*** LITTLE KNOWN PAROLE FACTS ***

INTRODUCTION

The mandatory language of Penal Code § 3041(b) imposes an affirmative obligation to grant parole, creating a legally cognizable liberty interest in parole and a presumption that parole release will be granted if certain conditions are met. McQuillion v. Duncan, 306 F.3d 895, 901-902 (9th Cir.2002); Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003). The deprivation of this is permissible only when the Board can provide evidence from the record supporting its decision. In re Rosenkrantz, 29 Cal.4th 616 (Sup.Ct. 2002). Biggs, 334 F.3d at 919 concludes that although a commitment offense can provide some evidence to justify the initial denial of a parole date, subsequent denials in the face of exemplary behavior and overwhelming evidence of rehabilitation raises serious questions involving a prisoner's liberty interest in parole.

In many of these cases, the Boards refusals to grant a parole date and repeated failure to provide post-commitment support for its decisions have violated a prisoner's liberty interest and due process rights. In addition, in light of a prisoner's sterling record, the Board's decisions also qualify as an unreasonable application of the facts on record. No evidence is provided to support the claim that the prisoner's continued incarceration is in the interest of the public. Although the gravity of the commitment offense and other unchanging factors alone may be sufficient to justify the denial of a parole date at a prisoner's initial hearing, subsequent Board decisions to deny a parole date must be supported by some post-commitment evidence that the release of the prisoner is against the interest of public safety.

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Points of Interest:

1. Cal. Penal Code § 3041 requires the Board to set a parole date unless some evidence suggests parole unsuitability.

2. Continued reliance on unchanging factors, such as the gravity of the crime, are contrary to the rehabilitative goals espoused by the prison system and can result in a due process violation.

- Critical Information -

In the case of a prisoner with a term-to-life sentence, one year prior to the prisoner's minimum eligible parole release date a panel of commissioners of the Board shall meet with the prisoner and "shall normally set a parole release date." (Pen. Code, § 3041, subd.(a).) Parole considerations applicable to term-to-life prisoners convicted of murder are contained in title 15 of the California Code of Regulations, section 2400 et seq. According to the regulations, before setting a parole date, the panel "shall first determine whether the life prisoner is suitable for release on parole."(tit 15, § 2402, subd.(a).) In determining whether the prisoner is suitable for parole, the Board considers circumstances tending to show unsuitability and circumstances tending to show suitability. Factors showing unsuitability are;

"(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. [¶]...[¶]

"(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

"(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

"(4) Sadist Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

"(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

"(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail." (tit 15§ 2402, subd.(c).)

In most of these cases, the panel relied solely on the circumstances of the commitment offense while concluding that the prisoner is "not suitable for parole," and that he would "pose an unreasonable risk of danger to society or threat to public safety if released from prison."

This finding appears to be in reference to the above cited tit 15, § 2402, subd.(c) (1), Commitment Offense.

Pursuant to Pen. Code § 3041.5 (b)(2)(B), exception is given to the Board allowing it to deny parole for an extended period of time if parole has been denied and the prisoner has been convicted of murder. The Penal Code makes allowance for such multi-year denials provided:

> if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the basis for the finding in writing. Id (Emphasis added)

For example, in addition to finding a prisoner unsuitable for parole release based solely on the commitment offense, a separate decision shall be rendered with regard to why the panel believes that it is not reasonable to expect that parole would be granted at a hearing during the next five years.

The specified general guidelines of Pen. Code § 3041.5 (b)(2)(B), supra, are codified in tit 15, § 2270, subd.(d), which explains what specified criteria the panel shall utilize, and their requirements regarding specific written findings, if a multiple year denial will be imposed:

> it shall utilize the criteria specified in sections 2281 or 2402 as applicable. It shall make specific written findings stating the basis for the decision to defer the subsequent suitability hearing for two, three, four, or five years. (tit 15, § 2270, subd.(d).)

