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Your Responsibility When Using this Information:

When putting this material together, we did our best to give you useful and accurate information. We know that people in prison often have trouble getting legal information, but we cannot give specific advice to all 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 information, 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 facility's law library, including in materials on the electronic tablets.

CHALLENGING A BOARD OF PAROLE HEARINGS' (BPH) DECISION DENYING PAROLE OR RESCINDING A PAROLE GRANT OR A GOVERNOR'S DECISION REVERSING A PAROLE GRANT (revised April 2024)

We send this information because you or someone on your behalf contacted our office requesting advice, assistance, or representation in challenging a BPH or Governor decision denying parole, rescinding a parole grant, or reversing a parole grant. Unfortunately, our resources are limited and we are unable to provide you with individual advice, assistance, or representation. The information below discusses the standards and factors for determining parole suitability, the legal standards courts use when reviewing parole decisions, and how to file a legal action challenging a parole denial, rescission, or reversal. We hope the information in this letter will help answer your questions and help you advocate for yourself.

Here is a list of other resources that may be helpful if you want more information on the parole consideration process or guidance on preparing for future parole hearings:

- Prison Law Office has free information packets on early parole consideration programs including Non-Violent Offender (Prop. 57) Parole, Youth Offender Parole, Elderly Parole, and Medical Parole. You can write to request any of those packets if we have not included them here. People who have internet access can view and print these packets on the Prison Law Office website at www.prisonlaw.com, under the Resources tab.
- UnCommon Law, an organization that provides legal services to help people through the parole consideration process, publishes an *Overview of California Parole Process & How to Prepare for It* (updated Spring 2024). You can get this information by writing to UnCommonLaw, 318 Harrison Street, Suite 103, Oakland, CA 94609. People who have internet access can view and print this information on the UnCommon Law website at www.uncommonlaw.org.
- In Spring 2024, BPH published *The California Parole Hearing Process Handbook*, which is nearly 100 pages and discusses in detail all aspects of the parole hearing process. We believe that the *BPH Handbook* is or will become available in CDCR law libraries and

electronic tablets. People with internet access can get the *BPH Handbook* at on the BPH website at www.cdcr.ca.gov/bph/. The website also has information on BPH rules, policies, hearing schedules, and statistics.

- *The California Prison and Parole Law Handbook*, published by the Prison Law Office, has information on many aspects of criminal law, prison and parole law, and legal actions for enforcing the rights of incarcerated people. The *Handbook* is on CDCR electronic tablets and kiosks in Law Library/California/Secondary Sources/The California Prison and Parole Law Handbook. People who have internet access can view and print the *Handbook* under the Resources tab at www.prisonlaw.com. Note that the *Handbook* was published in 2019, and that as of early 2024, we are in the process of updating the *Handbook* to reflect changes in the law since 2019. Updated chapters will show the date on which they were most recently revised.

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STANDARDS AND FACTORS FOR DETERMINING PAROLE SUITABILITY

The Parole Suitability Standard

When people are considered for parole, they have “ ‘an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.’ ”¹ The California Penal Code states that: “The Board shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.”² Accordingly, BPH regulations state that if you are serving a sentence of life with the possibility of parole, you shall be found unsuitable for parole if you “will pose an unreasonable risk of danger to society if released from prison.”³ The same basic standard applies if BPH is considering you for Youth Offender Parole,⁴ Elderly Parole,⁵ Medical Parole,⁶ and Nonviolent Offender (Prop. 57) Parole.⁷ Likewise, the Governor’s review of a BPH parole grant must be based on the same standard and factors that apply to BPH decisions.⁸

As of Spring 2024, the BPH is granting parole in about 19 percent of the cases that are scheduled for a suitability hearing and denying parole in about 32 percent of scheduled cases. In the rest of the cases, people stipulated to unsuitability or waived their hearing, or the hearing was postponed, cancelled, or continued.⁹

The Parole Suitability Factors

When deciding if you currently pose an unreasonable risk of danger to society, BPH commissioners are supposed to consider information and weigh factors relevant to predicting

¹ *In re Lawrence* (2008) 44 Cal.4th 1181, 1204.

² Penal Code § 3041(b).

³ Cal. Code Regs., tit. 15, § 2281(a) (life crimes committed on or after 7/1/77); Cal. Code Regs., tit. 15, § 2402(a) (murder and attempted murders committed on or after 11/8/1978); see also Cal. Code Regs., tit. 15, § 2316 [ISL commitments]; Cal. Code Regs., tit. 15, § 2422(a) [Pen. Code § 667.7 habitual offenders]; Cal. Code Regs., tit. 15, § 2432(a) [Pen. Code § 667.51 sex offenders]. Although BPH has separate regulations that apply to various groups of people, the parole suitability standard and factors are essentially the same for all groups.

⁴ Penal Code § 3051(d).

⁵ Penal Code § 3055(c).

⁶ Penal Code § 3550(a) [parole shall be granted if BPH “determines that the conditions under which he or she would be released would not reasonably pose a threat to public safety”]; Cal. Code Regs., tit. 15, § 3359(d).

