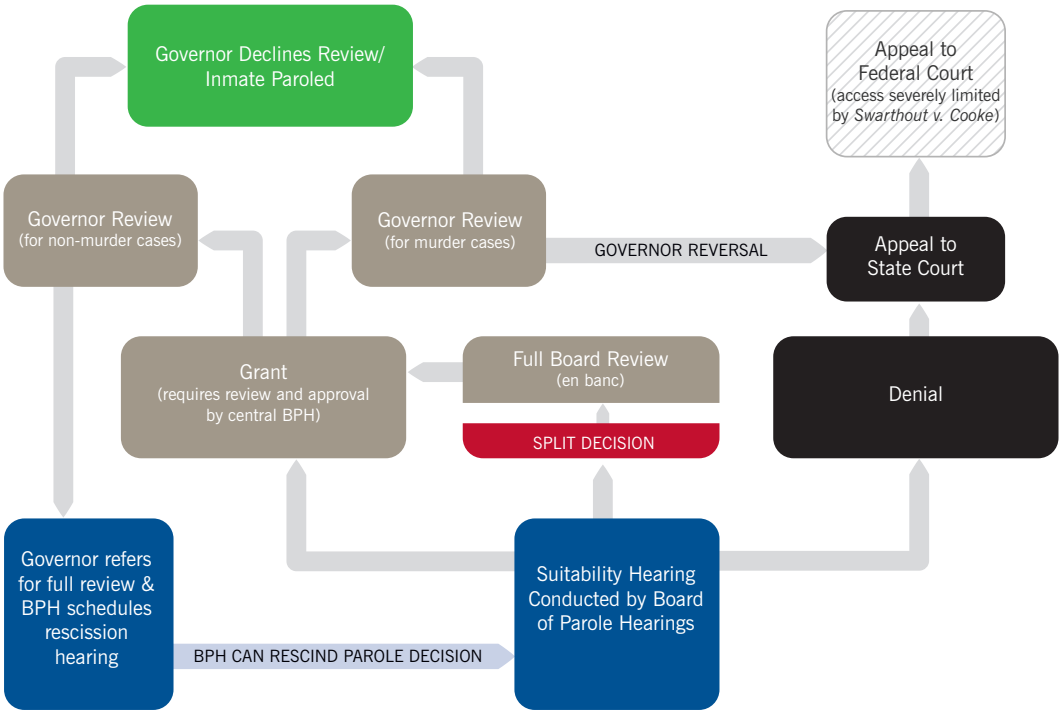
As discussed within the text, another very important change made by Marsy's Law was to lengthen the number of years by which individuals serving life sentences are granted subsequent hearings when denied parole by the Board.

The inmate is entitled to attend the hearing in person, ask questions, receive all non-confidential hearing documents at least 10 days in advance of the hearing, have his/her case individually considered, receive an explanation of the reasons for parole denial, and receive a transcript of the hearing proceedings.[11] The inmate is also entitled to be represented by counsel at a suitability hearing.[12] California pays appointed attorneys $50 per hour and a maximum of eight hours or $400 to represent inmates at parole hearings.[13] Privately retained attorneys charge between $2000 and $5000 for parole board hearing representation.[14] Some attorneys maintain that the amount of time necessary to review the inmate's file, meet and prepare with the inmate, and provide representation far exceeds eight hours.

The District Attorney from the county from which the inmate was committed has the right to participate in the hearing and be notified by the Board at least 30 days before the hearing date.[15] The District Attorney is limited to asking clarifying questions of the inmate via the Board.

As in nearly every jurisdiction in the United States, victims have the right to receive notice and participate in the parole hearing process in California.[16] As expanded by Marsy's Law in 2008, the victim, next of kin, members of the victim's family, and two representatives have the right to receive notice 90 days prior to the hearing and to present uninterrupted testimony at the hearing either in person, by written statement, audio or video statement, or by video-conference appearance.[17] The victim or his or her representative may speak about any of the crimes of which the inmate has been convicted, the effect of the crime, and the suitability of the inmate for parole. These individuals are also entitled to request and receive a stenographic record of all proceedings.[18]

In addition to the Board members, inmate, inmate's attorney, the District Attorney, and victim(s), members of the press are permitted and sometimes attend hearings. In addition, at least 30 days before the hearing, the Board must send written notice to the judge of the court where the inmate was convicted; the attorney who represented the defendant at trial, the law enforcement agency that investigated the case, and, where the person was convicted of the murder of a peace officer, the agency which had employed that peace officer at the time of the murder.[19] Any of these parties may submit written or recorded information to the Board.[20]



DETERMINING SUITABILITY FOR PAROLE RELEASE

Individuals serving life sentences with the possibility of parole—unlike those serving death or LWOP sentences—are presumed to receive a parole date unless the Board determines that the prisoner poses an "unreasonable risk of danger to society."[21] Regulations guide the Board in making these assessments. In particular, circumstances that weigh in favor of release include: (1) no juvenile record; (2) stable social history; (3) signs of remorse: (4) motivation for crime: (5) Battered Woman Syndrome; (6) lack of a significant violent criminal history; (7) age; (8) understanding and plans for the future; and (9) institutional activities that indicate an ability to function within the law upon release.[22] Factors that weigh against release suitability for release include: (1) the commitment offense;[23] (2) previous record of violence; (3) unstable social history; (4) sexual offense background; (5) severe mental problems; and 6) serious misconduct in prison.[24] California law also lays out detailed due process rights for prisoners in regard to these hearings.[25]

In a series of key decisions (see "California Courts Clarify Standards for Determining Release" on this page), the California Supreme Court has shed light on the weight of the factors identified in the law and regulations. Notably, "although the Board exercises broad discretion in determining whether to rescind parole, such decisions are subject to a form of limited judicial review to ensure that they are supported by at least 'some evidence."[26] By extension, the "some evidence" standard applies to Board decisions granting or denying parole.

> The nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole. Although the parole authority is prohibited from adopting a blanket rule that automatically excludes parole for individuals who have been convicted of a particular type of offense, the authority properly may weight heavily the degree of violence use and the amount of viciousness shown by a defendant.[27]

For some time, the Board had relied heavily and primarily on the commitment offense itself in making

CALIFORNIA COURTS CLARIFY STANDARDS FOR DETERMINING RELEASE

While statute and regulation present the factors the Board—and by extension, the Governor—should consider in deciding whether to release individuals serving life sentences, case law over several decades has clarified the standards and the weight of the various criteria to be used by the Board and Governor in making their decisions. The Court most recently clarified that the relevant inquiry is whether there is "some evidence" showing that the prisoner is a current threat to public safety, and while the commitment offense is probative, in and of itself cannot serve as the sole reason to deny parole.

Roberts v. Duffy (140 P.260 (Cal. 1914): Whether an inmate should be released on parole should "be left to the judgment and discretion of the [B]oard to be exercised as it might be satisifed that justice in the case of any particular prisoner required."

In re Minnis, 498 P.2d 997 (Cal. 1972): "Although a prisoner is not entitled to have his term fixed at less than maximum or to receive parole, he is entitlted to have his application for these benefits 'duly considered;" based upon an individualized consideration of all relevant factors.

In re Powell, 755 P.2d 881 (Cal. 1988): "[D]ue process requires only that there be some evidence to support a rescission of parole by the BPT."

In re Rosenkrantz, 59 P.3d 174 (Cal. 2002): '[U]nder California law the factual basis for a Board decision granting or denying parole is subject to a limited judicial review under the 'some evidence' standard of review." Also: "The nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole. Although the parole authority is prohibited from adopting a blanket rule that automatically excludes parole for individuals who have been convicted of a particular type of offense, the authority properly may weigh heavily the degree of violence used and the amount of viciousness shown by a defendant."

(continued next page)

its decision, labeling nearly all offenses "heinous, atrocious, and cruel" and using that as the basis for denying inmates parole. But the Court has now clarified that the Board must grant parole unless it concludes that the inmate is still dangerous, and the Board cannot use the circumstances of the crime, standing alone, as a basis to deny parole.[28] As a result, the trend has moved from reliance on the commitment offense to indicia that the inmate "lacks insight" (as shown by minimizing culpability or inconsistent statements of the crime itself) when determining unsuitability. In sum, the appropriate and governing standard of review of parole decisions for lifers is whether there exists "some evidence" that the inmate poses a current threat to public safety.

In 1988, Proposition 89 amended the California Constitution and gave the Governor authority to review the parole board's decisions in cases involving non-murder cases and reverse the parole board's decisions in cases involving murder convictions.[29] For decisions involving non-murder cases, the Governor is limited to remanding the case back to the Board for full review if s/he disagrees with the decision made by the Board. California is one of only four states with gubernatorial review of parole board decision-making, though California is unique in limiting reversal power to decisions involving murder convictions.[30] The Governor must apply the same legal standards as did the BPH itself when reviewing decisions. According to the California Supreme Court, the Governor's decision should "reflect an individualized consideration of the specified criteria" that also must be considered by the Board in making parole decisions.[31] Any judicial review of the Governor's decision, in turn, "strictly is limited to whether some evidence supports the Governor's assessment of the circumstances of petitioner's crime—not whether the weight of the evidence conflicts with that assessment."[32]

Once a prisoner is released from custody onto parole supervision, the length of the parole period post-release depends chiefly on the original crime of conviction, according to rules set out in California Penal Code § 3000.1. If the original crime was murder and it was committed after 1982, the released person is presumptively on parole for his/her lifetime but can petition the Board to be discharged from parole after either five years (if second-degree) or seven years (if first-degree). Most other lifers will serve between three and five years, but can petition for discharge earlier.

In re Dannenberg, 104 P.3d 783 (Cal. 2005): "[T]he Board, exercising its traditional broad discretion, may protect public safety in each discrete case by considering the dangerous implication of a life-maximum prisoner's crime individually." Also: [I]n order to prevent the parole authority's casey-b-case suitability determinations from swallowing the rule that parole should be 'normally" be granted, an offense must be 'particularly egregious' to justify the denial of parole."

In re Lawrence, 190 P.3d 535 (Cal. 2008): "[T]he relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense." Also: "In some cases, such as those in which the inmate has failed to make efforts toward rehabilitation, has continued to engage in criminal conduct postincarceration, or has shown a lack of insight or remorse, the aggravated circumstances of the commitment offense may well continue to provide 'some evidence' of current dangerousness even decades after commission of the offense."

In re Shaputis, 190 P.3d 573 (Cal. 2008): "[T]he paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety…"

RECENT DISPOSITION RATES

As Chart 2 depicts, in the last 20 years the annual number of scheduled hearings to determine suitability for parole release for individuals serving life sentences has grown significantly though not at a consistent rate, with the annual number averaging about 1600 early in this period and over 6000 in the most recent years. But the annual number of hearings actually conducted has grown less significantly and has fluctuated much more, with the percentage of scheduled hearings actually ending up in conducted hearings dropping notably from about 75 percent to about 50 percent. In 2009, the Board of Parole Hearings scheduled 5,639 hearings to determine parole suitability and conducted 2,714 hearings.[33]

The reasons for this drop-off and increasing magnitude of the drop-off require further examination, including inquiry into whether resource constraints on BPH have played any role. But a key factor—at least in the last two years—appears to be a disincentive built into the system: If an inmate anticipates a high probability of denial of parole at a hearing, s/he often chooses to cancel the hearing as a formal denial by the Board could greatly delay his or her entitlement to a subsequent hearing. The mechanisms by which an inmate exercises this risk aversion is a stipulation to his/her own unsuitability for parole release; a waiver of the hearing; or a postponement. A stipulation is essentially the inmate's concession that s/he is not suitable for parole release, while a waiver is a related but slightly different mechanism by which the inmate agrees to forego his/her entitlement to a hearing at which s/he could have argued suitability. The use of these procedural mechanisms has become much more significant since the passage of Marsy's Law in 2008, which greatly increases the delay in entitlement to a new hearing after a denial and regulations promulgated in 2008 that give an inmate the right to waive his or her hearing without stipulating to unsuitability.[34] The operation of these mechanisms and the inmate factors associated with them deserve special research emphasis, and the relationship between stipulations/waivers and the timing of later hearings and grant/release outcomes is an important question on which SCJC is now seeking to obtain and analyze empirical data. Meanwhile, we now have raw data on the frequency of stipulations/waivers.

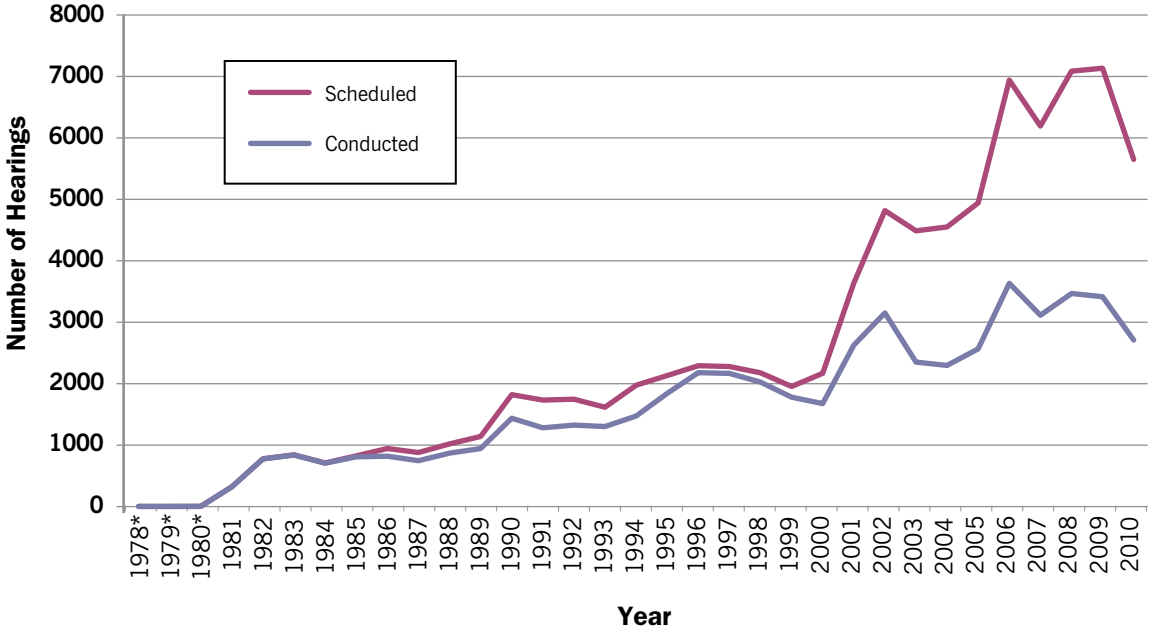
As Chart 3 illustrates, overall the grant rates by the Board of Parole Hearings have increased significantly in absolute numbers in recent years; these rates have fluctuated erratically as a percentage of conducted hearings, although in recent years that percentage has been higher than in previous ones. Currently the BPH grant rate is about 18 percent.

In the last decade (2000-2010), the percentage of scheduled hearings resulting in denial has dropped from about 75 percent to about 40 percent, but the percentage resulting in grants has only increased a few percent. The explanation for the difference, as noted, has been a very large decrease in the percentage of scheduled hearings resulting in actually conducted hearings. More analysis is necessary to appreciate the difference in grant rates year-by-year. In particular, the more extreme differences in grant rates may be explained by differences in the profiles of appearing inmates, the composition of the board, or other factors.