If a multiple year denial is imposed, the board must render a separate decision within the framework of the above regulation by stating:

> In a separate decision, the hearing panel finds that it is not reasonable to expect that parole would be granted at a hearing during the next five years. We are going to deny you for five years, sir.

The hearing panel's stated findings for the decision to defer the subsequent suitability hearing an additional five years, are often the same criteria as set forth in tit 15, § 2402, subd.(c); Factors Showing Unsuitability.

Constitutional procedural due process requirements place some limitations upon the broad discretionary authority of the Board of Prison Terms to make decisions concerning a prisoner's parole; not only must denial of parole be based on "some evidence" but such evidence must have some indicia of reliability. U.S.C.A. Const. Amend. 14; Cal. Const. Art. 1, § 7; Pen. Code 3041; tit 15, § 2402.

In Rosenkrantz, the Supreme Court held "that the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but that 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 upon the factors specified by statute and regulation. If the decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." (In re Rosenkrantz, 29 Cal.4th at p.658, 128 Cal.Rptr.2d 104, 59 P.3d 174.)

In Scott, the court examined the factual underpinning under this standard of review:

> Examined in light of the record, the Board's explanation of why petitioner is not suitable for release from prison is revealed as no more than the mouthing of conclusionary words. The reliable factual underpinning that is constitutionally required cannot be shown (see McQuillion v. Duncan, (9th Cir.2002) 306 F.3d 895, 902; In re Caswell, (2001) 92 Cal.App.4th 1017, 1027, 112 Cal.Rptr.2d 467),

even under the exceptionally deferential standard of review applied." In re Scott, (2004) 119 Cal.App.4th 871; 15 Cal.Rptr.3d 32.

Prisoners often argue that the factors relied upon by the panel in finding them unsuitable for parole at the parole hearing were supported by no evidence. Prisoners often claim that the panel has not considered all relevant, reliable information. The Board's failure to undertake the "individualized consideration of all relevant factors" required by Rosenkrantz, supra, 29 Cal.4th at page 655, 128 Cal.Rptr.2d 104, 59 P.3d 174, also offends the Board's own regulations, which require that "all relevant, reliable information available to the panel shall be considered in determining suitability for parole." (tit 15, § 2402, subd.(b), emphasis added.)

Prisoners claim that there was not sufficient evidence to find them unsuitable for parole. California's parole scheme gives rise to a cognizable liberty interest in release on parole. Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir.2003). "In the parole context, the requirements of due process are met if 'some evidence' supports the decision."Id. The evidence underlying the Board's decision must have some indicia of reliability.Id.

In Biggs, the Ninth Circuit indicated that a continued reliance on an unchanging factor such as the circumstances of the offense could result in a due process violation. Biggs was serving a sentence of twenty-five years to life following a 1985 first degree murder conviction. In the case before the Ninth Circuit, Biggs challenged the 1999 decision by the Board finding him

unsuitable for parole despite his record as a model prisoner. 334 F.3d at 913. While the Ninth Circuit rejected several of the reasons given by the Board for finding Biggs unsuitable, it upheld three: (1) petitioner's commitment offense involved the murder of a witness; (2) the murder was carried out in a manner exhibiting a callous disregard for life and suffering of another; (3) Biggs could benefit from therapy. 334 F.3d at 913.

The Ninth Circuit cautioned the Board regarding its continued reliance on the gravity of the offense and petitioner's conduct prior to the offense:

> As in the present instance, the parole board's sole supportable reliance on the gravity of the offense and conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. Over time, however, should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of Biggs' offense and prior conduct would raise serious questions involving his liberty interest in parole. 334 F.3d at 916

The Ninth Circuit stated that "[a] continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." 334 F.3d at 917.

A prisoner argues that in finding him unsuitable at his third parole suitability hearing, after having served nearly twenty-five years in prison, the panel again relied exclusively on unchanging factors such as the commitment offense, when denying him parole and deferring his next hearing an additional five years, totaling fourteen years of denied parole since his initial parole suitability hearing. At this point, the prisoner then makes this assertion in conjunction with his argument that the remaining conclusions reached and factors relied on by the Board were devoid of evidentiary basis.