⁷ Cal. Code Regs., tit. 15, § 2449.32(d) [nonviolent offender parole for indeterminately sentenced person]; Cal. Code Regs., tit. 15, § 2449.4(e) and § 2449.5(a) [parole shall be granted to nonviolent offender with determinate sentence if the person “does not pose a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity”].

⁸ *In re Rosenkrantz* (2002) 29 Cal.4th 616.

⁹ BPH, *Calendar Year 2024 Suitability Results, Total Parole Suitability Hearings – All Institutions, January 1, 2023 to February 29, 2024*, at www.cdcr.ca.gov/bph/2024/02/21/calendar-year-2024-suitability-results/.

whether you will commit more antisocial acts, such as crimes of violence, causing personal or financial harm to others, or failing on parole through noncompliance with restrictions imposed by your parole agent.¹⁰ A decision regarding your parole suitability must take into account “[a]ll relevant and reliable information available to the panel.” Such information shall include your social history; past and present mental state; past criminal history; the commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including special conditions under which you may safely be released to the community; and any other information which bears on your suitability for release.¹¹ However, you cannot be required to admit that you are guilty of the commitment offenses.¹² If the BPH commissioners deny parole, they must consider the same factors and the interests of the victims when deciding the date for your next parole suitability hearing.¹³

Factors that tend to indicate unsuitability for parole include:

- ◆ You committed the offense in an especially heinous, atrocious or cruel manner. Examples include attacking multiple victims, carrying out the offense in a dispassionate or calculated manner, demonstrating an exceptionally callous disregard for human suffering, or committing a crime for a motive that is inexplicable or very trivial in relation to the offense.
- ◆ You have a previous record of violence.
- ◆ You have a history of unstable or tumultuous relationships with others.
- ◆ You have previously sexually assaulted someone in a manner to inflict unusual pain or fear.
- ◆ You have a history of severe mental problems related to the offense.
- ◆ You have committed serious misconduct in prison or jail.¹⁴

Factors that tend to show suitability for parole include:

- ◆ You do not have a juvenile record of assault or crimes with the potential of causing harm to the victims.
- ◆ You have a history of reasonably stable relationships with others.
- ◆ You have demonstrated remorse and understanding of the magnitude of the offense.

¹⁰ *In re Lawrence* (2008) 44 Cal.4th 1181, 1205-1206, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655; *In re Reed* (2009) 171 Cal.App.4th 1071, 1081.

¹¹ Cal. Code Regs., tit. 15, § 2281(b); Cal. Code Regs., tit. 15, § 2402(b). Note that in order to rely on any confidential information, the panel must first find that the information is reliable. Cal. Code Regs., tit. 15, § 2235(a).

¹² Penal Code 5011(b); Cal. Code Regs., tit. 15, § 2236.

¹³ Penal Code § 3041.5(b)(3).

¹⁴ Cal. Code Regs., tit. 15, § 2281(c); Cal. Code Regs., tit. 15, § 2402(c). BPH cannot use evidence of being a victim of intimate partner battering to support a finding of lack of insight into the crime. Penal Code § 4801(a).

- ◆ You have committed the crime as a result of significant life stress.
- ◆ The crime appears to be the result of you being a victim of Intimate Partner Battering.
- ◆ You lack any significant history of violent crime.
- ◆ Your current age reduces the probability of recidivism.
- ◆ You have realistic plans for release or have developed job skills that can be put to use upon release.
- ◆ Your behavior in prison demonstrates an ability to comply with the laws upon release.¹⁵

Youth Offender Factors

If you were age 25 or younger at the time of your offense, when BPH commissioners considers your parole suitability they must give “great weight” to “the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.”¹⁶ If parole is denied, the commissioners must state which youth factors are present and explain how those factors are outweighed by relevant and reliable evidence of current public safety risk.¹⁷

The Youth Offender Factors are:

- ◆ Diminished Culpability of Youths as Compared to Adults, which includes:
 - The ongoing development in a youth’s psychology and brain function;
 - The impact of a youth’s negative, abusive, or neglectful environment or circumstances;
 - A youth’s limited control over his or her own environment;
 - The limited capacity of youths to extricate themselves from dysfunctional or crime-producing environments;
 - A youth’s diminished susceptibility to deterrence; and
 - The disadvantages to youths in criminal proceedings.
- ◆ Hallmark Features of Youth, which includes:
 - Immaturity;
 - An underdeveloped sense of responsibility;

¹⁵ Cal. Code Regs., tit. 15, § 2281(d); Cal. Code Regs., tit. 15, § 2402(d). BPH must consider any evidence that a crime was the result of being a victim of intimate partner battering, and must give great weight to such evidence if the offense occurred prior to August 29, 1996. Penal Code § 4801; Cal. Code Regs., tit. 15, § 2239; Cal. Code Regs., tit. 15, § 2830.

¹⁶ Penal Code § 3051(d); Penal Code § 4801(c); Cal. Code. Regs., tit. 15, § 2445(b)-(d); Cal. Code. Regs., tit. 15, § 2447.

¹⁷ Cal. Code. Regs., tit. 15, § 2445(d).