As Chart 4 illustrates, the average denial length (i.e. the numbers of years of delay before the inmate is entitled to a subsequent suitability hearing) has changed without pattern between 2000-08 but jumped dramatically after that. Proposition 9/Marsy's Law mandates denial periods of three, five, seven, 10, and 15 years,[35] the presumption starting with a 15-year denial period absent clear and convincing evidence that it should be shorter,[36] Although litigation is pending on whether these deferral periods violate the ex post facto clause.[37] An inmate may request that the Board advance a subsequent hearing once every three years. The Board has wide discretion to grant or deny these requests, the criteria including "the views and interests of the victim" and changed circumstances or "new information [that] establishes a reasonable likelihood that the additional period of incarceration is unnecessary."[38] According to statistics included by

CHART 2

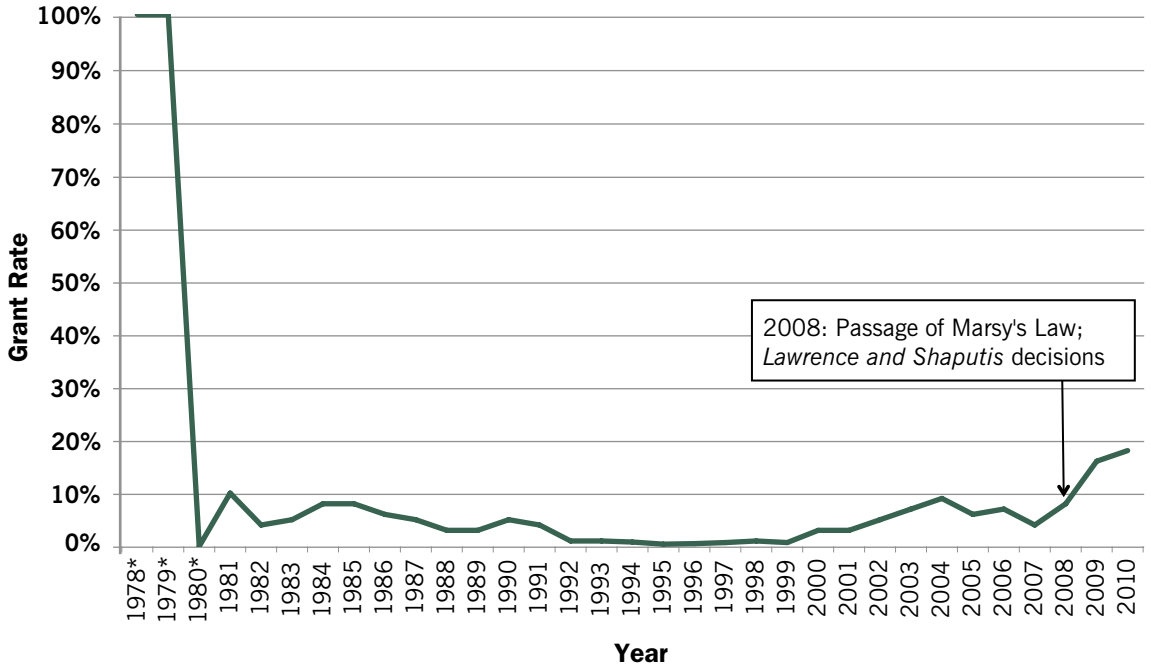
Number of Scheduled and Conducted Lifer Suitability Hearings, 1978 – 2010



* There was only 1 lifer suitability hearing conducted in 1978 and in 1979, and 2 hearings in 1980.

CHART 3

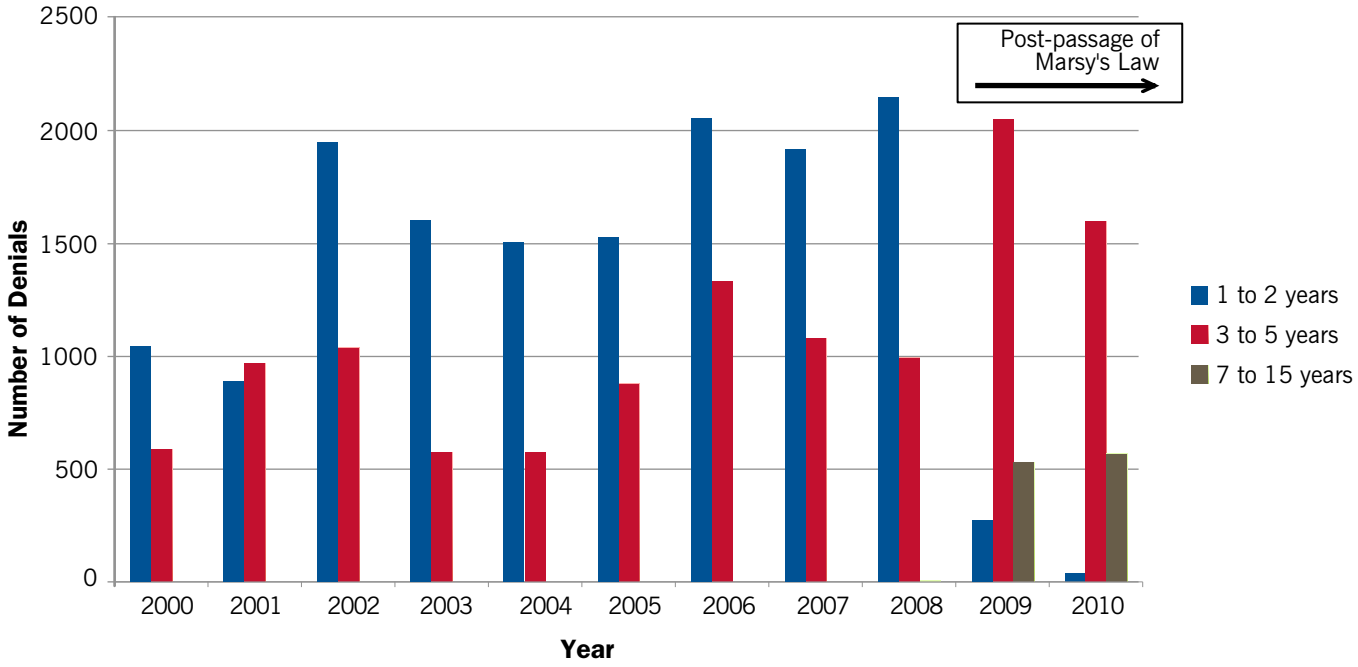
Board of Parole Hearings Grant Rate, 1978 – 2010



* There was only 1 lifer suitability hearing conducted in 1978 and in 1979, and 2 hearings in 1980.

CHART 4

Duration of Parole Denials, 2000 – 2010



plaintiffs in pending litigation, the Board denied 59 out of 61 or 97 percent of requests for advanced hearings submitted by prisoners between December 2008 and August 2010.[39]

Before the passage of Marsy's Law in 2008, two-thirds of prisoners who were denied released received deferral dates of one or two years. Now most inmates denied release receive 3- and 5-year denials. A significant incidence of those long-term denials has occurred and will probably increase the number of inmates requesting waivers and making stipulations of unsuitability.

As Chart 6 depicts, the Governor's use of his power to reverse grants by the Board of Parole Hearings has changed dramatically with the identity of the Governor. Governor Pete Wilson (1991-1999), the first Governor to implement the new measure, rejected only 27 percent of grants, although he only considered a handful of cases. Governor Gray Davis (1999-2003)—who claimed he would not parole a single convicted murderer—reversed virtually all the grants during his term. Governor Arnold Schwarzenegger (2003-2011) reversed about 60 percent of grants, while remanding about 20 percent to the Board of Parole Hearings for further review (though Chart 6 illustrates the reversal rate within his term fluctuated). In his first few months in office, Governor Jerry Brown has reversed at the lowest rate of the three Governors. The Davis Administration is likely to remain a sharp anomaly—a virtual nullification of the law—since the Proposition 89 procedure was arguably designed as a kind of appellate review by the Governor.

A lifer's prospect of actually being granted parole by the Board and not having the decision reversed by the Governor is—and always has been—slim. Using the overall Board grant rate and the Governor's non-reversal rate for murder cases, we have estimated the likelihood in Chart 7.

CHART 5

Annual Number of Governor's Parole Decisions Involving Murder Cases, 1991 – 2010

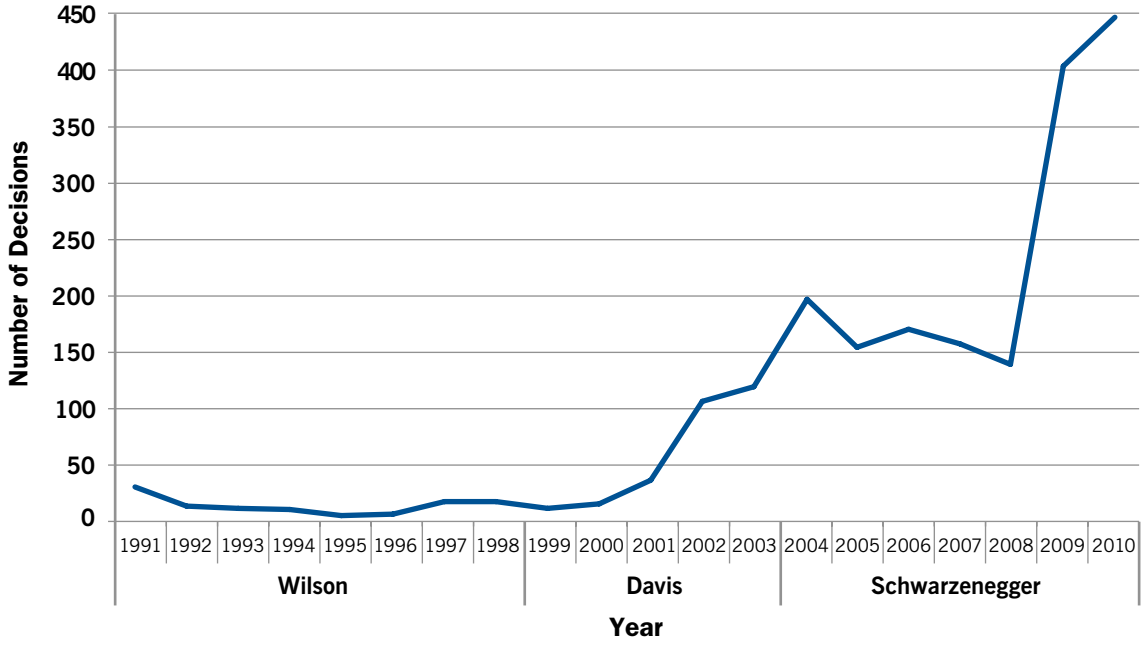


CHART 6

Governor's Reversal Rate for Parole Decisions Involving Murder Cases, 1991 – 2010

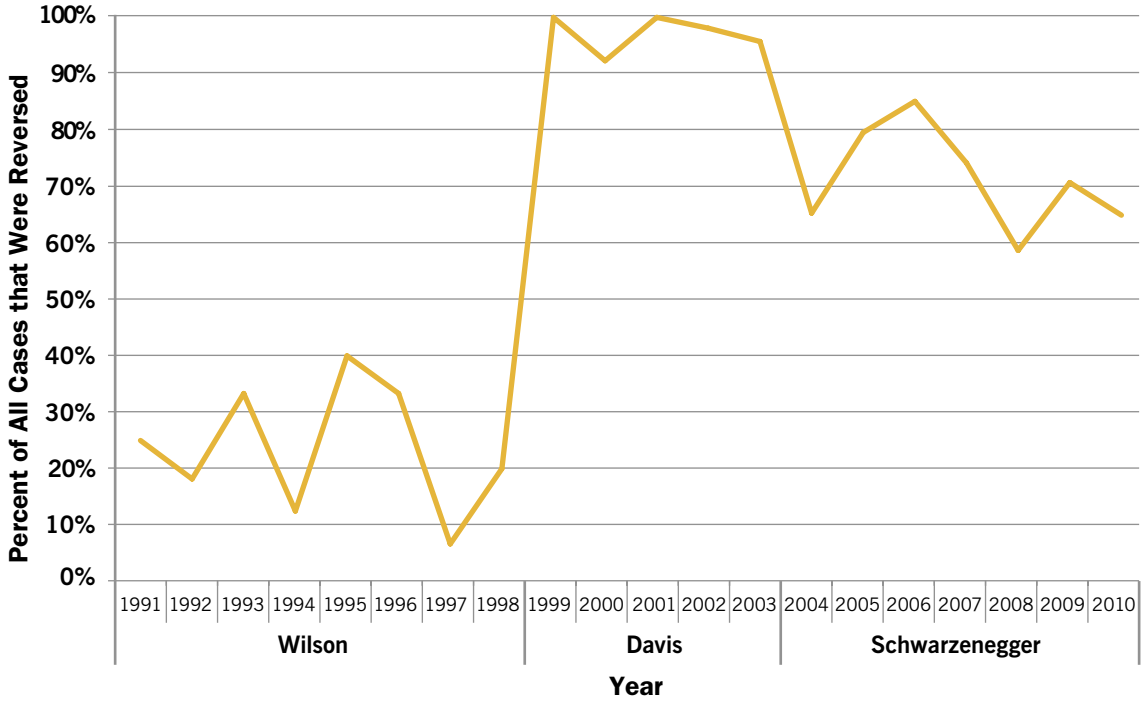
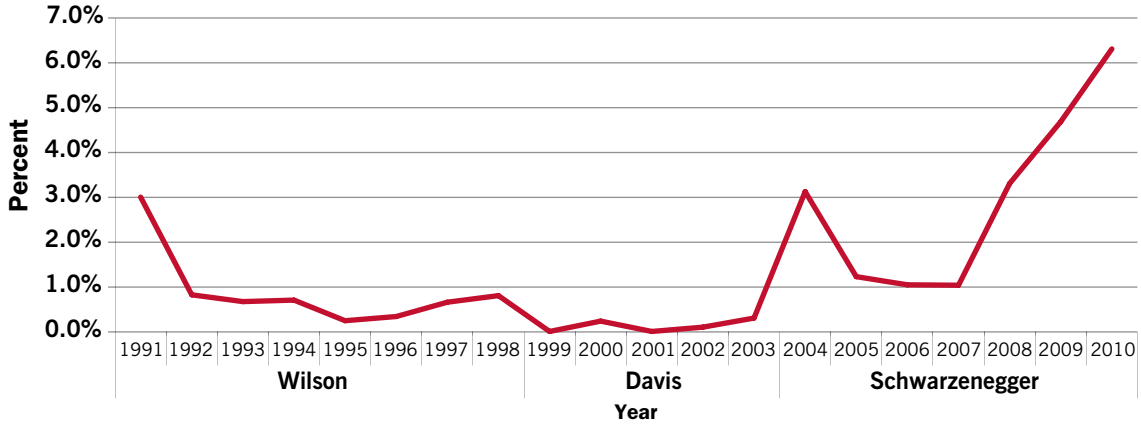


CHART 7

Estimated* Likelihood of a Murder Case Being Granted Parole by BPH and Governor, 1991 – 2010



*Estimated likelihood was calculated using the BPH's parole grant rate for all life-term sentences and the Governor's non-reversal rate for murder cases.

DEMOGRAPHIC DETAILS OF THE LIFER POPULATION

As discussed earlier and depicted in Chart 8, most lifers currently incarcerated were convicted of first- and second-degree murder.[40] Of the people serving term to life sentences in California as of December 31, 2010, the largest categories by crime type are described in Chart 8.

CHART 8

Lifer Population by Type of Crime

TYPE OF CRIME	NUMBER OF PRISONERS	AS A PERCENTAGE OF LIFER POPULATION
Murder	19,360	81%
1st Degree	8,299	35%
2nd Degree	8,654	36%
Attempted	2,399	10%
Rape & other sexual offenses	1,467	6%
Kidnapping	1,057	4%

For the 1499 individuals who served term-to-life sentences who were released from custody between January 1, 1990 and December 31, 2010, the average amount of time served was 225 months or 18.75 years. Of approximately 1,000 lifers who had been sentenced for murder and were released from custody during the 20-year period from 1990-2010, the average number of years served was about 20 years.

The average length served by the largest categories of crime type is depicted in Chart 9.

CHART 9

Lifer Population by Average Years Served

TYPE OF CRIME	NUMBER OF PRISONERS	MEAN (YEARS)	PUNISHMENT PROSCRIBED BY CURRENT CA PENAL CODE[41]
2nd Degree Murder	701	19.87	15 years to life
1st Degree Murder	375	20.14	25 years to life
Kidnapping for Robbery or Rape	120	17.13	7 years to life
Attempted Murder	107	13.85	7 years to life

Obviously, because these individuals have committed more serious crimes, they are not typical of the larger California prison population, but the mix of similarities and dissimilarities in comparisons to the overall prison population is complex.

The vast majority—**96%**—of lifers are **male** (as compared to 93% of the overall prison population).	The percentages of lifers who are **Black** (31%) and **Hispanic** (38%) are very similar to the percentages for these groups in the overall inmate population.[42]

In terms of age, 85% of current lifers are 55 or under and 14% are 56 or older. In addition, note that the actual number of currently incarcerated lifers who are aged over 65 is 929. Unsurprisingly, this distribution is not similar to the age disproportion of the overall inmate population, since most lifers are serving lengthy prison sentences. In particular:

13% of California prisoners are **22-25,** as compared to **5%** of lifers.	**33%** of California prisoners are **26-35,** as compared to **25%** of lifers.	**25%** of California prisoners are **36-45,** as compared to **30%** of lifers.	**18%** of California prisoners are **46-55,** as compared to **24%** of lifers.	**5%** of California prisoners are **56-65,** as compared to **10%** of lifers.	**1%** of California prisoners are **over 65,** as compared to **4%** of lifers.

The distribution among lifers by **mental health** designations is closely proportionate to that in the **general inmate population**.

The percentage of lifers "sentenced" by each county closely approximates the percentage of all prisoners coming from those counties and is also closely proportionate to the general population of those counties. In particular, **Los Angeles (39%)**, **San Diego (7%)**, and **Orange (6%)** and **Riverside (6%) Counties** comprise the **biggest feeders of the state's lifer population**. Further analysis might factor in serious crime rates of those counties, as well as changes in the distribution over time.