In Biggs, the Ninth Circuit stated that the Board was "initially justified" in finding Mr. Biggs unsuitable based on the circumstances of the

offense and his conduct prior to imprisonment. 334 F.3d at 916 (emphasis added). However, the Ninth Circuit was not specific as to when reliance on the circumstances of the offense would "run contrary to the rehabilitative goals espoused by the prison system" and result in a due process violation. 334 F.3d at 917.

Prisoners assert that the continued reliance on unchanging circumstances transforms an offense for which California law provides eligibility for parole into a de facto life imprisonment without the possibility of parole. Prisoners argue that nothing about the circumstances of their crime or motivation shall ever change, regardless of how much time passes.

In a recent opinion given in a similar case, Justice Karlton of the Eastern District Court ruled:

> Petitioner has no hope for ever obtaining parole except perhaps that a panel in the future will arbitrarily hold that the circumstances were not that serious or the motive was more than trivial. Given that no one seriously contends lack of seriousness or lack of triviality at the present time, the potential for parole in petitioner's case is remote to the point of non-existence. Petitioner's liberty interest should not be determined by such possibility. Irons v. Warden, (Jan. 19, 2005) U.S. Dist. Ct., ED Ca. No. 04-0220

INTRODUCTION

The central issue is the propriety of a Correctional Counselor I, without any special training, filing a Life Prisoner's Evaluation Report (LPER), Subsequent Parole Consideration Hearing, assessing a prisoner's risk of threat to the community, if released on parole.

Concurrently, the propriety of a Correctional Counselor I, filing a LPER, prescribing treatment programming, such as groups that may or may not be psychiatric in nature, without any special training to render such determinations.

THE CCI'S ASSESSMENT OF A PRISONER'S DEGREE OF RISK OR THREAT AND THE CCI'S TREATMENT OR GROUP THERAPY PRESCRIPTIONS IMPROPERLY INCLUDED IN LPER VIOLATES THE CDCR'S OWN REGULATIONS GOVERNING LPER FORMATTING AND ALL RELATED STATE-WIDE CASE LAW.

In August of 2003, the Los Angeles County Superior Court resolved the identical issue in In re Javier Cortez (2003) BH 001953, finding and holding that such risk assessments are invalid. The Court held that Correctional Counselors are ill equipped and untrained in the difficult task of predicting an individual's future behavior, and held that the Department Operational Manual (DOM) sections 62090.11 through 62090.11.21.2, nor anywhere else, do not call for or authorize an opinion on "assessment of threat" being filed by a Correctional Counselor I, when preparing an LPER.

In Cortez, the Court held that the DOM §§ 62090 et seq. appropriately omits such assessments from the LPER format. The Court redacted, and ordered the Board of Prison Terms (BPT) to ignore and not require such assessments in LPER's.

In the recent case of In re Taylor (2005) No. SC136042A, the Marin County

Superior Court held, as the Los Angeles Superior Court held in Cortez, that correctional counselors, authorized neither by training nor the DOM to do so, may not include in a LPER an assessment of the alleged "threat" or "risk" that a lifer's parole might pose.

In Taylor the Court ordered the CDC to remove all risk assessments found in LPER's from Mr. Taylor's files, prohibited inclusion of such assessments in his file in the future, and prohibited the BPT's consideration of such assessments in determining Mr. Taylor's parole suitability.

THE CURRENT STATE OF LAW
(2005 thru Present)

Over the previous nine years (since 2005), hundreds of very significant cases have augmented these established principles of law, generally in favor of the term-to-life prisoner population. As we have noted above, the mandatory language of California's Penal Code § 3041 imposes an affirmative obligation on the parole board to grant parole, creating a legally cognizable liberty interest in parole and a presumption that parole release will be granted if certain conditions are met.