- Impulsivity or impetuosity;
 - Increased vulnerability or susceptibility to negative influences and outside pressures, particularly from family members or peers;
 - Recklessness or heedless risk-taking;
 - Limited ability to assess or appreciate the risks and consequences of behavior; and
 - Transient characteristics and heightened capacity for change.
- ◆ Subsequent Growth and Increased Maturity While Incarcerated, which includes:
- Considered reflection;
 - Maturity of judgment including, but not limited to, improved impulse control, the development of pro-social relationships, or independence from negative influences;
 - Self-recognition of human worth and potential;
 - Remorse;
 - Positive institutional conduct; and
 - Other evidence of rehabilitation.¹⁸

Elderly Parole Factors

If you are 50 years of age or older, when BPH considers you for parole, it shall “give special consideration” to how age, time served, and diminished physical condition, if any, reduce the person’s risk for future violence.¹⁹ If parole is denied, the commissioners must state which elder factors are present and explain how those factors are outweighed by relevant and reliable evidence of current public safety risk.²⁰

The Elderly Factors are:

- ◆ Age, which includes consideration of:
 - Cognitive decline and its impact on ability to process information, convert thought to action, learn, plan, recall or reorganize information, organize information, control impulses, execute a task, incorporate feedback, alter a strategy, sustain complex attention, or to calm down when emotionally aroused; and
 - Physiological changes that decrease the motivation to commit crime or be violent.
- ◆ Time Served, which includes consideration of:
 - Reduced criminal propensity;

¹⁸ Penal Code § 3051(d)-(e), § 4801(c); Cal. Code. Regs., tit. 15, § 2445.

¹⁹ Penal Code § 3055(c), (e); Cal. Code. Regs., tit. 15, § 2449.42(b); see also Cal. Code. Regs., tit. 15, § 2449.40(a).

²⁰ Cal. Code. Regs., tit. 15, § 2449.42(c).

- Alteration of attitudes and beliefs over time;
 - Evidence of prosocial routines;
 - Social conformity; and
 - Detachment from crime-producing environments and peers.
- ◆ Diminished Physical Condition, which includes consideration of:
- The capability to physically commit crimes and violence;
 - Chronic or terminal illness;
 - Evidence of visual, hearing, or speech impairment;
 - Inability to walk or difficulty walking without an assistive device;
 - Nursing care acuity;
 - Diminished mental capacity;
 - Assistance with daily living activities like feeding, bathing, dressing, grooming, work, homemaking, or communication;
 - Permanent incapacitation due to a medical, physical, mental health, or other condition; and
 - Other evidence of diminished physical condition.²¹

LEGAL CHALLENGES TO PAROLE DENIALS, RESCISSIONS, OR REVERSALS

Requesting BPH Administrative Review (for Limited Issues)

BPH does not have an administrative grievance or appeal process for most types of issues concerning denial or rescission of parole. This means that you rarely will have to submit an administrative grievance or appeal before filing a lawsuit in court challenging a BPH denial or rescission of parole. There also is no administrative grievance or appeal process when the Governor reverses a BPH parole grant.

There are a few specific issues for which you can and should submit a grievance or request for review to BPH after the parole hearing and prior to filing a legal action. Those issues are:

- ◆ **failure to provide disability accommodations:** If you did not get satisfactory accommodations for your disability when preparing for or attending parole hearing, you should submit a BPH Form 1074 Request for Reasonable Accommodation-Grievance Process to the BPH Quality Control Unit, 1515 K Street, Suite 600, Sacramento, CA

²¹ Cal. Code. Regs., tit. 15, § 2449.43.

95814. Send the Form 1074 early enough so that BPH receives it no later than 90 calendar days after you were notified of the denial of your accommodation request. BPH must respond within 30 calendar days. BPH can either (1) order a new hearing with accommodations, (2) deny your grievance, (3) issue a new hearing decision, or (4) dismiss your grievance if it raises an issue that should be handled through a CDCR grievance process, is outside BPH authority, is premature, or was filed late. Completing the 1074 grievance process exhausts your administrative remedies for the disability issue and allows you to file a court action on the issue.²²

- ◆ **denial or rescission of “nonviolent offender” parole for a person serving a determinate sentence:** If you are serving a determinate sentence and you are found not suitable for nonviolent offender parole, or if you were found suitable for nonviolent parole but the decision was rescinded, you can request review by submitting a letter to BPH Board of Parole Hearings, P.O. Box 4036, Sacramento CA, 95812 within 30 calendar days after you got notice of the decision. A BPH officer who was not involved in the decision will conduct a review within 30 calendar days after your request is received. The hearing officer will either uphold the parole denial or vacate the parole denial and issue a new decision.²³
- ◆ **denial of a request to advance a hearing:** If BPH issues a parole denial longer than 3 years, you may submit a BPH Form 1045(A) Petition to Advance Hearing Date once every three years describing any changed circumstances or new information that supports advancing your hearing.²⁴ If your request to advance a hearing date is denied, you can request review of that decision by submitting a letter to BPH, P.O. Box 4036, Sacramento, CA 95812. Explain why the decision was wrong and provide any new information that was not available before the denial. You must submit your request for review within 30 calendar days after you receive the denial, and BPH should respond within 15 business days after receiving your request.²⁵

Obtaining the Hearing Transcript

Obtaining a transcript of everything that was said at your BPH hearing is one of the first steps if you want to file a court challenge to a parole denial, reversal, or rescission (unless you are challenging a “paper review” denial of nonviolent offender parole). You have a right to a copy of the hearing transcript upon request, which BPH must provide within a “reasonable” time after the hearing.²⁶

²² *Armstrong v. Brown* (Dec. 1, 2010) No. C94-2307CW, Board of Parole Hearings Remedial Plan; 15 CCR § 2251.5-§ 2251.7.