The distribution of lifers among across the state prisons is highly dispersed, ranging from one percent to eight percent in particular prisons, and is not a function of the differing sizes of the prisons: As a percentage of the prisoner population in particular prisons the lifer concentration differs drastically, with a huge concentration in **California State Prison - Solano (63%)**, **Calipatria State Prison (48%)**, **Correctional Training Facility (38%)** and **California State Prison - Corcoran (36%)**. The reason for this variance may lie in noncontroversial decisions about logistics, resources, and classification status, but the issue merits further examination, including analysis of program availability at those institutions and whether place of imprisonment bears any distinct association with rates of hearings and grants/denials.

Individuals serving life sentences with the possibility of parole are fairly evenly distributed among **medium (30%) and high medium (29%) housing security levels**, skewing them more toward the higher end than the general inmate population. On the other hand, **75%** of lifers score as **low risk** and **90%** as **low or moderate risk** by the Californa Static Risk Assessment instrument.[43] These scores contrast sharply with the general inmate population (28% low, 28% moderate, 11% high property, seven% high drug, 22% high violent, and four percent none). These figures merit detailed further and secondary data gathering, including correlations to hearing/grant rates and consideration in light of recidivism analysis.

RISK OF RELEASE

Any indeterminate sentencing system—including California's for individuals serving life sentences with the possibility of parole—purportedly has several important purposes. Among them is retribution which suggests that offenders should be punished in proportion to the harm they caused and their culpability in committing the crime. Thus, some portion of the time lifers serve is intended to satisfy the retributive purpose. The other portion meets other important purposes, including deterrence, rehabilitation, and incapacitation—all of which focus on using criminal penalties to minimize future criminal behavior by the individual offender and would-be offenders.[44] In meeting these purposes, the Board is charged with assessing what the public safety risk is of each lifer's release. Indeed, the criteria for release as articulated by governing statute and regulations and relevant case law reiterates that predicting and preventing recidivism is the primary concern.

Few studies have been conducted documenting the recidivism rates for lifers specifically but the few that exist all suggest that the recidivism rate—as defined by recommitment for a new offense—is relatively low.[45] In a cohort of convicted murderers released since 1995 in California, the actual recidivism rate is in fact minuscule. In particular, among the 860 murderers paroled by the Board since 1995, only *five* individuals have returned to jail or returned to the California Department of Corrections and Rehabilitations for new felonies since being released, and none of them recidivated for life-term crimes.[46] This figure represents a lower than one percent recidivism rate, as compared to the state's overall inmate population recommitment rate to state prison for new crimes of 48.7 percent.[47] The variance between these two rates warrants additional analysis; in particular, a more nuanced examination of the 860 individuals granted parole release as compared to the overall lifer population might explain their low recidivism rates.

Other sources of information shedding light on the recidivism risk of lifers are established studies of recidivism rates for non-lifers that focus on crime of conviction, criminal record, age at time of release, length of imprisonment and other factors. The factors examined in these studies can be used as proxies to help us gauge likely recidivism projections for lifers. A good example is the age factor. Some non-lifer studies demonstrate that as a general matter, people age out of crime. For most offenses—and in most societies—crime rates rise in the early teenage years, peak during the mid-to-late teens, and subsequently decline dramatically. Not only are most violent crimes committed by people under 30, but even the criminality that continues after that declines drastically after age 40 and even more so after age 50.[48] More uncertain are the prospects for offenders between the ages of thirty and fifty. Determining when there is not an unreasonable risk to public safety to parole relatively young lifers will depend on the continuing improvement of risk-assessment instruments, as well as careful attention to the empirical evidence linking particular types of crimes to particular rates of re-offending. In California specifically, CDCR's newest recidivism report (October 2010) documents that inmates designated as serious or violent offenders, older inmates and inmates who serve 15 years or more recidivated at a lower rate than those who were not.[49]

Two other sources of information are the risk levels classifications as assessed by both the California Static Risk Assessment instrument and the tools used by the Forensic Assessment Division (FAD) to predict current risk. Both indicate that lifers are relatively lower risk than other inmates, but more information is needed to understand the nature of instruments used and their ability to correlate recidivism rates with risk scores.

THE SCJC LIFER TRANSCRIPT ANALYSIS

In light of the rules governing and stakeholders participating in parole release for lifers, and the great variety of factors they bring into play in any hearing, the Stanford Criminal Justice Center decided to undertake the first empirical assessment of the actual conduct and circumstances of parole hearings to assess which factors play salient roles in predicting or determining outcomes. We received 754 hearing transcripts constituting a random sample of 10 percent of all parole suitability hearings conducted between October 1, 2007, and January 28, 2010 from the California Department of Corrections and Rehabilitation. Of the 754 hearings, 49 (6.5 percent) took place in 2007, 276 (36.7 percent) took place in 2008, 377 (50 percent) took place in 2009, and 52 (6.9 percent) took place in 2010.

These transcripts ranged from less than 50 to more than 200 pages. To transform them into usable data, we used two procedures. First, we roughly summarized the data, gathering a basic set of information about all of the transcripts: hearing date, inmate name, result (grant or denial), persons present at the hearing, and so on. As a second, more comprehensive, process, we designed an extended codesheet to capture more than 180 variables of interest from the transcripts, ranging from inmate characteristics to details of the life offense to prison programming. We hired and trained Stanford University undergraduates to code the transcripts by carefully reading the text and making selections on a web-based form.

To date, we have completed 448 transcripts in this second-pass process, or approximately 60 percent of the sample. The majority of the completed transcripts were from hearings conducted in 2009 (after the passage of Marsy's Law and the court decisions in *Lawrence* and *Shaputis*), though we have coded some transcripts from 2007, 2008, and 2010 as well.

GENERAL FINDINGS

There are two types of parole suitability hearings: initial suitability hearings, in which the prospective parolee is appearing in front of the parole board for the first time, and subsequent suitability hearings, in which the prospective parolee has been denied parole at a past hearing. Almost 90 percent of the hearings were subsequent, rather than initial, parole hearings. Chart 10 summarizes the dispositions of the 754 hearings by whether the hearing was an initial or subsequent hearing. (Note that the table excludes one hearing in which the decision was postponed pending the receipt of a missing psychological evaluation, and a second in which the commissioners' decision was not indicated in the transcript.)

CHART 10

Disposition by Hearing Type, Full Sample

	INITIAL	SUBSEQUENT	TOTAL	
Denied	87	567	654	(87.0%)
Granted	2	96	98	(13.0%)
Total	89	664	752	

In total, 87 percent of the hearings in our sample resulted in a denial of parole. Inmates in subsequent parole hearings fared much better than inmates appearing in front of the Board for the first time: nearly 15 percent of subsequent hearings resulted in a grant and 2.2 percent of initial hearings produced grants.

Grant rates appear to vary significantly by year. Chart 11 reports the grant rate by year from the full sample of transcripts. (Our reporting on the grant rate here is not intended to expand upon or change our earlier analysis of the overall grant rate, but to contextualize our transcript analysis.)

CHART 11

Grants by Year, Full Sample

YEAR	DENIED	GRANTED	GRANT RATE
2007	45	4	8%
2008	255	21	8%
2009	316	61	16%
2010	40	12	23%

By the end of our sample, the grant rate was nearly triple what it was in 2007 and 2008. The result is highly statistically significant.

Though commissioners became more lenient on one dimension, by increasing the grant rate in 2009 and 2010, they became more stringent on another dimension. Upon denying a parole applicant, parole commissioners must set a date until the next parole hearing but have discretion in determining the length of time. The commissioners most commonly set a date of one, three, or five years until the next parole hearing[50], but in some cases in our dataset, the commissioners delayed the next parole hearing for as much as 15 years. Chart 12 summarizes the average number of years to next hearing, by the year the hearing was conducted.

CHART 12

Years to Next Hearing, by Hearing Date

2007	2008	2009	2010	TOTAL
2.0	2.2	4.6	5.1	3.5

The result may reflect the impact of "Marsy's Law," an amendment to the California state constitution enacted by California voters via the ballot initiative process in November 2008. As discussed above, Marsy's Law, also called Proposition 9, increased the maximum parole denial period to 15 years. After 2008, one- and two-year denial terms, which were common prior to the passage of Marsy's Law, became prohibited. The result was a significant shift upward in denial periods: in the 2009 transcripts in our sample, 45 percent of denials were for periods of five years or more.

Every hearing is led by a presiding commissioner, who is joined by a deputy. In total, there were 24 presiding commissioners in our dataset. The total number of hearings they presided over varied from a low of six hearings to a high of 89. Because of the relatively small amount of data we have about each commissioner, we cannot conclude that there is a statistically significant difference between the grant rates of the various commissioners. That said, the numerical differences are substantial: grant rates by commissioner varied greatly from a low of zero percent to a high of 31 percent. One commissioner, for instance, granted parole in twelve of the 61 hearings in our sample he presided over; Another commissioner, by contrast, granted parole in only one of the 43 hearings in our sample over which she presided. Additional study is necessary to understand possible reasons for these variances, including the classification status of inmates seen by each commissioner.

The last piece of information we have collected about the complete sample is information about who attended the hearing. Specifically, we have data on whether a victim appeared at the hearing, with "victim" defined broadly as either the immediate victim of the crime or a friend, family member, or acquaintance of the victim of the crime. Chart 13 summarizes grant rates by the presence of victims.

CHART 13

Grant Rate by Presence of Victim at Hearing

	DENIED	GRANTED	GRANT RATE
Victim not present	586	94	13.8%
Victim present	70	4	5%

There is a statistically significant difference in the grant rate between hearings at which victims are present and hearings at which victims are not present. The effect is in the expected direction: when victims attending hearings, the grant rate is less than half the rate when victims do not attend. A more nuanced analysis of the relationship between victim participation and disposition rates might identify the reasons for this correlation. In particular, a better tracking of when victims most commonly participate in hearings—particularly whether they typically appear primarily at initial or first subsequent suitability hearings – could explain why their participation is associated with parole denials.

SPECIFIC FINDINGS: SECOND-PASS ANALYSIS

More detailed results can be obtained from our second-pass analysis. Because we have finished coding only around two-thirds of the transcripts, however, these analyses are necessarily preliminary. In what follows, we consider two general categories of results: first, the general characteristics of inmates serving life sentences and their relationship to release decisions; and second, other factors that are positively or negatively associated with parole release.

INMATE CHARACTERISTICS

Life Crime

As Chart 14 indicates, the majority of parole-eligible life offenders are second- or first-degree murderers. There is no statistically significant difference in the grant rates of various types of offenders, although those serving sentences for attempted murder are the least successful inmates. Grant rates for first- and second-degree murderers are nearly identical.

Chart 14 also includes the average time served by inmates in each offense category at the time of the hearing, in years.

CHART 14

Offense Type by Decision

	AVERAGE YEARS SERVED	DENIED INMATES	GRANTED INMATES	TOTAL
Second Degree Murder	20.1	195	44	239
First Degree Murder	17.2	104	20	124
Attempted Murder	14.2	26	0	18
Kidnapping for Sex Crime/Robbery	21.7	27	2	29
Aggravated Mayhem	15.0	2	0	2
Kidnapping for Ransom	16.5	2	0	2
Conspiracy to Commit Murder	21.2	4	2	6
Rape	13.1	3	0	3
Drive-By Shooting	20.1	1	0	1
Torture	8.6	2	0	2
Total	18.9	368	68	436

One factor that appears to be strongly associated with release is whether the life crime involved sexual violence. Only two of the 32 transcripts we have coded so far that involved sexual violence of any kind resulted in grants of parole; by contrast, 16 percent of parole cases not involving sexual violence (66 out of 404) resulted in release.

Several factors related to the life crime are not related to release in a statistically significant way. First, the use of a firearm in the life crime does not appear to have a significant effect on the outcome of the parole hearing. In total, 182 prisoners did not use firearms in the commission of their life crime, and 214 prisoners did use a firearm. The release rates were 15 percent and 16 percent, respectively; the difference is not statistically significant.

Commissioners' decisions did not seem to vary according to the number of people the inmate victimized in the commission of the life crime. Thirteen of the 106 cases (12 percent) in which the inmate's life crime involved multiple victims resulted in release; by contrast, 55 of the 333 (16.5 percent) single-victim cases resulted in release. The difference is not statistically significant.

Prior Record

Prior record does not appear to significantly affect release decisions, whether they are adult or juvenile records. Sixteen percent of inmates with juvenile records prior to the commission of their life crimes obtained parole release, compared to 15 percent of inmates without juvenile records. The difference is not statistically significant.

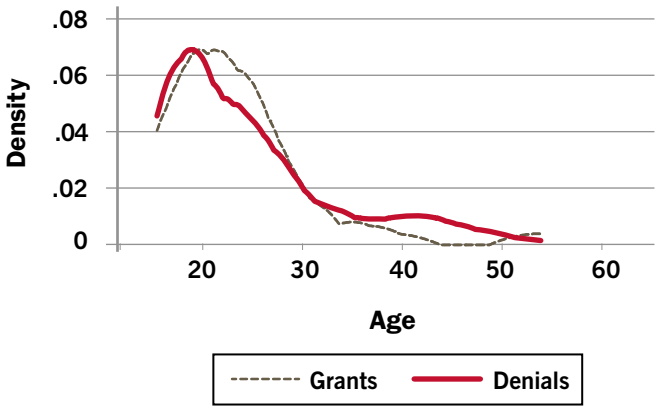
The same holds true for the effect of prior adult criminal records. Almost 60 percent of inmates in our sample had prior adult convictions before committing their life crime, but the grant rate was 14 percent for inmates without adult criminal records and 16 percent for inmates with criminal records.

Age

Chart 15 shows the age at life crime, by whether the inmate was paroled. The figure shows that most inmates committed their life crime between the ages of 20 and 25. The pattern is similar for both paroled and non-paroled inmates, though inmates who committed their life crimes between 20 and 30 were somewhat more likely to be paroled than inmates whose life crimes were committed in their forties. Few of the latter type of inmates received parole grants.

CHART 15

Age at Life Crime, by Parole Outcome



The average age of inmates at the time of the parole hearing is 50.8. The average age of inmates granted parole is 49.9 years, and the average age of inmates denied parole is 51. The difference is not statistically significant. Surprisingly, age does not appear to be a significant factor in release decisions: a simple logistic regression model using age at the hearing date to predict the probability of release shows a somewhat negative but statistically insignificant effect of age on the likelihood of parole release.

Other Factors

Chart 16 provides assorted demographic characteristics of the inmates in our sample. None of the characteristics presented in the table—immigration status, whether an inmate has children, and marital status—is significantly associated with a release or denial.

CHART 16

Assorted Demographic Characteristics

	DENIED	GRANTED	GRANT RATE	% OF TOTAL
Immigration Status				
Citizen	224	41	15.5%	63%
Illegal immigrant	50	6	10.7%	13%
Legal resident	3	1	25.0%	1%
Unknown*[51]	78	19	19.6%	23%
Children				
Has children	137	31	18.5%	41%
Doesn't have children	210	35	14.3%	59%
Marital Status				
Divorced	84	10	10.6%	24%
Married before prison	51	9	15.0%	15%
Married, during prison	32	15	31.9%	12%
Single	156	23	12.9%	45%
Spouse deceased	13	4	23.5%	4%

Though these characteristics are not significantly associated with the grant rate, some results are intrinsically interesting. First, 59 percent of the inmates in our sample have children. Of that population, only 35 percent are married, and only 22 percent were married before entering prison.

Other Factors Associated with Release

Facility

Parole hearings are held on-site at most of California's 33 state prisons. Grant rates might vary across facilities for a variety of reasons, such as systematic differences in the type of inmates held at various facilities, availability of rehabilitative programs at various facilities, or differences in the pool of commissioners who conduct hearings at various facilities.

Chart 17 presents the grant rate by facility. To avoid misleading findings, state prisons that are poorly represented in our sample—specifically, facilities with fewer than ten hearings in the sample—were omitted from this table, leaving a total of 13 facilities.

CHART 17

Grant Rate by Facility

	DENIALS	GRANTS	GRANT RATE
Mule Creek	9	5	35.7%
California Institution for Women	10	5	33.3%
San Quentin	13	4	23.5%
California Men's Colony	26	6	18.8%
Avenal	51	11	17.7%
Correctional Training Facility	45	9	16.7%
Central California Women's Facility	17	3	15.0%
California Substance Abuse Treatment Facility	23	4	14.8%
Solano	61	9	12.9%
California Medical Facility	16	2	11.1%
Chuckawalla Valley	20	2	9.1%
Folsom	12	1	7.7%
Pleasant Valley	10	0	0.0%

As the table indicates, grant rates differ dramatically by facility. Some prisons, like Chuckawalla, Folsom and Pleasant Valley, have grant rates below 10 percent, others, like Mule Creek and the California Institution for Women, grant more than a third of parole cases. As stated above, Solano houses the largest percentage of lifers as a percentage of its total prison population.

A more robust analysis of grant rates by institution is warranted to better understand the reasons underlying variances.

Behavior in Prison

Inmate behavior during the prison term is a recurring theme in parole hearings. Parole commissioners typically scrutinize inmate's disciplinary records, and often ask detailed questions about violations of prison rules.