A handfull of these cases have made their way to the California Supreme Court, and two or three have become the prominent standard for procedural guidance over California's Board of Parole Hearings (BPH). Perhaps the most significant case is In re Lawrence (2008) 44 Cal.4th 1181. The California Supreme Court heard this case (No. S154018) on August 21, 2008, and held that when the BPH or the Governor make a parole decision:

> the relevant inquiry is whether some evidence supports the decision of the Board or the Governor regarding whether the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms certain factual findings regarding dangerousness, and (2) immutable and unchangeable circumstances of parole applicant's murder offense did not constitute "some evidence," abrogating In re Andrade, 141 Cal.4th 807.

In another case, also heard in 2008 by the California Supreme Court, the Court's decision in In re Shaputis (2008) 44 Cal.4th 1249, upheld the denial of parole due to the prisoner's "lack of insight" into why he committed his crime. The Court found that there was evidence that Shaputis had failed to gain insight into his previous violent behavior, and therefore, was properly found unsuitable for parole even under the newly established Lawrence standard.

In another case of interest to the "lack of insight" issue, In re John Dannenberg (Cal.2009) 93 Cal.Rpter.3d 537, argued that, since neither the Board commissioners, the Governor or the District Attorney are certified to render expert psychological opinions (such as whether or not the prisoner has insight), their reliance upon their own opinion as "evidence" in judicial reviews violated the State Supreme Court's prior holding that the Governor and the Board "must" rely upon the professional opinions of the Board's own psychological experts when making parole determinations. (In re Lawrence (2008) 44 Cal.4th 1181.

Accordingly, today the rule of thumb for California's BPH in considering parole suitability requires that a rational nexus (connection) between the facts that the ultimate decision was based on, and the determination that the prisoner remains a current threat to public safety.

The California Supreme Court stated:

> 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness. (Lawrence, supra at 1210).
>
> mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability. (Lawrence, supra at 1227).

As the BPH continues to find the vast majority of term-to-life prisoners unsuitable for parole due to some type of "lack of insight" (in light of the Shaputis decision), many State Appellate Courts have been forced to confront this apparent abuse of discretion. On June 10, 2011, the 6th District Court of Appeal decided a case called In re Chester Ryner, No. H035893, finding that:

> if Ryner has weak insight into his life crime, he cannot lack insight, as to lack something means to not have it in the first place.

In a more recent case, In re Christopher Morganti, No. A132610, 1st Dist., March 28, 2012, the Court found that:

> any lack of insight would not provide a basis for the denial of parole in any event, because there is no evidence such a deficiency, either by itself or in conjunction with the commitment offense, has a rational tendency to show that Morganti currently poses an unreasonable risk of danger. ("Deficiency" being lack of insight into the causative factors of his drug abuse.)

In Morganti the Court explores the patterns of abuse exhibited by California's Board of Parole Hearings:

> the decisive inquiry is not whether there is 'some evidence' Morganti 'lacks insight' into his past criminal conduct or the cause thereof, but whether he constitutes a current threat to public safety. (Lawrence/Rosenkrantz) In other words, whether there is any connection between any lack of insight on his part and the conclusion that he is currently dangerous. Even if—as we do not believe—reasonable minds could find 'some evidence' in the record that Morganti lacks a satisfactory level of insight of some sort, the record is manifestly bereft of evidence connecting any such deficit to the conclusion he would present a risk to public safety if released on parole.

After considering all of the facts in this case, the 1st District Court of Appeals commented:

> The distressing nature of this case arises not just from the Board's distortion of the record, but as well from its abject indifference to the considerable evidence Morganti is unlikely to relapse and is suitable for release. While it is not a basis on which we rely, we cannot help but note both commissioners' indifference to the undisputed factors rationally indicative that Morganti is not currently dangerous: his age; his numerous medical infirmities; and most significantly, the several risk assessments uniformly indicating he was a 'low risk.'