²³ Cal. Code Regs., tit. 15, § 2449.4(i). Cal. Code Regs., tit. 15, § 2449.6(c); Cal. Code Regs., tit. 15, § 2449.7.

²⁴ Penal Code § 3041.5(d).

²⁵ Cal. Code Regs., tit. 15, § 2157.

²⁶ Penal Code § 3041.5(a)(4); Cal. Code Regs., tit. 15, § 2255; *In re Bode* (1999) 74 Cal.App.4th 1002.

People on the outside who are advocating for you also can get a copy of the transcript. Transcripts in an electronic format are free, but there is a fee for copying and mailing paper copies. Anyone can request a transcript by sending an email to BPHSuitabilityHearingTrans@cdcr.ca.gov or a letter to Board of Parole Hearings, P.O. Box 4036, Sacramento CA, 95812-4036 (Attention: Transcript Request).²⁷

Filing a State Court Petition for Writ of Habeas Corpus

A petition for writ of habeas corpus filed in state court usually is the best legal action for you to challenge a parole denial, rescission, or reversal. A state court habeas corpus petition can also be used to challenge other BPH decisions, policies, or practices.

If you are challenging a BPH parole denial or rescission or a Governor's reversal of a parole grant, you must file your petition in the superior court of the county in which you were convicted and sentenced.²⁸

You can raise both federal and state law issues in a state court habeas corpus petition, and there are many different arguments that could potentially be raised. Here are few examples of issues that can be raised in state habeas corpus proceedings:

- ◆ BPH or the Governor violated your California Constitution, Article I, § 7 and § 15 right to substantive due process by wrongly concluding that you currently pose an unreasonable risk of danger to public safety if released. This is the most common argument raised in challenges to parole denials, rescissions, and reversals. The sections at the end of this packet discuss the “some evidence” standard that courts use to review parole decisions and list cases applying this standard.
- ◆ BPH or the Governor did not follow procedures required by the U.S Constitution, Fourteenth Amendment; the Americans with Disabilities Act (42 U.S> 12101 et seq.); California Constitution, Article I, § 7 and § 15; or California statues and regulations.²⁹
- ◆ The BPH's or Governor's decision violated a specific promise that the court or prosecutor made when you agreed to plead guilty or no contest; however, this will be an uncommon situation.³⁰

²⁷ Penal Code § 3042(b); Cal. Code. Regs., tit. 15, § 2254; see more information at www.cdcr.ca.gov/bph/psh-transcript/.

²⁸ *In re Roberts* (2005) 36 Cal.4th 575.

²⁹ See, e.g., *In re Kavanaugh* (2021) 61 Cal.App.5th 320 (CDCR's Prop. 57 regulations for considering nonviolent offender parole for people with determinate sentences provided sufficient due process); *In re Bailey* (2022) 76 Cal.App.5th 837 (no due process violation in using “paper reviews” to evaluate whether person with determinate sentence was suitable for nonviolent offender parole).

³⁰ See, e.g., *In re Deluna* (2005) 126 Cal.App.4th 585 (holding plea bargain did not include promise that person would be released at any specific time or that prosecutor would cease arguing that crime was especially callous); *In re Honesto* (2005) 130 Cal.App.4th 81 (holding parole denial based on nature of the crime did not violate plea agreement where record showed no evidence of a specific promise that person would be paroled at any particular time); *In re Lowe* (2005) 130

- ◆ Applying an unfavorable new parole law to your case violates the ex post facto clauses of the U.S. Constitution, Article I, § 10 and/or California Constitution, Article I, § 9.³¹
- ◆ BPH's denial of your request to advance your next hearing date was a "manifest abuse of discretion."³²

Prison Law Office has a free information manual on how to file a state court petition for writ of habeas corpus. If that manual is not included here, you can request one by writing to Prison Law Office, General Delivery, San Quentin, CA 94964. People who have internet access can view and print the manual on the Prison Law Office website at www.prisonlaw.com, under the Resources tab.

Filing a Federal Court Petition for Writ of Habeas Corpus

If you present your habeas corpus issues through the state courts up through the California Supreme Court, you may then be able to raise any federal law issues in a petition for writ of habeas corpus filed in federal court.