In California prisons, disciplinary infractions are documented using two forms, the CDC 128 "Custodial Counseling Chrono" (or sometimes the CDC 128B "Informational Chrono"), and the CDC 115 "Rules Violation Report." 128 infractions are typically minor conduct violations, including smoking, being in an unauthorized area, using foul language, or possessing non-serious contraband. 115 infractions, which trigger a notice-and-hearing process, can be either non-serious ("administrative") or serious. Serious violations include violence toward inmates or prison personnel, possession of controlled substances or weapons, and other serious infractions.

Both 115s and 128s are exceedingly common. Eighty-one percent of inmates in our sample have at least one 115 in their record, and 89 percent of inmates have at least one 128. The 115 infractions are strongly associated with the grant rate; 25 percent of inmates with no 115 infractions received parole grants, while only 13 percent of inmates with at least one 115 infraction received a grant—a result significant at the .01 level. And the more 115s an inmate accumulates, the greater an effect the inmate's disciplinary record has on the inmate's chances for parole release. Just 16 of the 149 inmates with more than five 115s (11 percent) received parole release.

On the other hand, 128 infractions are not significantly associated with grant rate. One inmate received a grant of parole despite accumulating sixty 128 infractions.

Preliminary evidence also suggests that the seriousness of the disciplinary violation has a substantial effect on commissioners' decisions. For example, violent disciplinary infractions, regardless of when they occur, are significantly associated with parole denials. Only 11 of the 128 (8.5 percent) inmates with violent disciplinary records in prison were released, compared to 20 percent of inmates with no violent disciplinary infractions.

Psychological Evaluations

Virtually all inmates who appear at parole hearings have undergone psychological evaluations. Parole commissioners always receive and often review the results of these evaluations carefully.

The two most common types of clinical opinions in our sample are the Axis V Global Assessment of Functioning Scale and the Clinician Generic Risk assessment.[52] The Axis V GAF measures a patient's overall level of psychological, social, and occupational functioning on a 100-point continuum, with higher scores indicating higher functioning. The Clinician Generic Risk, by contrast, assigns inmates a simple risk-of-recidivating score: low, low-moderate, moderate, moderate-high, and high.

CHART 18

Grant Rate by psychological Evaluation Instrument

	DENIED	GRANTED	TOTAL	GRANT RATE
Clinician Generic Risk				
Low	107	42	149	28%
Low-Moderate	50	8	58	14%
Moderate	47	2	49	4%
Moderate-High	12	0	12	0%
High	14	0	14	0%
Axis V-GAF				
0-74	37	0	37	0%
75-84	78	18	96	19%
85-100	66	12	78	15%

Both the Clinician Generic Risk and the Axis V-GAF are significantly correlated with grant rate. This is especially true of the Clinician Generic Risk assessment, which is statistically significant at the .001 level. As Chart 18 indicates, inmates who receive an average score or higher virtually never receive parole release. Similarly, none of the inmates in our sample who received below 75 on the Axis V-GAF enjoyed favorable release outcomes.

These results suggest that the psychological evaluation tools used to assess risk potential and inmate psychological stability play an influential role in the parole process.

Drug Abuse

During parole hearings, commissioners often discuss inmates' records of drug and alcohol abuse at considerable length. A history of drug or alcohol abuse is not correlated with grant rate. What is highly associated with grant rate, however, is whether an inmate is participating in a "twelve-steps" program (that is, Alcoholics Anonymous, Narcotics Anonymous, or some similar program), and whether he or she can correctly answer questions about those steps, which commissioners often ask to test inmates' commitment to drug and alcohol treatment

In total, 159 inmates were asked whether they could identify one or more of the 12 steps. Of the 56 inmates who failed to correctly answer the commissioners' question, only one was paroled. By contrast, 37 of the 141 who correctly responded to commissioners' queries received parole—a grant rate double that of inmates who were not asked about their treatment program.

It therefore appears that commissioners mostly do not discriminate between inmates who have or have not abused drugs or alcohol. For those inmates with substance-abuse problems, however, the ability to demonstrate a commitment to a recovery program is a key component of obtaining parole release.

Conclusion

The foregoing analyses are necessarily preliminary, but they shed important light on how the parole hearing process functions in California. Some results, like the importance of in-prison conduct and psychological evaluations, confirm standard presuppositions about what matters to parole commissioners. Other results, like the irrelevance of age and offense type, are counterintuitive.

As the study proceeds, we will continue to analyze factors that contribute to parole release decisions, with the goal of developing a comprehensive model of parole decisionmaking in California.

FURTHER EMPIRICAL RESEARCH ON THE PAROLE RELEASE PROCESS FOR LIFERS

The Stanford Criminal Justice Center is working on the following other research projects related to lifers and will be issuing subsequent bulletins on a quarterly basis:

THE ROLE OF THE DISTRICT ATTORNEY: One key factor in the course and ultimate outcome of lifers seeking release is the role of the District Attorney. SCJC is currently undertaking an innovative survey consisting of interviews with district attorneys in a broad sample of California counties. The goal of the survey is to determine particular offices' approach to these hearings, including what resources and staff they devote, whom they assign to the hearing, what role the designated District Attorney representatives are expected to play, how they prepare for the hearings, what factors they consider important in opposing release, their role in judicial review, and other information.

THE ROLE OF VICTIM(S): We are currently reviewing the role victims play in the hearing process, including how their rights have expanded since the passage of Marsy's Law, how frequently and in what manner victims participate and whether victim participation has any bearing on Board decision-making. In addition, our research will identify model practices for victim participation used in other jurisdictions.

THE ROLE OF COMMISSIONERS: Given the enormous role commissioners and deputy commissioners play in the parole suitability hearing process, we are investigating the nature of training received by commissioners who preside over suitability hearings; how commissioners prepare for and approach suitability hearings; and the roles assumed by commissioners versus deputy commissioners.

FORENSIC EXAMINATIONS: The governing standard for granting parole is whether the inmate presents a current risk to public safety. The Forensic Assessment Division (FAD) is charged with conducting forensic examinations on lifer inmates prior to their meeting with the Board. We are currently researching the tools and procedures used by the FAD to determine the role the examinations play and the weight they get—and should get—in assessing current and future risk.

JUDICIAL REVIEW OF PAROLE DECISIONS: Given that the majority of decisions made by the Board result in denial and the relatively high reversal rate among Governors, the court serves as an effective and default vehicle for lifers seeking parole release through habeas appeals. Since the 2011 *Swarthout v. Cooke* decision, which virtually precludes federal habeas corpus review, state judicial review offers inmates an opportunity to challenge the decisions of BPH and the Governor.[53] Tracking the number of cases brought before the court and the results of these habeas petitions will help us gain important understanding into the flow of parole release for lifers.

ENDNOTES

1 Under California's Determinate Sentencing Law, most felonies carry a "determinate" prison sentence consisting of a specific number of months or years the offender must serve in prison before s/he can be released. See California Penal Code § 1170. The death sentence can only be imposed for first-degree murder when certain special and aggravating circumstances are charged and proved. For a few very egregious crimes, the sentence may be life without the possibility of parole (LWOP). Individuals serving LWOP sentences can only be released from prison by Governor pardon or commutation. See California Penal Code §§ 4801-4802; 15 California Code of Regulations § 2816. The "lifers" who are the subject of this study are prisoners who have been sentenced to a "life sentence with the possibility of parole." These sentences are also sometimes called "indeterminate" because, by definition, the trial judge cannot pre-determine the exact time the prisoner will be released; that time is subject to the parole process.

Any sentence of life with the possibility of parole has a minimum sentence that must be served before the Board can even consider release. The default rules for the minimum term are established by California Penal Code § 3046: (a) No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following: (1) A term of at least seven calendar years or (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.

For many specific crimes that authorize life sentences, the specific criminal statute expressly includes a minimum prison term that constitutes "any other provision of law" under § 3046 (a) (2). Thus, the punishment for second degree murder is ordinarily "a term of 15 years to life," while first degree murder generally carries "a term of 25 years to life." (California Penal Code § 190 (a)).

Other statutes specifying indeterminate sentences do not mention a minimum term, describing the sentence simply as "imprisonment in the state prison for life with the possibility of parole" or "imprisonment in the state prison for life." In this category are sentencing provisions for attempted premeditated murder (California Penal Code §§ 664(a), 187, 189) as well as aggravated mayhem (California Penal Code § 205), torture (§ 206.1), kidnap for ransom without bodily harm (§ 209, subd. (a)), kidnap for robbery or sexual assault (§ 209, subd. (b)), kidnap during carjacking (§ 209.5, subd. (a)), nonfatal train wrecking (§ 219), attempted murder of peace officer or firefighter (§§ 664, subd. (e), 187), exploding a destructive device with intent to kill (§ 12308), and exploding a destructive device that causes mayhem or great bodily injury (§ 12310, subd. (b)). These statutes would then incorporate the default minimum term of seven years under California Penal Code § 3046(a)(1).

Finally, note that if a person is convicted of a crime carrying an indeterminate term that does not specify a minimum term but is also convicted of a separate crime that does carry a fixed term, that latter term can establish the minimum number of years that must be served before parole eligibility. Thus, the operative minimum term can depend on any of the numerous complex determinate sentencing laws and enhancements. California Penal Code § 1168(b), cross-referenced in § 3040, states: "For any person not sentenced under [a determinate term], but who is sentenced to be imprisoned in the state prison … the court imposing the sentence shall not fix the term or duration of the period of imprisonment."

2 For instance, as comparison to other large systems, lifers (i.e. people serving life sentences with the possibility of parole) comprise nearly three percent of the federal prison population, four percent of the Florida prison population, nearly five percent of the Texas prison populations, 10 percent of the Ohio prison population, and nearly 15 percent of the New York prison population.

3 Because the Three-Strikes law was passed in 1994, the first inmates sentenced under that law will come before the Board of Parole Hearings in 2019 after they have served 25 years of their sentences. See California Penal Code § 667(e)(2): "If a defendant has two or more prior felony convictions …the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of…imprisonment in the state prison for 25 years."

4 Under California Penal Code §§187-189, a person commits first-degree murder when s/he kills with deliberation and premeditation, or otherwise causes death in the course of commuting or attempting to commit one of several enumerated felonies, including arson, rape, sexual assault against a minor, carjacking, robbery, burglary. A person commits second-degree murder if s/he kills intentionally, although without premeditation, or if s/he causes death with "an abandoned and malignant heart," which means that s/he has acted with a conscious disregard for—or indifference to—human life.

5 *Roberts v. Duffy,* 140 P.260 (Cal. 1914) at 264.

6 California Penal Code § 5075.

7 California Penal Code § 5075(b). The list of current Commissioners and their biographies is available on the California Department of Corrections and Rehabilitation website at: http://www.cdcr.ca.gov/BOPH/commissioners.html.

8 The minimum qualifications for a Deputy Commissioner include either: (1) two years of experience in the California state service with equivalent responsibility to a Parole Administrator I; (2) three years of experience within the last five in the California Department of Corrections and Rehabilitation or Board of Parole Hearings in an equivalent class to Parole Agent III; (3) three years of experience in the field of administrative or criminal law plus equivalent to graduation from college; or (4) three years of experience in the administrative plus equivalent to graduation from college. Unlike the Commissioners, the list of Deputy Commissioners is not made public.

9 California Penal Code §§ 5075.5, 5075.6(b)(2).

10 California Penal Code § 5075.6(b)(1).

11 California Penal Law Code §§ 3041.5, 3041.7.

12 California Penal Law Code § 3041.7; 15 California Code of Regulations § 2256.

13 "Board of Parole Hearings "Lifer Attorney Packet' Application for Attorney Appointment Roster Life Parole Consideration Hearings" at page 5. Available at: http://www.cdcr.ca.gov/BOPH/attorney_employment.html

14 California Lifers Newsletter "The Parole Board Hires 'Your' Attorney" Volume 5, Number 6 at 10 (December 2009).

15 California Penal Law Code § 3041.7; 15 California Code of Regulations § 2030.

16 California Penal Law Code § 3043.

17 California Penal Law Code § 3043, as expanded by Proposition 9 or "Marsy's Law" (2008). Also

18 California Penal Law Code § 3041.5(a)(4).

19 15 California Penal Law Code § 3042(a).

20 15 California Penal Law Code § 3042 (f).

21 California Penal Code § 3041(b); 15 California Code of Regulations § 2402(a).

22 15 California Code of Regulations § 2281(d).

23 In particular, the regulations spell out the following factors that should be considered in determining whether the prisoner committed the offense in an "especially heinous, atrocious or cruel manner": "(A) multiple victims were attacked, injured or killed in the same or similar incidents. (B) The offense was carried out in a dispassionate and calculated manner, such as execution-style murder. (C) The victim was abused, defiled or mutilated during or after the offense. (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. (E) The motive for the crime is inexplicable or very trivial in relationship to the offense." 15 California Code of Regulations § 2281(c)(1).

24 15 California Code of Regulations § 2281(c).

25 California Penal Code §§ 3041.5, 3041, 5011.

26 *In re Powell*, 45 Cal.3d 894 (Cal. 1988) at 904.

27 *In re Rosenkrantz*, 59 P.3d 174 (Cal. 2002) at 222.

28 *In re Lawrence* (44 Cal. 4th 1181 (2008)) and *In Re Shaputis* (44 Cal. 4th 1241 (2008), See W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 Colum. L. Rev, 893, 900 (2009).

29 Cal. Const. Article V, Section 8(b). See also California Penal Code § 3041.1.

30 The other states are Louisiana, Maryland and Oklahoma. In 2009, Louisiana allowed offenders sentenced to life on certain heroin offenses to be eligible for parole. All other life sentences are imposed without the possibility of parole. The Governor must approve all parole decisions. Interestingly, the Texas Constitution was amended in 1984 to remove Governor review of parole decisions. See www.tdcj.state.tx.us/bpp/publications/PG%20AR%202010.pdf

31 *In re Rosenkrantz*, supra, 29 Cal.4th at p. 677-79. The factors to be considered in determining parole suitability as set forth in Title 15 of the California Code of Regulations, Section 2402, include "the absence of serious misconduct in prison and participation in institutional activities that indicate an enhanced ability to function within the law upon release are factors that must be considered on an individual basis by the Governor in determining parole suitability. The Governor also must consider any evidence indicating that the prisoner has expressed remorse for his crimes, as well as any evidence demonstrating that "[t]he prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release." (§ 2402, subd. (d)(8).) .

32 *In re Rosenkrantz*, supra, 29 Cal.4th at page 679.

33 As noted below, the differences between the number of hearings scheduled and conducted in a given year are primarily due to stipulations by the inmate to unsuitability for parole, waivers to the right of a hearing, cancellations by the Board, and postponements by either the inmate or the Board.

34 Prior to 2008, the governing regulation required the inmate to stipulate to unsuitability and waive his/her right to a hearing simultaneously. See 2 California Code of Regulations § 2253(b).

35 California Penal Law Code § 3041.5(b)(3) as amended by Marsy's Law (Proposition 9, 2008).

36 California Penal Law Code § 3041.5(b)(3).

37 The California Court of Appeals recently held that the application of the mandated denial periods enacted pursuant to Marsy's Law to inmates convicted prior to the effective date of Marsy's Law violates ex post facto principles and therefore cannot be applied. *In re Michael Vicks*, No. D056998, slip op. (Calif Ct. App., May 1, 11 2011). The decision is likely to be appealed.

38 California Penal Law Code § 3041.5(b)(4).

39 See Notice and Motion for Preliminary Injunction to Entire Class, *Gilman v. Schwarzenegger*, December 20, 2010

40 A person commits first-degree felony murder if s/he causes a death in the perpetration or attempt to perpetrate robbery, rape, burglary, kidnapping, mayhem, or sexual assault on a minor. A person commits second-degree felony murder if s/he causes death in the course of perpetrating or attempting to perpetrate certain other inherently dangerous felonies, such as providing heroin to a minor, distributing methamphetamine, or discharging a weapon in an inhabited building.

41 Because the individuals whose sentences comprise the mean may be serving terms under varying historical iterations of the California Penal Code that carry different punishments, there may be discrepancies between the punishment proscribed by current California Penal Code and the mean years served.

42 Blacks represent a much higher than their share of the resident population at 6.2 percent, whereas Hispanics comprise 37.6 percent of California's resident population. See U.S. Census Bureau: State and County QuickFacts at: http://quickfacts.census.gov/qfd/states/06000.html

43 This instrument computes the risk to re-offend by using static risk indicators: gender, age, and offense history. See: http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/NCDR/2010NCR/10-02/CSRA%2012-09.pdf

44 Frase, R. "Punishment purposes" *Stanford Law Review* 58: 67-83.

45 A study of females in Canada found that only 6.3 percent of paroled lifers recidivated. See Bonta, J., B. Pang, and S. Wallace-Capretta 1995 "Predictors of recidivism among incarcerated female offenders" *The Prison Journal* 75: 277-294. Also a study that tracked a group of "Furman inmates" who had their death sentences commuted to life in 1972 found very low recidivism rates for the subset that were eventually paroled (though the sample size – 47 individuals – was very small. See Marquant, J. and J. Sorensen 1988 "Institutional and postrelease behavior of furman-commuted inmates in Texas" *Criminology* 26(4): 677-693.