Found within the Concurring & Dissenting opinion of Judge Anthony Kline, was perhaps the most insightful and studied analysis of today's BPH:

> The seemingly inordinate rate at which life prisoners are found unsuitable for parole..is hard to square with the fact that recidivism among life prisoners is less than one percent, which is 'miniscule' compared to that of other prisoners. (Stanford Criminal Justice Center, Life in Limbo (Sept.2011) at pg. 17.) The facially inexplicable

> discrepancy between the extraordinarily high rate at which life prisoners are denied parole, and the extraordinarily low rate which such prisoners recidivate lends credibility to Morganti's contention that the Board's systematic refusal to find life prisoners suitable for release is based on something other than an individualized inquiry into whether life prisoners eligible for parole would pose an unreasonable risk of danger to society if released from prison.

In the Morganti Court's final analysis they made the determination that California's parole board seemed to suffer from a systemic breakdown that fails to provide the required individualized consideration of parole suitability:

> Our agreement with the trial court's determination that the denial of parole to Morganti is unsupported by "some evidence" should not be allowed to obscure Morganti's more consequential constitutional claim, which pertains to the vexing sentencing issue now regularly confronting the courts of this state: whether the seemingly systematic denial of parole to life prisoners at the hearing specified in [Penal Code] section 3041(a), is the product of the individualized consideration that is constitutionally required or a thinly veiled policy of 'transforming most indeterminate sentences with the possibility of parole into sentences of life-without-parole.'

- Federal Review On Habeas -

The United States Supreme Court made clear that in the context of a federal habeas challenge to the denial of parole, a prisoner subject to a statute similar to California's receives adequate process when the BPH allows him/her an opportunity to be heard and provides him/her with a statement of the reasons why parole was denied. Swarthout v. Cooke, 131 S.CT.859, 862 (2011). If the record shows that the prisoner received at least this amount of due process at his/her parole hearing, then according to Swarthout, the Constitution does not require more. (Swarthout, 131 S.Ct. at 862.)

The Court also made clear that whether BPH's decision was supported by some evidence of current dangerousness is irrelevant in federal habeas: "it is no federal concern...whether California's 'some evidence' rule of judicial

review was correctly applied." (Swarthout, 131 S.Ct. at 863.)

However, federal habeas review does remain available in many other aspects relating to the parole process. For example, many prisoners have alleged that the BPH's application of Proposition 9 (Marsy's Law) at their parole hearing violated their constitutional protections against ex post facto laws. The way in which Proposition 9 changed California law is discussed in detail in Gilman v. Schwarzenegger, —F.3d—, 2011 WL 198435 (9th Cir.Jan.24,2011). Many federal district courts have since ruled that Gilman does not foreclose all ex post facto challenges to the application of Proposition 9 at parole hearings. A state prisoner's claim is cognizable in a federal habeas action so long as it is not vague, conclusory, or plainly incredible or frivolous.

- State Review On Habeas -

On May 11, 2011, a state Court of Appeal filed an opinion vacating the BPH's order to defer Mr. Vicks's subsequent parole hearing for five years. The majority concluded that the changes enacted by Marsy's Law to the scheme for setting parole hearings violate ex post facto principles as applied to prisoners who committed their crimes prior to the enactment of Marsy's Law. It directed the Board to issue a new order scheduling the hearing in accordance with the Penal Codes in effect in 1983, the year of his conviction. The laws prior to 1983 generally entitled a prisoner to an annual parole hearing, and only allowed hearing deferrals of up to three years. However, the case was reviewed by the California Supreme Court. On March 4, 2013, the Court reversed this ruling and stated:

> we conclude that the changes to the parole process effected by Marsy's Law do not, on their face, create a significant risk that life prisoners' incarceration will be prolonged. Finally, we decline to undertake an analysis of whether Marsy's Law violates ex post facto principles as it is being applied to those prisoners whose commitment offenses occurred before the passage of Marsy's Law, as Vicks did not raise this contention. (In re Michael Vicks, (2013) No. S194129)