Beware that federal courts *cannot* review a case to consider whether the BPH's or Governor's parole denial, rescission or reversal was supported by "some evidence." The rule that there be "some evidence" to support a conclusion of current dangerousness is a matter of California due process law only and is *not* protected by the U.S. Constitution's Fourteenth Amendment Due Process Clause.³³

Here are a few examples of federal law issues that can be raised in a federal habeas corpus petition:

- ◆ Your right to due process under the U.S. Constitution's Fourteenth Amendment was violated because you did not have an opportunity to examine the evidence, did not have an opportunity to be heard, did not have an unbiased decision-maker, and/or did not receive notice of the reasons why parole was denied, rescinded, or reversed.³⁴

Cal.App.4th 1405 (holding plea agreement not violated by Governor's reversal where there was no specific promise that parole suitability would be decided by BPH alone).

³¹ See, e.g., *In re Vicks* (2013) 56 Cal.4th 274 (holding that applying new law allowing for longer parole denials did not violate ex post facto clause when applied to people whose crimes were committed before the law was enacted); *In re Rozenkrantz* (2002) 29 Cal.4th 616 (holding that ex post facto clause was not violated by allowing Governor to review parole grants in cases where people committed their crimes before Governor was granted review authority).

³² See Penal Code § 3041.5(d)(2).

³³ *Swarthout v. Cooke* (2011) 562 U.S. 216; see also *Miller v. Oregon Board of Parole* (9th Cir. 2011) 642 F.3d 711, 712, 716-717. *Swarthout* nullified a line of Ninth Circuit cases examining application of the "some evidence" standard, including *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910; *Sass v. California Board of Prison Terms* (9th Cir. 2006) 461 F.3d 1123; *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846; *Hayward v. Marshall* (9th Cir. 2010) 603 F.3d 546, 555; *Powell v. Gomez* (9th Cir. 1994) 33 F.3d 39, 40; *Jancsek v. Oregon Board of Parole* (9th Cir. 1987) 833 F.2d 1389, 1390.

³⁴ See *Swarthout v. Cooke* (2011) 562 U.S. 216; *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* (1979) 442 U.S. 1; *O'Bremski v. Maass* (9th Cir. 1990) 915 F.2d 418, 422.

- ◆ Denial of parole violated specific terms or promises made as part of your agreement to plead guilty or no contest.³⁵
- ◆ Changes in the parole laws violate the U.S. Constitution, Article I, § 10 prohibition on *ex post facto* laws that forbid increase your punishment for a past offense.³⁶
- ◆ You were denied your rights under the federal Americans with Disabilities Act (ADA) to reasonable accommodations to allow you to prepare for and participate in your parole hearing³⁷

Prison Law Office has a free information packet on how to file a federal court petition for writ of habeas corpus. If that packet is not included here, you can write to Prison Law Office, General Delivery, San Quentin, CA 94964 to request it. People who have internet access can view and print the federal habeas corpus packet on Prison Law Office's website at www.prisonlaw.com, under the Resources tab.

Filing a Federal Civil Rights (§ 1983) Lawsuit

Generally, you *cannot* use a federal civil rights (“§ 1983”) lawsuit to challenge a parole denial, rescission, or reversal. This is due to the legal rule that you cannot use a federal civil rights action to challenge “the fact or duration of confinement.”³⁸ However, you can use a federal civil rights action to challenge parole laws or policies so long as you are not seeking an order vacating a BPH or Governor decision or seeking an order for release.³⁹

³⁵ *Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155 (court enforced plea agreement where person relied on prosecutor's statement that they would be released after serving half of minimum term if they did not commit any rule violations); see also *Buckley v. Terhune* (9th Cir. 2006) 441 F.3d 688 (enforcing plea agreement that person would be released after serving max term of 15 years); *Quintana v. Gates* (C.D.Cal. 2015) 88 F.Supp.3d 1102 (enforcing plea agreement that person would be eligible for parole after serving 80% of 25-years).

³⁶ See *Docken v. Chase* (9th Cir. 2004) 393 F.3d 1024 (ex post facto challenge to change in law extending the time been parole hearings); *Brown v. Palmateer* (9th Cir. 2004) 379 F.3d 1089 (Oregon parole board's application of new rules changing the standard for postponing a release date violated prohibition on ex post facto laws because there was significant likelihood that person would be incarcerated for a longer time).

³⁷ See 42 USC § 12101 et seq.; *Armstrong v. Schwarzenegger* (2002) No. C94-2307CW, Revised Permanent Injunction.

³⁸ See, e.g., *McQuillion v. Schwarzenegger* (9th Cir. 2004) 369 F.3d 1091, 1094, applying *Heck v. Humphrey* (1994) 512 U.S. 477; see also *Brown v. Palmateer* (9th Cir. 2004) 379 F.3d 1089 (discussing the different criteria for federal habeas and federal civil rights claims)

³⁹ See, e.g., *Wilkinson v. Dotson* (2005) 544 U.S. 74 (ex post facto challenge to application of new guidelines for parole suitability, where the people were not seeking injunctions ordering speedier or immediate release); *Thompson v. Davis* (9th Cir. 2002) 295 F.3d 890, 898 (establishing that the ADA bars BPH from categorically excluding a group of people from parole suitability because of their disabilities, such as a history of substance abuse); *Inouye v. Kemna* (9th Cir. 2007) 504 F.3d 705 (BPH violated First Amendment rights by requiring person to participate in drug treatment program that is “fundamentally religious” (such as Narcotics Anonymous) as a requirement for parole suitability) *Turner v. Hickman* (E.D. Cal. 2004) 342 F.Supp.2d 887 (similar).