46 The data does not reflect any new misdemeanors committed or any crimes committed in other states by this cohort.

47 For releasees in FY 2005-6.

48 Sex crimes are somewhat anomalous, with a bimodal distribution: a peak in the teen years, then a drop, and then another rise, but that later rise is in the offender's late 20s.

49 See page 26 of *2010 Adult Institutions Outcome Evaluation Report* (October 11, 2010) at: http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY0506_Outcome_Evaluation_Report.pdf

50 Our sample includes transcripts of suitability hearings conducted before the implementation of Marsy's Law when commissioners could delay hearings for one or two years.

51 Inmates whose immigration statuses are "unknown" are likely U.S. citizens. In the vast majority of parole hearings involving noncitizens, citizenship status is explicitly discussed by the commissioners. In many hearings involving citizens, however, citizenship status is not discussed in the course of the hearing.

52 As of 2008, BPH stopped relying on the Axis V GAF. Risk-assessment tools now used include the PCL-R, HCR-20, LS-CMI, and STATIC-99-R.

53 562 U.S., _, 131 S. Ct. 859 (2011)

UnCommon Law

220 4th Street, Suite 201
Oakland, CA 94607
Tel: (510) 271-0310
Fax: (510) 271-0101
www.theuncommonlaw.com

Overview of California's Parole Consideration Process

DOCUMENTATION HEARING

Lifers are provided with a Documentation Hearing within the first three years of their incarceration. In this hearing, a Deputy Commissioner from the Board of Parole Hearings (BPH) reviews the prisoner's file and makes recommendations regarding the kinds of activities the prisoner should pursue in order to demonstrate parole suitability whenever he or she becomes eligible.

PAROLE CONSIDERATION

Lifers have their Initial Parole Consideration Hearings scheduled thirteen months prior to their Minimum Eligible Parole Dates (MEPD). Legally, the presumption is that lifers will be granted parole at their initial hearings; however, this has happened only thirteen times in the past ten years or so.

Prisoners are entitled to attend their hearings in person, to have an attorney present, to ask questions, to receive all hearing documents at least ten days in advance, to have their cases individually considered, to receive an explanation of the reasons for denying parole and to receive a transcript of the hearing.

Parties attending parole hearings include the prisoner, his or her attorney, a Commissioner and Deputy Commissioner of the BPH, a representative from the District Attorney's office, two correctional officers, and the victims and/or their next of kin or representatives. Prisoners are not permitted to call witnesses or to have their family members attend, unless those family members happen to also be victims of the offense.

The main topics discussed at parole hearings are the following: the commitment offense and the circumstances surrounding it; any prior juvenile or adult criminal history; conduct (both good and bad) in prison; recent psychological evaluations prepared for the BPH; and the prisoner's plans for release upon parole. The area where prisoners' families and supporters have the most influence is in the parole plans. Through their letters to the BPH, supporters can demonstrate where prisoners are invited to live once released, where they are offered employment, where they may participate in any necessary transitional program (e.g., drug or alcohol treatment), and any other financial, emotional or spiritual support they may need. (See UnCommon Law's Free Guide to Lifer Support Letters, at www.theuncommonlaw.com, for more information on this.)

WHEN PAROLE IS DENIED

On average, the BPH's commissioners only grant parole in approximately 10% to 15% of the cases they hear, which is actually a much higher rate than it was just a year ago. Until Proposition 9 is overturned, prisoners denied parole at either an Initial Hearing or a Subsequent Hearing will have another hearing scheduled either three years, five years, seven years, ten years or fifteen years later. Like other aspects of the parole consideration process that have changed since Prop 9, the BPH is directed to consider the wishes of the victims and their representatives in determining when the next hearing should be.

WHEN PAROLE IS GRANTED

Even though the Board grants a prisoner parole, it does not mean he or she will be released right away. This is because, in addition to deciding that the person is not currently dangerous, the Board decides how much time the person should actually have to serve based solely on the specific details of the crime. In some cases, the prisoner has already served that much time, so he or she will be released as soon as the decision becomes final. In other cases, the prisoner still has some months (or perhaps years) to serve prior to release. The actual release date is calculated during the days and weeks following the parole hearing.

After the parole hearing, the case will be reviewed by the BPH's Decision Review Unit for 120 days. If they affirm the date, then the case proceeds to the Governor's office for 30 days of review there. By the end of the 30 days, the Governor may either reverse the parole grant, modify the release date, or let the decision stand, after which the prisoner will be released on the date established by the BPH.

In cases other than murder, the Governor cannot directly reverse a parole grant. Instead, the most the Governor can do is request that the full Board conduct an *en banc* review and schedule a rescission hearing, at which the prisoner's grant may be taken away (rescinded). In these cases, the Governor's review must take place within 120 days following the parole hearing; no additional 30-day period applies.

If a parole grant is reversed by the Governor or rescinded by the Board, the prisoner is placed back into the regular rotation of parole consideration hearings unless and until he or she is granted parole again. Some prisoners are granted parole several times before they are finally released from prison.

WHEN COMMISSIONERS CANNOT AGREE

If a hearing results in a split decision between the Commissioner and Deputy Commissioner (there are only two people on a hearing panel), the case goes to the full Board of BPH commissioners at a monthly executive meeting. This is called an *en banc* review, and a majority vote is required for a prisoner to be granted parole. Members of the public may attend this hearing and speak to the Board.

WHEN COURTS GET INVOLVED

At any stage of the parole consideration process, a prisoner may ask a court to intervene and correct some unlawful conduct by the BPH. In cases against the Governor, courts might set aside his decision and allow the prisoner's release. In cases against the BPH's denial of parole, courts might order the BPH to conduct a new hearing and grant parole unless there is some new evidence demonstrating a prisoner's risk to public safety.

The lifer cases from recent years that have helped establish the legal limits on conduct by the BPH and the Governor are *In re Rosenkrantz* (2002) 29 Cal.4th 616, *In re Dannenberg* (2005) 34 Cal.4th 1061, *In re Lawrence* (2008) 44 Cal.4th 1181, *In re Shaputis* (2008) 44 Cal.4th 1241, *In re Scott* (2005) 133 Cal.App.4th 573; *In re Rico* (2009) 171 Cal.App.4th 659; *McQuillion v. Duncan* (9th Cir. 2002) 306 F.3d 895; *Sass v. Cal. Bd. of Prison Terms* (9th Cir. 2006) 461 F.3d 1123, and *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846.

LIFE ON PAROLE

Most lifers who are released on parole must serve a minimum of five years or seven years on parole before they may be discharged from parole. However, these parolees face a maximum of a lifetime on parole if parole authorities find that there is good cause to believe they continue to require intense parole supervision. While on parole, they must abide by specific conditions supervised by a parole agent. A former life prisoner who is on parole faces the possibility of a new life sentence if he or she is returned to prison for even a minor violation of parole.

Post-Conviction Justice Project

SUMMARY OF CALIFORNIA PAROLE PROCESS

This information is intended to help students prepare for and perform successful parole hearings for clients at the California Institution for Women.

10/11/2011

GENERAL OVERVIEW

California prisoners who are convicted of certain crimes such as murder and kidnapping may be sentenced to indeterminate sentences with a possibility of a life term. These prisoners are, however, entitled to parole consideration hearings after having served a certain portion of their sentence. The initial decision as to whether a prisoner will be released on parole is made by an executive branch agency entitled the Board of Parole Hearings (BPH or Board). If the BPH decides that a prisoner should be paroled, the state governor has a right, pursuant to both statutes and the California constitution, to review and modify or reverse the finding.

The Board of Parole Hearings was established in 2005, and combines the previously existing Board of Prison Terms, Youth Authority Board, and Narcotic Addiction Evaluation Authority into one agency. One of the BPH's responsibilities is to conduct hearings to determine whether prisoners with indeterminate sentences are suitable for parole. (See Cal. Penal Code §3040, *et seq.*) Pursuant to internal restructuring in 2005, there are now seventeen BPH commissioner positions and an executive director. The director and the commissioners are appointed by the governor and must then be confirmed by the senate. Twelve of the commissioner positions conduct parole hearings for life prisoners. A short bio of each commissioner is available on the CDCR website (cdcr.ca.gov/Divisions_Boards/BOPH/commissioners.html). Additionally, there are approximately sixty deputy commissioners who are state civil servants. Although deputy commissioners are predominantly responsible for holding hearings to determine whether parolees have violated their parole conditions, one deputy commissioner sits on each parole hearing panel. Prior to 2001, each hearing panel consisted of two commissioners and one deputy commissioner. Because of the large backlog of hearings in recent years, the legislature enacted legislation with a sunset clause that allows panels to be comprised of one commissioner and one deputy commissioner.

By statute, every indeterminately sentenced prisoner has a Minimum Eligible Parole Date (MEPD), which is approximately two-thirds of the numerical sentence (i.e., for prisoners with a 15 to life sentence, the MEPD is about 10 years. (Cal. Penal Code §3046) By statute, the Board may not grant parole to any prisoner with an indeterminate sentence prior to her MEPD. A prisoner's MEPD also controls when that prisoner will have her initial parole hearing. According to Penal Code §3041, an initial hearing shall occur one year prior to a prisoner's MEPD.

At a prisoner's initial parole hearing, a BPH panel "shall" set a parole date unless it determines that the gravity of the offense, or the timing and gravity of current or past convicted offenses, are such that "consideration of the public safety requires a more lengthy period of incarceration." (Cal. Penal Code §3041 (b)). The language of the statute creates a presumption that a prisoner should be released on parole at her initial parole hearing. The California Code of Regulations sets forth the factors that the Board may consider in carrying out the mandate of the statute. (Cal. Code Regs. tit. 15 §2402(c)-(d) (2008).) These suitability and unsuitability factors are meant to guide the Board's determination and will be discussed in more detail

below, but the core determination of "public safety" under the statute and regulations is an assessment of the inmate's current dangerousness. In re Lawrence, 44 Cal. 4th 1181 (2008). The Board is limited to identifying and weighing only the factors relevant to predicting whether the inmate will be able to live in society without committing additional antisocial acts." (Id.)

In reality, the Board does not grant many parole dates and almost never grants a date at the initial hearing. Most prisoners are not found suitable until they have had at least several hearings. In order to adequately represent your client at her parole hearing, you **MUST** carefully read the sections of the penal code pertaining to parole hearings, which are §§3041 to 3049, and the California Supreme Court's decision in Lawrence.

If a Board panel determines that the prisoner is suitable, it then calculates the amount of time the prisoner is required to serve pursuant to a matrix in Title 15, which suggests varying prison terms based on certain specified characteristics of the commitment offense. (See 15 CCR §2403.) It is rare for a prisoner to be found suitable before she has served the amount of time suggested by the matrix. You must also read carefully the relevant portions of Title 15 (§§ 2000, 2025-2044, 2235-2256, 2268-2270, 2400-2411. A copy of Title 15 is in the clinic office.

HEARING PREPARATION

Prior to the hearing date, you will need to do these things:

(1) Prepare your client for the hearing, including at least one moot with a supervising attorney;
(2) Review your client's C-file;
(3) Prepare a written submission for the panel;
(4) Prepare an exhaustive list of every piece of information to be included in the hearing record;
(5) Prepare a list of potential questions to ask your client at the hearing; and
(6) Prepare a closing statement, including at least one moot with a supervising attorney and other students.

Your preparation will be slightly different depending on whether this is an initial hearing or a subsequent hearing. (*See* 15 CCR §2268-2270).

INFORMATION SOURCES

In order to sufficiently prepare your client and yourself for the hearing, you must be familiar with all of the information on your client's case, including: (1) the commitment offense and any other prior criminal conduct; (2) pre-commitment personal history; (3) activities while incarcerated; and (4) intended release plans. You will be able to obtain this information from a variety of sources, as explained below.

THE CLIENT

The most important source of information is your client. You should visit your client at the prison several times prior to the hearing and discuss with her all aspects of her case. The upcoming parole hearing is likely the most important thing in the client's life at the moment, so she probably has a reasonable grasp of the procedures and what information will be important at the hearing (particularly if she is preparing for a subsequent hearing).

In order to ensure that you have a comprehensive understanding of your client's case, verify her version of events against documents such as the appellate opinion (if one exists), the probation or police report, and the version(s) stated in the Board Report and/or is past hearing transcripts. Recognize that all parties involved, including your client, law enforcement, witnesses, (and possibly the victim in an attempted murder case) have a subjective view of the facts. You may find that discrepancies exist among the various accountings of the facts. If so, you need to discuss each discrepancy with your client and have a complete understanding of her version. At the parole hearing, you will be asked if you have any objections to a particular written version being entered into the record as the facts of the crime. You will need to know, and be able to articulate any "facts" with which your client does not agree. (Usually, any incorrect and harmful facts are in the probation report). If your client had a trial and an appeal, the Board is required to use the facts stated in the appellate opinion. In most cases, the appellate opinion has the least harmful version for your client. You may need to object to the use of another version that is less helpful to your client, if there is an appellate decision.

THE C-FILE

Every prisoner has a Central File (C-File) at CIW. The C-File contains extensive documentation of the client's behavior and activities while incarcerated, as well as other documents such the probation report from her conviction, and possibly the appellate decision, and letters of support. You should pay careful attention to what are referred to as "chronos." These are written memos that prisoners receive in their file at various times. Some of the chronos are disciplinary in nature, some are neutral, and others are laudatory.

Viewing and Obtaining Documents from the C-File

Many prisoner's C-Files have recently been scanned into electronic format. No portion of the paper C-File may be taken out of the prison, and this equally applies to the electronic version of the C-File.

Instead, you must viewed the C-File at CIW in the presence of a CDC staff member, most likely your client's counselor. In order to view the C-File, you must make an appointment at least one week before visiting. To make an appointment to view a C-File, call your client's counselor and tell him or her that you are cleared as a law student intern with USC and that the Appeals/Litigation Unit has your clearance information. If you do not know the name of your client's counselor, you may be able to get it from the CIW records department.

You will most likely view the C-File in its electronic format on a computer provided by the CIW staff. If you wish to have any copies of documents in the C-File made, you can give your client's counselor a list of the page references in the C-File you need copied. The counselor will then make copies and send them via mail to you at the office. Counselors are not always timely with this task, so do not hold back in chasing up your copies, especially if you need them for an imminent parole hearing.

Disciplinary and Laudatory Chronos

Disciplinary chronos are extremely important to note, especially recent ones. The hearing panel will discuss any chronos your client received since the last hearing and may also consider earlier disciplinary violations. The client should be aware of each disciplinary violation in her file and be prepared to discuss any part of it.

Essentially, there are two types of disciplinary action: (1) CDC-115 disciplinary action (serious rules violation or administrative violation) and CDC-128(A) counseling chronos (often referred to as "115s" and "128s"). A 115 violation is considered serious and carries great weight with the Board. There are two kinds of 115s, serious violations (ie, fighting, escape paraphernalia) and administrative violations. If your client was issued a 115 for a serious rules violation that was subsequently reduced to an administrative violation, it important to note this fact and the reasons why it was reduced during the hearing. A 128(A) counseling chrono is more along the lines of a warning and is not considered to be disciplinary. Examples of 128s are being late for work. (*See* 15 CCR §§ 3310, *et seq.*; Dept. Operations Manual ("DOM") § 52080.3.)

Confirm that all the negative information in the file actually belongs to your client. Prison officials have been known to misfile chronos, disciplinary write-ups, etc. If something is in the file that belongs to another prisoner, you should bring it to the attention of your client's counselor, to be removed before the hearing. If it does not get removed before the hearing, make sure to tell the Panel, on the record, that the document does not belong in your client's file, that you had asked for it to be removed, and that you expect them not to rely on it in making their parole decision.

Laudatory chronos are generally helpful to the client's case. Laudatory chronos include "form" chronos which clients may get for attending therapy and self-help groups. Although these are favorable, they are common enough that the hearing panel may not give them great weight. However, they are still important because they document the

client's participation in these programs. More valuable are chronos for unusual things your client did, such as assisting a guard or other prisoner in an emergency, and/or those that indicate that the client is rehabilitated. These types of chronos should be highlighted in your parole submission and again at the hearing.

THE PAROLE PACKET

CIW staff should send to USC, at least 30 days prior to the hearing, a thick folder of materials, called the parole packet. Any questions regarding parole packets should be directed to the lifer records desk at CIW at (909) 597-1771, ext. 5257.

The packet should contain much of the same information from the C-File and is divided into several sections: 1) Cumulative Case Summary, 2) Board Reports, 3) Psychiatric Reports, 4) Prior Decisions, 5) Notices and Responses, 6) Legal Documents, and 7) Miscellaneous. The Panel members will rely heavily on this packet to prepare for the hearing. ***AS YOUR CLIENT'S ADVOCATE, YOU MUST READ AND BE FAMILIAR WITH THE CONTENTS OF EVERY PAGE IN THE PACKET***. You do not want to be surprised by a discussion in the hearing about information in the packet.

PRIOR PAROLE HEARING TRANSCRIPTS

If the client has had prior parole hearings, transcripts of those hearings are available. The prisoner is entitled to a copy of the entire transcript and the decision rendered. Review all prior transcripts and consider any question asked at a prior hearing as a possible question in the upcoming hearing. Additionally, review the prior Board decision so that you are prepared to address the previous reasons for denials and to address whether the client has complied with the Board's recommendations since the last hearing.

PREPARING THE CLIENT

Preparing the client to testify well is the most important thing you can do to assist her in being found suitable for parole and lay the record for a successful habeas challenge to a denial or reversal. Nothing within your control is going to influence the Parole Board as significantly as how the client presents herself and her case on the hearing date. The client needs to be able to answer the Panel's questions appropriately and with the right attitude.

Preparing the client for questioning is a lengthy process. The best way to begin is to assemble a list of questions the Panel is likely to ask. The Panel always covers the same general areas during the parole hearing: commitment offense, behavior in prison,

and release plans. Transcripts from prior hearings are an invaluable resource for predicting the questions that will be asked and identifying issues or inconsistencies of concern to the Board.

Release Plans and Letters of Support

One of the first things you should review with your client is her release plans if she is paroled. She needs to have recent and detailed letters confirming residence(s) and job offer(s). If she does not have these, you will need to work with her to obtain these letters, and it is likely you will need some lead time to do this. It is optimal for her to have at least one back-up offer of residence and an additional firm job offer.

It is also important that she have recent letters of support from family members and/or friends. Talk to her about who might be able to send her support letters. The Panel is usually not going to be particularly impressed by letters that merely offer vague, general support ("I think the inmate is a good person" letters, or "I think she should be released" letters). The Panel *will* pay attention to letters that make concrete offers of support: financial support and emotional support, as well as job offers and residences.

If possible, you should review support letters before they get forwarded to the prison. Letters which are extremely hostile or which make wild accusations (frame-up, political prisoner, etc.) should be considered carefully--they may do more harm than good.

If you know that the victim's next of kin is sympathetic, or does not oppose parole, get a letter from him/her. You should discuss contacting the victim with a supervisor before you do this, as such contact has the potential to be detrimental to your client. Also, if you know that the D.A., law enforcement officer, or sentencing judge on the case is in support of her parole, you may want to ask them for a letter of support.[1] These carry great weight with the Panel.

If substance abuse has been an issue for your client, she should be prepared to present information to the Board about how she will continue to attend meetings if paroled. For example, if your client can tell the Panel that, upon release, she will go to the AA meeting at two o'clock three times per week at the church which is five miles from where she will be staying, they will feel more confident about her ability to maintain her sobriety. The more specific details that you or your client can give about her intended lifestyle if released, the more they will be reassured that she is serious about being a law-abiding citizen.

1 It is not appropriate to contact the victim unless you know that they may be sympathetic. It also may hurt, more than help, your client if you contact someone who turns out to be hostile to your client's release.

Commitment Offense

It is your responsibility to prepare your client to testify about her commitment offense. As discussed above, she should be ready to explain any inconsistencies with her prior version(s) of the crime or the various official versions of the crime. In addition, it is critical that she effectively discuss the causative factors of the commitment offense and her insight into those factors. It is also important that she is prepared to take full responsibility for the offense and express her sincere remorse for the crime.

To prepare your client most effectively, it is often useful to ask her to give you her narrative version of the commitment offense. Doing so may help you to identify areas of weakness or discrepancies between the official version and your client's version. When discussing aspects of the commitment offense, remember to consider your client's answers in the context of how the Board might respond to what your client is saying.

Note, however, that an inmate has a statutory right not to discuss the commitment offense during her parole hearing. Cal. Penal Code § 5011(b). In the past it was considered that an inmate that didn't discuss her crime had zero chance of being found suitable. However, with the change in law brought about by Lawrence, combined with the increased denial off-set periods of Marsy's Law, in some cases it may be advantageous for your client to exercise her right not to discuss the commitment offense. Such cases might include where your client has discussed the commitment offense in the past so well that the past record is sufficient, or where your client has great difficulty expressing herself effectively due to nerves or for other reasons.

Psychological Evaluations

You should also review all psychological evaluations the prison has done on the client, with predominant attention paid to the most recent one. (They will all be included in the parole packet.) Make sure that your client has carefully read her most recent psychiatric report and have her discuss with you any parts of it with which she does not agree. Anticipate that the Panel will ask your client questions about the psych report, including whether she agrees with the conclusions in it. BPH policy as to psychological reports has changed recently, to the extent that your client's most recent psychiatric evaluation may be as much as three years old. If you find that your client's most recent evaluation is unsupportive but a couple of years old, check to see if your client expects to have a new evaluation ahead of the hearing. If not, you may wish to discuss with your supervising attorney the possibility of requesting a new evaluation ahead of your client's hearing – note that you would probably need to do this at least 45 days in advance of the hearing.

Chronos

The Panel is almost certain to ask your client about every disciplinary chrono in the C-File, even the 128(A)s. This is a veritable certainty if one was given since the last hearing. Prepare your client to answer potential questions about the behavior stated in the chrono that required disciplinary consequences. The client may want to contest the version of events in the chrono and present her own side of the story.[2] Generally, however, the panel will believe the factual statement in the chrono and will *not* believe a prisoner who refuses to accept responsibility for the conduct. If the client is indeed guilty of the conduct outlined in the chrono, even if there are extenuating circumstances, it is usually best to advise her to admit to the offense, accept responsibility, and not try to explain why she failed to follow a rule.

Board's Previous Recommendations

If past panels have recommended that your client attend Alcoholics Anonymous (AA) or Narcotics Anonymous (NA), or read and write book reports, and she has done so, this should be emphasized at the hearing.

MOOTING YOUR CLIENT

Assemble a list of possible questions from the documents outlined above. In preparing your questions, do not go easy on your client. If anything, you want your questions to be more challenging, and even more severe, than the ones that the Panel will ask. Make sure you throw in some "curve-balls" ("The Board report says that you pose a low degree of danger, do you agree?") and some nastily-phrased questions ("Didn't you kill your husband just to collect his insurance money?"). The Panel may ask confrontational questions to see how the client reacts to pressure and even hostility. You want the client to be prepared for this. Parole hearings can be extremely trying experiences, and the most important thing you can do is prepare your client to do her best.

A few days prior to the hearing, you and one of the supervising attorneys should conduct a mock hearing with the client. You and the client will play your respective roles, and the supervising attorney will play the role of the Parole Board. Go through questions and direct examination. You may want to go through your closing as well, but remember that you will likely be changing it right up to the last minute.

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2 Inmates have an avenue to appeal any disciplinary chronos via the "602" process. If your client is adamant in contesting the negative chrono, check to see if she has filed a 602 petition against it. Sometimes, these appeals will not have been resolved by the time of a hearing, so it is important that you can show the Board that the inmate is taking proper actions to contest the chrono.

Additionally, you must prepare your client to make the best appearance possible before the Parole Board. Advise your client to try her best to get a good night's sleep and wear nice and clean clothes. Remind her to make steady eye contact with the Board members. She should be forthcoming and thoughtful in responding to the Panel's questions.

The client also has a right to make a closing statement at the hearing (this is in addition to your closing statement). If she wishes you to do so, you should review her proposed statement with her. The statement should be reasonably brief and should not be angry or defensive in tone. A positive closing statement from the client, in which she accepts responsibility and expresses remorse, may help her case. A good general theme for a client closing is the difference between the person she was at the time of the crime and the person she is today.

You should review all of the support or opposition letters with your client. She should be able to answer questions about who the people are, how she knows them, and why they wrote the support or opposition letter.

THE WRITTEN SUBMISSION

GENERALLY

Prior to the hearing, you will prepare a written submission to the Board. The parole submission is an advocacy document. You should include your client's personal background, an overview of the commitment offense, your client's behavior in the institution, and highlight the facts in support of her release.

The submission should be relatively short, approximately 10-12 pages. In addition to the advocacy portion, you will also include any relevant exhibits that are not included in the parole packet, such as support letters, housing and job offers, recent positive chronos and work reports, and recently earned certificates and degrees. You may find it most effective to include every relevant positive document that your client has received since the last hearing – this can be effective, as some commissioners have been observed to rely on the exhibits in a submission as much as in the parole packet or C-File. (You may also find that this approach helps you to organize all the materials you need to be aware of for the hearing.)

Keep in mind that the Panel hears a plethora of cases and will not be inclined to review lengthy documents about each prisoner. The most effective approach to advocate for your client is to choose a limited number of important issues you would like to highlight and focus on them. Among the most important things to address are the inmate's psychological progress (as per the psychiatric evaluations), release plans (including residence, employment, and emotional support), and how the inmate has addressed the Panel's recommendations from the last hearing.

Most likely, your submission will take one of two basic forms. First, you may be advocating for a client who has not received a parole date, in which case you will want to address why the client no longer presents a danger to the community, generally referencing the suitability criteria set forth in Title 15. (15 CCR § 2402, *et seq.*) Second, you may be writing your submission on behalf of a client who was previously granted a parole date which was reversed by the Governor, in which case you will want to focus on why the Governor's decision was wrong and/or how the client has met the Governor's concerns.

WHO MAY ATTEND THE HEARING

To represent the interest of the people, a representative of the District Attorney's office, not necessarily an attorney, from the county of commitment must be noticed and may participate in the hearing. (Cal. Penal Code § 3041.7). The prisoner must be notified if the prosecutor is to attend. (15 CCR §2030(b)). Pending the Board's permission, media representatives may attend, though they may not participate in the hearing. Additionally, the victim or the next of kin of a deceased victim must be noticed 90 days prior to the hearing and may attend and address the panel or may designate a representative to attend and address the panel. (Cal. Penal Code, § 3043.1).

HEARING RIGHTS

Parole hearings are held pursuant to Penal Code Sections 3041, *et. seq.* Your client has various rights. (*See* 15 CCR §§ 2245-2256). For example, the inmate is entitled to be notified of the hearing date at least one month before the hearing. (Normally, we will receive the hearing calendar several months prior to the scheduled hearing.) Documents marked "confidential" in your client's C-File may not be reviewed by her. The client has the right to be present at the hearing, ask and answer questions, and speak on her own behalf. Your client may present "brief, pertinent and clearly written" documents covering "any relevant matters" to the Panel and place copies in the C-File. (15 CCR ' 2249). It is a prisoner's responsibility to point out any abrogation of her rights or failure of the Board to follow the rules.

Your client is entitled to a copy of the record of the hearing upon request. As a matter of practice, each prisoner is mailed a copy of her transcript once prepared. The attorney does not receive a copy of the transcript unless you request it and pay for it. Your client is not entitled to have any representatives at the hearing other than her attorney. That is, no member of her family or other advocate may appear on her behalf.

Conversely, the victim, next of kin (NOK), or immediate family may appear or may designate representatives to appear and make a statement at the hearing. (Cal. Penal

Code §§3043-3043.3; 15 CCR §2029). Under the Victim's Bill of Rights, the victim has a right to be notified of the hearing and to be present. (Cal. Penal Code §3043, *et seq.*). In addition, the Board sends written notice to the original sentencing judge, the district attorney, the defense attorney, and the relevant local law enforcement agency about the impending hearing, and solicits comment as to the prisoner's suitability for parole. (Cal. Penal Code §3042). Check to see whether there are letters in the file from any of those persons. If there are letters in support of your client's release, be sure to direct the Panel's attention to them. If they are in opposition, which is more likely, make sure to directly address the reasons given for their opposition during the hearing. The D.A.'s office often sends someone to personally appear at the hearing to argue against the inmate's suitability for parole. (*See* 15 CCR § 2030). Listen carefully to his/her argument and be sure to rebut his/her points during your closing.

During the hearing, the Panel should consider all of the documents in the parole packet and the statements of the various parties allowed to speak. They must discuss the facts of the crime with your client, but she is entitled to refuse to discuss the facts and may not be compelled to incriminate herself. (15 CCR § 2236). If the prisoner refuses to discuss the crime, this cannot be held against her. (Id.)

Note: Prisoners at subsequent parole hearings are entitled to the same rights and treatment as at their initial hearing. (15 CCR § 2270 *et. seq.*)

THE FORMAT

The Panel will begin the hearing by having everyone around the table introduce themselves and spell their last names. The Commissioner will begin by reviewing your client's ADA rights and waiver with her and will explain the process of the hearing. The Commissioner will then ask whether she objects to any of the Panel members. Unless the client knows one of them outside of the parole context (e.g., one of them was the prosecutor in her case or one of the police involved in her arrest), you should not object to the Panel. Even though the Penal Code requires one of the Panel members to have been present at the inmate's prior parole hearing for purposes of consistency, this does not usually happen. (Cal. Penal Code §3041(a)). You may lodge this as an objection, but the Panel will proceed with the hearing nonetheless.

The Commissioner will also ask you whether all of your client's rights have been met up to this point. Generally the answer will be "Yes," but if you have any specific objections (e.g. the inclusion of an opposition letter which arrived too late for you to review), now is the time to put them on the record. Lastly, the Panel will ask whether the prisoner has any documents to submit, such as recently arrived support letters. You should confirm that the panel has received the submission and submit any other documents that were received too late to be included in the submission.

Once these preliminary matters are addressed, the Panel moves into the substance of the hearing. The questions are generally divided into three main parts: prior history and commitment offense, institutional adjustment, and release plans. The hearing will be tape-recorded, so it is important that any responses you or the client make are verbal. Nods, head shakes, shrugs, and gestures will not be part of the record. If your client responds to a question non-verbally during the hearing, you should remind her to answer aloud.[3] Additionally, advise your client that complete answers will prove more favorable than terse answers because the transcript will later be reviewed by the full Board and then the Governor, who will have to make their decision based solely upon the written words as opposed to your client's demeanor at the parole hearing.

The commitment offense portion of the hearing usually consists of reading the facts into the record and allowing the prisoner to state her version of the crime into the record as well. The Board will always accept the findings of the court over the prisoner's version. In subsequent parole hearings, the Panel will often ask to incorporate the facts from the prior hearing by reference so they do not have to read the facts into the record. If there are inaccurate facts relating to the crime, you should clarify at this time. It is not uncommon for the record to contain inaccurate facts that are relevant to the crime and conviction. If not corrected, panels will continue to rely on these facts in future hearings, most likely to your client's detriment.

Once the facts are in the record, the commissioner will ask your client questions about the commitment offense. Generally, the Panel is looking to see whether she is telling the truth about the offense and accepts responsibility for her involvement in the crime. They will also be trying to determine whether she understands the effects of the crime and feels remorse for the victims. In general, the panel will look favorably upon a prisoner who does not dispute the findings of the court and police investigation and is genuinely remorseful. This part of the hearing can get quite contentious if the prisoner denies the court's findings. However, do not let concern for appearing contentious keep you from raising legitimate issues if there is a genuine dispute over one or more facts.

During the second portion of the questioning, the deputy commissioner will review your client's progress in prison. S/he will generally go through the C-File noting programming, certificates, and favorable and unfavorable chronos and disciplinary infractions. The deputy commissioner will often ask about any unfavorable information, again hoping to ascertain whether the inmate is taking responsibility for her actions. Similarly, the deputy commissioner will go through the various activities in which the client has been involved while in prison, especially those activities for which she has received chronos since her last hearing. The deputy commissioner may also ask the prisoner to elaborate on favorable information, especially if it is unusual (e.g., a chrono for helping a guard during an emergency).

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3 Also, try to remember not to talk across anyone else who is speaking as this can lead to transcription problems, although this is frequently unavoidable.

Finally, the panel will address your client's release plans. The panel will be primarily concerned about whether she has an appropriate residence and confirmed job offer. The panel will also review letters of support to determine whether your client will have the necessary support, be it emotional or financial, from family and friends upon release. Ultimately, the panel is looking for evidence that your client will be well-positioned to sustain a crime-free life as a productive member of society.

For this part of the hearing, the deputy commissioner will go through the C-file and our submission to summarize the contents of any support letters your client has received. The panel may also ask questions about her plans, often very detailed ones. Just because the prisoner has a letter saying she can live with her sister does not mean the matter is closed. The Panel may ask how much room there is at the house, whether the prisoner will be paying rent (and if not, how the sister can afford to support her), and how long she will live there. Offers of employment may elicit similar questions. Panels have asked about job security, transportation between residence and job, documentation that an inmate is eligible for social security or disability benefits, and AA/NA meeting locations and schedules. It is best if your client has a more than one job offer and residence.