THE “SOME EVIDENCE” STANDARD

The most common argument in state habeas corpus cases challenging parole denials, rescissions, or reversals is that BPH or the Governor violated the person’s state constitutional right to due process (California Constitution, Article I, § 7 and § 15) by wrongly concluding that they currently pose an unreasonable risk of danger to public safety if released. This section gives a brief overview of cases defining the “some evidence” standard that courts use for reviewing parole denials, rescissions, and reversals. It also discusses the remedies that courts order when BPH’s or the Governor’s decision is not supported by “some evidence.” The next sections then list published state court of appeal cases applying the “some evidence” standard since 2009.

During the 1990s and most of the 2000s, BPH and the Governor characterized almost every life-term crime as being “especially heinous, atrocious, or cruel” and found less than a handful of people suitable for parole each year. Nonetheless, courts rejected arguments that BPH and the Governor had “no-parole” policies that violated the presumption in favor of parole and rights to an unbiased decision-maker applying non-arbitrary standards.⁴⁰ However, in the 2000s, the California Supreme Court decide important cases in which it set forth the standards for court reviews of parole denials, rescissions, and reversals.

In *In re Rosenkrantz* (2002) 29 Cal.4th 616, the Court held that the California constitutional right to due process places limits on BPH’s and the Governor’s authority. People have an expectation that they will be granted parole unless BPH or the Governor finds that they are unsuitable based on the standard and factors in the parole statute and regulations. The decision must reflect individualized consideration and cannot be arbitrary or capricious. Courts can review a BPH or Governor’s decision only to determine whether or not it is supported by “some evidence,” which means a “modicum” of evidence. A court cannot re-assess the credibility of witnesses or re-weigh the evidence. In addition, the Court held that a conclusion of current dangerousness can be based on the “particularly egregious” nature of the commitment offense so long as the violence or viciousness of the crime was “more than minimally necessary to convict him of the offense.” The Court upheld the Governor’s reversal of a parole grant based on the facts of the crime, lack of remorse, and failure to assume responsibility.

In *In re Dannenberg* (2005) 34 Cal.4th 1061, the Court held that BPH can find a person’s crime to be “particularly egregious” without comparing the facts of that crime to other crimes of the same type and without considering the base term or term matrices in BPH’s former regulations. Applying the “some evidence” standard, the Court upheld BPH’s denial of parole based on findings that the offense was especially callous and cruel.

In 2008, the Court decided *In re Lawrence* (2008) 44 Cal.4th 1181, in which it clarified that the existence of “some evidence” to support an unsuitability factor is not sufficient to uphold a parole denial, rescission, or reversal. A court’s focus must be on whether there is “some evidence” that the person currently poses a threat to public safety. The nature of the commitment offense and other historical static facts can be a basis for denying parole only if BPH or the Governor can articulate a rational “nexus” (connection or link) between the offense or past event and a conclusion that the

⁴⁰ *In re Rosenkrantz* (2002) 29 Cal.4th 616, 685-686; *In re Lewis* (2009) 172 Cal.App.4th 13, 28-29.

person is currently dangerous. The facts of the crime standing alone can rarely support denying parole without something either before or after that makes the crime relevant at the time of parole consideration. BPH and the Governor must consider the whole record, including the person's current demeanor or mental state, whether they show remorse, their efforts toward rehabilitation, and their behavior while incarcerated. In *Lawrence*, the Court overturned the Governor's parole reversal because the record contained extensive evidence of rehabilitation, negating any nexus between the crime facts and a conclusion of current dangerousness. In a companion case, *In re Shaputis* (2008) 44 Cal.4th 1241, the Court applied the analysis it described in *Lawrence* to uphold a Governor's parole reversal where there was a nexus between the crime and conclusion of current dangerousness due to continued "lack of insight" and failure to accept responsibility for the crime.⁴¹

In *In re Shaputis* (2011) 53 Cal.4th 192, the Court emphasized that the "some evidence" standard is meant only to guard against arbitrary or capricious parole decisions. "Only when the evidence reflecting the person's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the BPH or the Governor." The Court confirmed that "the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." The Board may not arbitrarily reject more recent evidence of rehabilitation in favor of older records. However, the Court concluded that BPH could rely on older records to find that a person lacked insight where the person had refused to either participate in a new CDCR psychological evaluation or discuss the offense at the hearing and BPH had rational reasons to be unpersuaded by the person's own written statements and evaluation by a privately retained psychologist.