After this, the Panel may want to ask additional questions. Your client should stay focused and answer questions as honestly as possible. If she does not know the answer to something, she should say so, and show a willingness to find the answer to satisfy the commissioner's concerns.

Once the questioning is finished, the Panel will go to questions and closing statements. If a district attorney representative is in attendance, he will have the opportunity to ask "clarifying" questions directly to the Panel. (15 CCR § 2030(d).) They are not allowed to render legal advice or speak directly to your client. In practice, this results in a proxy system in which the DA will ask a question of the Panel ("I'd like to know, did she kill her husband for the insurance money?") and the Panel will turn to the prisoner and ask her to answer. After the DA's questions are finished, it will be your turn to conduct your direct examination. You are not bound by strict rules of evidence, but you should be careful about asking obviously leading questions if you can avoid it.

Once the questioning is completely over, it is time for closing statements. The DA, if present, will make the first closing statement. (15 CCR ' 2030(c)(2). After the DA, you will get to make your closing. Again, it should be reasonably brief (approximately 5 minutes) and should highlight positive issues from your submission. You may also want to clarify any issues with which the Panel seems particularly concerned, putting things in the best possible light for your client.

As mentioned previously, the prisoner is entitled to ask questions and make a statement. (15 CCR § 2247) If the inmate decides to do so, she will make her statement after you are finished.

Once your client is finished, if a victim or member of the victim's family is present, they will get to make a statement for the record. (15 CCR § 2029(d).) The right to speak last is reserved to the victim or victim's next-of-kin under the Victim's Bill of Rights.

Once all of the closing statements are in, the hearing panel will recess to discuss the prisoner's eligibility off the record. During this time, everyone except the Panel members will have to leave the room, and the tape recorder will be off. When the Panel has made its decision, they will call everyone back in, go back on the record, and announce their decision. The prisoner may receive a recommended release date, or, more likely, a "denial" for three to fifteen years (meaning it will be that long before she gets another parole hearing). The Panel will cite the reasons for their decision on the record, and the hearing will then conclude.

Your Direct Examination and Closing Statement, Explained

During the hearing, you will have the opportunity to "directly examine" your client. In preparing, choose a couple of issues that will allow the hearing Panel to see your client in the most favorable light, or which are important to clarify any factual inaccuracies in the record. Do not assume the Panel will be intimately familiar with your submission prior to the hearing. They may have simply glanced over it, or they may not have read it at all. Any information in the direct examination and the closing remarks should stand pretty much on its own (obviously, the Panel will be familiar with the commitment offense and the inmate's time in prison; however, any specific issues or outside supporting facts you dug up for your submission may be new to them).

The direct examination serves two primary purposes: getting new information into the record, and clarifying matters for the Panel. You cannot use facts in your closing remarks or in your submission unless they are supported in the record, and this is your opportunity to get facts and sentiments into the record. If there is something you want to talk about, but there are no letters/chronos/prior testimony which support it, you may ask about it at this time. It is also an excellent place to clarify answers the client gave during the hearing, in case there is any confusion, or to help defray any concerns that the Panel seems to have. You may consider end your direct exam with one or two open-ended, upbeat questions that will allow your client to talk freely for a little bit about something positive.

Your closing remarks should be brief, no more than 5 minutes long. The actual prepared remarks should probably be around three or four minutes, to allow you some time for last-minute additions to address issues that come up during the hearing. By the time you have the opportunity to make your closing remarks, the Panel is going to be anxious to get to the decision-making stage, so do not go into a lot of extraneous material or simply repeat what has already been said. Generally, use the theme espoused in your submission and highlight the best areas for your client.

ESTABLISHING SUITABILITY

The BPH has broad discretion to determine who is suitable for parole. The Penal Code generally requires the Panel to set a release date, unless it determines that the gravity of the offense, or the timing and gravity of current or past convicted offenses, is such that "consideration of the public safety requires a more lengthy period of incarceration..." (Cal. Penal Code §3041(b).) In implementing this section, the Board has prescribed a multi-part test to determine parole suitability. The prisoner must first be found to pose no danger if released, or suitable for return to society. (15 CCR §3401, *et. seq.*) Even if this is satisfied, the prisoner must also have served a certain minimum sentence based on the gravity of her commitment offense. In most cases, our clients have not been found suitable for parole before they have served their adjusted base term, which is calculated using a matrix in Title 15, and other criteria stated in the code that concern specific circumstances surrounding the commitment offense and post conviction credit. (*See* Matrix at 15 CCR §§ 2403-2410.)

The Board considers several factors to determine suitability for return to society. In general, the Panel may consider aspects of the prisoner's social and criminal history, the nature of the offense, her attitude towards the offense, or "any other information which bears on the prisoner's suitability for release." (15 CCR § 2402(b).) Note that the Panel may consider past or subsequent criminal misconduct "which is reliably documented." (Id.) This essentially means that a *conviction* for the other crime is not required. An acquittal would likely preclude the Panel from considering the matter, but if the inmate has been accused or charged with a crime, but never went to trial for some reason (charges dropped, etc.), the Panel will probably hold this against her, pursuant to "evidence" such as police reports, statements from other prisoners, etc.

Section 2402 of Title 15 lists several factors to be considered by the Panel.

Factors unfavorable to release are:

(1) Especially heinous commitment offense – multiple victims, carried out in a dispassionate and calculated fashion, victim was abused, defiled or mutilated, callous disregard for human suffering, or the motive for the offense was inexplicable or trivially related to the crime;
(2) Previous record of violence – particularly if at an early age;
(3) Unstable social history (drug use, promiscuity—according to an internal memorandum, the panel should not be using parental abuse/neglect as an unsuitability factor);
(4) Sadistic sexual offenses in the prisoner's history (as the perpetrator, not the victim);
(5) Psychological factors – prisoner has a lengthy history of severe mental problems related to the offense;
(6) Serious misconduct while in prison (115s, etc). (15 CCR §2402(c).)

Factors favorable to release are:

(1) No juvenile record;
(2) Stable social history (may be demonstrated by stable relationships developed while in prison);
(3) Signs of remorse;
(4) Motivation for crime, (understandable motive, particularly as a result of long-term stressful situations, such as being battered);
(5) Lack of violent criminal history;
(6) Age;
(7) Realistic plans for the future, particularly if the prisoner has developed marketable skills;
(8) Good institutional behavior. (15 CCR §2402(d).)

If the panel finds the prisoner unsuitable for parole based on the above factors of consideration, they will deny her another parole consideration hearing for a period of between three and fifteen years. The default term of denial is 15 years under Marsy's Law, unless the Board finds "clear and convincing evidence" that a shorter term of 10, 7, 5 or 3 years is appropriate. Cal. Penal Code § 3041.5(b)(3). Note that in most of our client's cases you won't see a denial of longer than 3 years. If, however, the panel finds your client suitable, it will then determine how long the client should serve for the offense, in the manner discussed below.

THE MATRIX

If the panel finds your client suitable for return to society, it will compute an adjusted base term to be used in calculating a recommended release date. (15 CCR §2403(b).) This is done with the assistance of a matrix. Essentially, the matrices establish tri-part terms based on how the crime was committed, the injuries inflicted, and the relationship between the crime and the prisoner. The matrix has two axes: one for the relationship to the victim (more remote → longer term; in other words, you will get out sooner if you killed your spouse than if you killed a random passer-by), and one for the amount of harm inflicted (more harm inflicted → longer term; for instance, you will get out sooner if you were merely a nonparticipating accomplice to the murder than if you tortured the victim to death).

The panel considers only the commitment offense when establishing what it believes to be the appropriate category on the matrix. (15 CCR §2403(a).) Each category in the matrix provides three possible outcomes for each combination of factors. Normally the middle outcome is applied, but the panel may apply the lower or higher term if they find aggravating or mitigating circumstances were present during the commitment offense. (15 CCR §2403(a).) In addition, the panel may depart from the matrix entirely if justified by the particular facts of the individual case. (Id.) In one of our cases, the panel departed from the base term due to the severe abuse of the client by the victim.

Title 15 lists twenty aggravating circumstances that can result in imposition of the highest base term applicable to murderers. (15 CCR §2404.) Ten factors are listed which should be considered mitigating, and can result in imposition of the lower of the three possible base terms. (15 CCR §2405.) The panel will generally impose additional years if the prisoner is serving time for multiple offenses (even if the sentences are running concurrently), if the inmate has prior convictions or used a firearm, or for other reasons. (15 CCR §2406-08.)

If the final, adjusted term is equal to or less than the amount of time your client has already served (including pre-conviction credit), the panel will only determine the appropriate adjusted base term, and the prisoner will be released at the end of the review process – after the internal BPH review and a 30 day period in which the governor has the opportunity to change the decision . If your client is found suitable but has not yet served the matrix term, the panel will set a tentative date for the future.

Because the sentencing scheme changed in California, effective July 1, 1978, there are slightly different parole criteria and procedures for murders committed before that time. (*See* 15 CCR § 2400 *et. seq.*) The only notable difference between the two categories is the matrix, which sets forth significantly longer periods of imprisonment for murders committed after November 8, 1978 (which applies to most of our clients). (15 CCR § 2403(b)).

DECISION REVIEW

All decisions by parole hearing panels are subject to decision review by BPH staff– whether the Panel found the inmate suitable or unsuitable for parole.[4] Decisions are reviewed for technical and legal accuracy. Any parole date given at a hearing is considered a "proposed" date rather than a definite date. (15 CCR § 2041.) A decision becomes effective only after review by the decision review unit. The review is nominally constrained by certain guidelines, but they are so broad that the review is essentially *de novo*. (15 CCR § 2042) They may affirm the decision, modify it, or send it back for rehearing. (15 CCR § 2041) No adverse modifications may be made without a rehearing. (Id.)

For prisoners with a term to life sentence (such as 25 to life), the decision must become final within 120 days. (15 CCR § 2043). During those 120 days, BPH staff normally confirms that the information in the file is accurate and that the release plans are viable. Once this is done, and the 120 days have passed, the BPH decision becomes final and the file goes to the governor for his review. Additionally, however, if any BPH commissioner so requests within 60 days after the hearing, the BPH must review the matter *en banc*. (15 CCR § 2044.) This en banc review must take place within the 120

4 In practice, all suitability grants are reviewed, and a random sample of denials.

day period. If a majority approves of release, the decision is immediately effective. If not, the matter is sent back for rehearing.[5]

A different administrative review process applies to prisoners who have a sentence of "life with the possibility of parole." If you are representing such a client, you must review Section 2041(h) of Title 15.

THE GOVERNOR'S FINAL SAY

After the process laid out above, the governor has the right to review parole decisions for prisoners sentenced to an indeterminate life term for murder. (Cal. Const. Art. V §8(b); Cal. Penal Code §3041.2.) As stated above, the Governor has 30 days to review the decision. (Id.) (*See* In re Arafiles, 6 Cal. App. 4th 1467, 1474 (1992), which interpreted when this time limit begins to run.) Unlike the review panels, the governor may reverse the BPH decision without sending the matter back for rehearing. Your client has no right to be present, ask and answer questions, or speak on her own behalf at the Governor's review. The Governor is required to send a written statement to your client delineating the reasons for reversal or modification. (Cal. Penal Code § 3041.2(b).)

AFTER THE REVIEWS ARE DONE

Once the review processes are complete, the "recommended" date becomes an "effective" date. On that effective date, the prisoner is released on parole. The prisoner is free to leave, but parole is subject to revocation. Parole revocation proceedings are governed by a different set of regulations, which are not discussed here. Parole may be rescinded at any time "for good cause." However, since the parolee's liberty is being restricted by the revocation, she is entitled to due process protection during the revocation proceedings. (*See* generally 15 CCR §2600, *et. seq.*)

BPH Contact Information:
1515 K Street
Suite 600
Sacramento, CA 95814
916.445.4072

5 The regulations governing this process are currently being revised by the BPH. The new regulations should bring more clarity to the process, and more specificity about deadlines.

PRISON LAW OFFICE
General Delivery, San Quentin CA 94964
Telephone (510) 280-2621 • Fax (510) 280-2704
www.prisonlaw.com

Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information and cannot give specific advice to all prisoners who ask for it. The laws change often and can be looked at in different ways. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and still applies to your situation. Most of the materials you need should be available in your institution's law library.

INFORMATION REGARDING PROPOSITION 9

(revised June 2011)

The following information is a summary of some of the changes in California law resulting from Proposition 9 (also knows as "Marsy's Law"), which was passed by the voters on November 4, 2008. Proposition 9 modified the California Constitution and altered the California Penal Code by amending two statutes and adding two additional statutes. The main changes that affect people who have been convicted and sentenced are (1) changes in the procedures for determining whether life prisoners are suitable for parole; (2) changes in the procedures for revoking parole; (3) new rules on the payment of restitution; (4) restriction of the early release of prisoners; and (5) limitations on the rights of prisoners.

I. CHANGES IN LIFE PAROLE CONSIDERATION PROCEDURES

A. Scheduling Parole Consideration Hearings for Life Prisoners (Pen. Code § 3041.5)

Before the passage of Proposition 9, when a prisoner with an indeterminate life sentence was found unsuitable for parole, he or she was entitled to an annual parole consideration hearing unless the Board of Parole Hearings (the Board) found that it was not reasonable to expect that parole would be granted the following year and stated the reasons for the finding. The next hearing could be delayed up to two years in non-murder cases and up to five years in murder cases.

After Proposition 9, the maximum period between parole hearings following a denial has changed. Under the new provision (Pen. Code § 3041.5, subd. (b)(3)), the Board, after considering the views and interests of the victim, shall schedule the next hearing, as follows:

(A) In 15 years, unless the Board finds by clear and convincing evidence that consideration of the public and victim's safety does not require a more lengthy period of incarceration than 10 additional years.

(B) In 10 years, unless the Board finds by clear and convincing evidence that consideration of the public and victim's safety does not require a more lengthy period of incarceration than seven additional years.

(C) In three years, five years or seven years, where consideration of the public and victim's safety does not require a more lengthy period of incarceration than seven additional years.

Thus, under Proposition 9, the soonest a prisoner would have his or her next parole consideration hearing is three years, and the presumption is that parole will be denied for 15 years unless the Board finds a reason to schedule it earlier. Because of these changes, a prisoner may want to consider waiving his or her hearing for a period of one to five years if the prisoner knows it is unlikely that he or she will be found suitable at the next hearing.

The Board has discretion to "advance" the next hearing date and hold the hearing sooner if there is a change in circumstances or new information establishing a reasonable likelihood that public safety does not require the additional years of incarceration. A prisoner may send one written request to the Board every three years asking to advance the hearing date and describing the changed circumstances or new information. (Pen. Code § 3041.5, subds. (b)(4) and (d).) BPH Form 1045(A) is used to make this request. A court can overturn a Board's decision regarding such a request only if the Board has committed a "manifest abuse of discretion." (Pen. Code § 3041.5, subd. (d)(2).)

Before Proposition 9, when the Board rescinded a previously set parole date, the Board was required to schedule the next hearing within 12 months. Now, the Board will follow the same scheduling guidelines described above after rescinding a previously set parole date. (Pen. Code § 3041.5, subd. (a).)

The Board began implementing this portion of Proposition 9 effective December 15, 2008. However, the Board agreed not to apply Proposition 9 at the next hearing for any prisoner who was supposed to have his or her hearing before December 15, 2008, but had the hearing postponed by the Board for some reason beyond the prisoner's control, such as needing a new psychological report.

Proposition 9 has been subject to challenges. In May 2011, a state court of appeal held that the provisions raising the minimum parole deferral period, increasing the default maximum deferral period and limiting the Board's discretion to reduce the maximum deferral period violate the "ex post facto" clauses of the federal and state constitutions when applied to prisoners whose crimes were committed prior to the enactment of Proposition 9. The court found that under Proposition 9 the risk of increased incarceration is real and significant. (*In re Vicks* (2011) __ Cal.App.4th ___; 11 Cal. Daily Op. Serv. 5670.) As of early June 2011, the *Vicks* case is not yet final and may be subject to rehearing or review.

On the other hand, in December 2010, the federal Ninth Circuit Court of Appeals reached a conclusion opposite to that in the *Vicks* case. The Ninth Circuit found that because the Board can grant a request to advance a hearing date, Proposition 9 does not create a significant risk of prolonging an individual's incarceration. The Ninth Circuit held that, even assuming that Proposition 9 created some risk of prolonged incarceration, prisoners' ability to apply for expedited hearings remedied any possible ex post facto violation. (*Gilman v. Schwarzenegger* (9th Cir. 2010) __ F.3d ___.; 11 Cal. Daily Op. Serv. 994.