Courts have put some limits on BPH's and the Governor's discretion to use "lack of insight" findings to deny or reverse parole. "Evidence of lack of insight is indicative of a current dangerousness only if it shows a *material* deficiency in an inmate's understanding and acceptance of responsibility for the crime. [Fn. omitted.] To put it another way, the finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense has some rational tendency to show that the inmate currently poses an unreasonable risk of danger."⁴² Lack of insight can support a denial of parole only if the deficiency is "probative to the central issue of current dangerousness when considered in light of the full record."⁴³ As a related matter, refusal to admit guilt, without more, cannot support a conclusion that a person lacks insight into the crime, lacks remorse, or has failed to take responsibility.⁴⁴

When a court decides that a BPH or a Governor's unsuitability decision is not supported by some evidence, it must send the case back to BPH or the Governor with directions to conduct a

⁴¹ It appears that the "rational nexus" and "some evidence" standards set forth in *In re Lawrence* apply to people with determinate sentences who are being considered for discretionary parole. *In re Ilsa* (2016) 3 Cal.App.5th 489 (applying to CDCR's former non-violent second striker parole process, the forerunner to Proposition 57 nonviolent offender parole.)

⁴² *In re Ryner* (2011) 196 Cal.App.4th 533, 550.

⁴³ *In re Shelton* (2020) 53 Cal.App.5th 650, 667.

⁴⁴ Penal Code 5011(b); Cal. Code Regs., tit. 15, § 2236; *In re Perez* (2016) 7 Cal.App.5th 65, 87-88.

new hearing or review that complies with due process.⁴⁵ The court cannot order the Board to reach a particular result or to consider only a limited category of evidence at the new hearing or review. However, “a court may, in appropriate circumstances, expressly state in its remand order that the Board may not base an unsuitability determination solely upon evidence already considered and rejected by the reviewing court.”⁴⁶ For example, in a case in which a court of appeal struck down two consecutive unsupported parole denials, the court directed BPH to, within 35 days, “review the full record to determine whether there is any evidence, which does not rely on the purported evidence of petitioner’s dangerousness rejected in this opinion, that it believes could provide a basis for finding that petitioner is currently dangerous. . . . If any such evidence is found in the record, the Board shall immediately set an expedited parole hearing, at which the additional evidence can be explored and petitioner’s parole suitability determined. If no such additional evidence suggesting current dangerousness is found during the review of the record, petitioner shall be granted parole immediately.”⁴⁷

If a court decides that BPH erroneously denied or rescinded parole or the Governor erroneously reversed a parole grant, you are not entitled to credit toward your parole period for extra time spent in prison as a result of the erroneous decision.⁴⁸

California Court of Appeal Cases Overturning BPH or Governor Decisions

In re Van Houten (2023) 92 Cal.App.5th 1 (no evidence to support lack of insight finding; offense and past conduct current dangerousness in light of strong evidence of rehabilitation and other indicators of parole suitability).

In re Shelton (2020) 53 Cal. App. 5th 650 (failure to give “special consideration” to elder factors and improper reliance on what was effectively an immutable factor where person was unlikely ever to be able to coherently answer questions about motivations for the crime due to mental confusion and memory loss)

In re Poole (2018) 24 Cal.App.5th 965 (improper rejection of low risk assessment and refusal to accept evidence of insight, plus failure to give great weight to youth factors)

In re Perez (2016) 7 Cal.App.5th 65 (improper to merely give “lip service” to the hallmark features of youth; denial based on lack of insight and disciplinary history in prison was unsupported by some evidence of current dangerousness; rule violation for excessive physical contact with fiancée during a visit did not show dangerousness)

In re Swanigan (2015) 240 Cal.App.4th 1 (improper findings that heinous nature of crime, lack of insight or lack of credibility where person had admitted crime only after prior panels had told him he would not be paroled without admitting guilt, and then later recanted)

⁴⁵ *In re Lira* (2014) 58 Cal.4th 573, 582; *In re Sena* (2015) 236 Cal.App.4th 1270.

⁴⁶ *In re Prather* (2010) 50 Cal.4th 238, 244.

⁴⁷ *In re Perez* (2016) 7 Cal.App.5th 65, 101.

⁴⁸ *In re Lira* (2014) 58 Cal.4th 573; *In re Chaudhary* (2009) 172 Cal.App.4th 32.

In re Stoneroad (2013) 215 Cal.App.4th 596 (failure to to give due consideration to suitability factors and no evidence person was currently dangerous)

In re Denbam (2012) 211 Cal.App.4th 702 (improper rejection of low risk evaluation based on commissioners' incorrect factual contentions and guesswork)

In re Martinez (2012) 210 Cal.App.4th 800 (evidence did not show unreasonable threat to public safety where person who was permanently medically incapacitated would not physically be able to commit a crime similar to commitment offense)

In re Sanchez (2012) 209 Cal.App.4th 962 (social history, probation failures, and minor discrepancies in person's description of crime did not demonstrate rational nexus to current dangerousness)

In re Hunter (2012) 205 Cal.App.4th 1529 (no evidence that person's mental state indicated current dangerousness or that his description of the crime was inaccurate; failure to report to work on one occasion did not show dangerousness when most recent previous rule violation was twenty-one years prior)

In re Young (2012) 204 Cal.App.4th 288 (no support for parole denial based on findings that person had tumultuous relationships and did not remember offense, and speculative doubts about whether the victim assaulted the person);

In re Pugh (2012) 205 Cal.App.4th 260 (although person's version of the crime was different than prosecutor's, it was not inherently unbelievable, and comments during evaluations demonstrated remorse and insight)