B. Expansion of the Rights of Victims at Life Parole Consideration Hearings (Pen. Code §§ 3041.5(a)(2) and 3043)

Proposition 9 expanded the rights of victims to attend and to be heard at various criminal proceedings, including parole consideration hearings for life prisoners. The victim, next of kin, members of the victim's family, and two representatives may now attend and are entitled to testify at parole consideration hearings. Their testimony may include their views on the parolee's previous convictions, the effect of the crimes on the victim and their families, and the suitability of the prisoner for parole. The Board is required to consider the entire and uninterrupted statements of all of these persons in deciding whether to release the prisoner on parole, and the prisoner or parolee's attorney are not entitled to ask questions of them. In addition, victims and their representatives can require that transcripts of their statements be provided to every hearing panel that considers the prisoner's parole in the future.

II CHANGES IN PAROLE REVOCATION PROCEEDINGS

Proposition 9 attempted to modify Penal Code § 3044 and reduce parolees' due process rights in parole revocation proceedings. However, those parts of Proposition 9 conflict with a permanent injunction entered by a federal district court in a class action lawsuit called *Valdivia v. Davis*. In 2009, the federal court told the state that it had to keep complying with the injunction in the *Valdivia* case, instead of making the changes set forth in Proposition 9. (*Valdivia v. Schwarzenegger* (E.D. Cal. 2009) 603 F.Supp.2d 1275.) In March 2010, the Ninth Circuit Court of Appeals vacated the district court order and instructed the court to amend the *Valdivia* injunction to accord with Proposition 9 unless it found that specific Proposition 9 provisions violate the federal constitution or other federal law. *Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 994-995.

As of June 2011, the provisions of the *Validiva* injunction generally remain in effect. Further litigation is on hold due to the passage of Assembly Bill (AB) 109 in April 2011. AB 109, if put into effect, would take responsibility for most parole supervision and revocations away from the CDCR and the Board and transfer it to the counties. However, AB 109 is NOT currently in effect and will not take effect unless and until laws are passed to provide funding for it. It is currently not known if or when AB 109 will ever take effect.

The provisions of Proposition 9 that have been in dispute are as are follows:

Appointment of an Attorney – As of June 2011, all parolees continue to receive appointed attorneys for parole revocation hearings. If Proposition 9 goes into effect, parolees would no longer automatically be appointed an attorney for revocation proceedings. Instead, parolees would have to request an attorney. The Board would grant the request only if the parolee is indigent and appears to be incapable of speaking effectively in his or her own defense due to the complexity of the charges, the defense, or the parolee's mental or educational incapacity.

Probable Cause Hearing – Under Proposition 9, parolees would be entitled to a probable case hearing no later than 15 calendar days following arrest for a parole violation. This actually would provide sooner probable cause hearings for most parolees than required by *Valdivia*, under which the Board was usually required to conduct a probable cause hearing no later than 13 business days after placement of the parole hold. However, unlike Proposition 9, *Valdivia* requires the Board to hold an expedited hearing where a parolee has a complete defense to the parole violation charge; the expedited hearing must be held within 6 to 8 business days after placement of the parole hold (or as soon as possible thereafter, if the parolee needs more time to produce defense evidence).

Revocation Hearing – Under *Valdivia*, the Board is required to conduct a final revocation hearing no later than 35 calendar days after placement of a parole hold. If the relevant parts of Proposition 9 were to take effect, a parolee would be entitled to a revocation hearing no later than 45 calendar days following his or her arrest for a parole violation.

Hearsay Evidence – Under Proposition 9, hearsay evidence offered by parole agents, peace officers, or a victim would generally be admissible at parole revocation hearings. However, this portion of Proposition 9 is not likely to take effect, as the Ninth Circuit Court of Appeals has re-affirmed that hearsay is not admissible at parole revocation hearings (even if the evidence falls within one of the hearsay exceptions applicable in criminal cases) unless the state's reason for not producing the witness outweighs the parolee's interest in confronting the witness. (*Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 989-991.)

Elimination of Various Due Process Rights – Under *Valdivia*, the Board is required to provide a number of other due process rights to parolees such as written notice of charges, the right of the parolee to appear and speak on his or her own behalf at the probable cause hearing, a neutral hearing officer, the right to subpoena witnesses and evidence, the consideration of alternatives to incarceration, a written statement by the fact-finder of the evidence relied on and reasons for revoking parole, and access to an audiotape of the parole revocation hearing. Full implementation of Proposition 9 would eliminate many of these rights.

III. PAYMENT OF RESTITUTION BY CRIMINAL OFFENDERS

Proposition 9 added subdivision (b)(13) to Article I, Section 28, of the California Constitution to require courts to order restitution for every case in which a crime victim suffers a loss. Any funds collected by a court or law enforcement agencies will first be applied to restitution. Thus, payment of restitution takes priority over other fines and obligations a prisoner may legally owe. This law has little actual impact, as the law has long required sentencing courts to impose restitution and the CDCR to collect restitution from money deposited in prisoners' trust accounts.

IV. RESTRICTION OF THE EARLY RELEASE OF PRISONERS

Proposition 9 amended Article I, section 28(f) of the California Constitution to state that sentences must be carried out in compliance with the court's sentencing orders and prisoners' sentences shall not be "substantially diminished" by early release policies intended to alleviate overcrowding. It also requires the legislature to provide enough funds to house prisoners for the full terms of their sentences, although statutorily authorized credits will still be permitted to reduce prisoners' sentences.

Despite this provision, a federal court issued an order in January 2010 that would require the state of California to implement a plan to significantly reduce its prison overcrowding. (*Coleman v. Schwarzenegger* (E.D. Cal) No. CIV S-90-0520 LKK GGH/*Plata v. Schwarzenegger* (N.D. Cal.) C01-1351 TEH, January 12, 2010 Order to Reduce Prison Population.) On May 23, 2011, the United States Supreme Court upheld the federal court's decision, finding that over-crowding is resulting in cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. *Brown v. Plata,* Case No. 09-1233. The Court's ruling means that the state must reduce its prison population by approximately 32,000 prisoners within the next two years.

The court gave the state the right to choose the crowding reduction methods it will use. The plan developed by the state does not include "early releases" of any current prisoners, but proposes other means of reducing the prison population and expanding the prison capacity. The reductions in overcrowding would be accomplished through other means including: (1) building more California state-operated prison beds on the grounds of existing CDCR prisons or recently-closed juvenile facilities, (2) opening new re-entry and community-based facilities, (3) transferring more prisoners to out-of-state facilities, and (4) housing some prisoners in privately-operated prisons within California. The plan also proposes reducing the prison population by (5) redefining some property crimes so that they are misdemeanors rather than felonies, (6) housing some incoming low-risk felons in jails for their entire terms, (7) placing some prisoners on monitored home detention,(8) implementing reforms to reduce the number of people sent to prison on probation or parole revocations, (9) increasing the good conduct and work credits that can be earned by some prisoners, and (10) commutating sentences for certain non-citizens who will be deported or transferred to federal custody. At this time, we do not know exactly when or how all the parts of the state's plan will be put into effect.

V. LIMITATIONS ON THE RIGHTS OF PRISONERS

Proposition 9 added subdivision (a)(5) to Article I, Section 28, of the California Constitution to limit the rights and privileges of prisoners to those required by the United States Constitution and the laws of California. This provision could potentially affect various rights and privileges such as visitation, higher education, and recreational programming. If the CDCR uses this provision to interfere with court-ordered consent decrees that require the CDCR to provide prisoners with various rights beyond those mandated by state and federal law, there will likely be litigation over those matters.

Per Curiam

SUPREME COURT OF THE UNITED STATES

GARY SWARTHOUT, WARDEN *v.* DAMON COOKE

MATTHEW CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* ELIJAH CLAY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10–333. Decided January 24, 2011

PER CURIAM.

I

California's parole statute provides that the Board of Prison Terms "shall set a release date unless it determines that . . . consideration of the public safety requires a more lengthy period of incarceration." Cal. Penal Code Ann. §3041(b) (West Supp. 2010). If the Board denies parole, the prisoner can seek judicial review in a state habeas petition. The California Supreme Court has explained that "the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." *In re Lawrence*, 44 Cal. 4th 1181, 1191, 190 P. 3d 535, 539 (2008). See also *In re Shaputis*, 44 Cal. 4th 1241, 1253–1254, 190 P. 3d 573, 580 (2008); *In re Rosenkrantz*, 29 Cal. 4th 616, 625–626, 59 P. 3d 174, 183 (2002).

A

Respondent Damon Cooke was convicted of attempted first-degree murder in 1991, and a California court sentenced him to an indeterminate term of seven years to life in prison with the possibility of parole. In November 2002, the board determined that Cooke was not yet suitable for parole, basing its decision on the "especially cruel and callous manner" of his commitment offense, App. to Pet.

for Cert. 50a; his failure to participate fully in rehabilitative programs; his failure to develop marketable skills; and three incidents of misconduct while in prison. The board admitted that Cooke had received a favorable psychological report, but it dismissed the report as not credible because it included several inconsistent and erroneous statements.

Cooke filed a petition for a writ of habeas corpus in State Superior Court. The court denied his petition. "The record indicates," it said, "that there was some evidence, including but certainly not limited to the life offense, to support the board's denial." *Id.*, at 42a. Cooke subsequently filed a habeas petition with the California Court of Appeal and a petition for direct review by the California Supreme Court. Both were denied.

In October 2004, Cooke filed a federal habeas petition pursuant to 28 U. S. C. §2254 challenging the parole board's determination. The District Court denied his petition. The Ninth Circuit reversed, holding that California's parole statute created a liberty interest protected by the Due Process Clause, and that "California's 'some evidence' requirement" was a "component" of that federally protected liberty interest. *Cooke* v. *Solis*, 606 F. 3d 1206, 1213 (2010). It then concluded that the state court had made an "unreasonable determination of the facts in light of the evidence" under §2254(d)(2) by finding any evidence at all that Cooke would pose a threat to public safety if released. *Id.*, at 1215.

B

Respondent Elijah Clay was convicted of first-degree murder in 1978, and a California court sentenced him to imprisonment for seven years to life with the possibility of parole. In 2003, the board found Clay suitable for parole, but the Governor exercised his authority to review the case and found Clay unsuitable for parole. See Cal.

Const., Art. 5, §8(b); Cal. Penal Code Ann. §3041.2 (West 2000). The Governor cited the gravity of Clay's crime; his extensive criminal history, which reflected "the culmination of a life of crime," App. to Pet. for Cert. 116a; his failure to participate fully in self-help programs; and his unrealistic plans for employment and housing after being paroled. Regarding the last factor, the Governor concluded that Clay would be likely to return to crime, given his propensity for substance abuse and lack of a viable means of employment.

Clay filed a petition for a writ of habeas corpus in State Superior Court. That court denied Clay's petition, as did the California Court of Appeal. The California Supreme Court denied review.

Clay subsequently filed a federal petition for a writ of habeas corpus, which the District Court granted. The District Court concluded that the Governor's reliance on the nature of Clay's long-past commitment offense violated Clay's right to due process, and dismissed each of the other factors the Governor cited as unsupported by the record. The Ninth Circuit affirmed, agreeing with the District Court's conclusion that "the Governor's decision was an unreasonable application of California's 'some evidence' rule and was an unreasonable determination of the facts in light of the evidence presented." *Clay* v. *Kane*, 384 Fed. Appx. 544, 546 (2010).

II

In granting habeas relief based on its conclusion that the state courts had misapplied California's "some evidence" rule, the Ninth Circuit must have assumed either that federal habeas relief is available for an error of state law, or that correct application of the State's "some evidence" standard is required by the federal Due Process Clause. Neither assumption is correct.

As to the first: The habeas statute "unambiguously

provides that a federal court may issue a writ of habeas corpus to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wilson* v. *Corcoran*, 562 U. S. ___, ___ (2010) *(per curiam)* (slip op., at 4) (quoting 28 U. S. C. §2254(a)). "We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" *Estelle* v. *McGuire*, 502 U. S. 62, 67 (1991) (quoting *Lewis* v. *Jeffers*, 497 U. S. 764, 780 (1990)).

As for the Due Process Clause, standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient. *Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454, 460 (1989). Here, the Ninth Circuit held that California law creates a liberty interest in parole, see 606 F. 3d, at 1213. While we have no need to review that holding here, it is a reasonable application of our cases. See *Board of Pardons* v. *Allen*, 482 U. S. 369, 373–381 (1987); *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 12 (1979).

Whatever liberty interest exists is, of course, a *state* interest created by California law. There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners. *Id.,* at 7. When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures. In the context of parole, we have held that the procedures required are minimal. In *Greenholtz*, we found that a prisoner subject to a parole statute similar to California's received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why

parole was denied. 442 U. S., at 16. "The Constitution," we held, "does not require more." *Ibid.* Cooke and Clay received at least this amount of process: They were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied. 606 F. 3d, at 1208–1212; App. to Pet. for Cert. 69a–80a; Cal. Penal Code Ann. §§3041, 3041.5 (West Supp. 2010).

That should have been the beginning and the end of the federal habeas courts' inquiry into whether Cooke and Clay received due process. Instead, however, the Court of Appeals reviewed the state courts' decisions on the merits and concluded that they had unreasonably determined the facts in light of the evidence. See 606 F. 3d, at 1213–1216; 384 Fed. Appx., at 545–546. Other Ninth Circuit cases have done the same. See, *e.g.*, *Pearson* v. *Muntz*, 606 F. 3d 606, 611 (2010). No opinion of ours supports converting California's "some evidence" rule into a substantive federal requirement. The liberty interest at issue here is the interest in receiving parole when the California standards for parole have been met, and the minimum procedures adequate for due-process protection of that interest are those set forth in *Greenholtz*.* See *Hayward* v. *Marshall*,

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*Cooke and Clay argue that the greater protections afforded to the revocation of good-time credits should apply, citing *In re Rosenkrantz*, 29 Cal. 4th 616, 657–658, 59 P. 3d 174, 205 (2002), a California Supreme Court case that refers to our good-time-credits decision in *Superintendent, Mass. Correctional Institution at Walpole* v. *Hill*, 472 U. S. 445 (1985). But *Rosenkrantz* did not purport to equate California's parole system with good-time credits. It cites *Hill* twice. The first citation merely observes that the court relied upon *Hill* in an earlier opinion adopting the "some evidence" test for decisions to *revoke* parole that had previously been granted. 29 Cal. 4th, at 656, 59 P. 3d, at 204. The second citation, which does occur in the part of the opinion discussing the need for "some evidence" review in parole decisions, simply borrows language from *Hill* to support the proposition that "'[r]equiring

603 F. 3d 546, 559 (CA9 2010) (en banc). *Greenholtz* did not inquire into whether the constitutionally requisite procedures provided by Nebraska produced the result that the evidence required; *a fortiori* it is no federal concern here whether California's "some evidence" rule of judicial review (a procedure beyond what the Constitution demands) was correctly applied.

It will not do to pronounce California's "some evidence" rule to be "a component" of the liberty interest, 606 F. 3d, at 1213. Such reasoning would subject to federal-court merits review the application of all state-prescribed procedures in cases involving liberty or property interests, including (of course) those in criminal prosecutions. That has never been the law. To the contrary, we have long recognized that "a 'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U. S. 107, 121, n. 21 (1982); see also *Estelle*, 502 U. S., at 67–68. Because the only federal right at issue is procedural, the relevant inquiry is what process Cooke and Clay received, not whether the state court decided the case correctly.

The Ninth Circuit's questionable finding that there was *no* evidence in the record supporting the parole denials is irrelevant unless there is a federal right at stake, as §2254(a) requires. See *id.*, at 67. The short of the matter is that the responsibility for assuring that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts, and is no part of the Ninth Circuit's business.

The petition for a writ of certiorari and respondents'

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a modicum of evidence'" can "'help to prevent arbitrary deprivations.'" 29 Cal. 4th, at 658, 59 P. 3d, at 205 (quoting *Hill*, 472 U. S., at 455). In any event, the question of which due process requirements apply is one of federal law, not California law; and neither of these citations comes close to addressing that question. Any doubt on that score is resolved by a subsequent footnote stating that the court's decision is premised only on state law. 29 Cal. 4th, at 658, n. 12, 59 P. 3d, at 205, n. 12.

motions for leave to proceed *in forma pauperis* are granted.

The judgments below are

Reversed.

SUPREME COURT OF THE UNITED STATES

GARY SWARTHOUT, WARDEN *v.* DAMON COOKE

MATTHEW CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* ELIJAH CLAY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10–333. Decided January 24, 2011

JUSTICE GINSBURG, concurring.

In *Superintendent, Mass. Correctional Institution at Walpole* v. *Hill*, 472 U. S. 445, 455 (1985), this Court held that, to comply with due process, revocation of a prisoner's good time credits must be supported by "some evidence." If California law entitled prisoners to parole upon satisfaction of specified criteria, then *Hill* would be closely in point. See *In re Rosenkrantz*, 29 Cal. 4th 616, 657–658, 59 P. 3d 174, 205 (2002). The Ninth Circuit, however, has determined that for California's parole system, as for Nebraska's, *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1 (1979), is the controlling precedent. *Hayward* v. *Marshall*, 603 F. 3d 546, 559–561 (2010) (en banc)). Given that determination, I agree that today's summary disposition is in order.