In re Morganti (2012) 204 Cal.App.4th 904 (unsupported decision that person lacked insight into his drug abuse)

In re Jackson (2011) 193 Cal.App.4th 1376 (improper reliance on refusal to confess to offense; minimization of culpability for prior offense and purported failure to attend sufficient self-help programs did not constitute some evidence of current dangerousness)

In re Rodriguez (2011) 193 Cal.App.4th 85 (no evidence that indeterminate life prisoner made inconsistent statements; finding that commitment offense was especially heinous was speculative; any lack of insight was not "some evidence" of current dangerousness)

In re Ryner (2011) 196 Cal.App.4th 533 (improper refusal to accept evidence showing understanding and remorse)

In re Gomez (2010) 190 Cal.App.4th 1291 (finding of lack of insight was not supported by the record, which showed that person accepted responsibility for their actions)

In re Twinn (2010) 190 Cal.App.4th 447 (no support for finding of insufficient parole plans in light of record showing person had a job offer, and no support for finding of lack of insight based on inconsistent statements because person's "version of the crime was not physically impossible and did not strain credulity")

In re McDonald (2010) 189 Cal.App.4th 1008 (person's insistence of innocence cannot be basis for denying parole)

In re Powell (2010) 188 Cal.App.4th 1530 (parole denial improperly based on post-release plan to attend substance abuse program far from home)

In re Loresch (2010) 183 Cal.App.4th 150, 153 (improper reliance on speculation person could relapse and commit future acts of violence)

In re Moses (2010) 182 Cal.App.4th 1279 (failure to articulate rational nexus between circumstances of commitment offense or prior criminal history and current dangerousness)

In re Juarez (2010) 182 Cal.App.4th 1316 (improperly rote recitation of unsuitability factors that were not probative of current dangerousness)

In re Dannenberg (2009) 173 Cal.App.4th 237 (Governor conceded improper reliance solely on nature of commitment offense)

In re Criscione (2009) 173 Cal.App.4th 60 (no connection articulated between findings and conclusion of current risk to public safety)

In re Lazor (2009) 172 Cal.App.4th 1185 (failure to connect unsuitability factors to current dangerousness)

In re Palermo (2009) 171 Cal.App.4th 1096 (rule violations for unauthorized use of a copy machine, participating in a work strike, and being in possession of a fan stolen by roommate did not show current dangerousness)

In re Rico (2009) 171 Cal.App.4th 659 (decision improperly based solely on gravity of commitment offense)

In re Vasquez (2009) 170 Cal.App.4th 370 (decision improperly based entirely on nature of commitment offense);

In re Gaul (2009) 170 Cal.App.4th 20 (no evidence person posed unreasonable risk to society)

In re Ross (2009) 170 Cal.App.4th 1490 (failure to articulate nexus between old facts and current dangerousness or to cite mental state evidence)

In re Singler (2008) 169 Cal.App.4th 1227 (no evidence person posed unreasonable risk to society)

California Court of Appeal Cases Upholding BPH or Governor's Decisions

In re Casey (2023) 95 Cal.App.5th 1265 (aggravated offense and evidence of inadequate insight)

In re Busch (2016) 246 Cal.App.4th 953 (implausible claim of innocence and explanation for injuries)

In re Butler (2014) 231 Cal.App.4th 1521 (lack of insight into reasons for execution-style murders)

In re LeBlanc (2014) 226 Cal.App.4th 452 (lack of insight and mental instability)

In re Stevenson (2013) 213 Cal.App.4th 841 (history of alcohol and drug abuse, minimization of offense, evaluation finding of moderate risk of future violence, and deficient substance abuse relapse plan)

In re Shigemura (2012) 210 Cal.App.4th 440 (lack of insight where person minimized role in murder plot)

In re Montgomery (2012) 208 Cal.App.4th 149 (rule violation for possessing prohibited substance)

In re Davidson (2012) 207 Cal.App.4th 1215 (record of drunk driving, alcoholism, and previous relapse)

In re Tapia (2012) 207 Cal.App.4th 1104 (failure to take full responsibility for crime until the day before the hearing)

In re Mims (2012) 203 Cal.App.4th 478 (lack of insight based on prior psychological evaluations, where person refused to participate in new CDCR evaluation or answer questions at hearing)

In re Hare (2010) 189 Cal.App.4th 1278 (disciplinary violation for possession of dangerous contraband)

In re Taplett (2010) 188 Cal.App.4th 440 (lack of insight into circumstances surrounding offense)

In re Shippman (2010) 185 Cal.App.4th 446 (aggravated offense, plus past control issues)

In re Criscione (2009) 180 Cal.App.4th 1446 (aggravated offense, history of instability, and inconclusive psychological report)

In re Cerny (2009) 178 Cal.App.4th 1303 (insufficient plan for residency and employment)

In re Rozzo (2009) 172 Cal.App.4th 40 (aggravated offense and implausible denial that offense was racially motivated)

In re Smith (2009) 171 Cal.App.4th 1631 (aggravated offense and lack of insight)

In re Reed (2009) 171 Cal.App.4th 1071 (counseling chrono for leaving work without permission that occurred two months after BPH directed person not to violate rules).